The ReNEUAL Model Rules on EU Administrative Procedure in a nutshell

ACA Europe Seminar
“Administrative Law in the EU Single Case Decision-Making”

3 December 2018, Cologne
Why thinking about Model Rules of EU Admin Procedure Law?

- **Background and motive:**
  - fragmented EU Administrative Law
    - uncoordinated sector specific legislation
    - few partial „codifications“
    - punctual case-law
    - soft law
  - traditional dualistic concept of EU administrative law
    - direct ↔ indirect implementation
    - but growing number of composite procedures
    - underconceptualized vertical, horizontal and network aspects of EU Administrative Law
  - Pluralisation of the European administration
    - Commission
    - Member States authorities
    - decentralized (regulatory) agencies
  - legal uncertainty, intransparancy, opacness and incoherence
    - gaps concerning the protection of individual rights and the EU rule of law
    - accountability gaps and democratic legitimation
    - room for enhanced efficiency in admin. procedures
Why thinking about Model Rules of EU Admin Procedure Law?

Aims of ReNEUAL:
- innovative codification, no mere restatement of the (deficient) state of play
- translating constitutional values into rules on administrative procedure
  - admin effectiveness/efficiency ↔ protection of individual rights
- simplification
- filling of normative gaps
- better coordination
  - within the EU legal order
  - between the EU legal order and national admin. Law

Not: harmonising national administrative law

"the European legal culture is made of the diversity of legal systems progressively brought closer to each other“

Vassilios Skouris
at the European Law Institute’s Inaugural Congress 2011 in Paris
ReNEUAL Model Rules on EU Administrative Procedure – History

- 2009/10: Founding of ReNEUAL
  - establishment of 4 working groups which organized several workshops
  - financed by university budgets and various research funds (Germany/Luxembourg, Spain, Italy)

- ReNEUAL Conference 2012: Towards an EU administrative procedure law? – Concepts and structure
  - hosted by the European Ombudsman in Brussels (March 2012)

- Joint Conference of ReNEUAL with the Association of the Councils of State and Supreme administrative jurisdictions of the EU (ACA-Europe), 2013
  - Composite procedures and food safety: coordinating European and national powers, and judicial review

- ReNEUAL Conference June 2013 in Luxembourg
  - internal discussion of 1st tentative draft model rules 2013

- European Law Institute (ELI) Project Conference September 2013
  - Project session III: Towards Restatement and Best Practices Guidelines on EU Administrative Procedural Law

- Workshop organised by the Centre for Judicial Cooperation of the European University Institute (EUI) (Feb. 2014): Model Laws for EU Administrative Law – A discussion on ReNEUAL Project Results
  - in collaboration with the European Law Institute and ReNEUAL

- ReNEUAL Conference 2014: EU Administrative Procedures – Presenting and Discussing the ReNEUAL Draft Model Rules 2014
  - hosted by the European Ombudsman in Brussels (May 2014)

- ReNEUAL Model Rules Online version September 2014 (www.reneual.eu)

- ReNEUAL Model Rules Updated print version 2015/16
  - English, French, German, Italian, Polish; Romanian, Spanish

- The EP draft regulation of 9.6.2016 for an open, efficient and independent EU Administration
ReNEUAL Model Rules on EU Administrative Procedure – Online version 2014
www.reneual.eu
European Parliament
2014-2019

TEXTS ADOPTED
Provisional edition

P8_TA-PROV(2016)0279

A regulation for an open, efficient and independent European Union administration

European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2619(RSP))

2018: impact assessment provided by the European Parliament
Rechtssache C-219/17

Silvio Berlusconi,
Finanziaria d'Investimento Fininvest SpA (Fininvest) gegen
Banca d'Italia,
Istituto per la Vigilanza Sulle Assicurazioni (IVASS),
Streithalter:
Ministero dell'Economia e delle Finanze,
Banca Mediolanum SpA,
Holding Italiana Quarta SpA,
Fin. Prog. Italia di E. Doris & C. s.a.p.a.,
Streit SpA,
Ennio Doris

(Vorabentscheidungersuchen des Consiglio di Stato [Staatsrat, Italien])

58. Allerdings kommt das Unionsrecht in immer mehr Fällen in Verfahren zur Anwendung, an denen Organe, Einrichtungen oder sonstige Stellen sowohl der Union als auch der Mitgliedstaaten beteiligt sind. Sie sind im Unionsrecht nicht allgemein geregelt, aber in der Literatur eingehend untersucht worden.

The overall structure of the ReNEUAL Model Rules

- Book I – General provisions
- Book II – Administrative Rulemaking
- Book III – Unilateral Single Case Decision-Making
  - Reference to specific rules of Book IV (award procedures)
- Book IV – Contracts
  - References to specific rules of Book III
- Book V – Mutual Assistance
  - applicable in various admin. procedures governed by books II, III, IV
- Book VI – (inter-)Administrative Information Management
  - applicable in various admin. procedures governed by books II, III, IV

Book I – General Provisions

- Preamble referring to relevant legal principles

I-1: Scope of application

- ReNEUAL Conference 2013: 2 Alternatives
  - comprehensive approach
    - direct / indirect / shared implementation of EU law
  - restricted approach with opt-in
- Re-drafted after various dicusions
  - applicable to EU authorities
  - Generally not applicable to Member States’ authorities (compare Books II, III, IV)
  - Books V and VI applicable to EU & MS authorities (+ specific legislative opt-in options)

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 sector-specific EU 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.
Book I – General Provisions

- I-2: Relation to sector specific norms of the European Union
  - draft model rules as the generally applicable standard
  - primacy of sector-specific rules

I-2 Relation to specific procedural rules of the European Union
(1) These model rules shall apply where no specific procedural rules exist in EU law.
(2) Specific procedural rules in EU law shall be interpreted in coherence with and may be complemented by these model rules.

- I-3: Relation to Member State’s law
  - RMR as guidance / point of reference / …

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

10
concept of Book III (single case decision-making)

- Art. III-1 – Scope of application
  
  (1) Book III applies to administrative procedures by which an EU authority prepares and adopts a decision as defined in Article III-2.
  
  (2) Book III applies to administrative procedures by which a Member State authority prepares and adopts a decision as defined in Article III-2 insofar as sector-specific EU law or the respective Member State law renders it applicable.

- rules on composite procedures: Art. III-18, 19, 20, 21 (inspections); III-24, 26, 27 (hearing)

- Art. III-2 - Definitions

  `Decision` means administrative action addressed to one or more individualized public or private persons which is adopted unilaterally by an EU authority […] to determine one or more concrete cases with legally binding effect.

- balance between
  
  - detailed rules ⇔ general principles
  - procedural rights ⇔ administrative efficiency
Book III: structure and concepts

- **Chapter 1: General Provisions**
  - Scope and application; Definitions (decision; party; interested public)

- **Chapter 2: Initiation and management of procedures**
  - General duty of fair decision-making + standards for the management of procedures (responsible officer)
  - Initiation of procedures (special rules for application procedures)
  - Time limits for concluding procedures

- **Chapter 3: Gathering of information**
  - Section 1: General rules
    - Principle of investigation by competent authority: duty of care
    - Power to investigate by simple request or by mandatory decision
    - Duties to cooperate for parties to the proceedings ⇔ rights of defense
  - Section 2: Inspections (especially rules on vertical and horizontal cooperation)
Chapter 4: Right to hearing and inter-administrative consultations

- Section 1: Access to the file
- Section 2: Hearing, participation, and consultation
  - Right to be heard for potential addressees of decisions (esp. in composite procedures)

III-24 (1) The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this article. The application of the right to be heard will depend on the division of responsibility in the decision-making process. […]

- Right to participate: third parties (adversely affected persons ⇔ interested public)

III-2 (3) `Party´ means the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure. Sector-specific EU law may assign the status of party to persons not adversely affected.

- Consultation of other authorities

Chapter 5: Conclusion of procedures

- Duty to specify the decision; to give reasons; indication of legal remedies; notification

Chapter 6: Rectification and withdrawal of decisions

- Decisions with adverse effects ⇔ decision which are beneficial
European Parliament
2014-2019

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A regulation for an open, efficient and independent European Union administration

European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP))
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<td>Art. III-2 (3) <em>Party</em> means the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure. EU sector-specific law may assign the status of party to persons not adversely affected.</td>
<td>Art. 4 (f) <em>party</em> means any natural or legal person whose legal position may be affected by the outcome of an administrative procedure.</td>
</tr>
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<td>Art. I-4 (6) <em>Person</em> means any natural or legal person. Other associations, organizations or groups may be considered as a person on the basis of sector-specific EU law or the case law of the Court of Justice of the European Union.</td>
<td></td>
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<tr>
<td>Art. III-2 (4) <em>Interested public</em> for the purposes of Article III-25 means every natural or legal person and other associations, organizations or groups expressing an interest in an administrative procedure.</td>
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Information Management Activities

Single Case Decision-making (Book III) [or conclusion of contracts, Art. IV-7]

Initiation (Chap. 2) → Info. Gathering (Chap. 3) → Hearing … (Chap. 4) → Conclusion (Chap. 5)

(specific) Information Management Activities (Book VI)

- (shared) Data Bases
- Duties to inform other authorities
- Structured Cooperation Mechanisms

supported by Info. Systems (IT Systems / …)

(informational) Mutual Assistance (Book V)

- is based to a large extent on Book III of the ReNEUAL Model Rules
  - in some cases with improved (more elegant) wordings
    - Inspections, form of decisions, duty to state reasons
  - includes explicitly a duty to keep records
  - adds time-limits, a right to request an administrative review

- but
  - has a rather unclear scope of application!!
    - broad notion of administrative activities as a starting point
    - but most rules applicable only for procedures preparing, adopting, implementing and enforcing – undefined – administrative acts
    - very unclear level of application concerning acts of general scope
  - omits provisions on composite procedures and on e-government
  - entails some less convincing deviations from Book III (less detailed/clear rules):
    - party; duty to investigate; duty to cooperate; binding (?) proposals of experts; no exemptions to the right to be heard; access to secrets in the file; withdrawal of lawful acts

- is opposed by the EU Commission: EU Admin. Law is necessarily sector-specific
  - which formally has the monopoly for legislative initiatives
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<td>III-3 (4) A party may request that a responsible official affected by a <strong>conflict of interest</strong> should not take part in the making of the decision.</td>
<td>Art. 13 (3) Any party may request that a member of staff be excluded from taking part in an administrative procedure on the ground of conflict of interests. (…)</td>
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<td>III-5 (1) Administrative procedures can be initiated ex-officio or by an <strong>application</strong>. =&gt; III-6 application proc.</td>
<td>Art. 5 Administrative procedures may be initiated by the Union’s administration on its own initiative or by an application of a party. =&gt; Art. 7 (application)</td>
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<td>III-8 (1) The parties shall have the following rights related to the <strong>management of the procedure</strong>: (information, use electronic communication, legal representation, …) (2) … parties shall have the right to <strong>file a complaint</strong> against the responsible official, …</td>
<td>Art. 8 The parties shall have the following rights related to the management of the procedure: (information, use electronic communication, legal representation, …) / /</td>
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<td>III-14 Privilege against <strong>self-incrimination</strong> and <strong>legal professional privilege</strong> …</td>
<td>Art. 10 (3) Where the administrative procedure may lead to a penalty, the parties shall be reminded of the right against self-incrimination.</td>
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<td>III-15 (2) The parties may propose <strong>witnesses and experts</strong>.</td>
<td>Art. 11 Witnesses and experts may be heard at the initiative of the competent authority or proposed by the parties. (…)</td>
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<td>III-22(1) Every party has a <strong>right of access to his or her file</strong> (…)</td>
<td>Art. 15 (1) The parties <strong>concerned</strong> shall be granted full access to the file (…)</td>
</tr>
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<td>III-23 (1) Every party has the <strong>right to be heard</strong> by a public authority before a decision, which would affect him or her adversely, is taken. (…) =&gt; III-24 (composite procedures)</td>
<td>Art. 14 (1) The parties shall have the right to be heard before any individual measure which would adversely affect them is taken. (…)</td>
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<td>III-33 (1) Decisions shall be <strong>notified</strong> to the parties as soon as they are adopted. They shall take effect for a party upon notification.</td>
<td>Art. 21 Administrative acts which affect the rights and interests of the parties shall be notified in writing to them as soon as they are adopted. Administrative acts shall take effect for a party upon notification to that party.</td>
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<td>III-10 (1) When taking decisions, the public authority shall <strong>investigate the case carefully and impartially</strong>. It shall take into consideration the relevant factors, including those favourable to the parties, and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The public authority shall use such <strong>evidence</strong> as, after due consideration, it deems necessary in order to ascertain the facts of the case.</td>
<td>Art. 9 (1) The competent authority shall investigate the case carefully and impartially. It shall take into consideration all relevant factors and gather all necessary <strong>information</strong> to adopt a decision.</td>
</tr>
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<td>(2) The public authority may <strong>under the conditions laid down in Article III-11 and Article III-12 or in other provisions of EU law</strong>: (a) gather information of all kinds, (b) hear the evidence of the parties, witnesses and experts or gather statements in writing or electronically from parties, experts and witnesses, (c) obtain documents and records, and (d) under the conditions of Article III-16 visit and inspect the premises involved.</td>
<td>(2) With the purpose of gathering the necessary information, the competent authority may, where relevant: (a) hear the evidence of parties, witnesses and experts, (b) request documents and records, (c) carry out visits and inspections. (3) Parties may produce evidence that they deem appropriate.</td>
</tr>
</tbody>
</table>

| III-11 Investigation by **request** | . / . |
| III-12 Investigation by **mandatory decision** | . / . |

**III-16 Inspection powers** of public authorities  
**III-17 Duties of inspecting officials**  
**III-18 Duties of sincere cooperation during inspections by EU authorities**  
**III-19 Participation of EU authorities in Member State inspections**  
**III-20 Joint inspections** of Member State authorities  

Art. 12 Inspections (1) (2), (3), (4), (5) (6), (7)
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<td>III-13 (1) The <strong>parties shall assist</strong> in ascertaining the facts of the case. In particular they shall state such facts and evidence as are known to them and which can reasonably expected to be presented by them. <strong>If a participant fails to state such facts</strong>, the final decision shall be taken on the basis of the information available. The public authority is obliged to conduct <strong>additional investigations ex officio</strong> only if additional evidence or issues to be investigated are evident. A <strong>more extensive duty to assist</strong> in ascertaining the facts, and in particular the duty to appear personally or make a statement, shall exist only where the law specifically requires this.</td>
<td>Art. 10 (1) The parties shall assist the competent authority in ascertaining the facts and circumstances of the case. . . .</td>
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<td>(2) In application procedures according to Article III-6(3) the <strong>applicant supplies</strong> in an appropriate form the <strong>information</strong> specified in EU law. If the applicant so requests before submitting an application, the public authority shall give an <strong>opinion on the information to be supplied</strong> by the applicant. The public authority shall consult appropriate authorities in accordance with Articles III-26 and III-27 before it gives its opinion. The fact that the public authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the applicant to submit further information. Any public <strong>authorities holding relevant information</strong> must make this information available to the applicant on his or her specific request and on the condition that the applicant cannot reasonably be expected to obtain this information on his or her own.</td>
<td>. . .</td>
</tr>
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<td>III-6 (3) Applications shall be acknowledged in writing as quickly as possible. (...) In the event of a <strong>defective application</strong>, the acknowledgment shall specify the defects or missing documents and give an appropriate period for remedying or producing the missing documents. (...)</td>
<td>(2) The parties shall be given a reasonable time-limit to reply to <strong>any request of cooperation</strong>, taking into account the length and complexity of the request and the requirements of the investigation</td>
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