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Appropriateness, Competence, and Due Process in the Regulation of EU Administrative Procedures

(outline for the ReNEUAL conference "Towards an EU administrative procedure law")

I. **Introduction**. In this presentation, I will briefly consider four issues. While the first is a twofold issue of method, concerning the debate about a legislative regulation of EU administrative procedures, the other three issues concern three possible rationales for such a legislative regulation, i.e. the appropriateness of administrative procedures, their organizational dimension, and their adequacy from the point of view of procedural due process of law, respectively.

II. **Two issues of method.** As a first step, two *caveats* may be helpful.

1. First, the distinctiveness of EU administrative procedures should be taken into due account. As a result, whatever their intellectual soundness, not all the pros and the cons of a legislative regulation have, at EU level, the same importance which is recognized to them at national level.
2. Secondly, the discussion that follows tries to eschew the risks that Alfred Hirschman has showed in the rhetoric of reaction, as well as in the "progressive" narratives: both are simplistic, flawed, and cut off debate. There are dangers and risks in both action and inaction. Such dangers and risks can, and should, be carefully assessed to the extent possible, but are unlikely to be entirely knowledgeable and measurable in advance

III. **The appropriateness of administrative procedures.**

1. A first rationale for a new legislative regulation is ordinariness or, better, appropriateness, since there is a variety of ideas of what is ordinary. We may compare a certain decision-making process with other legal processes to determine whether similar processes have been or are used in analogous legal contexts. We may observe that certain procedural requirements, such as the duty to give notice to affected parties and to provide them with a reasonable opportunity to be heard, are respected in some procedures, but not in others. The question thus arises whether such differences are justified by the nature and number of the interests at stake or not and, if so, whether some adjustments are necessary.

2. this methodology does not regard only the procedures carried out exclusively by the European administration, but also those characterized by its interaction with national authorities, or mixed administrative procedures. Consider, for example, access to files

IV. **The model of competence**. Whether there are good reasons for a legislative regulation of the administrative process can be maintained also from a distinct perspective, that emphasizes the organizational dimension of administrative procedures.

1. This is a Weberian perspective to the extent that it holds that respect for formalized procedures is essential for both functional purposes

and the legitimacy of public authorities as such. It emphasizes, accordingly, the need of coherence and predictability of administrative action. Of course such "values" are closely connected with the idea of *Rechtsstaat*

2. in the lights of these values, coherence and predictability, the changes occurred in the administrative procedures of the EC/EU, that are not anymore based on the traditional distinction between direct and indirect administration, raise some problems. Consider, for example, Borelli (Case C-97/91, *Oleificio Borelli v. Commission*), where the ECJ held that the national measure, an opinion, was "binding" on the Commission. If so, we may wonder whteher the affected party should have had a reasonable opportunity to be heard. But such an opportunity was not provided by EC legislation.

V. **Procedural due process of law**. a third rationale ought to be considered, that of procedural due process of law.

1. in this respect, especially after the ECJ's ruling in *Transocean Marine Paint Association*, a measure can be challenged by an individual or a firm for disregard of his right to be heard. However, the question arises whether some minimum standards ought to be adopted, such as those issued by the Council of Europe. As an alternative approach, general rules could be introduced

2. a quick glance at the well-known *Kadi* judgment of the ECJ (Joined Cases C-402/05 P and C-415/05) raises a further question, i.e. whether certain procedures could be characterized not simply by simplified procedural requirements, but by no procedural constraints at all, because "the public interest so requires". The reasoning of the Court suggests, instead, that some kind of hearing and some form of access to files must be provided

3. Last but not least, EU law limits citizens' collaboration with the administration, let alone that of participation in the strict sense. We may wonder whether the European administration should be obliged to carry out notice and comment procedures, such as those requested by the APA, in order to structure communication between the holders of a variety of interests in ways that permit public understanding and dialogue.