

Research Network on European Administrative Law (ReNEUAL)

Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law

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A. Abstract

ReNEUAL addresses the potential and the substantial need for simplification of EU administrative law, as the body of rules and principles governing implementation of EU policies by EU institutions and Member States. EU administrative law has evolved on a policy-by-policy basis in an unsystematic and non-transparent manner. Simplification can be achieved by rationalisation and improvement of structures and methodology used throughout EU policy fields. This project by a network of researchers and practitioners from across the EU, suggests a path in that direction. It will establish a series of draft ‘restatements’ and proposals for best-practice guidelines of a general European administrative procedure law. These may serve as template or frame of reference for future case-law and general or policy-specific legislation.

B. General Background and Approach

EU administrative law is the body of rules and principles governing implementation of EU policies. EU administrative law is central for establishing structures (such as agencies, networks of European and national actors and comitology) and defining procedures for cooperation between administrations (from the Member States, the EU institutions, private actors and international organisations) as well as procedures for supervision and review thereof.¹

EU administrative law as understood in this project, contains the vertical, horizontal and network aspects of activities for administrative implementation of EU policies. This includes

- the vertical aspects of EU administrative law (ie EU policy implementation by EU institutions and bodies).
- the horizontal aspects (ie implementation or action within the sphere of EU law by MS cooperation and coordination).
- the ‘network’ aspects of EU administrative law (ie where vertical and horizontal aspects come together due to a combination of MS cooperation with input from EU law and EU bodies such as agencies, the Commission etc).

Implementation of EU policies includes not only implementation in the narrow sense, the activities necessary to implement legislative acts issued on the EU level. The focus of the

¹ What this project does not intend to address is proposing a general harmonisation of Member State administrative law. The focus of the project is exclusively EU administrative procedure law for implementation of EU policies by EU and/or Member State institutions and bodies. Inevitably this will impact in some fashion on the Member States legal orders.

network is also implementation in the wider sense, including the activity of the MS when acting in what the ECJ calls the 'sphere' of EU law, i.e. action by the Member States and cooperation amongst Member States and their bodies. This includes, as Jean-Bernard Auby points out, transnational administrative decisions or contracts, circulation of information between national administrations, trans-border cooperation between local governments, networks of national administrative bodies.

EU administrative law is an area of growing interest in practice and theory. It shows several overarching characteristics.

- EU administrative law is regulated in a rather unsystematic manner, mainly on a policy-by-policy basis. To date, only few areas of EU administrative law are subject to a systematic approach with rules and principles applicable beyond a single policy area.² In some areas the Commission is actively proposing a more systematic approach, for example, with respect to the organisation and functioning of regulatory agencies.³
- Implementation of the EU's policies takes place in networks consisting of large national bureaucracies and a comparatively small EU-level bureaucracy. EU administrative law often provides for an intense cooperation between the European and Member State levels. Thereby it creates administrative networks consisting of public and private actors from sub-national, national, European and international levels and organisations.
- 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 embeddedness in various control and legitimacy mechanisms. This often leads to a lack of transparency, predictability, intelligibility and trust in European administrative and regulatory procedures and their outcome.
- The entry into force of the Treaty of Lisbon will require modernization of matters such as comitology following the introduction of the distinction between delegated acts and implementing acts. Importantly, the Treaty of Lisbon under Article 298 TFEU establishes a legal basis for legislation regulating an 'open, independent and efficient European administration' and gives binding force to Article 41 of the Charter of Fundamental Rights of the European Union on the principle of good administration.⁴

These characteristics result from EU legislation having been a true laboratory of experimental institutional and procedural design for administrative structures. They are marked by an overburdening complexity of often overlapping rules and principles, further increased by a great variety of national administrative law systems which work hand in hand with European provisions for implementation of EU policies.

For the future of EU administrative law, a key issue to be addressed in this context is the potential and arguably the **substantial need for simplification**. There is a real need to

² These include comitology, executive agencies, the financial regulation as well as certain aspects of data protection (in the EU context) and access to data provisions, the EU language regime, staff matters as well as to a certain degree impact assessment rules.

³ Communication from the Commission to the European Parliament and the Council: European agencies- The way forward COM(2008) 135 final of 11.3.2008.

⁴ The latter had also been subject to efforts by the European Ombudsman's "code of good administrative behaviour."

understand the prevailing diversity and have it reflected in a general approach to the development of EU administrative law. Such can be achieved by a coordinated attempt to rationalise and improve structures and methodology used throughout EU policy fields for which there is no standard template for EU administrative procedures. Such rationalisation promises increasing transparency and predictability of outcome as well as improving conditions of accountability of administrative activities. It would allow for more streamlined legislation, better implementation of EU policies and better cooperation between Member State institutions and bodies when working together in composite procedures. It further might increase the possibilities of legal certainty and better judicial protection of individuals in the single market.

C. The ReNEUAL project

The ReNEUAL project shall contribute to rationalisation and proposes improvement in certain central aspects of **EU administrative procedure law**. Focussing on procedure allows establishing a systematic understanding of EU administrative law centred on improving the way implementation is undertaken, output generated and information used. Taking the procedural angle is a first necessary step in reducing complexity within the overall field of EU administrative law.

The basis of this project lies in a joint and **concerted effort of researchers** throughout the EU. The project practically addresses needs of EU administrative law by drafting a series of **restatements of a general European administrative procedure law** and on this basis identifying best-practices.⁵ The draft restatements and the distillation of generalisable best-practices will be based upon and enriched with comments and annotations on the sources of the individual concepts. They arise from an analysis of case-law, general and policy specific legislation as well as the result from comparative studies.

The approach to establishing draft restatements and best-practice approaches in EU administrative procedure law will take place in three steps with :

- 1) reports setting forth and discussing the various legal sources that were used as the basis for establishing a certain combination of the restatement and best-practice approaches;⁶
- 2) comments on these materials evaluating advantages and disadvantages of certain models, thereby analyzing and rationalising the existing approaches;⁷
- 3) statements of existing approaches and identification of best-practice approaches with explanation.⁸

⁵ This does not indicate that solutions from different Member States will be classified as better or worse. In this context, it also needs to be stressed that this project is not about general harmonising of national administrative law. The best practice guidelines will be used to reduce the complexity of EU law itself.

⁶ The definition and isolation of problematic issues will take place on the basis of a cross-policy-section comparative approach in legislation, case-law and administrative practice. The analysis concentrates on information about procedural differences and where necessary disfunctionalities of certain policy areas. Information for this arises from an inter-disciplinary comparative approach; from an analysis of EU and, where applicable, national case law; and from a comparison of solutions developed in various policy areas.

⁷ This step, analyses and questions the legal and practical rationale of the existing approaches reported. In order to evaluate legal approaches, this project will draw not only on legal arguments like protection of rights and democratic legitimacy but will also integrate interdisciplinary work especially of political scientists and institutional economists as far as possible and feasible.

These will be drafted in the form of rules accompanied by comments on the proposals explaining their selection as best practice guideline in a given context and display in a transparent way the policy choices that lie behind them. The comments thereby draw upon and develop the evaluations that have been made of the status-quo. The best-practice explanations will present similar and differing legal models that exist in different branches of EU law or in the Member States respectively. These explanations will demonstrate by means of appropriate references the support which the restated rules and principles enjoy and explain what kind of outcome the interpretation and application of the restated principles produces. Wherever appropriate the final restatements will present and discuss alternative best practices.

The ReNEUAL Steering Committee (SC) has decided that the choice of the areas subject to the comparative approach in the first step will be subject to a method which takes into account real-world constraints due to limited time and resources. Not every national system and every EU policy area will be subject to a full in-depth review. The approach will consist of the Working Groups identifying potential areas and Member States which promise to be most fruitfully analysed. The Working Groups will then draw inspiration from various sources whilst acknowledging the open-endedness of the comparative process to include in later stages other areas, identified as containing valuable models.

In summary, the approach will be to develop a three-step model consisting of, first, a structured analysis of the *status quo* for addressing regulatory patterns in various policy areas; second, an analysis and discussion of differences of approaches and reasons therefore; and third, the development on this basis of a more focused tool-box of approaches to certain specific problems. Such academic work is a pre-requisite for a rational further development of EU policies through case-law, legislation and administrative practice.

The research carried out by ReNEUAL as well as its results will be structured according to three types of outcome of administrative procedures which are differentiated in most legal systems in the EU. Research in the Working Groups dealing with these matters will generally begin from the *core* matters dealt with by these topics, if time and resources permit, borderline matters will also be dealt with.

- a) **Administrative rule-making**, as distinct feature of EU administrative law in the strict sense as the EU administration is often characterized as a regulatory system. The field of administrative rule-making will be possibly the procedural issue the most affected by the entry into force of the Treaty of Lisbon.

Elements of administrative rule-making to be taken into account include

- Delegated and Implementing acts under Articles 290 and 291 TFEU and the various control mechanisms.

⁸ This step consists of using the restatement and analysis of the status-quo undertaken in steps one and two for the development of best practice guidelines. The latter identify approaches to problematic aspects of EU administrative procedure, which will have proven either valuable in a certain policy context and which the authors of the report argue would be generalisable, or, alternatively, solutions which the authors of the report advance as innovative solutions.

- Rules primarily intended for taking binding effect outside of the institution which is the author of the rule as well as initially only internally binding rule-making, with potential external effect (such as information guidelines...).
 - Rules designed to regulate inter-institutional relations such as Inter-Institutional Agreements.
 - Also, initially included are borderline cases such as policy statements, planning procedures and information procedures.
 - Procedural questions such as the use of Expert groups, Impact Assessment and other information gathering and assessment tools for rule-making.
 - Questions of procedures for creation of acts, conditions of the validity of acts of rule making and possibilities for their revocation.
- b) **Unilateral single-case decision-making**, which is increasingly a field in which EU organs and agencies have acquired competences. In most cases these competences are shared with the Member States or with organisational arrangements establishing a joint European administration with national as well as EU representatives. Such integrated or composite procedures are of special interest for this project as the results of this project shall contribute to smoothing the interaction of different legal orders regulating different phases within such procedures.
- c) **Administrative contracts** are a typical, although not deeply conceptualized feature of the EU administrative order, while several national legal orders have a long-standing experience with this form of administrative project. Other national legal orders are just developing consensual forms of modern administration. Therefore administrative contracts constitute a research topic with enormous prospects for mutual learning by comparative analysis. Beside, contracts are often used to establish administrative networks implementing EU policies or programmes. Contracts are also a flexible instrument for structuring inter-administrative arrangements between EU institutions and authorities from third countries. Following the approach to deal first with *core* matters research concerning administrative contracts will address primarily issues such as:
- Procurement agreements
 - Single-case agreements by EU institutions and bodies (including agencies) for implementation of EU policies
 - Inter-agency agreements (between EU and MS agencies).
 - Agreements between EU institutions and bodies, on one hand, and individuals on the other.
 - International administrative agreements by EU agencies and bodies.
 - The relation between unilateral administrative action and contractual obligations. (e.g. can a contractual relation be amended by a unilateral decision?; can a decision be used to enforce a contractual obligation?; can a contract be used to enforce a unilateral decision? Etc.)
- d) **Information management** as a major issue for any administrative system. Questions of information gathering, quality, use exchange and individual rights related to information

are important for all three types of administrative action mentioned above. A cross sectional or horizontal analysis searching for common structures as well as for specifics of each type of procedure will be applied.

The research on information management will concentrate on issues such as the use and effect of public information infrastructures to gather, assess and share information for decision-making in one of the forms discussed above. Also, it will look at common rules and principles for the quality of information necessary for decision-making.

Work on the issues mentioned above will be structured in four topic-specific Working Groups. The Working Groups will be composed of members from various Member States. The core members of the Working Groups will be leading experts of European and national public and administrative law as well as of different EU policy fields. They will be supported by a larger group of affiliated scholars. The composition of the Working Groups will provide for both a comparative and European outlook and a mix of theoretic and practical legal expertise.

Chairs of the Working Groups are

WG on rule-making: Deirdre Curtin, Herwig Hofmann.

WG on single-case decision-making: Giacinto della Cananea, Paul Craig.

WG on administrative contracts: Jean-Bernard Auby, Ulrich Stelkens.

WG on information management and coordination of the overall project: George Bermann, Herwig Hofmann, Jens-Peter Schneider.

The progress of the Working Groups will be supported and critically reviewed by regular exchange of ideas and concepts with the project's Advisory Board. This will be composed of EU and national experts from the European Commission, the European Court of Justice, the Council, European agencies as well as the national judiciaries and governments. The exact composition of the Advisory Board will be established.

D. The Result

In its final version the results of the ReNEUAL project may serve as template or frame of reference for future general or policy-specific legislation. It may also serve the European and national Courts as well as the European legal scholarship as reference for the state of the art in EU administrative law. It could also be used by national courts review of the legality of preparatory acts undertaken by institutions of other Member States in composite procedures. The work undertaken in the context of this project will constitute a contribution to an open, transparent, understandable and predictable EU. It will add to understanding of procedures and thereby also laying the basis for criteria for control and supervision of implementation activity in networks of EU and Member State institutions. The draft restatements and the best practice guidelines will thus be an academic contribution to a structure of good and legitimate exercise of public powers in the EU by EU and Member State institutions and bodies.⁹

⁹ A meaningful restatement of EU administrative law fostering legal certainty and rationality, needs a structured approach. The restatement approach is a unique technique. It was originally developed in legal research in the US to address the uncertain and complex nature of law, which had developed through a mix of general principles developed by case law and occasional policy specific legislation. It has been developed and applied to great success by the American Law Institute, a widely respected organisation of academics and practitioners

The project will establish a basic toolbox of procedural approaches applicable in EU policies based on a deep understanding of the complexities of the conditions for implementation of EU policies.

E. Details of the Approach

Methodology

The approach will be to develop a three-step model consisting of first, a structured analysis of the *status quo* for addressing regulatory patterns in various policy areas; second, an analysis and evaluative discussion of differences of approaches and reasons therefore; and third, the development on this basis of a more focused tool-box of approaches to certain specific problems in an innovative format of comprehensive restatements with model rules, comments and notes. Such academic work is a pre-requisite for a rational further development of EU policies through case-law, legislation and administrative practice.

a) The **first step** consists of definition of the scope and problematic aspects of EU administrative procedure law in the four chosen areas of the WGs, i.e. rule-making, single case-decision-making, administrative contracts and horizontal questions. This will take place on the basis of a cross-policy-section comparative approach in legislation, case-law and administrative practice. It will lead to the identification of problematic issues in need of further work in each WG. The analysis concentrates on information about procedural differences and where necessary dysfunctionalities. Information for this arises from an inter-disciplinary comparative approach; from an analysis of EU and, where applicable, national case law; and from a comparison of solutions developed in various policy areas. This step leads to a set of status-quo presentations tentatively structuring the procedural framework as it exists on the basis of a broadly comparative approach. The policy-areas to be analysed and the comparative approach to looking into national legal systems will be decided according to the necessities and possibilities in each Working Group.

b) In the **second step** the WG produce evaluations and discussions of these status-quo reports and their materials, identifying similarities and differences, investigating the reasons of differences and evaluating functional advantages and disadvantages of certain models. In this step the WG thereby dissect and question the legal and practical rationale of the reported existing approaches. In order to evaluate legal approaches the Programme will draw not only on legal arguments, like protection of rights and democratic legitimacy, but to a certain extent will integrate interdisciplinary work from political sciences and institutional economics. The definition of the most promising interdisciplinary approaches and the means by which they will

specifically created for that purpose. This is a situation highly comparable to EU administrative procedure law in the current stage which is characterised by a dynamic, evolutionary and policy specific development. The network created by the project therefore will include one of the leading experts on the restatement method and also expert on EU public law Professor Bermann of Columbia Law School in New York.

be included depends on the specificities of the WG topics and will be decided by their team leaders.

c) The **third step** consists of the development of best practice guidelines. The latter identify approaches to problematic aspects of EU administrative procedure, which will have proven either valuable in certain policy contexts and which the authors of the report would consider fit to be generalised, or, alternatively, solutions which the authors of the report advance as innovative solutions. They will be drafted in the form of rules accompanied by two sets of explanations (comments and notes). This three-partite final report may be labelled as a “restatement of EU administrative procedural law” and will be a highly innovative approach to this field of law drawing on similar experiences in European private law and in the US. Comments on the proposals explain their selection as best practice guideline in a given context and display in a transparent way the policy choices that lie behind them. The comments thereby draw upon and develop the (step two) evaluations that have been made of the status-quo. The notes will present the similar and differing legal models that exist in different branches of EU law or in the Member States respectively drawing upon the (step one) status-quo reports. These explanations will demonstrate by means of appropriate references the support which the restated rules and principles enjoy and explain what kind of outcome the interpretation and application of the restated principles produces.

Working Groups – Composition and Working Methods

The research described above will be structured in four **topic-specific Working Groups (WG)**. These are first a WG on administrative rule-making, second a WG on unilateral single case decision-making and third a WG on contractual relations between administrations as well as between administrations and private parties. Within these Working Groups, issues such as transparency, access to information, participation and other essential elements of good administrative procedure will each be addressed in the context of specific problems arising therein. A fourth Working Group will serve as an umbrella group and will ensure cross-referencing of topics between the single Working Groups especially with regard to terminology and address horizontal issues such as management of information.

The Working Groups will be composed of members from various Member States. The core members of the Working Groups will be leading experts of European and national public and administrative law as well as of different EU policy fields. The core groups in each WG will be responsible for final drafting. They will be supported by a larger group of affiliated scholars. This structure will bridge the gap of knowledge that exists with respect to EU administrative law and guarantee effective and efficient drafting. The composition of the Working Groups will provide for both a comparative and European outlook and a mix of theoretic and practical legal expertise.

The members of the WG will be either asked by the coordinators of the WG to join, or will be picked from the members of the project which have signed up on-line.

Each WG will establish a specific and detailed working plan reflecting and concretizing the milestones identified above. Having in mind the complexity of EU administrative procedural law and the time restraints of the Programme, the WG may only be able to draft first “tentative” proposals on key aspects of the respective fields of law. According to the high risk nature of the Programme, working plans have to be flexible and might be modified during the course of progress. Nevertheless the SC and AB will assure that WG will meet the deadlines of their working plans.

Coordination Between Working Groups

The general cooperation and coordination as well as joint responsibility for the final overall draft will lie with the **Steering Committee (SC)** which contains *inter alia* all the chairpersons of the Working Groups

The progress of the Working Groups will be supported and critically reviewed by regular exchange of ideas and concepts with the Programme’s **Advisory Board (AB)**. This will be composed of EU and national experts from the European Commission, the European Court of Justice, the Council, European agencies as well as the national judiciaries and governments.

All members involved are invited to gather once a year in a **Plenum** to discuss the results and review the consistency of research. The participants of the Programme will consist of both senior and junior researchers. Support to early stage researchers will also be provided by opening the doctoral schools of the various participating researchers’ institutions to junior researchers from within the network. This will enhance exchange and improve cross-jurisdictional legal debate. These tasks can also be furthered by research visits and exchanges of researches to participating institutions.

Publications

For dissemination of results and discussion thereof, the ReNEUAL project will create a working paper series (on the ReNEUAL website and on SSRN). Other forms might be added at a later stage.

Financing

So far ReNEUAL is based on de-central financing for both network activities as well as the work of specific WG.