

# Towards an EU Administrative Procedure Law?

## *Report of the ReNEUAL Conference*

Brussels March 15<sup>th</sup> &16<sup>th</sup> – (draft)

---

On March 15<sup>th</sup> and 16<sup>th</sup>, the conference “*Towards an EU Administrative Procedure Law?*”, which was jointly organised by the European Ombudsman and the Research Network on EU Administrative Law (ReNEUAL), took place in the European Parliament. At this occasion, ReNEUAL members presented their work on EU administrative procedure law. They were joined by members of the EU institutions, national administrations, and universities, who contributed to a rich discussion on the arguments for and against the elaboration of an EU administrative procedure law.

The first session entitled “*Codifying EU administrative procedures? Whether, why, and if so what could be the options – Introducing the ReNEUAL project*” was dedicated to present ReNEUAL. Also, the form an Administrative Procedure Law could take was thoroughly discussed.

As *Prof. Schneider* exposed, administrative procedural rules in the EU have mostly developed in a fragmented manner. These sector specific rules are contained primarily in the legislation regulating policy areas. Administrative procedure rules of a more general nature may also be found in the Treaties, the Charter, and in the case law of the Court of Justice. In spite of these numerous provisions, the absence of an overarching framework causes a growing number of gaps in the fabric of EU administrative procedure.

The current development of EU administration is shifting from a sectoral approach to the fostering of administrative cooperation and coordination. These patterns of cooperation, whether horizontal, vertical or star-shaped, bring new issues. As *Prof. Schneider* pointed out, composite procedures, pooling various EU and national administrative actors, and preparing final decisions, are rapidly emerging. They are crystallising different administrative authorities around common tasks and objectives. The development toward an integrated administration leaves numerous procedural issues unaddressed. Failure to determine clear and predictable rules causes a deficit of accountability and gradually erodes the rule of law in the European Union.

To develop an administrative procedure law, several techniques were envisaged. The possibility to use restatement techniques, in reference to the US experience, or “statements”, which is a more genuine approach, was evoked. *Prof Ziller* stated that such an approach would bring more clarity and consistency to the already existing written material that contains EU administrative provisions and would help filling existing gaps. In that respect, *Prof. Ziller* stressed that restatements and statements may help for various types of codification and that particular attention should be paid to the purpose of EU administrative procedure. In addition, *Prof. Ziller* underlined the necessity to ensure compatibility of an EU administrative procedure regulation with the Member States’ own administrative procedure law.

*Prof. Bermann* indicated that in the US legal system, a restatement brings clarity consistency and systematisation of already existing material and builds upon case law. A restatement is a rich highly structured matter, which supposes some degree of fidelity to what is restated. There are three schools of thoughts with respect to the degree of liberty that a restatement may take. The first, which has lost considerable favour, considers that a restatement reflects the prevailing existing views. It brings them to greater prominence and expresses them in a more useful and intelligible way. A second view is that a restatement stays faithful to the basic conceptual structure of the law and to its content, but does not

necessarily reflect the prevailing law. With regard to this intermediate position, one may say: “a restatement should say nothing that no Court has ever said, but it does not have to say what most Courts have said”. The third school, more audacious, considers that it is permitted to say something that has never been said, to state solutions that never were put forward provided the vocabulary, the concepts, and the overall conception of the field is adhered to.

*Prof. Bermann* underlined that if one wishes to depart from what previously existed to elaborate an EU administrative procedure law, it must be established to what degree that departure will take place. Therefore, in order to establish what may be kept and what may be added, it is important to determine the degree of satisfaction for what already exists, its quality, its virtue and also its vices.

*Prof. Bermann* added that there never were procedural restatements in the US. One would not be content with a statement of general principle of procedure, but would demand something more precise, concrete, durable, and less evolutionary, such as a code of procedure. A restatement in the US conception of the term does not seem the right approach to develop an EU administrative procedure law. In that respect, *Prof. Bermann* emphasised that the American Law Institute is doing fewer restatements and more general principles, and draft statutes in some occasions. If the American Law Institute were to address administrative procedure, it would likely take the form of a set of seriously considered soft law general principles, or of a genuine codification. In light of these elements, *Prof. Bermann* stated that an EU administrative procedure law would rather correspond to either a set of principles or a draft statute.

*Prof. Mir* exposed the main arguments in favour of adopting a general code of EU administrative procedure. Codification of the procedure of institutions, bodies, offices and agencies would be the best way of fulfilling the mandate given by 298 TFEU and of developing the fundamental right to good administration laid down in article 41 CFREU. To do so, the national codifications of administrative procedures should be a model. First, codification of EU administrative procedure would increase legal clarity and certainty. A code would summarise, coordinate and systematise procedural provisions that are currently spread across multiple sectoral acts of secondary legislation, judgements of the various European courts and codes of conduct. Because of its broad scope, codification would be applicable to most sectors and would reduce the existing gaps. It would further help achieve principles of simplification and accessibility associated with the quality regulation of the Mandelkern Report.

*Prof. Mir* then stated that codification would systematically standardise basic procedural rules and principles of EU administration thus creating a common reference procedural framework without unjustified differences. Also, codification would allow improving regulation with innovative solutions to current challenges and problems, such as those related to shared-implementation of EU law, through a democratic and legitimate process. It would give stability to the regulation of the EU and would guide future sectoral developments. *Prof. Mir* added that codification would facilitate the adoption of new rules by the institutions, relieving them from negotiating the procedural aspects. Finally, such a model could be exported to other regions of the world.

*Prof. Mir* indicated a number of dysfunctions to avoid. Codification should coexist with sectoral regulations to avoid excessive substantive uniformity. It should incorporate technical elements resistant to the passage of time to avoid obsolescence and should adapt to rapid changes. Codification should be modified by the legislature whenever necessary and case law would keep playing a key role in the interpretation of new provisions. Finally, *Prof. Mir* underlined that the codifying process should involve both legal doctrine and legal actors – judges, officials, lawyers – in a pre-legislative phase, which would bear positive fruits.

*Mr Cardona* argued that an administration ruled by law produces decisions and actions that are predictable and follow a standardised procedure. *Mr Cardona* exposed that standardisation of administrative procedure goes beyond a technical evocation of the term, and goes deep in political meaning. A standardised procedure implies the reduction of

arbitrariness and the production of legal certainty. It allows producing effective public policies, efficiency in the work of the administration, bureaucrats and politicians that are accountable, and transparency.

The spill over effect of EU administrative law in neighbouring countries and countries that want to join the Union should be considered. What is at stake in these countries is the credibility of the governments. The meaning of trust is crucial and it is difficult to establish mechanisms to bring forth the credibility of the State and make sure that any kind of collective action is carried out in the public's interest. Civil services operate in an administrative law field where administrative procedure law and judicial review are prominent. Rationalisation of administrative decision-making produces legal certainty, which is the basis for individuals to plan their own development, and to ensure investments both domestic and foreign. In this respect, *Mr Cardona* stressed the importance of good administrative procedure and judicial review, and underlined that unclear ways in which civil servants take decisions favour the risk of corruption.

*Prof Harlow* expressed some concerns with respect to codification and argues that a code may in fact add to legal uncertainty. An ill drafted text creates uncertainty as to its meaning. Also, in order to interpret the provisions of a code, reference to the Courts' case law is necessary. *Prof Harlow* underlined that drafting at the EU level can be a difficult process. Once the legislation is agreed on, it may prove difficult to modify or review. Finally, general codification at the EU level would necessarily create spill over effects on Member States. To the contrary, sectoral codification would be more efficient. Indeed, such legislation already exists and it may be observed that it already ties Member States in sector specific areas but in a less intrusive manner. Finally, *Prof Harlow* submits that a French style codification is needed. It would collect all relevant legislations to specific areas such as state aids, asylum, environmental law, and publish them together with the aim to make them accessible.

In the following session, the ReNEUAL members presented four main areas of possible design of EU administrative procedure.

## Rule-Making Procedures in the EU

In the field of EU rule-making procedure, three main issues were explored. First, the sector of executive rule-making was addressed, followed by an overview of the status quo in participation rights, and a discussion on openness in the EU administration.

Procedures for adopting binding EU non-legislative acts on the basis of 290 and 291 TFEU can be found in various sector specific legislations. These procedures vary from one another and are not subjected to a common framework. In addition, actors of executive rule-making procedures are numerous. In fact, depending on the policy involved, the final product is the result of in-puts from EU agencies, experts, and comitology committees. The absence of a formalised procedure regulating the adoption of soft-law instruments such as guidelines, notices or communications, raises concerns with regards to individual rights and judicial review. However, as *Prof. Hofmann* observed, executive Rule-making procedures are the object of an increasing convergence towards a common set of procedural steps. One may distinguish a first step where the rule-making topic is identified and formulated, then an impact assessment ensues, followed by a consultation process and finalized with the publication of a reasoned draft. It was concluded that a generalised approach to executive rule-making procedures would increase the legitimacy, intelligibility and compliance with the rule of law.

The importance of participation rights in EU rule-making procedures should not be underestimated. As *Dr. Mendes* stated, among other aspects, they contribute to enhancing the

quality and rationality of the final product through a necessary dialogue between institutions and concerned persons. Participants provide the institutions with supplemental external information thereby preventing the adoption of a one-sided position. Finally, this dialogue enables a balancing of the various interests involved in adopting the final product. It should be underlined that participation also introduces a certain degree of legitimacy. Participants exercise a control, which limits rule-makers' power and shields citizens from arbitrariness. Thus, it is crucial that the participation process be followed with feedbacks. Those should then be linked with the duty to give reasons. The duty to provide feedbacks would trigger a reflection on the part of decision-makers and guarantee that they duly consider different aspects implicated in the material situation subject to regulation. Only then, the effectiveness of the participation process would be guaranteed and its objectives fulfilled.

However, the current application of participation rights leaves much to be desired. As *Dr. Mendes* explained, the 2002 Commission Communication<sup>1</sup> is inconsistently applied and does not satisfactorily cover non-legislative rule-making. Thus, it does not ensure a satisfying protection of participation rights. Further, the fragmentation of the rule-making procedural framework induces variations and discrepancies in the application of participation rights. One may observe a general lack of clarity with respect to the selection of participants, time frames that inadequately take into account both the complexity of a measure and the language differences amongst the participants, and finally, inadequate or lacking feedbacks on the consultation process. As *Dr. Mendes* stated, if the need for efficiency should not undermine participation rights, participation rights should not unduly stall the rule-making process. In order to avoid undesirable drawbacks, a balance should be struck in the implementation of participation rights with the need for efficiency of the rule-making procedure.

Decisions of the ever-closer Union must be taken as openly as possible. The idea of openness is grounded in article 1 and 10 (3) of the Lisbon Treaty and it covers both *voice* and *vision*. *Voice* refers to participation, and *vision* to the visibility of information. With respect to *vision*, transparency of the EU rule-making procedure plays an essential role in avoiding arbitrariness and ensuring legal certainty in the Union. *Prof. Curtin* focused on the issue of secrecy, which is regulated at the institutional level through the use of the institutions' own internal rule-making powers. The Parliament and the Council have both adopted such internal rules of procedure. The Council Decision "EU Confidential Information" is not confined to the Council's use, but is in fact currently applied by many agencies such as Europol. Even though the application of such rules is wide spread, the procedures remain invisible to the outside. Thus, it is unclear who is covered by which rule, and in that regard, what the relationship should be with respect to public access to information.

*Prof. Curtin* pointed out the issue of inter-institutional exchange of information. On the basis of rules of procedure adopted internally, institutions may provide one another with information. For instance, comitology committees provide information to the European Parliament on the basis of such rules, and the information is not made accessible to the public. *Prof. Curtin* stressed that the limited transparency of these processes undermines any serious accountability process. *Prof. Curtin* argued that openness must not remain a passive requirement only fulfilled through the punctual exercise of the right to access documents. Rather, it must be envisaged as a positive duty resting on the EU institutions during the rule-making process. Tensions between internal rules of secrecy and external regulation of public access to information should be addressed with the adoption of horizontal rules on openness, transparency and oversight. Such rules would guarantee a full and efficient parliamentary and judicial accountability. Thus, it would contribute to a greater degree of openness of the EU rule-making process.

---

<sup>1</sup> Communication from the Commission COM(2002) 704 final, 11.12.2002, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*

In the following discussions, it was suggested that rule-making procedures be assessed not merely in relation to a democratic standard, but against a clear normative standard. It was submitted that in order to elaborate an EU administrative procedure law, the assessment of the status quo should reflect the various degrees of development of existing procedures. More specifically, it should be determined whether the current administrative procedures guarantee the exigencies of rationality and of legitimacy of administrative action.

*Mr Chiti* argued that, despite important theoretical and practical obstacles due to different views, modalities for judicial, procedural, and political accountability mechanisms should be developed. Indeed, the elaboration of clear procedural rules would greatly increase the efficiency of accountability.

Finally, the complexity of rule-making in the field of risk assessment and management was underlined. It may prove a difficult exercise to convert these specific rules into a more general legislation. Though it was acknowledged that the need to impose organisational and internal elements existed, it remains that imposing too strict a regulation should be avoided.

With respect to participation rights, *Mr Chiti* stated that certain fundamental elements contributing to openness and transparency should be strengthened, expanded and generalised. *Mr Chiti* argued that these two principles could be successful only if consultation as a mechanism is further developed. Participation holds a central role as it allows the institutions to acquire relevant information, it contributes to the quality of the political process through exchanges of arguments and deliberations, and finally, it stabilizes the interactions between *regulators* and *regulatees* in polycentric administrative systems.

In accordance with the point made by *Dr. Mendes*, *Mr Chiti* added that current participation processes rarely identify the concerned parties and the power they have to take part in procedures. Further, the soft law nature of the 2002 Communication evoked made it difficult for individuals to articulate complaints before the European Ombudsman. The fact that the duty to give reason is not always formalised was raised. Without a clear link between consultation and the duty to give reason, it was affirmed that a real exchange would never take place.

*Mr Craig* further observed that if the participation process were to be further regulated, the use of new technologies, IT tools and the internet should be considered to enhance the quality of the participation process, and enable a broader reach of concerned persons.

Finally, *Mr Harden* raised the issue of conflict of interests. Complaints have been filed with the European Ombudsman in relation to conflict of interests in the area of rule-making. These complaints mostly relate to the activities of stake-holders within regulatory bodies and agencies. Indeed, it may be observed that stake-holders are more and more involved in rule-making procedures, notably within EU agencies. In that respect, at the request of the European Parliament, the European Court of Auditors is carrying out a study of the management and handling of conflict of interests within four EU agencies: the European Food Safety Authority, the European Chemicals Agency, the European Medicines Agency, and the European Aviation Safety Agency.

In light of these elements, a general framework introducing a certain degree of consistency in informal rule-making processes, allowing a better consideration for participation rights, and ensuring the openness and transparency of procedures is warranted.

## **Single-Case Decision Making in the EU**

As *Prof. Craig* pointed out, rules applicable to single-case decision procedures are scattered amongst various sources. One may distinguish between general rules and rules applicable in specific policy areas. The treaty contains on the one hand specific elements such as the right of access to documents and the duty to give reasons, and on the other hand, it contains general principles such as, *inter alia*, proportionality, legal certainty and legitimate expectations. These principles constitute the foundation for judicial review under articles 263 or 267 TFEU. Further, the general principles developed in the case law of the ECJ along with the right to good administration and the right to an effective remedy laid out in the Charter are also relevant to single case decision procedures.

Rules pertinent to single case decision procedures may also be found in sector specific legislation. Whereas in some areas the procedural steps and the rights of concerned parties are well defined, for instance in the field of state aids and antitrust, *Prof. Craig* underlined that in other areas, no such detailed rules existed. The consequent lack of a unique and coherent procedural framework raises numerous issues. In that regard, lacunae and weakness of the current framework are particularly striking with respect to composite single-case decision procedures.

As *Prof. della Cananea* exposed, in the *Borelli* case, the Commission relied on the unfavourable national opinion to inform the oil producer that his application for aid from the European Agricultural Guidance and Guarantee Fund could not be admitted. The company's subsequent action for annulment was dismissed. The ECJ held that it was not competent to rule on the lawfulness of a national measure where it is binding and leaves to the Commission no discretion in adopting the final decision. Conversely, any Italian court would have considered the national unfavourable opinion merely preparatory and hence not susceptible to judicial review. This case illustrates the lack of a coherent and consistent approach of composite procedures at both EU and national levels. The application procedure in *Borelli* identified neither the decision subject to judicial review nor the competent jurisdiction. In light of this case, it is urgent that clear rules regulate composite single-case decision procedures.

Also, attention should be paid to the growing number of EU agencies entrusted with the power to issue decisions. These decision-making procedures are grounded in sectorial rules, often laid out in the founding act of the agency. To illustrate the matter, *Prof. Wierzbowski* presented a case study of the European Securities and Market Authorities. ESMA is enabled by its founding regulation to adopt individual decisions in various instances. When adopting decisions, it is bound by article 39 of its founding regulation, which restates some of the principles of good administration such as the right to notice, the right to be heard, the right to know of available remedies and the duty to give reason on the part of ESMA. However, the absence of a general framework regulating agencies' decision-making procedures increases the potential for discrepancies in the protection of individual rights.

Several remarks were made in the following discussion. With respect to the elaboration of an EU administrative procedure, *Judge Bradley* suggested that EU staff law be the pioneer field. Being regulated by a single piece of legislation, having developed for 60 years, and being the object of an important case law, EU staff law constitutes a rich area. In that regard, one should consider the procedures and methods to establish facts, for taking decisions, the procedure to challenge decisions, rules of judicial review, rules or principles regarding the time frame to issue a decision; and envisaging the time frame to file a complaint in relation with the time constraints on initiating a legal action. It was also suggested that consideration be given to the possibility for EU Courts to issue injunctions.

It was also discussed whether such a procedural law should provide a set of general rules or if it should rather be constituted of general principles supplemented by rules applicable to sectoral areas. In that respect, it was submitted that the Code of Good Administrative Behaviour offers a starting point to undertake the elaboration of a procedural act. It was also observed that the issue of how to handle regulation of specific policy areas remains to be addressed.

Whether rules of single-case decision making should only apply to the EU level or whether they should also apply to national administrations was also evoked. It was submitted that developing an EU administrative procedure law should be done in consideration of the Member States own procedure laws to ensure the necessary compatibility. In that regard, an integrated work is needed as the efficacy of drafting an administrative procedural law would be significantly limited if rules were not to apply to national administrations.

Conversely, *Mr Grill* pointed out the discrepancies in terms of procedural rights in various EU procedures, which should be remedied. Even though a general law would help fill the lacunae, *Mr Grill* stated that designing rules applying to both EU and national level may prove quite complex, the risk being not to reach any solution at all.

With regards to secrecy, it was submitted on the one hand that reports of ECJ hearings should be made fully available as opposed to being only accessible on site. In addition, it was stated that the question of secrecy in relation to evidence, as it was the case in *Kadi*, must be addressed. Without full access to her file, the person concerned remains unable to exercise meaningful judicial review.

It was concluded that due process of the law requires clear and predictable procedures. Concerned persons should be able to adequately take part in the process and effectively defend their rights. In light of the *Kadi* litigation, it was affirmed that fundamental procedural rights should not be overridden solely on the ground that procedures relating to sensitive and urgent matters touch upon the Member States' sovereignty.

In order to shape overarching principles and concepts, the numerous procedures for single-case decisions should be assessed not only on the basis of general principles, but also against the Charter, which should be given an important place.

## Information Networks in the EU

Efficient cooperation of national and EU authorities is necessary in the common EU administrative space to guarantee the optimal implementation of EU laws. Due to the deficit of EU administration, administrative control over EU common areas is necessarily undertaken for the most part by national authorities. Thus, the development of administrative cooperation supported by information systems has been exponential. It creates administrative procedures relying on the collection, exchange, and use of information to various ends, such as policy planning but also for single-case decision making. Even though in that context one easily understands the need for quick flexible and efficient administration, these interests should be balanced with the exigencies of procedural fairness.

There is a multitude of cooperation systems supported by IT-based information exchange. With respect to formalized systems, a careful analysis of their legal framework reveals shortcomings. As *Prof. Schneider* demonstrated through a comparative analysis of rapid alert mechanisms such as RASFF and RAPEX, the question of liability for the network's activities is not properly addressed. It also resulted that adequate administrative procedures taking into

account the multilevel nature of information systems in connection with individual rights remained to be designed.

Also, numerous systems have developed informally and are currently operated as such. *Prof. Galetta* illustrated the issues stemming from the absence of a consistent framework of information management. To do so, *Prof. Galetta* exposed an analysis of the functioning of the Public Procurement Network, SOLVIT, and EU Pilot. It was concluded that the absence of a coherent formalised framework causes unnecessary discrepancies between the systems.

It must be stressed that these cooperation mechanisms rest heavily on the exchange of personal information. As *Prof. Galetta* indicated, it is thus crucial to ensure a full and consistent applicability of data protection laws. Beyond personal data protection, the exchange and subsequent use of any information need to meet certain procedural standards to ensure the quality of the resulting administrative response. To do so, information systems must contain rules of security, of data quality, of internal and external oversight. As *Prof. Schneider* underlined, these various standards should be build-in to ensure compliance “by design”.

Finally, attention must be paid to the composite nature of administrative procedures within information systems. The separation between EU and Member States’ administrations becoming less and less relevant, one must go beyond the traditional fragmented approach to develop mechanisms that take into account not only the multi-level aspect of these procedures, but also the varying intensity of the Commission’s role. Thus, clear accountability allocation rules as well as predictable procedures allowing effective judicial review should be designed to uphold individual rights. Such a ground regulation for IT based administrative cooperation would enhance legal certainty in the EU and foster good will for its decentralized administration.

In relation to these presentations, *Ms Lipowicz* underlined that the development of information technologies is necessary but that it gives rise to important issues and may present threats for freedom of citizens. It must therefore be considered that personal data protection is central to information management. Efficient data management necessarily includes respect for basic rights of individuals.

It was observed that information networks have effects on both EU and national levels. It is thus necessary that a coherent framework be developed. To do so, it must be considered whether rules should be general or more organic, or whether they should be akin to informal guidelines creating space to learn and adapt as the policy evolves. It was stressed that a balance should be struck between consistency and certainty on the one hand, and diversity on the other hand.

EU agencies were considered a good case study to develop a procedural framework. The production of information in agencies results more from administrative techniques than from administrative procedures, which are not the only way to make a network function. Often times, agencies do not have procedures, or only limited ones, allowing the protection of individual rights. In that respect, it was stated that a systematic approach to develop rules for information networks should include the individual.

It was submitted that determining whether activities of information networks are preparatory or final acts was crucial in order to envisage mechanisms of judicial review. In that regard, it was stated that a procedural law should contain adequate conditions to allow the initiation of actions for annulment, liability and the release of declaratory judgements.

The unclear role of the Commission within Information Networks was the object of several remarks. The uncertain applicability of Regulation (EC) n° 45/2001 to its activities within

information networks was pointed out. It was also stated that determining in what instances the Commission may be held liable should be considered when elaborating the procedural framework. *Ms Grubben* however rebutted that in networks as RAPEX or IMI, the Commission's role was in fact clear. The Commission is merely the supplier of the system and as such, it has no access to data and has no specific knowledge of the information processed.

Finally, it was underlined that a certain degree of oversight and transparency was necessary in information networks. It was suggested that information in relation to the network's functioning such as the number of cases treated and the information contained, be published and accessible, and that perhaps, common standards on that matter could be adopted. Such transparency would allow measuring the effectiveness of the networks' activities. In that regard, it was stated that administrative cooperation is necessary for the effective functioning of the internal market.

It results from these various elements that the use of information systems by both the EU and the national administrations raises complex issues and often creates confusion in terms of accountability mechanisms. Thus, a clear procedural framework regulating these structures is necessary. The deficit of the EU administration should not leave individuals and undertakings subjected to the decentralized administration without due process of the law.

## Public Contracts in the EU

In the absence of harmonisation, contracts entered into by EU institutions are governed by a mix between EU Law on the one hand, and that of a Member State or of a third country on the other hand. As *Prof. Auby* exposed, each of the Member State's law is characterised by specific elements proper to its legal tradition. For instance, while Common Law countries do not distinguish between private and public law, the German system effectuates this distinction but public contracts remain governed by private law. In France, most public contracts are submitted to specific provisions of public law. Therefore, as *Prof. Auby* pointed out, the rules applicable to the conclusion of a contract, to the externalization of public functions, to choice of law clauses, execution, supervision, cases of illegalities, termination and litigation, are determined on a case-by-case basis. They vary greatly from a Member State to another, thus submitting EU public contracts to very different legal frameworks. The public procurement legislation illustrates this issue as its transposition resulted in a mix of local traditions and national practices in each Member State. The absence of common procedural standards for EU public contracts increases the potential for discrepancies and shortcomings.

As *Prof. Stelkens* stressed, even if the expression "public contracts" is used in the EU public procurement rules, there is no generally accepted concept of "public contract" in European Union legal texts and materials. Still, EU institutions, bodies, offices and agencies enter into contracts in various occasions with private entities or national administrations. These contracts may concern employment of agents, sale of property, concessions, settlements, or the implementation of financial policies. Presently, no EU procedural framework lays out standards governing EU contracts at large. As *Prof. Stelkens* points out, rules dealing with EU public contracts can be found in several policy fields, as well as in a limited case law of the Court and in standardised contract model documents developed by the Commission. Unfortunately, no consensus is reached in the Union on the interpretation of these relevant materials. *Prof. Stelkens* further raised that article 335 TFEU, which determines that EU institutions may enter into contracts to which Member States law is applicable,

introduces uncertainty as to the determination of the laws applicable to the public contractual process.

*Prof. Ziller* presented one of the methods, which will be used in order to identify gaps in existing EU administrative procedure law. The recent *Mauerhofer*<sup>2</sup> case provides a persuasive illustration of issues raised in the field of EU public contracts as regards subcontractors. The Commission had entered into a framework contract with the consortium (“AES”). Subsequently, AES entered into a contract with Mr Mauerhofer for the supply by him of expert services. A dispute then arose with respect to the quality of the work delivered by Mr Mauerhofer. The AES expressed the opinion that the expert should be paid for fewer work-days than what was originally agreed. In order to do so, AES needed an administrative order from the Commission by which the terms of the contract between the AES and the Commission relative to the expert’s payment would be modified. Mr Mauerhofer thus challenged the administrative order by which the Commission modified the specific contract. The ECJ considered that the administrative order modifying the contract produced and exhausted its effects solely between the Commission and the AES, relationship to which Mr Mauerhofer was only a third party, therefore, it could not be the object of an action for annulment. The present case further raises questions as to the role of good administration and the place of the right to an effective remedy. *Prof Ziller* then went on analysing the European Ombudsman’s “ombudsprudence” referring to subcontractors. He indicated that on such a basis it should be possible to identify more clearly issues that need to be addressed, make proposals for relevant statements to be submitted to discussion as to whether the best way would be creating new hard law rules, or developing appropriate soft law instruments.

With respect to these presentations, it was stated that finding a unitary solution to the various public contract issues presented would be difficult. Though, one option could be to elaborate a framework for procedures contained in the various contracts, and another possibility would be to design a set of solutions for a set of problems.

With respect to the issue of sub-contractors rights illustrated by the *Mauerhofer* case, *Mr Diamandouros* presented a mechanism specific to foreign aid. Pursuant to this mechanism, where a dispute arises between contractors and subcontractors, an appeal may be lodged to a panel set up in the European Investment Bank. Such a procedure brings the matter in the realm of EU Institutions. Further, it allows the European Ombudsman to subsequently exercise its review and to determine whether there has been maladministration.

*Judge Bonichot* raised an important point with respect to the lack of consistency and predictability of the rule of law. *Judge Bonichot* stated that it had an important economic cost for private entities, an important cost for the administration and its staff, and also, it represents an important cost for judges with respect to their capacity to judge within a reasonable time.

A coherent EU public contract framework would provide a greater degree of clarity, simplicity, and of predictability to interested parties. Further it must be ensured that contractual relations of the EU administration do not create situations where third parties, competitors, subcontractors, cities, citizens, are left without remedies when the contractual relationship affects them.

---

<sup>2</sup> Case 433/10 P, *Volker Mauerhofer v. European Commission*, order of the Court of 31 March 2011

## The Future of Article 298 TFEU – Administrative procedures for EU institutions and integrated administration in the EU

Envisaging an EU administrative procedure law prior to the adoption of the Lisbon Treaty would have proved problematic. Even though the Treaties then contained numerous policy specific legal bases, they failed to provide a provision transcending the lines of policy fragmentation.

The introduction of article 298 TFEU by the Lisbon Treaty palliates this shortcoming. The article offers a legal basis for the adoption of a legislation binding on the “*institutions, bodies, offices and agencies of the Union*”. 298 TFEU may be considered as the basis to design procedural rules in the four main EU administrative fields presented by the ReNEUAL members. Further, *Prof. Hofmann* pointed out that the use of 298 TFEU as a legal basis would not necessarily be exclusive from policy specific legal bases the Lisbon Treaty provides such as 114 TFEU.

*Judge Jaeger* stated that ideally, the future of 298 TFEU would be codification of procedural administrative rules already existing in various sources such as provisions of primary and secondary law, case law, identified good practices, and incorporate the influence of the Ombudsman Code of Good Administrative Behaviour. When designing procedural rules, *Judge Jaeger* stressed the exigency to conduct a “litigation impact assessment” to take into account the resulting litigation aspects of the law. A right balance should be struck between the efficiency and the rapidity of the procedure.

To the contrary, *Mr Legal* stated that article 298 was not to be understood as a proper legal basis for a piece of legislation governing relations between the EU institutions and the public. Rather, it was to be understood as establishing a link between the institutions and their supportive administration. In that respect, *Ms Martínez Iglesias* rebutted that it would be challenging to explain the objective of openness contained in 298 TFEU in a purely internal context. Conversely, the openness requirement exerts all its meaning if it is thought of as a guarantee to the persons administered by the EU institutions, bodies, offices and agencies. *Mr Legal* also expressed concerns regarding the rigidifying effect adopting procedural rules would have on the efficacy of work of the institutions.

It was also stated during the ensuing debate that the existence of more detailed rules of administrative procedure would not necessarily imply better administration. Rather the great importance of administrative culture in daily practices was emphasised. The administration must be citizen friendly and geared towards persons in plain language. It was finally concluded that procedural fairness should infuse the entire enterprise.

As *Mr Madsen* indicated, such an enterprise may only have a future if is listed on the political agenda. In that respect political awareness is necessary. Even if, as *Mr Nymand Christiansen* remarked, the Commission has not yet started to reflect on 298 TFEU, *Ms Martínez Iglesias* stated that the European Parliament had taken a position regarding article 298 TFEU. *Ms Martínez Iglesias* argued that such a procedure law was needed using the example of OLAF to expose the lack of procedural guarantees accorded to persons concerned with an investigation. *Ms Martínez Iglesias* finally exposed that the procedure law could either take the form of a code of conduct general enough to avoid any contradiction with sectoral provisions, or it could be accompanied by a revision of the sectoral legislations.

Adopting an EU procedural law would enhance the coherence and the consistency of EU administrative procedure. It would render administrative action more transparent and

intelligible. As *Prof. Hofmann* stated, an EU administrative procedure law would further improve the implementation of policies from a functional perspective, by ensuring that rights and policy objectives can be pursued; from an organisational perspective, by ensuring that institutions and bodies are equipped with means to pursue tasks; from a procedural perspective, by ensuring that the core values and rights are fulfilled and realised through procedural provisions and forms of act; and finally from an accountability perspective, by ensuring that acts are reasoned and justified, and that there is proper review and control of activities.

The analyses conducted by the four working groups of ReNEUAL reveal similar weaknesses and lacunae in the studied areas of EU administrative activities. They all demonstrate that procedural rights of individuals along with standards of good administration are severely impacted by the lack of an overarching and consistent approach. Therefore, it is urgent to design an EU administrative procedure law. This law must acknowledge the complexity of multilevel administrative cooperation, comply with procedural guarantees and principles of good administration, and uphold the rule of law in the European Union.

Morgane Tidghi  
Marie Curie Fellow Researcher  
University of Luxembourg  
May 2012