Bundesverwaltungsgericht

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

Leipzig, Germany

Answers to questionnaire: Poland

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

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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.

The main legislative act concerning administrative proceedings is the Act of 14 June 1960 – The Code of Administrative Proceedings, which does not establish mechanisms of information exchange among authorities which are similar to those categories as defined in Book VI.
Only in Article 7b of this Code the general principle of cooperation between public administration bodies is provided. According to this Article: in the course of proceedings, public administration bodies shall cooperate with each other within the scope necessary for a detailed explanation of the factual and legal state of a case, taking into account the public interest and the legitimate interest of citizens and the efficiency of proceedings, by means adequate to the character, circumstances and complexity of the case. Section VIII A of the Code additionally regulates the rules of cooperation with authorities of other EU Member States and EU administration bodies. These are general solutions based on Book V of ReNEUAL rather than mechanisms from Book VI.

Nevertheless, the provisions of the Act of 17 February 2005 on Informatization of the Activities of Entities Performing Public Tasks provide the exchange of information by electronic means, including electronic documents, between public and non-public entities.
Article 15 of this Act concerns solutions similar to those referred to in Book VI. According to this Article the entity keeping the public register shall provide the public entity (or an entity performing public tasks) with free access to data gathered in the kept register, to the extent necessary for the performance of these tasks. The data should be made available by means of electronic communication and may be used exclusively for the performance of public tasks.

Specific shared databases or public registers are provided for in separate legislative acts.
For example, the Act on Road Traffic Law regulates the principles of maintaining the IT System of the Central Register of Vehicles and Drivers (SI CEPiK). In SI CEPiK there are, for example, data such as: brand, model and technical data of the vehicle, information on theft or sale of the vehicle, information on obligatory third party liability insurance, data on persons who have the right to drive vehicles or who are banned from driving. Data collected in the CEPiK SI can be used by many entities, for example: the Police, the Border Guard, the Central Anti-Corruption Bureau, National Fiscal Administration authorities, courts and public prosecutor's offices.
Another example is: Universal Electronic Population Register System (PESEL register), which is a central data collection of Polish citizens and foreigners residing on the territory of Poland. Access to the PESEL register is available, for example, to courts, public prosecutor's office, the Police, Border Guard, Internal Security Agency.
Another example is system Poltax Plus – a central system for recording and processing data on taxpayers used in tax offices and by the National Fiscal Administration authorities. Currently, Poltax Plus is used only for PIT, CIT and VAT settlements. In the future, information on other taxes, which are currently in separate systems (e.g. customs and excise duty), will be transferred to it.

Also the provisions of the Act of 29 August 1997 – Tax Ordinance introduce the obligation for central and local administration bodies and central and local government organisational units to cooperate, provide free-of-charge information in individual cases, and offer support to tax authorities in the execution of their tasks (Article 82b § 1). When executing their tasks, tax authorities are entitled to use free-of-charge the information compiled in case files, data collections, records, and registers by central and local government administration, courts, central and local government organisational units, and state-owned legal persons, including also information in electronic form, subject to separate regulations (Article 82b § 2).
Article 84 § 1 provide for the obligation for courts, bailiffs and public notaries to prepare and submit information to competent tax authorities resulting from legal events that could give rise to a tax liability.

A mechanism similar to the one described in Article VI-2 (1) of ReNEUAL in Poland is: ePUAP – a nationwide ICT platform for communication between citizens and public administration bodies and between public entities in a unified, standardized manner. The provisions of the Act on Informatization of the Activities of Entities Performing Public Tasks and the ordinance

of the President of the Council of Ministers of Minorities of 14 September 2011 issued on the basis of this Act provide for: the obligation for public entities to have an electronic mailbox on this platform and possibility to communicate with each other via the ePUAP platform.

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.

Information from the databases described above may also be available to other authorities and persons interested on the basis of a prior, reasoned request.

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?

An impact assessment is one of the obligatory annexes to a draft of a normative act that describes the expected impacts of proposed legislation according to a cost-benefit analysis method. The obligation to carry out an impact assessment is regulated by the Rules of Procedure of the Council of Ministers.

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?

Polish administrative courts adjudicate for example in cases concerning the obligation to obtain free access to data gathered in the public register (Article 15 of the Act on Informatization of the Activities of Entities Performing Public Tasks, see answer for question I.1.).
The administrative courts stress, that only such data from the public register which are necessary for the performance of public tasks may be requested. In doing so, they define a concept: "public tasks" and what kind of data are "necessary" for the execution of public tasks.

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?

It can rely on the data it receives.
According to the Article 75 § 1 of the Code of Administrative Proceedings documents constitute evidence. Pursuant to the Article 76 § 1 of the Code official documents drawn up in the prescribed form by competent state authorities within the scope of their activity shall constitute proof of what have been officially confirmed therein. This rule apply also to the electronic documents. Nevertheless this rule does not exude the possibility of submitting counterevidence against the contents of those documents (Article 76 § 3 of the Code).

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?

N/A

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?

No.
Pursuant to Article 5 (1) of the Act of 10 May 2018 on the protection of personal data, an entity performing a public task shall not provide the information referred to in Article 15(1) to (3) of Regulation 2016/679 if it serves the purpose of performing a public task and the provision of such information prevents or significantly impedes the proper performance of a public task, and the interest or fundamental rights or freedoms of the person concerned are not superior to the interest resulting from the performance of that public task, or it will violate the protection of classified 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?

According to Article 5 (3) and (4) of the Act on the protection of personal data, an entity performing a public task shall ensure appropriate measures to protect the interest or fundamental rights and freedoms of the person concerned. The entity is obliged to inform the person concerned, upon his/her request, without undue delay, but no later than within one month from the date of receipt of the request, of the grounds for non-performance of the obligations referred to in Article 15(1) to (3) of Regulation 2016/679.
Pursuant to Article 5a of this Act an entity who received personal data from an entity performing a public task does not perform the obligations referred to in Article 15 (1) to (3) of Regulation 2016/679 if the entity that provided the personal data made a request to that extent due to the need to properly perform a public task intended to: 1) prevent crime, identify or prosecute criminal offences or enforce penalties, including to protect against threats to public security and prevent such threats; 2) protect the economic and financial interests of the state.

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?

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.

According to provisions of the Polish Civil Code (Act of 23 April 1964) the State Treasury or an entity of local government or other legal person who by virtue of law exercises public task shall be liable for the damage inflicted by an illegal act or omission committed while exercising the public task (Article 417 § 1 of the Civil Code). Where the exercise of duties within the scope of public task has been commissioned on the basis of an agreement to an entity of local government or to some other legal person, the executor of those duties and the entity of local government or the State Treasury commissioning it shall be held jointly and severally liable for the damage incurred (Article 417 § 2).
Pursuant to the Article 417^1 of the Civil Code if the damage has been inflicted by issuing a final court ruling or a final decision, its redress may be demanded after it has been acknowledged in an appropriate proceeding that the ruling or decision contradict the law unless otherwise provided by separate provisions. It shall also apply to the case where the final ruling or the final decision have been issued on the basis of a normative act incompatible with the Constitution, a ratified international treaty or a statute (§ 2). If the damage has been inflicted by the failure to issue a ruling or a decision where the law provides for a duty to issue them, its redress may be demanded after it has been acknowledged in an appropriate proceeding that the failure to issue the ruling or the decision contradicted the law, unless separate provisions provide otherwise (§ 3).
According to Article 417^2 where an injury to a person has been inflicted by the exercise of the public authority compliant with the law, the injured party may demand a complete or partial redress of it as well as pecuniary compensation for the wrong suffered, where the circumstances and in particular an inability of the injured party to work or his grave financial situation indicate that the reasons of equity require it.

In addition to civil liability, there is also criminal liability in the Polish legal system: according to Article 212 § 1 of the Criminal Code (Act of 6 June 1997), anyone who slanders another person for such conduct or characteristics that may humiliate them in public opinion or expose them to the loss of trust necessary for a given position, profession or type of activity, is subject to a fine or a penalty of restriction of liberty. The prosecution of this crime is based on a private accusation.

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?

We don't have any knowledge of specific safeguards or remedies in case of false information or illegal exchange of information in this context. The general rules shall apply (see answer for question I.7.)

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?

There are judgments of the administrative courts in tax cases concerning the cross-border exchange of information between tax offices (Polish and European or third countries' authorities). Most cases concern the control by an administrative court of the correctness of conducting evidence proceedings by tax authorities (evidence gathered by a Polish authority includes documents and/or information obtained from tax authorities of other countries).
For example in case I FSK 1262/15 the Supreme Administrative Court dismissed the party's plea of failure to carry out evidence because it found that the alleged circumstances of cooperation with an American company had already been the subject of an investigation by the Polish tax and customs authorities, which had received information on that cooperation from the US tax authorities.
In case II FSK 2753/18 the Supreme Administrative Court decided that information from the tax authorities that the applicant was not an Italian tax resident could be regarded as an official document within the meaning of Polish law, which means that it constitutes proof of what was stated in it. Since, therefore, the applicant was not an Italian resident, even though he resided in Italy, he must be considered to have Polish tax resident status and unlimited tax liability in Poland.
In case I FSK 1141/17 the Supreme Administrative Court found that the tax authorities had correctly established that intra-Community supplies of goods (despite the presentation of documents) did not in fact take place. The Court stressed that those findings were made by the Polish tax authorities primarily on the basis of official documents from the tax authorities of other EU Member States.
In case II FSK 2238/15 the Supreme Administrative Court decided that the failure to ask the Cayman authorities for tax information does not constitute an infringement of the law by the

Polish tax authorities, because the practice of the Cayman authorities with regard to the possibility of obtaining tax information on entities registered in the Cayman territory makes it practically impossible to obtain such information despite the agreements concluded.

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?

Background: see Question I.5.

The Voivodship Administrative Court in Warsaw (administrative court of the first instance) in some judgements referred to the judgment in Case C-503/03 only in a context of "a uniform level of control and surveillance of the external borders deriving from the freedom to cross internal borders within the Schengen area" (see for example judgments in case: IV SA/Wa 1048/18; IV SA/Wa 2262/17).

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?

To the best of our knowledge, there are any such judgments of administrative courts.

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?

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).

The provisions of the Tax Ordinance provide some specific solutions concerning cross-border information sharing.
According to the Article 297a § 1 of the Tax Ordinance tax information obtained from Member States of the European Union or files containing such information shall be made available to the tax authorities where the proceedings before the given authority or activities performed by

the given authority are related to the correct determination of the taxable base and of the amount of the tax liability or to the amount of other liabilities that may be pursued at the request of a foreign state in accordance with the provisions on administrative enforcement proceedings.
Tax information obtained from countries not being Member States of the European Union or files containing such information shall be made available in accordance with the rules laid down in § 1 and taking into account double taxation conventions, other ratified international agreements to which the Republic of Poland is a party, and other international agreements to which the European Union is a party (§ 2).
Information may be made available for purposes other than those referred to in § 1 and 2 subject to the consent of the foreign country from which the information was obtained (§ 3).
Files and documents containing the information referred to in § 1 and 2 shall be classified as "tax secret" and shall be provided in accordance with the procedure applicable to documents containing classified information and classified as "restricted" (§ 4).

The other specific legal solution is the suspension of the proceedings.
According to the Article 201 § 1b of the Tax Ordinance the tax authority may suspend the proceedings: 1) if a request is made, based on ratified double taxation conventions or other ratified international agreements to which the Republic of Poland is a party, to the authorities of another state for the provision of information necessary to define or determine the amount of the tax liability, if there are no other circumstances apart from those covered with the request which could be an object of evidence, or 2) if the mutual agreement procedure has been commenced.
According to the Article 70a § 1 of the Tax Ordinance the period of limitation for tax liabilities shall be suspended if establishment or determination of tax liability is possible on the basis of a double taxation agreement or another international agreement to which the Republic of Poland is a party, and the establishment or determination of the amount of that liability by a tax authority depends on whether the authorities of another state provide sufficient information.