

The ReNEUAL Draft Model Rules on EU Administrative Procedures

- A Comment on Book I -

Nearly 150 years after *Lorenz v. Stein's* vision of an European Administrative Law, which he has designated as the "*Greatest development of law in world history*",¹ the actors of the ReNEUAL Project have presented an impressive Draft of Model Rules on EU Administrative Procedures. Regarding the conditions for a successful realization, time has to be ripe for such a codification of procedural rules which are legally enforceable and don't serve only as soft law recommendations or best practice standards. Only after having developed common principles and regulations in a community - a process which needs enough time for fermentation - the fully developed substrate can be casted into a codification. But after the maturing time the development of a codification gives the chance to evaluate sector specific regulations and the corresponding courts jurisdiction to extract common principles, which can be systematised and brought together into a code. If you then have general procedural rules like that, sector specific statutes can be relieved. Because they have to provide special procedural rules only if the pattern of the general Codification doesn't fit. On the other hand a codification helps to reduce the centrifugal forces in sector specific law, because special rules, for which of course needs may exist, have to be justified.

The codification of an Administrative Procedure Act can even be necessary for the sake of the clarity of law. We have arrived at that point in the European Union. In regard to the procedural rules applying to EU authorities there is an extreme fragmentation in the sector specific law. On the other hand the European Court of Justice and the EU General Court have developed a set of general principles with procedural effects. Now the legal foundation has been laid. Time is right for a codification - the time frame is now open and it could be even a historic chance.

¹ *Lorenz v. Stein*, Handbuch der Verwaltungslehre mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England, Deutschland und Österreich, 2. Aufl. Stuttgart 1876 S. 93. Vgl. dazu instruktiv *Sommermann*, DÖV 2007, 859.

Furthermore I can allay anyone's concerns regarding a codification. For a German observer the discussion about the pros and cons of a codification of administrative procedural rules are a *déjà vu* because we had the same discussion in Germany before the enactment of our Administrative Procedure Act of 1976.² The pure positive experience, which we have made in Germany with it shows that the fear of ossification or even petrification of the law is unfounded. Its provisions give a useful framework for the German authorities and the citizens in everyday procedures and leave enough room for flexibility in extraordinary situations. In the sector specific law the German legislature gives differing procedural regulations only if necessary. After nearly 40 years, during which the German APA has developed and adapted for example to the possibilities of the electronic media, in Germany this Code seems indispensable and has nevermore been challenged.

Coming back to the European level it could even be said that the clarity which comes along with a codification of the procedural rules can contribute to - or even be a precondition for - implementing the Right to Good Administration in Art 41 of the Charter of Fundamental rights. But before we get ahead of ourselves let us consider the creational process and the results of the ReNEUAL project. At this point I don't want to anticipate the discussion on the detailed rules in all the books but I'd like to highlight five points in general.

1. Concerning the vertical scope of application (Art I-1) the drafters were wise to drop the idea of including the indirect implementation of EU-law by the member states. In the update version Art I-1 addresses in principal only EU authorities and no longer applies to member states authorities "*when they act in the scope of EU law*".³ This restricted approach avoids the problem of the doubtful legal basis in Art 298 TFEU for a broader scope of application;⁴ the rearguard battles linger on in the recitals to the Introduction of Book I in Para 37 ff. This problem would have burdened the whole project because in Brussels every discussion on regulations starts with checking the legal basis. In addition the European Parliament has explicitly limited the mandate to develop a Code for the Union's administration.⁵ Last but not least it was a question of political wisdom and realism to restrict the scope of application. Otherwise unnecessary political opposition against the whole project would have been provoked because it was predictable that the member states would have defended their procedural autonomy.⁶ Fortunately this discussion is over.

² *Verwaltungsverfahrensgesetz* (Federal Administrative Procedure Act) vom 25.05.1976, BGBl. I S. 1253.

³ Previous version of Art I-1 Para 2. Since the judgment of the ECJ in *Åkerberg Fransson* (EuGH, U.v. 26.02.2013 - C-617/10, NJW 2013, 1415 Rn. 17 ff.), this phrasing raises suspicion that the ECJ aims to usurp jurisdiction even in those areas, where non EU-determined national law is implemented by the member states (vgl. BVerfG, U.v. 24.04.2013 - 1 BvR 1215/07, NJW 2013, 1499 Rn. 91; *Lange*, NVwZ 2014, 169).

⁴ Previous version Book I Introduction Para 23-30; now Para 46 ff.

⁵ PE Resolution of 15 January 2013 Recommendation 1, P7_TA(2013)0004.

⁶ Art. 291 Abs. 1 TFEU; vgl. EuGH, U.v. 16.12.1976 - C-33/76 - *Rewe* - Slg. 1976, 1989 <1997 f.>; U.v. 21.09.1983 - C-205/82 etc. - *Deutsche Milchkontor*, Slg. 1983, 2695 Rn. 17.

2. Art I-2 Para 2, the **provision for horizontal conflicts**, has to define the scope of the Code in regard to procedural rules in sector-specific EU law. But it doesn't achieve that goal perfectly because it poses more questions than it resolves. The presumptive ulterior motive, the attempt to raise the standards in the sector specific law, cannot be reached in that way which causes a lack of clarity. The better way to solve the conflict of coequal provisions seems to me the application of the "*lex generalis and lex specialis*" principle:

"As long as procedural rules in sector-specific EU law do not provide more specific procedural standards they shall be interpreted in coherence with these model rules and may be complemented by them."

3. The Preamble refers among other things to the constitutional principle of the rule of law and the fundamental right to good administration as well as to efficiency and effectiveness. With regard to the legal structure of the Code and the importance of these constitutional values the drafters were well advised to take these general principles out of the former Art I-6⁷ and put them in a preamble. Thus underlines that rules on administrative procedure are "applied constitutional law",⁸ because constitutional values as for example the right to be heard are transformed into and spelled out in the procedural regulations.

In Para 2 of the preamble the words "... and development ..." are at least superfluous. The legislature may refer to these principles as standards of interpretation for the administration and the courts; but can't bind itself.

The preamble provides the opportunity to look at the **collaborative drafting process** of the ReNEUAL network. As a convinced federalist I'm glad that the drafters, who come from various European countries and represent different administrative traditions, have brought together components which fit and complement one another and form a remarkable building. The diversity of the administrative traditions in the member states show the rich heritage of different approaches to the concept of the rule of law.⁹ For example on one hand the structural principle of administrative efficiency by underlining the privileges of the executive branch and on the other hand the concept of effective protection of individual rights. The ReNEUAL project is the positive proof of a process of legal convergence in European Administrative law: Concepts which seemed incompatible have converged and bridges were built between the different systems.

And this process of convergence is necessary in the European Union. As we all know the result of implementing a substantive provision largely depends on the procedural frame in which a decision is taken. For example the decision in a refugee case under the European-Qualification-Directive¹⁰ might differ depending on whether the particular national law

⁷ Previous version Art I-6 - General principles of Good administration.

⁸ Vgl. *Fritz Werner*, DVBl. 1959, 527.

⁹ Vgl. *Thomas v. Danwitz*, Europäisches Verwaltungsrecht, 2008, S. 127 und S. 137.

¹⁰ RL 2004/83/EG; now: RL 2011/95/EU.

follows the *adversarial* or the *inquisitorial* system. Therefore I join the drafters - and this little preview of Book III may be allowed at this point - that **Art III-10** states the **Principle of investigation** and stipulates that the authority "... shall take into consideration the relevant factors, including those favourable to the parties of the proceedings ...". Opting for the principle of investigation, supplemented by the duties of the parties to cooperate (Art III-13), shows that the substantive correctness of the administrative decision is the intended purpose of the whole administrative procedure. *Procedure is not an end in itself*. Furthermore the principle of investigation compensates for the predominant position of the authority which results from its expert knowledge and experience.

4. Let me refer to the sixth recommendation of the European Parliament, that the regulation of an EU Administrative Law should be drafted in a clear and concise manner.¹¹ With regard to the administrative effectiveness the legislature has to give clear instructions by means of sufficiently precise procedural provisions. In an administrative action (as mentioned in Art I-4) it is difficult enough to find the relevant facts and to state the substantive legal requirements precisely in the case. Lacking a clear procedural framework, the implementation would be burdened with additional unnecessary uncertainties which may produce avoidable procedural flaws.

So by drafting formal and **procedural provisions** the legislature has to consider the **principle of legal certainty** in a specific manner. The clarity of formal and procedural provisions is a necessary - even though not a sufficient - condition for a well functioning administration and an efficient implementation of substantive rules. The legislature's vague wording in procedural provisions is often a result of a political compromise and hands off the unsolved problems to the administrative agencies. There they are duplicated and burden the implementation by the administration until the courts solve these problems. Therefore elements in formal or procedural provisions which are open to discretion should be avoided as far as possible. Especially there "*the golden and straight metwand of the law*" has preference over "*the uncertain and crooked cord of discretion*."¹²

So my **plea** to the drafters: Please eliminate in the next editorial review in all books vague wordings like "*unnecessary*" (Art III-6 Para 1), "*adequate*" (Art. III-7), "*appropriate*" (Art. III-8 Para 1 lit b) and "*reasonable time*" (Art III-36 Para 5) etc. These elements are not a proof for the right balance between generality and specify of the drafted rules but an obstacle for an effective implementation by the authorities. A greater precision will increase the practical usefulness of the drafted rules.

¹¹ PE Resolution of 15 January 2013 Recommendation 6, P7_TA(2013)0004.

¹² Vgl. *Sir Edward Coke* (1552-1634), *Institutes of the Law of England*, Vol. 4, 40-41.

5. Last but not least I would like to draw your attention to some points, for which **rules** seem to be **necessary** in a contemporary APA: In Book III in Art III-33 rules concerning the validity or the legal binding effect of a decision could be included:

A decision shall remain effective for as long as it is not withdrawn, otherwise cancelled or expires for reasons of time or for any other reason.

In this context in Book II as well as in Book III provisions might be needed for the different consequences of formal or procedural flaws (consequences of illegality). A modern codification should develop a systematic conception concerning the effects of an infringement of its formal and procedural regulations and it shouldn't abandon these important decisions to the judges.

Conclusion: My criticism of a few details shouldn't be misunderstood. In fact it is a sign of my conviction that the drafters of the ReNEUAL project have done a great job.

Thank you all for that.