

## **ReNEUAL Model Rules on EU Administrative Procedure**

### **Introduction to the ReNEUAL Model Rules / Book I – General Provisions**

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## Editorial note and acknowledgements

This publication of the Research Network on EU Administrative Law (ReNEUAL) is the result of a cooperative effort by many people and institutions. ReNEUAL was set up in 2009 upon the initiative of Professors Herwig C.H. Hofmann and Jens-Peter Schneider who coordinate the network together with Professor Jacques Ziller. ReNEUAL has grown to a membership of well over one hundred scholars and practitioners active in the field of EU and comparative public law.

The objectives of ReNEUAL are oriented towards developing an understanding of EU public law as a field which ensures that the constitutional values of the Union are present and complied with in all instances of exercise of public authority. It aims at contributing to a legal framework for implementation of EU law by non-legislative means through a set of accessible, functional and transparent rules which make visible rights and duties of individuals and administrations alike. The Model Rules on EU Administrative Procedure are proof that it is possible to draft an EU regulation of administrative procedures adapted to the sometimes complex realities of implementing EU law by Union bodies and Member States in cooperation.

In order to develop the Model Rules, ReNEUAL established four working groups addressing the main aspects of EU administrative procedure in the EU. These working groups were concerned primarily with executive rule-making (chaired by Deirdre Curtin, Herwig C.H. Hofmann and Joanna Mendes; Book II); single-case decision-making (chaired by Paul Craig, Giacinto della Cananea, Oriol Mir and Jens-Peter Schneider; Book III); public contracts (chaired by Jean-Bernard Auby, Ulrich Stelkens and Jacques Ziller; Book IV); and information management (chaired by Diana-Urania Galetta, Herwig C.H. Hofmann and Jens-Peter Schneider; Books V/VI). The design of these working groups reflected the scope of the ReNEUAL project on Model Rules on EU Administrative Procedure. In order to draft the various books the chairpersons of the working groups established drafting teams. In addition to the chairpersons the following scholars acted as drafting team members: Micaela Lottini (Book VI), Nikolaus Marsch (Book VI), Michael Mirschberger (Book IV), Hanna Schröder (Book IV), Morgane Tidghi (Book VI), Vanessa M. Tünsmeier (Books III, V), Marek Wierzbowski (Book III). Edoardo Chiti, Paul Craig and Carol Harlow actively collaborated in the initial drafting of Book II. Detailed information about the chairpersons and the

additional members of the drafting teams are provided in the respective list following this note and acknowledgements.

A steering committee composed of the chairs and most active members of the working groups undertook the task of management of the project and ensuring the consistency of content and drafting and finally acted as the editorial board of these ReNEUAL Model Rules. It was joined by Professor George Berman (Columbia University, New York) as external member.

The working groups' research and drafting activities benefitted from the insights and critical input in terms of time and expertise by many ReNEUAL members as well as civil servants from the EU institutions and bodies and also other experts from Europe and other parts of the world during presentation at workshops and conferences, and as reactions to earlier publications.

ReNEUAL would like to express its particular gratitude to the support from the European Ombudsman and the European Parliament. In 2011 the European Parliament established a sub-committee to the JURI committee under the presidency of MEP Luigi Berlinguer. The committee heard *inter alia* ReNEUAL steering committee members Paul Craig, Oriol Mir and Jacques Ziller as experts. The EP sub-committee prepared the January 2013 EP resolution requesting the Commission to submit a proposal for an EU Administrative Procedures Act. Following this invitation, the European Commission has undertaken hearings to which ReNEUAL Steering Committee members have contributed.

Since 2011 ReNEUAL has closely cooperated with the European Ombudsman initially with Ombudsman Nikiforos Diamandouros and since 2014 with Ombudsman Emily O'Reilly. Both have publicly supported ReNEUAL's efforts to improve EU administrative procedure law. We are especially grateful for the opportunities they offered to discuss the ReNEUAL project in 2012 and 2014 at conferences in the European Parliament organised by the Ombudsman. We would also like to thank Ian Harden, Secretary General, European Ombudsman's office, for his interest and support of the ReNEUAL project.

ReNEUAL would also like to acknowledge the cooperation with ACA-Europe, an association composed of the Court of Justice of the European Union and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union. ACA-Europe's first joint conference with

ReNEUAL was organised in April 2013 at the European Food Safety Authority in Parma, Italy, at which judges from nearly all EU member states of the EU participated and contributed to the discussion of composite decision-making procedures. The meeting had been prepared by a preparatory workshop of members of the French Conseil d'Etat with Herwig Hofmann, under the chairmanship of the vice-President of the Conseil Jean-Marc Sauvé. The second conference in which ACA-Europe cooperated with ReNEUAL was held in Amsterdam (Netherlands) under the Dutch presidency of ACA-Europe with participation of Paul Craig and Jean-Bernard Auby of ReNEUAL, in The Hague in November 2013, in collaboration with the Council of State of the Netherlands.

The European Law Institute (ELI) joined the ReNEUAL project in 2012. In this context, we received many thoughtful comments by members of the ELI Membership Consultative Committee chaired by Marc Clément (Lyon) and Christiaan Timmermans (The Hague) and by participants of two ELI annual general meetings. We would like to thank all individual commentators for contributing their time, energy and knowledge to this joint project as well as ELI for lending its institutional support. A conference organized by the Centre for Judicial Cooperation, Department of Law of the European University Institute in Florence under the directorship of Loïc Azoulai in cooperation with ELI and ReNEUAL in February 2014 allowed for further in-depth discussion. Next to the organisers, we would like to especially thank the participating judges from Member States high jurisdictions.

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- Florence:
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## Table of Abbreviations

APA(s)	Administrative Procedure Act(s)
Austrian APA	Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist
CFR	Charter of Fundamental Rights of the European Union [2007] OJ C 303/1
CJEU	Court of Justice of the European Union
CJ	Court of Justice
CoE	Council of Europe
CoE Recommendation	Council of Europe Recommendation of the
CM/Rec(2007)7	Committee of Ministers to member states on good administration CM/Rec(2007)7
Commission Communication on contract awards	Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02)
DCFR	Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at <a href="http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf">http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf</a> .
DG	Directorate-General
Dutch GALA	Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315), in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij Wet van 25 juni 2014, in werking getreden op 1 augustus 2014

ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDPS	European Data Protection Supervisor
EO	European Ombudsman
EO Code	European Ombudsman – The European Code of Good Administrative Behaviour
EP	European Parliament
EP Resolution of 15 January 2013	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))
EU	European Union
EURODAC	European Data Comparison system for the comparison of fingerprints for the effective application of the Dublin Convention established by Council Regulation (EC) No 2725/2000 of 11 December 2000
GALA	General Administrative Law Act
GC	General Court of the Court of Justice of the European Union
German APA	Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist
Italian APA	Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192)
MoU	Memorandum of Understanding
Polish APA	Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz.



	168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183)
RAPEX	Rapid Exchange of Information System
RASFF	Rapid Alert System for Food and Feed
SIRENE	Supplementary Information Request at the National Entry [Regulation (EC) no 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)]
SIS	Schengen Information System
Spanish APA	Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)
Swedish APA	Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223)
US APA	Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFP	European Civil Service Tribunal of the Court of Justice of the Union

# Introduction to the ReNEUAL Model Rules / Book I – General Provisions

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## A. Introduction to the ReNEUAL Model Rules

### *Executive summary of the introduction*

- (1) The project on ReNEUAL Model Rules on EU administrative procedure undertaken by the Research Network on EU Administrative Law (ReNEUAL) aims to determine how **constitutional values of the Union** can be best **translated into rules on administrative procedure** covering non-legislative implementation of EU law and policies. Well-designed rules for implementation of EU law and policies could improve the quality of the EU's legal system. They have the potential to add to the compliance with general principles of EU law, to help simplify the legal system, enhance legal certainty and fill gaps in the legal system.
- (2) The **ReNEUAL Model Rules are organised in six 'books'**. These books are designed to reinforce general principles of EU law and identify - on the basis of comparative research - best practices in different specific policies of the EU. The **process of drafting the model rules was conducted as follows**. First, policy areas of the EU and national legal systems were screened in a comparative fashion. Second, a preliminary version of possible rules which had been identified was drafted and accompanied with explanations on the choices made and the sources consulted. Third, these ReNEUAL 'model' rules were subjected to a process of discussion and review in iterative consultations with a wide variety of practitioners and academics.
- (3) The ReNEUAL Model Rules are presented in a form that would suit **possible adoption as an EU Regulation** – with an appropriate legal basis *de lege lata* or *de lege ferenda*. Nevertheless, the term 'Model Rules' highlights the **academic character of the ReNEUAL project**.
- (4) The ReNEUAL Model Rules follow an approach of '**innovative codification**'. This involves a new law bringing together in one document existing principles, which are scattered across different laws and regulations and in the case-law of courts. If necessary, the innovative codification also modifies these existing principles and rules and it may add new ones as well.

- (5) **Rules and principles of EU administrative law** are on the whole the product of the incremental introduction of legislation in specific policy areas, some of which may have had an experimental design. EU administrative law is thus characterised by **significant fragmentation** into sector-specific and issue-specific rules and procedures with highly complex, overlapping rules and principles; at the same time, there are also gaps in regulation.
- (6) **EU law applies a mixture of tools** in specific and evolving contexts of implementation of EU law and policies. Each of these tools – single case decisions, non-legislative acts of general application, agreements and contracts – has its own specific requirements for ensuring procedural justice. EU law on administrative procedures is also characterised by the **multi-jurisdictional nature** of many of its procedures and a pluralisation of the actors involved.
- (7) Rules for EU administrative procedures **do not exist in a vacuum; nor are they unique**. Legal systems around the world face similar difficulties when it comes to organising the administrative implementation of law. Inspiration can be drawn from many of the Member States' laws on administrative procedure, but no one single model is transferable wholesale.
- (8) The main objective of the ReNEUAL project has been to produce ways of improving the implementation of EU law as a whole. From the beginning of the project the possibility of transforming all or part of the project into draft EU legislation has been actively considered. Within the EU system of the conferral of powers, possible future EU legislation on administrative procedures requires the identification of treaty provisions granting a legal basis for the adoption of such legislation. The **legal basis for a codification of EU administrative procedures** is a delicate question. ReNEUAL has taken these difficulties into account in a variety of ways.
- (9) ReNEUAL's Model Rules on Administrative Procedures do not follow the same definition of the **scope of applicability** in all books. Some specific considerations have to be taken into account, which lead to differentiation between the general scope of Books II, III and IV, which focus on EU institutions, bodies, offices and agencies, whereas Books V and VI have been drafted having both EU authorities and Member States' authorities in mind.

- (10) In line with the approach presented in this introduction, the drafting of the rules have iteratively undergone - since the very beginning - **internal and external processes of consultation and debate**, the details of which are indicated in the explanations of the respective books.

*I. Background and mission of the ReNEUAL project: EU administrative procedures and constitutional principles*

- (11) Constitutional principles constitute decisive normative standards for the design of administrative procedures in the EU. The existence or non-existence of administrative procedural rules in the EU is not merely a ‘technical’ question, free of constitutional value choices. The realisation of constitutional principles has a considerable potential impact on substantive outcomes. Administrative procedures for the implementation of EU law and policies entail administrative action in all its phases. **Rules on administrative procedures need to be designed to equally maximise the twin objectives of public law: to ensure that the instruments in question foster the effective discharge of public duties and, at the same time, that the rights of individuals are protected.**
- (12) **Constitutional values and principles are the central normative standards** for judging the design of procedures for implementation of EU law. Those values and principles include the protection of the **rule of law** and its emanations in sub-principles such as legality, legal certainty, proportionality of public action and the protection of legitimate expectations. Those values and principles further include the concepts of a **democratic Union** on the basis of a transparent system requiring not only the definition and protection of rights of participation and access to information but also, under Article 9 TEU, equality of citizens in their access to Union administration. Prominently, Articles 1(2) and 10(3) TEU require that, in the Union, in line with the principles of openness and of subsidiarity, “decisions shall be taken as openly and closely as possible to the citizen”.
- (13) **Other individual rights and obligations** underpinning the design of procedures **arise from the principle of good administration** as partially restated in Article 41 CFR. Good administration requires that decisions be taken pursuant to procedures which guarantee fairness, impartiality and timeliness. Good administration includes the right to be given reasons - a requirement also

protected by the right to an effective remedy restated by Article 47 CFR - and the possibility of claiming damages against public authorities who have caused harm in the exercise of their functions. Good administration also requires the protection of the rights of defence, language rights and more generally, protection of the notion of due process. In addition, good administration extends to information rights which include privacy and business secrets as well as access to information.

- (14) The Model Rules on EU administrative procedure produced by ReNEUAL **seek to address how the constitutional values of the Union can be best translated into rules on administrative procedure** covering the non-legislative implementation of EU law and policies. It is the understanding of the drafters of these ReNEUAL Model Rules that well designed rules for the implementation of EU law and policies could improve the quality of the EU's legal system. Such ReNEUAL Model Rules have the potential of fostering compliance with the general principles of EU law. This result would contribute not only to the clarity of the legal rights and obligations of individuals and participating administrations, but also to the transparency and effectiveness of the legal system as a whole. A codification of administrative procedures could help simplify the legal system, enhance legal certainty, fill gaps in the legal system and thereby further contribute to compliance with the rule of law. Establishing enforceable rights of individuals in procedures that affect them contributes to compliance with principles of due process and fosters procedural justice. Moreover, the existence of one basic set of rules for administrative procedures might reasonably be expected to reduce overall litigation. The **current rules and procedures for administrative procedures are fragmented and mostly policy-specific**; there are gaps and it is not always possible to have a coherent interpretation of the rules that apply in different sectors even though they are intended to be similar. The current rules and procedures for administrative procedures often need to be complemented with procedural provisions concerning certain transversal issues.
- (15) The **ReNEUAL Model Rules of administrative procedure are organised in six 'books'**. These books are designed to reinforce general principles of EU law and identify - on the basis of comparative research - best practices in different specific policies of the EU. Book I addresses the general scope of application of the model rules, their relation to sector-specific rules and Member State's law and the definitions of wordings applied in all the books. The Preamble of Book I contains

a summary of principles, which guide administrative behaviour, and the interpretation of all subsequent norms in Books II to VI. The latter books cover more in-depth administrative procedures in the EU that have the potential to directly affect the interests and rights of individuals. The Books address non-legislative implementation of EU law and policies by means of: rulemaking (Book II), single case decision-making (Book III), contracts (Book IV) and, very important for the composite nature of EU administration, procedures of mutual assistance (Book V) and information management (Book VI).

- (16) ReNEUAL's Model Rules on Administrative Procedures **do not follow the same definition of their scope of applicability in all books**. The procedures covered by Books II, III and IV are those conducted by EU institutions, bodies, offices and agencies. The procedures covered by Books V and VI address issues which cannot be solved without taking into account the relationship between EU institutions, bodies, offices and agencies, on the one hand, and Member States' authorities, on the other hand. Given the reality of Member States being more often than not involved in the implementation of EU law and policies, the Model Rules of Books V and VI are designed to be applicable also to implementation activity by Member States. Generally speaking, the ReNEUAL Model Rules were also drafted in order to be useful to Member States' authorities who might choose to apply them for their activities when implementing EU law and policies.
- (17) The **process of drafting the model rules** was conducted by, first, screening policy areas of the EU and national legal systems in a comparative manner in order to identify joint problems and common or innovative solutions to these problems. A variety of fields, including, for instance, State aids, environmental protection, telecommunications, or research and innovation were thus studied. A second step consisted of the preliminary drafting of possible rules identified in these models, accompanied with the necessary explanations on the choices made and the sources consulted. In a third phase, these ReNEUAL Model Rules have been continuously submitted to discussion and review in various fora of practitioners and academics.<sup>1</sup> This process has led to iterative processes of redrafting to improve and clarify the text. In ReNEUAL's view, the evolution of the European legal system has reached a point where such codification is not only possible but also necessary for EU's future development as regulatory system.

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<sup>1</sup> See the General Acknowledgements for details of the many consultation processes.

ReNEUAL members concluded at an early stage of the project that Model Rules for EU law of administrative procedure are best designed following a process of **‘innovative codification’**. ‘Innovative codification’ occurs when a new law establishes one source of existing principles which are usually scattered across different laws and regulations and in the case-law of courts; it may also modify these existing principles and rules, if needed, as well as add new ones. This method allows contradictions in the existing laws to be resolved and gaps to be filled. It also fosters the further dynamic development of EU law, taking into account particularly the evolution of case-law as well as the changing needs of diverse policies. By contrast, what is known as *‘codification à droit constant’* – a technique which amounts to establishing a legally binding consolidated version of existing legislation – would not be well suited to address these different challenges that are endemic to the EU system.

- (18) The ReNEUAL Model Rules on Administrative Procedures are presented in a **form adapted to their possible adoption as an EU Regulation** – with an appropriate legal basis *de lege lata* or *de lege ferenda*, as discussed in section IV of this Introduction. **Nevertheless**, the term ‘Model Rules’ highlights the **academic** character of the ReNEUAL **project**. The Model Rules provide European legal scholarship and legal practitioners with a structured framework for debating and further developing EU administrative law. The ReNEUAL Model Rules also aim to inform legislative bodies and courts about legal options and best practices. It has to be stressed that the codification we are elaborating is a **codification of binding law and also of soft law rules that thus become binding**: this means that **non-compliance with those rules should have consequences**. However, at this stage, the ReNEUAL Model Rules do not go further and actually indicate the nature of the consequences of non-compliance. The reasons are two-fold: first, while some national administrative procedure laws indeed give binding indications as to the sanctions for non-compliance – annulment, damages or other – many others don’t and are nevertheless enforced by courts in the way they deem most appropriate; second, the EU courts have managed very well until now to adjudicate the appropriate sanction for non-compliance with EU law. The choice that has been made in this version of the ReNEUAL Model Rules does not, however, mean that a codification of EU administrative procedure law should not in the future try and find an appropriate formulation of the sanctions to be applied in the event of non-compliance.



## *II. Law of administrative procedure in the EU – characteristics and challenges*

- (19) EU administrative procedure law, covering forms of non-legislative implementation of EU law and policies, not only has to comply with the constitutional values and principles on which the EU is based; it also has to **address the main challenges of implementing EU law** in the real world and be adapted to some of the main characteristics – and shortcomings – of EU administrative law as it stands.
- (20) Rules and principles on EU administrative law have largely emerged from the evolutionary development and experimental design of legislation in specific policy areas. As a result, the rules applicable are **characterised by significant fragmentation** into sector-specific and issue-specific rules and procedures. Today, this fragmentation leads to an overburdening complexity of often overlapping rules and principles. One example is to be found in the codification of procedures for the application of competition rules by Regulation 1/2003<sup>2</sup>: even though according to recital 23 “When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement [...]” the binding provisions of the regulation do not restate this principle, which is based on the CJEU’s jurisprudence. The regulation, furthermore, does not mention the legal professional privilege protecting communications between a lawyer and client, which is guaranteed by the CJEU’s jurisprudence;<sup>3</sup> it takes a skilled lawyer to be aware of the existence of those procedural guarantees which are not to be found in the relevant regulation but are the consequence of the presumption of innocence and right of defence, guaranteed by Article 48 CFR. There is, in many respects, a growing gap between, on one hand, the proliferation of new forms of administrative action in the EU and their regulatory framework and, on the other hand, their integration into a coherent system of protection that translates the overarching constitutional values and the various control and legitimacy mechanisms.

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<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 last amended by Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (Codified version) [2009] OJ L 148/1.

<sup>3</sup> Case 155/79 *AM&S Europe Limited v Commission* [1982] ECR 1575.

- (21) **Gaps in regulation** further result from the fact that some procedural elements are addressed within policy-specific rules only partially, which means that often unspecified **general principles of law must fill the void**. One example is the right to a fair hearing. According to the case-law of the ECJ, an authority implementing EU law can act in violation of the EU general principle on the right to a fair hearing even in cases where the legal basis which establishes the procedures to be followed by that authority does not oblige it to organise a hearing.<sup>4</sup> Fragmentation often leads to a **lack of transparency, predictability, intelligibility and trust** in EU administrative and regulatory procedures and their outcome, especially from the point of view of citizens and other non-specialists.
- (22) Despite the fact that most legal problems are not specific to single policy areas, **only few matters** of EU administrative procedure law **are the subject of a more systematic approach** beyond a single policy area in existing legislation. Most transversal issues such as the adoption and implementation of binding decisions with identified addressees (single case decision), binding acts of general application (rulemaking), binding agreements (contracts) or the handling of the collection and use of information as input into decision-making are not addressed in a transversal manner. The **absence of a systematic transversal** approach is not just a formal problem. It is one of the main reasons why lacunae in the protection of procedural rights continue to exist. It also limits the mobility of EU officials from one EU authority to the other, in contrast to the modernisation goals of the EU civil service that have been implemented in the past decades.
- (23) A very **limited partial codification** of some principles in **Article 41 CFR** on good administration has been adopted for those ‘administrative acts’ affecting single interests of individuals, groups or businesses adopted by EU institutions, bodies offices and agencies. Partial guidance is also given by the **EO Code**<sup>5</sup> and by the relevant institutions’ internal rules of procedure. The **general principles of EU administrative law** as developed by the CJEU, on the other hand, have a broader scope than such partial codifications or soft law codifications. Case-law develops on the real-life canvas of specific conflicts involving EU law and the need to protect rights in that context. General principles of law can in theory cover rights and obligations arising in the context of rulemaking, contracts, planning procedures, information exchange systems, and enforcement networks.

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<sup>4</sup> C-135/92 *Fiskano AB v Commission* [1994] ECR I-2885, para 39.

<sup>5</sup> European Ombudsman – The European Code of Good Administrative Behaviour.

Yet the reality is that the development of general principles dealing with many of these issues is hampered by the limited standing rights of individuals especially when it comes to rulemaking, contracts and information management activities.

- (24) Rules on administrative procedures for the implementation of EU law have been **developed very dynamically and often rather experimentally**. An example of this is in the use of information networks as a flexible model to ensure decentralised implementation of EU law whilst creating common rules for a single market. ReNEUAL Model Rules should not reduce the dynamic, experimental nature of the system. They should instead allow for building blocks of standard models for decision-making procedures without limiting the possibility of further experimentalist developments in certain policy areas. The approach of defining these Model Rules as *lex generalis*, which could cover the general questions of protection of rights in the design of effective decision-making procedures, in our view, actually allows for a simplified dynamic adaptation of elements in *lex specialis* which require policy specific adaptations. We are aware that this approach requires careful drafting of the rules governing the relationship between *lex generalis* and *lex specialis*.
- (25) EU law applies a **mixture of instruments** to achieve the objectives of the Union in the specific and mostly fast evolving contexts of implementation of EU law and policies. Each of these instruments – single case decisions, acts of general application, agreements and contracts, etc. – has specific requirements for ensuring procedural justice as well as effectiveness. The ReNEUAL Model Rules try and assemble an appropriate set of rules for each of these instruments.
- (26) EU law on administrative procedures is characterised by the **multi-jurisdictional nature** of many of its procedures and a pluralisation of the actors involved. Despite ‘Europeanization’ of the 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. The multi-jurisdictional nature and pluralisation of actors involved in the implementation of EU policies reinforces fragmentation between sector-specific procedures. The lack of general rules of procedure at the level of EU institutions, bodies, offices and agencies has therefore a negative impact on the coherence of the approach to procedural issues of a Member State’s authorities. This creates barriers to administrative coordination within Member States.

(27) The multi-jurisdictional nature and pluralisation of actors **requires a high degree of procedural cooperation** between the actors in many areas in practice: this is achieved by composite procedures. Under these complex forms of integrated administrative procedures the procedural steps leading up to the decision result from a mix of applicable laws by different actors. This is irrespective of whether the final decision is taken by an EU or a Member State authority. Composite procedures require joint gathering and use of information as the raw material of decentralised decision-making. In many policy areas, EU authorities establish shared databases for the collection and exchange of information in those procedures. Today, the design of composite procedures is geared predominantly towards achieving efficiency and optimal use of pre-existing resources, but their multi-jurisdictional nature may diminish protection of individual rights and possibilities of effective judicial review. Rules of administrative procedure are, therefore, necessary to prevent that the rights and interests of addressees and third parties in the implementation of EU law fall in a ‘black hole’ between situations covered by the EU-level review and accountability mechanisms and those of Member States. This second set of issues arising from the multi-jurisdictional nature and pluralisation of actors is mainly addressed by Books V and VI of the ReNEUAL Model Rules.

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

(28) Rules for EU administrative procedures do not exist in a vacuum. Legal systems around the world face similar difficulties when it comes to organising the administrative implementation of law. Especially during the last century, in line with the development of the ‘administrative state’, **many legal systems have turned to codification of administrative procedures**. It is clear to the drafters of the ReNEUAL Model Rules on administrative procedure that the challenges to implementation of EU law and policy might in many cases be characterised by a greater complexity than the issues encountered within states when implementing their own national law, even in federally organised states. Nevertheless, although national codification experiences are not generally transferable one-to-one to the EU level, they do contain valuable case studies and inspiration to be taken into account when analysing the possibilities of EU administrative procedures.

- (29) Additional inspiration for codification on the EU level comes from the fact that the scope of administrative law is not only national and supranational but also global. **Regulatory powers are increasingly transferred to international organisations at the global level.** The study of the conditions of regulation and decision making at that level (sometimes referred to as 'global administrative law'), show that general principles such as consultation and participation, access to information rights and reason-giving are increasingly seen as central to the legitimacy of administrative action beyond the state.
- (30) Many of the present EU Member States have adopted codifications of administrative procedures – after a first attempt in Spain in 1889 – over the course of the twentieth century beginning with Austria in 1925. A similar tendency is visible outside of the EU, for example, the US with the 1946 Administrative Procedures Act (APA). The movement towards codification has gained momentum in the second half of the twentieth century and the issue is now on the agenda, for instance, in France. This being said, **national codifications differ with regard to their scope and purpose.** In some countries, there are either different laws of administrative procedure for different levels of government, or their entry into force has been staggered. For example, in Denmark the law was introduced in 1986 for central government and in 1987 for local government. Also, some Member States have a regional level of government with their own legislative powers (for example, Austria, Belgium, Germany, Italy and Spain, as well as for certain parts of their territory, Finland, Portugal and the United Kingdom) which complicates the discussion of codification of administrative procedure at the different levels. Germany, for example, has a parallel existence of a federal law of administrative procedure applicable to federal authorities and alongside it the laws of each Land which are in turn applicable to the latter's authorities. In Germany this was achieved in the context of a common and coherent legal and administrative culture. In Spain and in Italy, a single general law is applicable to all levels of administration – central as well as regional and local, but there is room for complementary legislation at the regional level of 'autonomous communities'.
- (31) The **depth of regulation may also differ across the national systems.** Whilst some codifications, such as the administrative procedure law of Italy, are to a large extent built on principles to be fleshed out in specific policy legislation, other procedural acts regulate the matters they cover in great detail.

(32) Differences exist, moreover, with regard to the **administrative actions which are codified**. For example, many national procedures acts apply only to so-called administrative decisions (or adjudication), i.e. to unilateral decisions affecting single interests of individuals, groups or businesses, even if they sometimes contain a few rules applicable to contracts, as in the German law of 1976. Only few laws on administrative procedure have also included general provisions on agreements and contracts between administrative authorities and other private or public bodies or individuals; this was, for instance, the case of the initial Portuguese codification of 1992: later these provisions on contracts were brought within a separate law in order to facilitate compliance with the frequently changing EU directives on public procurement, but a recent bill proposes to incorporate them again. In France contracts and agreements entered into by the public administration are also considered as ‘administrative acts’ and should, therefore, normally be subject to a general administrative procedure law. National approaches also differ as to whether rulemaking is covered. The US APA<sup>6</sup> applies generally to ‘rulemaking’, i.e. the exercise of regulatory power by federal administrations establishing famously a ‘notice and comment’ procedure, which aims to facilitate the participation of stake-holders in rulemaking. In some Member States, like France, ‘administrative acts’ also include regulatory acts (decrees, ministerial regulations etc.) and, therefore, it is logical that a codification of administrative procedure also applies to the latter. Furthermore, most Member States, like the EU itself, have adopted specific legislation on data protection and on access to documents. But only a few Member States have a more extensive set of principles on information management. For the implementation of EU law, information management is central to a growing number of networks which involve EU institutions, bodies, offices and agencies on the one hand, and Member States’ authorities, on the other.

(33) It follows from what has just been described that, although inspiration can be drawn from many of the Member States’ laws on administrative procedure, **no one single model is transferable as such**. Our Model Rules on EU administrative procedure are designed to fit the special nature and the specific needs of implementation of EU law. They inevitably differ from what is found

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<sup>6</sup> Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946).

within the Member States or other national codifications beyond the EU but nonetheless draw inspiration from single national solutions.

#### *IV. Legal bases for EU codification*

- (34) The main objective of the ReNEUAL project on EU administrative procedure is first and foremost to develop academic ideas for improving the implementation of EU law. As a consequence, ReNEUAL took the view that **the project should not be constricted by the existing framework of legislative competences**. Nonetheless, the possibility of the (future) adoption of the whole or parts of the project as EU legislation has been considered and factored in from the beginning of the project. Within the EU's system of conferral of powers, possible future EU legislation on administrative procedures requires the identification of treaty provisions providing a legal basis for the adoption of such an Act. ReNEUAL is fully aware of the **importance of addressing the issue of legal basis** for four reasons.
- (35) **i) If no proper legal basis can be found for codification**, the transformation of the results of the ReNEUAL project into legislation is **dependent on general treaty reform**. The chances that treaty reform in the short or medium term will be limited to the introduction of an appropriate legal basis for the codification of administrative procedures (or even include it) are not large.
- (36) **ii) The scope and impact of many rules will vary according to the legal basis that is chosen**; it is not sufficient to identify an enabling legal basis, it is also necessary to check whether there are no limitations to the use of such legal bases coming from other treaty provisions.
- (37) In practice and in the scholarly literature, the **discussion** about a legal basis for codification of EU administrative procedures **has mainly centred on Article 298 TFEU**; however, other treaty provisions also need to be examined. Without trying to give a definite answer to the existence and limits of a legal basis for codification of EU administrative procedures, we highlight the relevant issues and indicate possible options. Article 298 TFEU states in paragraph 1 that “[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.” The notions of independence, openness and efficiency evoked in

Article 298 TFEU are exemplary in a Union based on the rule of law, given the need to comply with the overarching list of constitutional principles already referred to. Possible issues of legal basis are raised by the wording ‘European administration’ in its paragraph one as well as in the wording of Article 298 TFEU’s second paragraph, which require that “[i]n compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.” There is a lively debate amongst scholars and policy makers about the interpretation and scope of the latter provision but, so far, no case-law of the CJEU is at hand to guide that interpretation. **At this stage of the debate, it appears necessary only to exclude the narrowest of possible interpretations of Article 298 TFEU** that would allow using the legal basis only for the regulation of the internal procedures of EU institutions, bodies, offices and agencies. Such a narrow interpretation would appear neither compatible with the materials of the preparatory work of the 2002-2003 European Convention, nor is it sustainable in view of the necessary *effet utile* of Article 298 TFEU. The narrow interpretation would have the effect of reducing the scope of this Article to a mere reference announcing the possibility of staff regulations adopted under Article 336 TFEU or a simple restatement of the principle of institutional self-organisation. **ReNEUAL’s initial view is that Article 298 TFEU constitutes the most appropriate legal basis** for a codification of general rules and principles of administrative procedures of the EU.

- (38) One specific issue – which has not been discussed very much by existing literature – has to do with the **existence of specific legal bases for certain transversal issues**. For example, this is the case for Article 322 TFEU for the adoption of financial regulations, for Article 15 TFEU for regulations on access to documents and for Article 16 TFEU for data protection. The question is whether the existence of those legal bases would prevent relevant topics being included in the framework of a general codification such as the one envisaged in the present ReNEUAL Model Rules. ReNEUAL acknowledges the existence of this problem but is convinced that it can be solved. As the relevant legal bases quoted here provide for the use of the ordinary legislative procedure, **it should be possible to use a joint legal basis** combining the relevant provisions with Article 298 TFEU. This view is supported by well-established case-law of the CJEU.



- (39) There is also another treaty provision to consider: **Article 295 TFEU regulating interinstitutional agreements**. The scope of this provision is limited to the European Parliament, the Council and the Commission, and cannot, therefore, serve as a general basis for the codification of EU administrative procedures that would apply to all institutions, bodies, offices and agencies. It seems difficult to argue that Article 295 TFEU pre-empts the use of Article 298 TFEU for all EU institutions, including the European Parliament, Council and Commission. On the contrary, Article 295 TFEU indicates that Article 298 TFEU cannot be limited to internal arrangements, as otherwise a conflict between both articles would arise.
- (40) Another issue derives from the existence of **legal bases for sector-specific regulation that provide for the use of a special legislative procedure**. Such is the case, for instance, with Article 86 TFEU on establishing Eurojust, Article 87 TFEU on police cooperation, Article 118 TFEU on the protection of intellectual property rights, Article 182 TFEU on the adoption of specific programmes for research and technological development, or Article 192 TFEU for certain measures in the field of environment. In such circumstances the possibility of a joint legal basis, in combination with Article 298 TFEU is not available. According to the well-established case-law of the CJEU the legislator would need to use the legal basis that corresponds to the central issues of the relevant Act. While acknowledging that the problem is not easy to solve the EU legislator could, for instance, render the Model Rules applicable to a such a sector by a sector-specific act applying the legislative procedure established in the relevant legal basis; such a sector-specific act might take advantage, if needed, of the flexibility provided by the *lex generalis – lex specialis* relationship.
- (41) Even in the case where legal bases for sector specific regulation imply the use of the ordinary legislative procedure, a problem might arise if those **sector-specific legal bases include specific objectives** – as, for instance, in the fields of consumer protection or environment. Here again we acknowledge the existence of a problem, but we do not think this should prevent us from trying to design generally applicable rules. At any rate, the provisions of Book I on the relationship between the Model Rules and other EU legislative acts are designed in order to provide a solution to this problem, by adopting if necessary, sector-specific complementary or alternative procedural rules.

- (42) **iii)** A central political and legal issue is whether in the present wording of the treaties there is a legal basis for a transversal **codification of administrative procedures that would impact beyond the EU institutions, bodies, offices and agencies and also impose duties on member states' authorities** in the same way that a number of sector-specific regulations or directives already do.
- (43) The concept of '**European administration**', which appears in the treaties only in Article 298(1) TFEU is not defined: there is very little discussion of this concept in the scholarly literature. Article 298(1) TFEU is substituting for Article 9(3) of the Amsterdam Treaty and Article 24(1) first indent of the Merger Treaty of 1965, which referred to a 'single' administration of the different Community institutions. It can, therefore, be argued that European administration means the administration of EU institutions, bodies, offices and agencies. It is also possible to argue, however, that 'European' is not identical to 'single' and that it might therefore indicate a broader scope. The latter interpretation would enable Article 298 TFEU to provide a legal basis for a general codification extending to Member States' authorities when they implement EU law. If this interpretation is not followed, Article 298 TFEU needs to be combined with other treaty provisions in order to extend the scope of the Model Rules to Member States' authorities. A joint legal basis can only be used if those provisions provide for the use of the ordinary legislative procedure as indicated in the second paragraph of Article 298. Even though the use of joint legal bases for EU legislative acts has in practice become less frequent, they are accepted in the case law of the CJEU especially where the various legal bases use the same legislative procedure. This is the case for various provisions allowing for the adoption of 'measures' for the harmonisation of the legislative and administrative provisions of the Member States for the realisation of EU policy goals.
- (44) The lack of clarification of the scope of the 'European administration' leads to the situation where there are **two alternative interpretations of Article 298 TFEU**, both of which appear reasonable from a strictly legal point of view.
- (45) One interpretation would allow for provisions in the form of regulations adopted according to the ordinary legislative procedure to cover the internal administrative organisation of EU institutions, bodies, offices and agencies and also the cooperation between those various administrative actors. In addition, it would cover procedures leading to externally binding **acts of the institutions, bodies,**

**offices and agencies of the Union** and the external relation between those EU authorities and citizens or other private or public addressees of EU administrative actions. This interpretation is the basis of the European Parliament's Resolution of 15 January 2013 containing recommendations to the Commission on a Law of Administrative Procedure of the European Union. The EP started the debate at the political level and introduced the issue onto the legislative agenda of the coming years. Its approach is, however, limited, suggesting that it applies only to EU-level implementation and single case decision-making with one party being a citizen.<sup>7</sup> The EP draft leaves aside the salient issues of composite procedures, questions of contracts, information systems and even rulemaking.<sup>8</sup> As much as the ReNEUAL drafters strongly welcome the EP's resolution of 15 January 2013, they consider that the EP took a limited approach that does not fully develop the potential of the future legislation at this stage. Article 298 TFEU, even in its limited interpretation, allows for the adoption of procedural rules **dealing not only with single case decisions, but also with rule-making and contracts and, to a certain extent, composite procedures.**

- (46) A **broader interpretation** of the second paragraph of Article 298 TFEU is also possible. The distinction between 'European administration' in Article 298 TFEU and 'institutions, bodies, offices and agencies of the Union' in other treaty provisions must be viewed **in the context of the pluralisation of the administrative bodies involved in the implementation of EU law** on the national and EU levels. 'European administration' is used, on this understanding, to describe the entire corpus of administrative actors implementing EU law which, given the principle of primacy and the possibility of direct effect of EU law, includes Member State administrations and courts. 'Institutions, bodies, offices and agencies of the Union' are, by contrast, only those administrations organised on the EU level. This broader interpretation is well adapted to the complexities of

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<sup>7</sup> 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 1 of the Annex. The Annex to the Resolution contains six "detailed recommendations as to the content of the proposal requested".

<sup>8</sup> 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 3 of the Annex lists principles including that of lawfulness; of non-discrimination and equal treatment; of proportionality; of impartiality; of consistency and legitimate expectations; of respect for privacy; of fairness; and of efficiency and service. Recommendation 4 (on the rules governing administrative decisions) contains indications on: the initiation of the administrative procedure; the acknowledgment of receipt; the impartiality of administrative decisions; the right to be heard; the right to have access to one's file; time-limits; the form of administrative decisions; the duty to state reasons; the notification of administrative decisions; and the indication of remedies available.

implementation of EU law, taking into account the importance of composite procedures in the practice of EU administration. Furthermore, this broad interpretation is also more compatible with the case-law of the CJEU requiring all administrative actors in the Union to comply with EU law and, where necessary, to dis-apply conflicting national law. However, as explained both in this introduction and in the explanations to the Model Rules of Book I, for pragmatic reasons, the ReNEUAL drafters chose to have a general scope of application that would not extend to Member States' authorities for all books.

(47) **iv) Two other treaty provisions with a general scope** need to be taken into account in the search for a legal basis for the general codification of the law of administrative procedures.

(48) The first of these treaty provisions is **Article 352 TFEU**, which establishes the '**flexibility clause**'; it can be seen as an alternative to the use of Article 298 TFEU. Article 352 TFEU could only be an alternative because, contrary to Article 298 TFEU, it provides for a special legislative procedure, requiring unanimity by the Council. A delicate issue is that, according to the CJEU's well-established case-law, the flexibility clause may not be used in order to substitute another legal basis, but only in the event of lack of a legal basis to attain one of the Treaty objectives. This being said, if it is argued that Article 298 TFEU does not provide a legal basis for a general codification of EU administrative procedures, it follows that Article 352 TFEU may be used. A second problem with Article 352 TFEU is that its paragraph 3 forbids harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. If Article 352 TFEU were to be used as a legal basis for a codification the scope of which would include the Member States' authorities, the resulting EU Act could not lead to harmonisation in the sectors where the EU only has a competence for supporting, coordinating or supplementing action. Further study is needed to establish the extent to which this presents a problem in practice.

(49) The second treaty provision to be taken into account in this context is **Article 197 TFEU on administrative cooperation**. Article 197 TFEU is to be taken into consideration for the issue of extending the scope of application to the Member States' authorities. However, paragraph 2, which insists on the facultative character of measures adopted on the basis of Article 197 TFEU and excludes harmonisation of the laws and regulations of the Member States, makes it clear

that Article 197 TFEU could only be a basis for a non-binding EU act. The question whether Article 197 TFEU would exclude the adoption of a binding act based on another treaty provision such as Article 298 TFEU is answered by paragraph 3, according to which Article 197 TFEU “*shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union*”.

- (50) It should be recalled that, irrespective of the interpretation of the exact meaning of Article 298 TFEU, any act with this legal basis or another one would additionally be scrutinised for compliance with the **principles of subsidiarity and proportionality**.
- (51) This outline of the main issues regarding the legal basis for a codification of EU administrative procedures shows the delicacy of the question. **ReNEUAL has taken these difficulties into account in several ways**: the scope of application of Books II, III and IV is, in principle, limited to EU institutions, bodies, offices and agencies; the question whether the same legal basis can be used for different types of administrative actions has been taken into account in drafting the rules in Book I; the wording of the Model Rules has been scrutinised in view of its relationship with possible legal bases.
- (52) **ReNEUAL concludes** that solving the problem of the appropriate legal basis is **not a precondition to the academic drafting** of procedural rules and that the discussion on the content of those rules should not be pre-empted by the discussion on the legal basis. It is only after having assessed the content of those rules that a political decision can be made on how to proceed further. Three possibilities are envisaged: i) finding further arguments to sustain the use of existing legal bases, ii) putting the issue on the agenda of the next treaty revision conference in order to establish a new fully fledged legal basis, or iii) enacting the rules of some of the six books through different legal instruments, each based on an appropriate existing or future legal basis. The latter solution – although inelegant and difficult to apply coherently – should not be considered incompatible with the concept of a single codification. As long as the Model Rules are written as a coherent whole, they may be contained in several different instruments.

- (53) **Irrespective of any discussion on the legal basis**, provisions laid down in the ReNEUAL Model Rules on administrative procedure could also be used as a type of ‘stand by codification’ or as a ‘boilerplate’ to be supplemented with sector-specific norms in policy-specific legal acts that benefit from a single legal basis such as, for example, Article 114 TFEU for the internal market. A key issue in this respect is the relationship between the Model Rules and other norms of EU legislation, existing or forthcoming; that issue is addressed in Book I by Article I-2 and the relevant explanation. ReNEUAL’s option is indeed to have Model Rules worded in such way that they are applicable without further details in sector-specific legislation or other transversal instruments, in order to be able to fill existing lacunae. In principle, the ReNEUAL Model Rules should also be considered as standard protection that may be expanded in sector-specific legislation. Deviation from the Model Rules in sector-specific legislation is not excluded, but it will need to be solidly grounded both with regard to the specificities of the field that is being regulated as well as paying due regard to the principle of proportionality.
- (54) The ReNEUAL Model Rules project is of course not limited to a legal basis discussion. This academic project is much more fundamentally conceived as a way of showing the usefulness of one single Law by means of an elaborate and much discussed and debated set of Model Rules which can easily be used in whatever form the Union legislature might deem appropriate and politically expedient.

## *V. The six Books of the ReNEUAL Model Rules on EU Administrative Procedures*

- (55) ReNEUAL’s **Model Rules on Administrative Procedures do not follow the same definition of the scope of applicability across the various books**. Some specific considerations have to be taken into account, which lead to differentiation between the general scope of the proposed Model Rules as reflected in Book I and the more specific scope of some of the other Books. Generally speaking Books II, III and IV are drafted for the EU institutions, bodies, offices and agencies, whereas Books V and VI have been drafted for EU authorities and Member States’ authorities.

- (56) As far as **rulemaking in Book II** is concerned, the most important part of this activity, from a qualitative point of view – and maybe to a certain extent also from a quantitative one – is by the EU institutions. At any rate, Article 291(2) TFEU applies: “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council”. Furthermore, the institutional context, as framed by Articles 289, 290 and 291 TFEU calls for many specific rules. The drafting exercise has thus from the beginning been focused on rulemaking by EU institutions, bodies, offices and agencies.
- (57) As for **single case decision-making in Book III**, the situation is somewhat different. In the implementation of EU law a very important amount of the relevant single case decisions are taken by Member State authorities. The need is for coherence in the principles of administrative procedure and the consequent rules. Nevertheless, we are fully aware of the technical and political difficulties in applying the scope of Book III to all aspects of composite procedures and shared administration. We, therefore, also limit the scope of application of Book III to EU institutions, bodies, offices and agencies even in the case of composite procedures. The Model Rules in Book III are conceived to be compatible with Member States’ rules on administrative procedures. If a Member State so chooses, it may use Book III as a template for the reform of existing procedural rules or for the adoption of new procedural rules.
- (58) **Book IV on contracts** deals with a particularly complex legal situation. The relevant Treaty provisions do not limit the choices of EU institutions, bodies, offices and agencies when it comes to the law applicable to a contract. In practice, there are often good reasons to choose not to apply EU law as the law of the contract, but rather a specific Member State’s law, or even the law of a non-EU State. Drafting clauses of administrative procedure applicable to all these situations would imply a degree of technicality and detail that go well beyond that of the Model Rules for single case decision-making and rulemaking. The scope of Book IV is thus limited to contracts of EU institutions, bodies, offices and agencies. Here again, however, nothing prevents Member State legislators from adopting the Model Rules – with the necessary adaptations – in their national

legislation. Nor does it impede EU legislative acts on specific policies from referring to provisions of a general EU administrative procedure act.

- (59) The **existence of composite procedures and shared administration** is one of the main reasons why the EU is – much more than a State administration – in need of rules of administrative procedure that make sure that the rights and interests of addressees and third parties in the implementation of EU law do not fall in a ‘black hole’, namely situations which occur between those covered by the EU-level review and accountability mechanisms and those covered by review and accountability mechanisms of Member States. It is indispensable, as a result, that Books V and VI – regulating mutual assistance and inter-administrative information management – extend to composite procedures and shared administration. The issue of an appropriate legal basis for the rules of Books V and VI is particularly delicate as it relates to rules that apply to Member States’ authorities and EU authorities at the same time, and as there is a specific legal basis for data protection. The pressing need for procedural rules in the field of Books V and VI is, however, more important in our view than the immediate solution of the existence of a legal basis *de lege lata* or *de lege ferenda*: this view has guided the drafting of Books V and VI.
- (60) ReNEUAL’s work on information management has highlighted the fact that, beyond the issue of legal basis, it is necessary to develop rules on **mutual assistance between the EU and the Member States’ authorities** in order to ensure coherence and to keep pace with on-going developments in the implementation of EU legislation and policies. This issue is **covered in Book V** and its relevance for individual rights and interests lies not only in the fact that personal data or business secrets will be affected by such activity. It also arises from the need to better structure and design inter-administrative cooperation, which will generally benefit from the application of such rules.
- (61) **Information management covered in Book VI** is central to a growing number of networks which involve EU institutions, bodies, offices and agencies, on the one hand, and Member States’ authorities, on the other. Even if in many cases such networks do not formally participate in a procedure that may lead to the adoption of a decision, a regulatory act or an agreement, the information they collect, collate and distribute to EU-level and Member State-level actors is often a central factor in decision-making. The current legal framework applicable to the



exchange and use of information through EU information systems is insufficient and does not ensure compliance with the general principles of EU constitutional law; the novelty of many of those areas and the specific nature of the cooperation in these areas require creative approaches for the use of information systems in adjudication, rulemaking and contracts.

## *VI. The approach*

(62) **In summary**, we believe that well-designed rules of administrative procedure for implementation of EU law and policies will help to foster compliance with principles of the rule of law and of good administration for the benefit of individuals and the system of EU law as a whole. A well-designed codification can also contribute to compliance with the principle of subsidiarity reducing the need for centralised EU level decision-making and thus ensuring that decision-making can effectively take place closer to the citizen. A codification of administrative procedures, preferably in the form of a binding legislative act applying, in the first place, to EU institutions, bodies, offices and agencies will serve both elements of the central objective of public law: it will provide instruments for an effective discharge of public duties while at the same time, and no less importantly, protect the rights of individuals. Inspiration for this codification can be drawn from solutions developed regarding specific EU policies which, after careful review, appear suitable to be generalised, as well as from Member State codifications and the success they have already had in many EU Member States in enhancing compliance of the legal system with the rule of law. However, no single approach from Member States' codifications, international organisations or EU policies is applicable as such to the EU and all of its policies.

(63) The **sources of inspiration for the proposed rules** consist of primary and secondary EU law, the case-law of the CJEU, the practice of EU institutions, bodies, offices and agencies, on the one hand, and the comparative law of the EU Member States and other relevant national and international experiences of full or partial codification of administrative procedure, on the other hand. Furthermore, some proposed rules are the result of comparative studies as well as studies of the so-called 'ombudsprudence' of the EO.

(64) In addition, the drafting teams consulted academic literature. In order to present the Model Rules in the style of a legislative proposal, the editorial board decided to refrain from references to academic literature. Those interested in information on such literature are invited to consult scholarly works of drafting team members which were produced during the project and which serve as supplementing material to these Model Rules and their introductions and explanations. This material includes

- P. Craig, A General Law on Administrative Procedure, Legislative Competence and Judicial Competence, *European Public Law* 19 (2013), pp. 503-524
- D. Curtin/H.C.H. Hofmann/J. Mendes (eds) *European Law Journal* 19 [2013] pp. 1-142 including:
  - D. Curtin, H.C.H. Hofmann & J. Mendes, Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda, pp. 1-21
  - Joana Mendes, Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design, pp. 22-41
  - Thomas Christiansen & Mathias Dobbels, Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts, pp. 42-56
  - Linda Senden, Soft Post-Legislative Rulemaking: A Time for more Stringent Control, pp. 57-75
  - Alberto Alemanno & Anne Meuwese, Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in ‘New Comitology’, pp. 76-92
  - Edoardo Chiti, European Agencies’ Rulemaking: Powers, Procedures and Assessment, pp. 93-110
  - Madalina Busuioc, Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope, pp. 111-125
  - Alexander H. Türk, Oversight of Administrative Rulemaking: Judicial Review, pp. 126-142
- Diana-Urania Galetta/Herwig C.H. Hofmann/Jens-Peter Schneider (eds.), Special edition: Information Exchange in the European Administrative Union, *European Public Law (EPL)* 20 (2014), Issue I, pp. 63-163 including:
  - D.-U. Galetta, H.C.H. Hofmann & J.-P. Schneider, Information Exchange in the European Administrative Union: An Introduction, pp. 65-69
  - D.-U. Galetta, Informal Information Processing in Dispute Resolution Networks: Informality versus the Protection of Individual’s Rights?, pp. 71-88

- J.-P. Schneider, Basic Structures of Information Management in the European Administrative Union, pp. 89-106
- M. Lottini, An Instrument of Intensified Informal Mutual Assistance: The Internal Market Information System (IMI) and the Protection of Personal Data, pp. 107-125
- N. Marsch, Networks of Supervisory Bodies for Information Management in the European Administrative Union, pp. 127-145
- H.C.H. Hofmann & M. Tidghi, Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks, pp. 147-163
- O. Mir, Die Kodifikation des Verwaltungsverfahrenrechts im Europäischen Verwaltungsverbund, in: J.-P. Schneider/F. Velasco Caballero (eds.), *Strukturen des Europäischen Verwaltungsverbunds*, Berlin 2009, pp. 177-210
- R. Noguellou/ U. Stelkens [eds.], *Comparative Law on Public Contracts: Comparative analysis of the public contract law of 28 states [within and outside the EU] 2010*
- J.-P. Schneider, European Information Systems and Data Protection as Elements of the European Administrative Union, in: Dieter Dörr / Russel Weaver (eds.), *The Right to Privacy in the Light of Media Convergence – Perspectives from Three Continents*, Walter de Gruyter Berlin/Boston 2012, pp. 374-385 (extended version in German: Informationssysteme als Bausteine des Europäischen Verwaltungsverbunds, in: *Neue Zeitschrift für Verwaltungsrecht* 2012, pp. 65-70)
- U. Stelkens/H. Schröder, EU Public Contracts – Contracts passed by EU Institutions in Administrative Matters, FÖV Discussion Papers N° 70, 2012. An updated version of this paper has been published in M. Trybus/R. Caranta/G. Edelstam, (eds.), *EU Public Contract Law - Public Procurement and Beyond*, 2014, pp. 395-416 and pp. 443-459
- J. Ziller, Aspects Relating to Added Value for Citizens and Economic Operators, Research paper, Annex II, in: European Parliament, *Law of Administrative Procedure of the European Union European Added Value Assessment*, PE\_494.457, October 2012.
- J. Ziller, Article 29 on European Administration, in: *Smit & Herzog on The Law of the European Union*, Lexis-Nexis/Matthew Bender, rev. E., 2013, pp. 298-1/298-6

(65) The final drafting of the rules are undergoing iterative **processes of deliberation and consultation** within ReNEUAL and with outside experts: content check, in order to ensure clarity and coherence of the proposed wording; language compatibility check, in order to avoid the use of concepts that would lose their

meaning in translation<sup>9</sup>, and English-language check, as the rules are drafted first in a single language, due to restraints of resources, while we keep in mind projects for translations in other languages if supplementary resources can be found.

- (66) ReNEUAL highly appreciates the **input** its drafting teams have received **from the ReNEUAL membership as a whole as well as from outside experts**. Details are provided in the editorial note of the ReNEUAL coordinators.

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<sup>9</sup> The composition of ReNEUAL's Steering Committee allows for a first level linguistic/conceptual check in the Danish, Dutch, English, French, German, Italian, Polish, Portuguese and Spanish languages.

## **B. Model Rules**

### **Preamble**

Public authorities are bound in administrative procedures by the rule of law, the right to good administration and other related principles of EU administrative law.

In the interpretation and development of these model rules, regard should be had especially to equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality, participation, proportionality, protection of legitimate expectations, transparency, and due access to effective remedies.

Public authorities shall have regard to efficiency, effectiveness and service orientation.

Within European administrative procedures due respect must be given to the principles of subsidiarity, sincere cooperation, and clear allocation of responsibilities.

### **I-1 Scope of application**

- (1) These model rules are applicable to all EU authorities when they are implementing Union law through administrative action.
- (2) These model rules do not apply to Member States' authorities unless EU sector-specific law renders them applicable.
- (3) The model rules of Books V and VI are applicable to Member States' authorities as defined in Articles V-1 and VI-1.

### **I-2 Relation to specific procedural rules of the European Union**

- (1) These model rules shall apply where no specific procedural rules exist.
- (2) Specific procedural rules shall be interpreted in coherence with and may be complemented by these model rules.

### **I-3 Relation to Member State law**

Member State authorities may use these model rules as guidance when they are implementing Union law in accordance with their national procedural law.

### **I-4 Definitions**

For the purpose of these model rules the following definitions apply to all Books:

(1) `Administrative action` means activity of a public authority as defined in paragraph (6) that results in:

- a) a legally binding non-legislative act of general application as defined in Book II,
- b) a decision as defined in Book III,
- c) a contract as defined in Book IV,
- d) mutual assistance as defined in Book V,
- e) information management activities as defined in Book VI.

(2) `Administrative procedure` means the process by which a public authority prepares and formulates administrative action as defined in paragraph (1) lit. a. to c.

(3) `Competent authority` means the public authority in the sense of paragraph (6) which is responsible for performing administrative action according to the applicable law.

(4) `Composite procedure` means an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent. A composite procedure may also mean the combination of two administrative procedures that are directly linked.

(5) `EU authority` means an institution, body, office or agency of the Union. Other bodies are also to be considered as EU authorities when they are entrusted with administrative action on behalf of the EU.

(6) `Person` means any natural or legal person. Other associations, organizations or groups may be considered as a person on the basis of EU sector-specific legislation or the case law of the Court of Justice of the European Union.

(7) ‘Public authorities’ means EU authorities according to paragraph (5) and Member States’ authorities; insofar as these model rules apply to them.

## C. Explanations

### Preamble

- (1) As highlighted in the introduction,<sup>10</sup> as well as by the EP’s resolution of 15 January 2013,<sup>11</sup> rules on EU administrative procedures must be based on **constitutional principles**. These principles **are already laid down in various provisions of the EU treaties** and the ReNEUAL Model Rules do not intend to duplicate those provisions. Instead, the preamble briefly refers to them in order to remind all addressees and other readers of the constitutional background of the detailed rules which must be interpreted “in the light” of these principles. Paragraph 1 refers to the rule of law and the principle of good administration as these are fundamental standards of administrative procedural law.
- (2) The **list in paragraph 2 pinpoints more specific principles**, some of which are more concrete manifestations of the two fundamental principles mentioned before. The list follows, in principle, the order of the EP’s resolution of 15 January 2013. Paragraph 3 lists principles which are additional important guidelines for administrative action. Paragraph 4 highlights principles which are especially important for the design of composite procedures, but are also applicable to other types of European administrative procedures. The principle of clear allocation of responsibilities is very important with regard to composite procedures in order to provide due access to effective judicial review and other remedies. Responsibilities further have to be allocated clearly not only between different public authorities but also within institutions, bodies, offices and agencies, especially if they are powerful authorities such as the European Commission.

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<sup>10</sup> See paras 11-14, 62 of the introduction.

<sup>11</sup> 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)); see also the Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

- (3) The Preamble refers to rules and principles which guide any administrative activity in the scope of EU law. The bases for such activity are restated in the first sentence and, as the other parts of the preamble, are applicable throughout the following Books. The first sentence of the preamble recalls that administrations are bound by the rule of law, the right to good administration and other related principles of EU administrative law. The preamble then restates that all administrative activity will take place in the context of certain specific obligations which, as the case may be, may also contain rights for individuals such as the obligation to ensure equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality. Furthermore, rights of participation shall be respected and participation fostered. The principles of proportionality, the protection of legitimate expectations, transparency, and access to effective legal remedies need to be complied with. The organisation of this list or the order of restatements does not indicate any possible legal consequences of compliance or non-compliance with these principles. The same holds true for the requirement that administrations exercise their duties efficiently, effectively and with service orientation. In the same sense, the preamble closes with the restatement of the obligation for administrations in the exercise of their duties, to give due respect to principles of subsidiarity, sincere cooperation, and clear allocation of responsibilities.

#### **I-1 Scope of application**

- (4) As explained in detail in the introduction,<sup>12</sup> the ReNEUAL Model Rules have an **asymmetric scope of application**. The Model Rules of Books II, III and IV are generally applicable to EU authorities only. However, if the EU legislator so decides, Model Rules of Books II, III and IV may become applicable through a sector-specific act to Member States' authorities implementing EU law, as specified in paragraph 2. Under conditions specified in Books V (→ Article V-1) and VI (→ Article VI-1), the relevant Model Rules are also applicable to Member States' authorities involved in mutual assistance and inter-administrative information management activities.
- (5) **Paragraph 1 stipulates the general applicability of the ReNEUAL Model Rules to EU authorities**, which, according to the definition in Article I-4(5), include

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<sup>12</sup> See paras 16, 55-59 of the introduction.



institutions, bodies, offices and agencies of the Union. An important limitation in this regard is that the rules apply only to specific administrative actions of those authorities which are defined in Art. I-4(1) and in more specific definitions in the various books. Legislative procedures and judicial court proceedings are not covered by the ReNEUAL Model Rules. As courts or legislative bodies might also act as administrative authorities, paragraph 1 and Article I-4(1) avoid a purely organizational definition of the scope of these model rules. Such an approach could jeopardize their uniform application.

- (6) According to **paragraph 2**, the Model Rules do **generally not apply to Member States' authorities**. This limited scope has its disadvantages, but after intense discussions within the drafting teams as well as with outside experts, ReNEUAL takes the view that at this stage of the integration process and of the scholarly debate those disadvantages are more than counterbalanced by advantages; ReNEUAL opts for this subsidiarity-friendly solution. This approach is mainly applicable to Books II, III and IV regulating rulemaking, single case decision-making and contracts and reflects the fundamental choice made by ReNEUAL to focus on the establishment of procedural standards for EU authorities. Nevertheless, the Model Rules may also inspire national legislators and provide them with best practice solutions for a wide range of issues of administrative procedural law. In addition, national authorities may be influenced by these Model Rules if they choose to do so.
- (7) In contrast, as discussed in paras 59 to 61 of the introduction, **such an approach is not feasible with regard to Books V and VI**. These books regulate mutual assistance and inter-administrative information management activities which unavoidably also concern Member States' authorities. It would be extremely dysfunctional to regulate only the input or actions of EU authorities in such inter-administrative arrangements of intensive collaboration.

## **I-2 Relation to specific procedural rules of the European Union**

- (8) Article I-2 stipulates the **lex specialis principle**. This means that the ReNEUAL Model Rules are not intended to substitute existing specific legal provisions on administrative procedures or to prohibit the legislator to enact new specific rules on administrative procedures. ReNEUAL is aware of the fact that in certain circumstances such specific rules are needed to cope with peculiarities of a

special field of law. Such sector-specific law or matter-specific transversal law can deviate in both directions from the standard set by the ReNEUAL Model Rules by providing higher standards or – in duly justified cases – also lower standards. In accordance with Article 296(2) TFEU, such deviations from the general ReNEUAL Model Rules must be duly and explicitly motivated by the legislator.

- (9) The **possibilities for deviation by specific EU acts** provide flexibility in a codified framework.<sup>13</sup> The possibility of deviation is justified because the Model Rules are not drafted with the intention to set only a minimum standard.<sup>14</sup> The ReNEUAL Model Rules are intended to present and stipulate best practice solutions. In addition, the possibility of new rules is a protection against petrification, a widely discussed danger of any codification. New specific rules may present innovative solutions which may be tested in a limited field of application and later on integrated into the ReNEUAL Model Rules after they have proved to be successful.
- (10) This being said, as stated in paragraph 1, these Model Rules are, in principle, **generally applicable if no sector-specific law exists**. Moreover, as stated in paragraph 2, these Model Rules may have a **twofold function even if sector-specific rules exist**. They may serve as a point of reference for the interpretation of such specific procedural rules and they may constitute a valuable default solution if an unintended gap is identified in such a specific framework. Thereby, the Model Rules have the potential to simplify the overall framework for EU administrative procedural law as well as to prevent ‘black holes’ in the protection of citizens and in the efficient administrative implementation of EU law.

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<sup>13</sup> See also para 24 of the introduction.

<sup>14</sup> 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.”

### I-3 Relation to Member State law

- (11) Article I-3 on the relation between the Model Rules and Member States' law is a consequence of Article I-1(2) but it does not impede the applicability of Books V and VI to national authorities according to Article I-1(3). The ReNEUAL Model Rules are **in general not applicable to Member States' authorities**, but they can influence the actions of those authorities indirectly. As far as Member States' law provides for discretion concerning the concrete design of administrative procedures by the competent authorities or leaves even normative gaps, Article I-3 **reminds Member States' officials that they can find guidance** in the ReNEUAL Model Rules. Thereby, officials can set up and apply their procedures under their Member State's law in accordance with European best practices. Such European best practices might help those officials to fulfil their duties under the principle of sincere cooperation and to implement EU law effectively and in a non-discriminatory manner. Furthermore, the ReNEUAL Model Rules can also support law reform at Member State-level that promotes EU-friendly amendments.

### I-4 Definitions

- (12) Article I-4 contains definitions of **terms** which are **used throughout the ReNEUAL Model Rules**. In addition, each book provides definitions of terms with specific relevance only. There is no attempt to give an exhaustive list of definitions: only those corresponding to possible issues of interpretation are included.

#### Paragraph 1

- (13) **Paragraph 1** defines **'administrative action'**, a term which is used in Article I-1(1) to define the applicability of the ReNEUAL Model Rules. The definition is **technical and restricted**, and not one that would apply in a broader context than the Model Rules. A general definition would probably be highly disputable as it would need to take into account divergent ideas about the concept of administration as a whole and consequently also of administrative action in the various legal orders of the EU and its Member States.
- (14) **Paragraph 1** therefore lists **only** those administrative **actions** which are **regulated in the Books** and refers to the respective definitions of those specific

activities in Books II to VI. In combination with Article I-1(1), such an approach limits the applicability of the Model Rules to such specified activities. ReNEUAL takes the view that this approach, i.e. a focused codification of rules for pivotal administrative activities, is not only a consequence of the resources of an academic network but also adequately reflects the state of play in the scholarly and practical debate on EU administrative law.<sup>15</sup>

- (15) It has to be emphasized that such a **limited approach shall not preclude further evolution** of EU administrative law concerning administrative activities that are not included in the scope of the present Model Rules. The ReNEUAL Model Rules may serve, quite on the contrary, as guidance or point of reference for further development of legal requirements for such additional activities, if appropriate.<sup>16</sup>

#### **Paragraph 2**

- (16) The definition of ‘**administrative procedure**’ in **paragraph 2** is also based – similar to the definition of ‘administrative action’ – on a rather **technical and restrictive approach** in order to set, as far as possible, clear boundaries for the application of the procedural requirements spelt out in the Books.
- (17) A **first limitation** follows from the fact that **only processes which might result in clearly defined acts** (acts of general application, decisions or contracts) **are taken into account. In contrast**, requests for **mutual assistance** or the response to such requests as well as information management activities as defined in → Articles VI-1(1) and VI-1(1)–(3) do not constitute independent administrative procedures according to this technical and restrictive approach: they are (only) important elements of administrative procedures for the purposes of these Model Rules. As such, requests for mutual assistance or the response to such requests as well as information management are also regulated by the fundamental principles which are the basis of these Model Rules. Where appropriate such requests and responses are also submitted to the legal requirements spelt out in Books II, III or IV. It must be emphasised that this (technical) limitation shall not preclude that activities linked with mutual assistance or information management might be qualified by the courts as reviewable acts. In line with this, Books V and VI provide the necessary legal safeguards with regard to the relevant activities, irrespective of the fact that they

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<sup>15</sup> See also paras 22, 25 of the introduction.

<sup>16</sup> See also paras 17, 24 of the introduction.

are indeed performed as part of an administrative procedure in the strict meaning of Article I-4(2).<sup>17</sup>

- (18) A **second limitation** follows from the **exclusion of activities which take place after the final act is adopted**, such as enforcement of a decision, administrative reviews and supervisory monitoring. According to the definition adopted in this Article, the procedure ends with the adoption of the respective act. A procedure preparing a potential withdrawal of a decision constitutes a separate administrative procedure<sup>18</sup>, and the same is true for administrative appeal or review procedures.
- (19) It has to be emphasized, in order to avoid misconceptions, that the **adoption and notification of the final act itself** is captured by the term “formulates” and is consequently **part of the procedure**. It should also be highlighted that **procedures which do not end** in a formal final act but are initiated with the potential intent of adopting such an act **constitute administrative procedures** at least because they “prepare” such an act.

### Paragraph 3

- (20) **Paragraph 3** defines the term ‘**competent authority**’ which is especially **important** for the clear allocation of responsibilities in **composite procedures** and **shared information management**. The ReNEUAL Model Rules do not determine the competent authorities. Instead the definition refers this organisational matter to the respective legislator or heads of administrative authorities at EU or national level.

### Paragraph 4

- (21) Paragraph 4 defines ‘**composite procedures**’, which are a distinctive and important element of EU administrative law.<sup>19</sup> The wording is based on a definition formulated in 1999 by the Committee of Independent Experts who reported on needs to reform the Commission.<sup>20</sup> The second sentence of this paragraph reflects the situation in which procedures at EU level are preparing decisions by EU authorities which are directly addressed to a Member State whilst having also direct effects on third parties; the latter happens because the

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<sup>17</sup> See also paras 59-61 of the introduction.

<sup>18</sup> See also Arts III-34 and III-35.

<sup>19</sup> See also paras 26-27 of the introduction.

<sup>20</sup> Compare Committee of Independent Experts, Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud (10 Sept 1999), Vol I, para 3.2.2.

EU decision obliges the Member State to take a precisely determined action against that third party in a national procedure, such as, for instance, a beneficiary of a national state aid.

### Paragraph 5

- (22) Paragraph 5 Sentence 1 defines **EU authorities** in line with the wording of a number of Treaty provisions.<sup>21</sup> Sentence 2 is inspired by Article 58(1)(c)(vii) of Regulation 966/2012.<sup>22</sup> The definition impedes avoidance of the application of these Model Rules by means of a delegation of administrative tasks to bodies not covered by sentence 1, for instance, persons who act on behalf of the EU. However, sentence 2 only renders the ReNEUAL Model Rules applicable to such bodies, it does not regulate the lawfulness of such a delegation; this is an issue for the relevant policy- specific or organisational law.
- (23) **Sentence 2 may also cover Member States' authorities** if they explicitly act not on their own account but "as formal agents" on behalf of the EU. Nevertheless, it must be emphasised that Member States usually act on their own behalf, even if they implement EU law indirectly or in shared implementation and composite procedures. Therefore, sentence 2 does not compromise the general approach taken in Article I-1(2), which provides that these Model Rules do not apply to Member States' authorities.

### Paragraph 6

- (24) Paragraph 6 defines **persons**, a generic term used throughout the ReNEUAL Model Rules. The notion of natural person needs no further explanation, as it is common to the legal orders of the Union and of all Member States. In contrast, the definition of legal persons varies not only from one legal order to another, but also according to the issues at hand –e.g. the capacity to be an addressee of a decision, to be a party to a contract or to have standing in courts etc. The CJEU has established that the meaning of 'legal person' under Article 263 on the action for annulment "is not necessarily the same as in the various legal systems of the

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<sup>21</sup> See *inter alia* Arts 15(1), (3) Subparagraph 3, 16(2), 24(4), 123(1), 228(1) Subparagraph 2 Sentences 2 and 3, (3) Sentence 2, 265(2) and (3), 267(1), 277, 282(3), 287(3) Sentence 2, 298(1), 325(1), (4) TFEU; see also Arts 71, 263(1), (5), 265(1), 287(1) Subparagraph 1, (3) Subparagraph 1 TFEU.

<sup>22</sup> Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L 298/1 last amended by Regulation (EU, Euratom) No 547/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union [2014] OJ L 163/18.

member states". In its ruling *Groupement des Agences de voyages* of 1982<sup>23</sup>, for instance, the Court has considered that an ad hoc association of ten travel agencies, grouped together in order to respond jointly to an invitation to tender, fulfilled "the conditions required by community law for the purpose of recognition as having the character of a 'legal person' within the meaning of article [263]", since it had been allowed by the Commission itself to take part in the invitation to tender, had been considered in the tender, and its tender had been rejected, although the Groupement as such was not constituted as a legal person in any Member State's system. Another example is given in Regulation 1367/2006<sup>24</sup> on the application of the provisions of the Aarhus Convention, where Article 2 defines 'the public' as meaning "one or more natural or legal persons, and associations, organisations or groups of such persons" whereas the same Article defines 'applicant' as meaning "any natural or legal person requesting environmental information". A quite different definition is to be found in Regulation 1049/2001<sup>25</sup> on access to documents, where according to Article 2 'third party' is defined as meaning "any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries". It has to be stressed that, whereas States and International Organisations have legal personality under International Law and under domestic law, albeit often with very specific features derived from their immunities, EU institutions and bodies, do not have a legal personality of their own, and neither do many offices, whereas agencies often have such legal personality. The different Books of the ReNEUAL Model Rules give further indications about the capacities that legal and natural persons enjoy in the relevant field. It may thus well occur that a grouping will be considered as a person for the purpose of one Book and not for the purpose of another Book.

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<sup>23</sup> Case 135/81 *Groupement des Agences de voyages, Asbl, v Commission of the European Communities* [1982] CR 3799; see also Case 18/74 *Syndicat general du personnel des organismes européens v Commission* [1974] ECR 933, and Case 175/73 *Union syndicale, Massa & Kortner v Council* [1974] ECR 917.

<sup>24</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions [2006] OJ L 264/13

<sup>25</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43

### **Paragraph 7**

- (25) Paragraph 7 defines **‘public authorities’**, a generic term used throughout the ReNEUAL Model Rules in order to use a short and abstract term. It must be emphasised that using this term does not impede the restrictive approach concerning the applicability of the ReNEUAL Model Rules with regard to Member States’ authorities as indicated in in Article I-1(2) and (3) and in the relevant Articles of Books II to VI.

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