Bundesverwaltungsgericht

ACA-Europe Colloquium
ReNEUAL II – Administrative Law in the European Union
Administrative Information Management in the Digital Age

Leipzig, Germany

Answers to questionnaire: Finland

Activity co-financed by the Justice Programme of the European Union

ACA-Colloquium
ReNEUAL II – Administrative Law in the European Union
Administrative Information Management in the Digital Age

11 May 2020

Bundesverwaltungsgericht (Federal Administrative Court), Leipzig

Questionnaire

Introduction:

National legal orders and European Union law are in many fields closely linked. Both underlie mutual influences. The jurisdiction of the European Court of Justice is not only relevant and binding as the interpretation and application of European Union law is concerned. Also, its jurisdiction partly affects the interpretation and application of national law. This phenomenon can be observed e.g. in the law of administrative procedure or of administrative court procedure.

On the other hand, European Union law is founded on the national jurisdictions of the member states. From an optimistic point of view it ought to be an essence of the best the national legal orders have to offer. In this line of thinking the European Court of Justice considers the national legal orders as source of inspiration in determining the general principles of European Union law which traditionally, i.e. before the Charter of Fundamental Rights came into force, were the sole source of fundamental rights within the jurisdiction of the European Court of Justice (cf. ECJ Case 4/73 (Nold), ECLI:EU:C:1974:51, p.507-508). Accordingly, the European Court of Justice has deducted many procedural rights in administrative procedure from the national legal orders. It is in the interest of the member states that the relationship between European Union law and the national legal orders remains one of mutual interchange, better: a dialectic process.

This is especially the case in evolving new legal fields like the law of composite and inter-linked information management between various national authorities as well as between national and European Union administrative bodies. Such inter-administrative information management is a major component of administrative procedures implementing European Union law. It reflects the need of public authorities for reliable and up-to-date information from various sources in cases concerning cross-border public or private activities within the internal market. In order to provide such information the European Union has established sets of mechanisms for cross-border and/or multi-level exchange of information. Prominent examples are rapid alert systems providing information about risks for consumers caused by dangerous food or feed or other products, the Internal Market Information System (IMI), information systems in the field of customs and taxation, and the growing number of information systems concerning migrants or

travellers (Schengen Information System, Visa Information System, Eurodac). More recently, discussions arise that these systems may evolve into semi- or even fully automated decision-making systems.

This integration of various databases and other sources of information raises a number of legal questions: Can a decision-making body rely on information from partners of the information network or are they obliged to scrutinize them themselves? Who is liable for any damage caused by malfunctioning of those systems or by false information entered into the system by a partner institution? Is there a need for new legal safeguards of effective legal protection?

The ReNEUAL Model Rules on European Union Administrative Procedure contain in Book VI draft rules on inter-administrative information management which concern types of information exchange beyond the basic rules of mutual assistance covered by Book V of the Model Rules. The rules of Book VI shall inform the discussions at the 2020 colloquium in Leipzig in a similar way as the draft model rules of Book III concerning single case decision-making stimulated the seminar in Cologne at the end of 2018. In addition, the colloquium is supposed to recall the discussion within ACA concerning digital technology and the law with a stronger view on the decision making at the colloquium in The Hague on 14 May 2018.

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed. The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book VI (Administrative Information Management) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

In contrast to the 2018 Cologne seminar, we will not discuss a resolution adopted by the European Parliament in 2016 on a proposal for a regulation for an open, efficient and independent European Union administration (EP-No. B8-0685/2016 / P8_TA-PROV(2016)0279). This draft focusses for good political reasons on single case decision-making and does not cover the topic of the Leipzig colloquium.

The colloquium 2020 to be held in Leipzig aims at further investigating into the national legal orders in order to assess their principles more profoundly and on a wider scale. ReNEUAL is very much aware of the fact that Book VI contains the most innovative part of the Model Rules. In addition, Book VI covers a highly dynamic field of law. Thus, Book VI itself will certainly evolve during the next years and ReNEUAL has already set up a new working group in order to update the existing rules and to investigate the need and the options for additional rules, especially concerning automated decision-making and the use of artificial intelligence in administrative procedures.

In line with this, the purpose of the Leipzig colloquium is to achieve a better understanding of the existing (additional) approaches of the national legal orders, to discover similarities and/or differences in order to promote the dialectic process mentioned above and thus both contribute to a better understanding of the principles of the European Union legal order derived from the essence of the member states' legal orders and enable a mutual learning process as well between national legal orders among themselves as between the national legal orders and the European Union's legal order.

Wherever you consider it appropriate, it would be helpful if you not only described your national legal order, but also compared your national legal order with the relevant provisions of Book VI of the ReNEUAL Model Rules. For this purpose the questionnaire makes reference to single provisions of Book VI in order to facilitate the links.

I. Shared databases, structured information mechanisms or duties to inform of national authorities and the case law of your court or other courts of your country

Background: Book VI establishes in Art. VI-2 (1)-(3) three categories of (advanced) inter-administrative information management not covered by the (more basic) rules for information exchange under the obligations of mutual assistance regulated in Book V (in order of their level of integration): structured information mechanism; duties to inform, and (shared) databases. They are defined in Art. VI-2 (see also Introduction to Book VI paras 17-23 and paras 5-8 of the explanations of Book VI).

1. Does your national legal order establish mechanisms of information exchange among authorities within your country which are similar to those categories as defined in Book VI? If so, please provide the most important examples from a range of legal domains, describe how they work and classify them into the categories as defined in Book VI as far as feasible.

Category 1: The Register of Aliens is a register of persons which is maintained and used for the processing, decision-making and control of matters relating to entry into Finland, departure from Finland, and residence of aliens in the country for ensuring the security of the state and for carrying out basic and extensive security investigations as referred to in the Act on Security Investigations for the processing and decision-making of matters related to the acquisition, retention and loss of Finnish citizenship and the determination of citizenship status. The main controller of the Register of Aliens is the Finnish Immigration Service. The register is also maintained and used by the Ministry for Foreign Affairs, the police, the Finnish Border Guard, the Customs, the Ministry of Employment and the Economy, the Centres for Economic Development, Transport and the Environment, the Employment and Economic Development Offices, the Prison Administration Authority and the Non-Discrimination Ombudsman as well as the Supreme Administrative Court and the regional Administrative Courts.The Register of Aliens is used via an information system called UMA. Officials of the authorities maintaining and using the

system are entitled to view and process data through a technical interface, within the limits of their competence.

Category 2: There are a number of provisions in various laws according to which an authority is obliged to provide information to another authority without prior request. An authority may grant access to a secret document to some other authority, if there is a specific provision on access or the right of access in an Act; the person whose interests are protected by the secrecy provision consents to the same; the document is necessary for the consideration of a matter pertaining to advance information, a preliminary ruling, an appeal or a complaint against a decision by an authority, an appeal for nullification or a submission regarding a measure taken by an authority, or a complaint made to an international body for the administration of justice or investigation; the information is required for the performance of a specific monitoring or inspection task by the authority. An authority may open a technical interface for another authority in order to access, from its personal data filing system, information which the latter authority must take into account in its decision-making under a specific statutory obligation. If there is a provision on the secrecy of personal data, the interface may be used only for retrieving information on persons who have consented to the same, unless specifically otherwise provided on access to secret information.

Category 3: The Act on Data Management in Public Administration will come into force on 1 January 2020. The act regulates the provision of information by opening a technical interface or through electronic access. According to the act authorities must provide information which is recurrent and standard in content by opening a technical interface, if the receiving authority is entitled to the information according to a provision on access in an Act. An authority may also provide another authority with electronic access to such information in its data resources to which the latter has right of access.

2. Are there additional mechanisms of information exchange among authorities within your country which are not covered by those categories? If so, please provide examples, describe how they work and explain their specifics in relation to the ReNEUAL categories.

With regard to general outlines, see above question 1.

3. In your country, do there exist legal obligations or a political practice to conduct an impact assessment before such advanced forms of information exchange are established?

The right of access to data and information and the sharing of data and information among authorities is subject to specific provisions of an Act. An impact assessment regarding exchange of information is therefore conducted as part of the legislative process. As regards the more technical aspects of advanced forms of information exchange, the above-mentioned Act on Data Management in Public Administration stipulates that when planning administrative reforms which will affect the contents of data management and before the introduction of information systems, an impact assessment has to be conducted. Government agencies and

institutions also have to assess the economic impacts as part of such an assessment. The responsible branch ministry has to prepare the mentioned assessment when draft legislative provisions affect data sets and information systems. The ministry also has to assess the impacts of the planned reform on the right of access to documents.

4. Has your court (or other courts of your country) pronounced judgements on such mechanisms of advanced information exchange among authorities within your country? Are you aware of ongoing court proceedings concerning such matters? What are most important cases or principles established in this case law?

N/A

5. a) Can a decision-making body in your country rely on information from partners of such national (!) information networks or is it obliged to scrutinize the information itself?

Authorities may rely on the accuracy of information contained in the registry or information system. However, the decision-making authority has to explain the grounds of its decision, including what significance has been attached to information received from another authority.

Background: In Case C-503/03 Commission v Kingdom of Spain [2006] the CJEU established an obligation for users of the Schengen Information System (SIS) to take advantage of the so-called SIRENE offices in the system in order to validate sensitive information provided through the SIS. This jurisprudence inspired Art. 25(2) SIS II-Regulation (EC) 1987/2006 and the general draft rule in Art. VI-21 of the ReNEUAL Model Rules.

b) If a decision-making body in your country is obliged to scrutinize information obtained from a national information network, what does this mean in practice? How far does this obligation reach?

See above.

6. In case of an information exchange between national authorities which concerns the transfer of personal data:

a) Does your national legal order provide for the automatic (i.e. without request) information of the person concerned?

As mentioned above, an authority may open a technical interface for another authority in order to access, from its personal data filing system, information which the latter authority must take into account in its decision-making under a specific statutory obligation. If there is a provision on the secrecy of personal data, the interface may be used only for retrieving information on persons who have consented to the same, unless specifically otherwise provided on access

to secret information. The transfer of personal data is based on the right of the receiving authority to access the information.

b) Does you national legal order provide for an enforceable right of the person concerned that he/she be informed of such an exchange upon request?

Data subjects have the right, on request, to obtain information regarding whether his or her personal data has been disclosed or will be disclosed – and if yes, to whom

7. Who is liable for any damage caused by malfunctioning of those national information networks or by false information entered into the system by a partner institution?

The controller is responsible for the accuracy of the information, the notifier is responsible for the accuracy of the information provided to the controller. In case of registries which have several controllers, such as the Registry of Aliens, each controller is responsible for the accuracy of the information that it has included in the registry.

Background: In the legal framework of some European information systems the legislator established a substitutional liability or subrogation mechanism (Art. 48 SIS II-Regulation (EC) 1987/2006; see also Art. 116(2) Convention Implementing the Schengen Agreement; Art. 40(2), (3) CIS-Regulation 515/97). Art. VI-40 ReNEUAL Model Rules formulates a general rule along these lines in order to enhance the protection of individuals facing damages caused by such mechanisms. In addition, Art. VI-40(2) provides for a compensation mechanism among the participating authorities in order to provide incentives to comply with their respective legal obligations.

8. In you national legal order, are there any specific safeguards or legal remedies of individuals considering information about them to be false or an exchange of information about them to be illegal? Is there a political or academic discussion about (further) needs for new or more specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

A person has the right to refer a matter to the Data Protection Ombudsman if he or she considers that the relevant legislation is being infringed in the processing of personal data concerning him or her.

II. Cross-border and multi-level information sharing and the case law of your court or other courts of your country

1. Has your court (or other courts of your country) pronounced judgements on such EU mechanisms of advanced cross-border or multi-level information exchange among European authorities? Are you aware of ongoing court proceedings concerning such matters? What are most important cases or principles established in this case law?

Supreme Administrative Court decision 20/6/2012, KHO 2012:51: A had requested the Data Protection Ombudsman to control the legality of the information on A in the Schengen register kept by the SIRENE Bureau at the National Bureau of Investigation, and to ask the National Bureau of Investigation to remove the erroneous information on A. According to A, information that A would have been wanted in France was erroneous. The Data Protection Ombudsman discovered that the information on A had been removed from the Schengen Information System and from the national Schengen Information System, considered the claim of A that the entries deemed erroneous by A be rectified as regards entries in the archive database of the SIRENE workflow system, and dismissed the claim of A. In its statement to the Supreme Administrative Court the National Police Board explained that the national section of the Schengen Information System consists of a Schengen query system and of the workflow system of the SIRENE Bureau, which contains data on information exchange by the Finnish SIRENE Bureau resulting from Schengen alerts. According to the National Police Board the archive data in the SIRENE workflow system are not part of the national Schengen Information System, but a technical archive database created in connection with the workflow system. Information is transferred from the workflow system to the archive database only on such alerts in the Schengen Information System that have resulted in a hit in Finland and in national and international information exchange between authorities. The Supreme Administrative Court carried out an inspection in the matter, and on the basis of the facts it deemed that the National Police Board was not incorrect in its opinion that the archive database of the SIRENE workflow system does not constitute part of the national Schengen Information System. Under Section 1(1) of the Act on the Processing of Personal Data by the Police and Section 29(1) and (2) of the Personal Data Act, a request for the rectification or removal of information in the archive database should not have been considered by the Data Protection Ombudsman as the first instance, but by the controller of the personal data file. As the archive database contained information that had been in the SIRENE workflow system, the controller of the SIRENE workflow system had to be regarded as the controller of the archive database, and under Section 7 of the Act on the Processing of Personal Data by the Police, the National Police Board is nowadays the controller of the national Schengen Information System. To avoid delay the Supreme Administrative Court considered the matter without referring it to the National Police Board as regards the claim of A that erroneous entries on A be removed from the archive database of the SIRENE workflow system. The entries on A in the archive database of the SIRENE workflow system consisted of information exchange between the Finnish and French SIRENE Bureaus, measures taken by the Finnish SIRENE Bureau, and of information exchange between different units of the Finnish police. As data on information exchange they could not be deemed erroneous on the grounds that the validity of the original alert could no longer be established in the matter because information had been removed. Thus it had not been shown that the data on the information exchange and on the measures were incorrect in view of Section 27 of the Act on the Processing of Personal Data by the Police. Therefore, there were no grounds to assent to the claim of A that the entries on A in the archive database of the SIRENE workflow system be removed as erroneous.

2. Has your court (or other courts of your country) delivered judgements drawing on the CJEU case law in Case C-503/03 Commission v Kingdom of Spain [2006] or on Art. 25(2) SIS II-Regulation (EC) 1987/2006?

N/A

Background: see Question I.5.

3. Has your court (or other courts of your country) delivered judgements drawing on a substitutional liability or subrogation mechanism in accordance with Art. 48 SIS II-Regulation (EC) 1987/2006, Art. 116(2) Convention implementing the Schengen Agreement, Art. 40(2), (3) CIS-Regulation 515/97) or similar provisions of EU law?

N/A

Background: see Question I.7.

4. In your national legal order, are there any new or specific legal safeguards with regard to cross-border or multi-level information sharing? Is there a political or academic discussion about (further) needs for new or specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

No new or specific legal safeguards with regard to cross-border or multi-level information sharing. See above question 8 with regard to the Data Protection Ombudsman.

Background: At least in some sector-specific secondary EU law new approaches are developed in order to avoid either gaps of judicial oversight or to minimize factual burdens for concerned citizens to initiate effective judicial review. One of these new instruments allows for trans-national representative legal action (compare Art. 111(1) Convention Implementing the Schengen Agreement; Art. 36 (5) CIS-Regulation 515/97).