

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**Towards Restatements and Best
Practice Guidelines on EU
Administrative Procedural Law**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Towards Restatements and Best Practice
Guidelines on EU Administrative
Procedural Law

NOTE

Abstract

ReNEUAL is a network of scholars and practitioners from across the Member States, addressing the potential and the substantial need for simplification of EU administrative law (as body of rules and principles governing implementation of EU policies by EU and Member States' institutions). It intends to establish draft 'restatements' and proposals for best-practice guidelines which may serve as template or frame of reference for future case-law and general or policy-specific legislation.

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EXECUTIVE SUMMARY

Background

ReNEUAL (Research Network on European Administrative Law) is a network of scholars and practitioners from across the Member States, which has been set up in 2009 by scholars who are specialists of administrative law of the EU and its Member States.

Aim

- The aim of the network is to try and address the potential and the substantial need for simplification of EU administrative law, which it defines as the body of rules and principles governing implementation of EU policies by EU and Member States' institutions.
- The project "Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law" intends to establish of draft 'restatements' and proposals for best-practice guidelines which may serve as template or frame of reference for future case-law and general or policy-specific legislation.

1. ReNEUAL (Research Network on European Administrative Law)

KEY ELEMENTS

ReNEUAL (Research Network on European Administrative Law) is a network of scholars and practitioners from across the Member States, which has been set up in 2009 by scholars who are specialists of administrative law of the EU and its Member States.

1.1. A Specialised Network on European Administrative Law

The initiative to set up a specialised network on European administrative law has been launched in early 2009 by professors Herwig Hofmann, Professor of European Law at the University of Luxembourg, author/editor, of books on “EU Administrative Law and Policy” (Oxford, 2010), “Legal Challenges in EU Administrative Law: The Move to an Integrated Administration” (Cheltenham 2009) and “EU Administrative Governance” (Cheltenham, 2006) and Jens Peter Schneider, Professor of European Administrative Law at the University of Osnabrück, author of “Verwaltungsrecht in Europa” (Göttingen, 2007).

A number of European and international networks or associations dealing with comparative and European public law already existed, but none of them had a specific focus on European and/ or comparative administrative law, defined as the body of rules and principles governing implementation of EU policies by EU and Member States’ institutions. The experience of the European Legal Studies Institute at the University of Osnabrück as a major contributor to the project of a “Draft European Frame of Reference” on “Principles, Definitions and Model Rules of European Private Law” triggered the idea of setting up a specialised network with the specific aim of exploring the feasibility of a similar kind of endeavour in the framework of administrative law.

A group of specialists of EU administrative law and of comparative administrative law of EU Member States was therefore convened, which has become the Steering committee for the network. This group concluded that, albeit there were considerable differences with the subject matter of contract law, which has been the field of the work which led to the “Draft European Frame of Reference”¹, there were some similar needs of simplification in the field of EU administrative law (see point 2). The ReNEUAL network does not intend to replicate the work done by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) in the field of civil law, but it thinks that useful lessons can be learnt from their experiences from a methodological and organisation point of view. These discussions led to the formulation of a project on restatements and best practices of EU administrative law, which is presented in this note (see point 3).

¹ The Draft European Frame of Reference is available on the site of the European Commission: http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf

1.2. The Steering Committee of the ReNEUAL Network²

The group of specialists of EU administrative law and of comparative administrative law of EU which acts as ReNEUAL Steering Committee is composed of the following scholars, who are amongst the major scholars dealing with EU administrative law and administrative law of EU Member States. It includes the authors of some of the most recent and most relevant handbooks and treatises on EU administrative law and comparative administrative law in English, French, German and Italian. The steering committee includes scholars from ten different EU member states as well as from the United States of America (Prof. George Bermann, who has directed a 6 volume "Guide to European Union Administrative Law" published by the American Bar Association. The complete list of members of ReNEUAL is given in table 1 of the Annexes (p. 15).

- Prof. Jean-Bernard Auby, Paris, co/editor of the handbook "Droit Administratif Européen" (Brussels, 2007).
- Prof. George Bermann, New York, co/editor of the treatise "ABA Guide to European Union Administrative Law (New-York, 2008)
- Prof. Giacinto della Cananea, Naples, author of the book "Al di là dei confini statuali. Principi generali di diritto pubblico globale" (Bologna, 2009)
- Prof. Paul Craig, Oxford, author of the handbook "EU Administrative Law" (Oxford, 2006)
- Prof. Deirdre Curtin, Amsterdam, author/editor of the books "Executive Power in the European Union. Law, Practices and the Living Constitution" (Oxford, 2009) and "The Real World of EU Accountability: What Deficit? (Oxford, 2010)
- Prof. Diana-Urania Galetta, Milan author of the book "Procedural Autonomy of EU Member States: Paradise Lost?" (Berlin 2010) and coordinator of the "Trattato di diritto amministrativo europeo" (Milan, 2007)
- Prof. Herwig Hofmann, Luxembourg, author/editor of the books "EU Administrative Law and Policy" (Oxford 2010)and "Legal Challenges in EU Administrative Law: The Move to an Integrated Administration" (Cheltenham 2009)
- Prof. Oriol Mir Puigpelat, Barcelona, autor of the book "Globalización, Estado y Derecho. Las transformaciones recientes del Derecho administrative (Madrid, 2004)
- Prof. Jens-Peter Schneider, Osnabrück, author of the book "Verwaltungsrecht in Europa" (Göttingen, 2007)
- Prof. Ulrich Stelkens, Speyer, author of the book „Verwaltungsprivatrecht - Zur Privatrechtsbindung der Verwaltung, deren Reichweite und Konsequenzen" (Berlin, 2005)
- Dr. Georgios Trantas, Thessaloniki, Secretary General, Center of Int. and European Economic Law, Thessaloniki, Greece
- Prof. Marek Wierzbowski, Warsaw, co-author of "Prawo administracyjne" (Warsaw, 2007 and "Postępowanie administracyjne" (Warsaw, 2005)
- Prof. Jacques Ziller, Pavia co-editor of the book "L'Europe des Administrations- La mise en oeuvre de la législation communautaire dans les Etats membres / Making European Policies Work – The Implementation of Community Legislation in the

² The ReNEUAL Website is to be found on <http://www.reneual.uos.de/>

Member States" (Maastricht, 1988) and author the handbook of "Administrations compares – Les systems politico-administratifs de l'Europe des Douze", as well as books on the European Constitution (in 2003, 2004 [French and Italian] and 2005 [English and Polish]) and on the Lisbon Treaty (in 2007 [Italian]-2008 [French] and 2010 [Portuguese]).

2. ADDRESSING THE POTENTIAL AND THE SUBSTANTIAL NEED FOR SIMPLIFICATION OF EU ADMINISTRATIVE LAW

KEY ELEMENTS

The aim of the network is to try and address the potential and the substantial need for simplification of EU administrative law, which it defines as the body of rules and principles governing implementation of EU policies by EU and Member States' institutions.

2.1. EU Administrative Law: Vertical, Horizontal and Network Aspects

EU administrative law as understood by the ReNEUAL network includes the vertical aspects of EU administrative law (EU policy implementation by EU institutions and bodies), the horizontal aspects (implementation or action within the sphere of EU law by member States' cooperation and coordination), the 'network' aspects of EU administrative law (where vertical and horizontal aspects come together due to a combination of member States' 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 network is also implementation in the wider sense, including the activity of the member States when acting in what the Court of Justice of the European Union calls the 'sphere' of EU law, i.e. action by the Member States and cooperation amongst Member States and their bodies.

This includes transnational administrative decisions or contracts, circulation of information between national administrations, cross-border cooperation between local governments, networks of national administrative bodies. EU administrative law is regulated in a rather unsystematic manner, mainly on a policy-by-policy basis.

2.2. The Lack of a Systematic Approach with Rules and Principles Applicable Beyond a Single Policy Area

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. In some areas the Commission is actively proposing a more systematic approach, for example, with respect to the organisation and functioning of regulatory agencies.

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.

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. 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 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 requires modernisation of matters such as in the field which has been hitherto referred to as "comitology", following the introduction of the distinction between delegated acts and implementing acts. Importantly, 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.

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 understand the prevailing diversity and have it reflected in a general approach to the development of EU administrative law. This 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 to increase transparency and predictability of outcome as well as to improve conditions of accountability of administrative activities.

It would allow for more streamlined sectorial 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 Area of Freedom, Security and Justice and in the Single Market.

3. THE PROJECT "TOWARDS RESTATEMENTS AND BEST PRACTICE GUIDELINES ON EU ADMINISTRATIVE PROCEDURAL LAW"

KEY ELEMENTS

The project "Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law" intends to establish of draft 'restatements' and proposals for best-practice guidelines which may serve as template or frame of reference for future case-law and general or policy-specific legislation.

3.1. Restatements and Best Practice Guidelines: an Alternative to or Preparation for Codification

There are different views on the feasibility and desirability of a codification of EU administrative law. This is due not only to general differences in views on the use and effect of codification, but more specifically to the existence of three dimensions of EU administrative law mentioned before: vertical, horizontal and network aspects. Whereas Article 298 TFEU would now offer a legal basis of a codification of EU administrative law as far as applied by EU institutions, bodies, offices and agencies, there is no legal basis for an EU wide codification generally applicable to the implementation of EU law and policies by Member States' institutions, bodies, offices and agencies. This lack of a general legal basis is known in EU law as the "principle of procedural autonomy". A codification of some aspects of administrative law in the Member States is only feasible in the framework of sectorial policy fields. It does not seem that Article 114 TFEU would permit a general codification for the purpose of the "establishment and functioning of the internal market". The flexibility clause of Article 352 TFEU would probably not either be an appropriate legal basis for such a general codification.

A general codification of EU administrative law might contribute to simplification and clarification but only if it took into account the conflicting needs of general applicability of its principles and rules and of adaptability to sectorial differences. Furthermore, a general codification of EU administrative law which would be limited to EU institutions, bodies, offices and agencies would nevertheless have to take into account the needs of cooperation with Member States' institutions, bodies, offices and agencies in almost all EU policy fields.

These reasons have led the ReNEUAL Network to concentrate on a project of restatements and best practice guidelines. The basis of the project lies in a joint and concerted effort of researchers and practitioners 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 (law in the sense of "*droit - Recht*" not of "*loi - Gesetz*") and on this basis identifying best-practices. The draft restatements and the distillation of generally applicable 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.

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 United States 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 with great success by the American Law Institute, a widely respected organisation of academics and practitioners specifically created for that purpose. This is a situation somewhat 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.

3.2. Working Groups Dealing with Issues of Administrative Law: Individual Decision-making, Rulemaking, Contracts and Information

The research carried out by the ReNEUAL Network will be structured according to three types of outcome of administrative procedures which are differentiated in most legal systems in the EU: unilateral single case decision-making, rule-making, and contracts. 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, more marginal matters will also be dealt with.

Unilateral single-case decision-making is a field in which EU institutions, bodies, offices and agencies have increasingly 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 should contribute to smoothing the interaction of different legal orders regulating different phases within such procedures.

Elements of EU administrative rule-making to be taken into account include: delegated and implementing acts under Articles 290 and 291 TFEU and the various control mechanisms; 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 marginal 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 are also to be dealt with, as well as questions of procedures for creation of acts, conditions of the validity of acts of rule making and possibilities for their revocation.

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 of the working group the issues that will primarily be addressed are: 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.

There is furthermore an important issue which cuts across the three previous topics that will be dealt with by a separate working group: information management, which is 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

Working group 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 will thus be structured in four topic-specific Working Groups. The Working Groups will be composed of scholars and practitioners from various Member States and the EU institutions, bodies, offices and agencies. The core members of the Working Groups are 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 single-case decision-making: Giacinto della Cananea, Paul Craig; WG on rule-making - Deirdre Curtin, Herwig Hofmann; WG on administrative contracts: Jean-Bernard Auby, Ulrich Stelkens, Jacques Ziller; 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 soon. The European Ombudsman Nikiforos Diamandouros, and his Secretary General Ian Harden have already agreed participating in the Advisory Board.

3.3. Expected results

In its final version the results of the project may serve as template or frame of reference for future general or policy-specific EU legislation – and possibly Member States' legislation. It may also serve the EU 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 for the 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 administration. 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.

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;
- 2) comments on these materials evaluating advantages and disadvantages of certain models, thereby analyzing and rationalising the existing approaches;
- 3) statements of existing approaches and identification of best-practice approaches with explanation.

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 rules will be formulated at first in English, but with constant care for their capacity to be translated accurately in the other official languages of the EU. 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.

ANNEX**Table 1: Members of ReNEUAL by 1-10-2101**

Surname and name	Position	Organisation	Country of origin
Auby, Jean-Bernard	Professor of Public Law	Science Po Paris, France	FR
Bermann, George	Professor	Columbia University New York, USA	USA
Craig, Paul	Professor of English Law	University of Oxford, United Kingdom	UK
Curtin, Deirdre	Professor of European Law	University of Amsterdam, The Netherlands	IRL
Della Cananea, Giacinto	Professor of Italian and European Administrative Law	University of Naples, Italy	IT
De Waard, Boudewijn	Professor of Constitutional and Administrative Law	University of Tilburg, The Netherlands	NL
Díez Sastre, Silvia	Assistant Professor of Administrative Law	Autonomous University of Madrid, Spain	ES
Galetta, Diana Urania	Professor of Italian and European Administrative Law	University of Milan, Italy	IT
Gøtze, Michael	Professor of Administrative Law	University of Copenhagen, Denmark	DA
Hofmann, Herwig	Professor of European Law	University of Luxembourg – Centre for European Law, Luxembourg	DE
Koch, Charles	Woodbrigde Professor of Law	College of William and Mary - Williamsburg, Virginia, USA	USA
Lottini, Micaela	Assistant Professor of Administrative Law	University of Rome – Roma Tre, Italy	IT
Mattarella, Bernardo G.	Professor of Administrative Law	University of Siena, Italy	IT

Mendes, Joana	Post-doctoral researcher	University of Amsterdam, The Netherlands	PT
Meuwese, Anne	Senior Lecturer in Constitutional and Administrative Law	Tilburg University, The Netherlands	BE
Mir Puigpelat, Oriol	Professor of Administrative Law	University of Barcelona, Spain	ES
Ponce, Juli	Professor of Administrative Law	Universtiy of Barcelona, Spain	ES
Radaelli, Claudio	Professor of political science	University of Exeter, United Kingdom	IT
Schneider, Jens-Peter	Professor of German and European Administrative Law	University of Freiburg, Germany	DE
Stelkens, Ulrich	Professor of Public Law	University of Administrative Sciences Speyer, Germany	DE
Trantas, Georgios	Secretary General	Center of Int. and European Economic Law, Thessaloniki, Greece	EL
Walter, Christian	Professor of Public, European and Public International Law	University of Münster, Germany	DE
Wierzbowski, Marek	Professor of Administrative Law and Administrative Procedure	University of Warsaw, Poland	PL
Ziller, Jacques	Professor of European Union Law	University of Pavia	FR

Source: <http://www.reneual.uos.de/>

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POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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