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Developing Administrative Law in Europe:

Natural Convergence or Imposed Uniformity?

Setting the Scene: Introduction & Aim of the Seminar

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1. Introduction

It is honor and a privilege to deliver the opening speech in this seminar on 'Developing administrative law in Europe' of the Association of the Councils of State and Supreme Administrative Jurisdiction in the European Union (ACA Europe).

Today we will discuss the growing convergence between the administrative laws of the EU Member States and of the EU itself and it is my task to set the scene of today. In doing so, I will first introduce in quite general terms the developments which have lead to the growing convergence in administrative law in Europe. Some of these developments date from quite some time ago, but others, especially in the area of legislation, are fairly new. Furthermore I will try to give some direction to the discussions of today by suggesting some – in my view important - questions which might be debated afterwards. Moreover, I will try to make clear why these developments are of importance for the Councils of State and other Supreme Administrative Jurisdictions, which have in their MS an advisory function as regards legislation, and therefore for the ACA.

But before I come to these questions, I first have to introduce the topic of the today, the growing convergence of administrative law in Europe.[1] This process is connected to the establishment of – what is now called – the European Union and to the way Union law is generally applied vis-á-vis individuals. The convergence of administrative law in Europe is also enhanced by recommendations of the Council of Europe,[2] but in this speech I will not elaborate on them.
In Union law the application of Union law towards individuals sometimes takes place by EU-institutions, in general the Commission. The most important area in which this so-called *direct application* of Union law is at hand, is the area of competition law. However, in by far most areas of Union law, the application of Union law takes place in a sincere cooperation between two levels, the Union level – at which the Union institutions lay down general applicable rules in the Treaties, regulations, directives and so on – and the level of the Member State – at which level these rules are applied and enforced towards individuals. This cooperative application is also referred to as *shared administration* and the role of the MS when applying Union law is called *indirect application*.

In this system, the administrative law which governs the implementation of Union law is often called *European administrative law*. This term was introduced by the German professor Jürgen Schwarze at the end of the eighties and is now widely used.[3] European administrative law includes both, the administrative law applicable to the direct application of Union law by Union institutions, and the national administrative laws, which are used by the MS when they implement Union law towards individuals.
In this seminar administrative law does not only refer to rules and principles governing the administrative stage of the application of Union law, but also to rules and principles on legal protection in administrative matters (administrative litigation) in Union cases.

In the system of shared administration national administrative law is – so to speak – a 'vehicle' for the effective application of Union law and the effectiveness of this application therefore depend to a large extent on the national administrative laws of the MS. Because of this interdependence it is not at all strange that Union law has already influenced the administrative laws of the MS to a certain extent and that this process is still ongoing.
The harmonization of administrative law in Europe, resulting from this, has been enhanced by both, the case law of the Court of Justice of the EU (CJEU) and increasingly also Union legislation. In the title of the seminar we have used in this respect the terms

[1] See on this development f.i. P. Craig, EU Administrative Law, Oxford: OUP 2006; J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, Europeanization of Public Law, Groningen: Europa Law Publishing 2007; J.-B. Auby & L. Dutheil de la Rochère (éds.), Droit Administratif Européen, Brussels: Bruylant 2007, T. von Danwitz, Europäisches Verwaltungsrechts, Berlin/Heidelberg: Springer Verlag 2008.
[2] For instance as Resolution (77) 31, on the Protection of the Individual in Relation to the Acts of Administrative Authorities, Recommendation No R (80) 2, concerning the Exercise of Discretionary Powers by Administrative Authorities, Recommendation No R (87) 16, on Administrative Procedures Affecting a Large Number of Persons, and Recommendation No R (2000) 10, on Codes of Conduct for Public Officials.
[3] J. Schwarze, Europäisches Verwaltungsrecht, London: Sweet & Maxwell 1988, updated in 2006.

'natural convergence' (convergence related to the case law of the CJEU) and 'imposed uniformity' (convergence prescribed by EU legislation). However, as will become clear in the next section, the convergence related to the case law of the ECJ is to a certain extent also 'imposed'.

2. 'Natural' convergence

The process of convergence of administrative law within Europe is not new. It has been enhanced by both top down and bottom up judge-made influences.

The most important top down influence is the development of *general principles of Union law* by the CJEU since the end of the fifties of the past century.[4] These general principles have been derived by the Court from the general principles common to the laws of the MS and their content is quite similar to, although not always identical with, the equivalent principles of the MS.
Most general principles of Union law apply to the administrative stage, which includes individual decision-making but also rule-making. Nowadays they are generally referred to as principles of good administration. Examples are well-known principles such as equality (including the prohibition of non-discrimination), proportionality, legal certainty and legitimate expectations, the rights of defense and participation, transparency, effectiveness, impartiality and integrity, fairness and so on. Most of them have been codified, some in the Treaties and others in the Charter of Fundamental Rights of the European Union (CFR). In this respect especially Article 41 CFR should be mentioned, because it explicitly codifies several principles of 'good administration'.
Other general principles of Union law, developed by the CJEU, apply to legal protection, namely the principle of effective judicial protection, which includes sub-principles such as impartiality, fair trial, reasonable time et cetera. Also these principle have been codified in the CFR, namely in Article 47 CFR.

General principles are first and foremost binding for the Union institutions. However, they must also be observed by the MS at least when they are *acting in the scope of Union law*. As has been stated by the Court in the case of *Akerberg Fransson* this scope applies both to the unwritten general principles of Union law as to the principles and fundamental rights which are codified in the CFR.[5] I will not go in depth on the precise meaning of the phrase 'acting in the scope of Union law', but it is clear from the case law of the Court that the scope of this phrase is wide and includes *inter alia* the application by MS' authorities and courts of EU-regulations, decisions and directives (including the application of national legislation in which a directive is transposed[6]), the restriction by the MS of free movement rights, the national application of competition law and state aid Treaty provisions, and so on.

[4] See Joined cases 7/56 en 3/57 to 7/57 (Algera), ECR 1957, 120, for the 'discovery' by the CJEU of the first European general principle, namely the principle of legal certainty. The content of the European principle was derived from the national principles of legal certainty of the (at that time 6) MS.
[5] Case C-617/10 (Akerberg Fransson), judgment of 26 February 2013. See also Case C-418/11 (Textdata Software), judgment of 26 September 2013.
[6] And including the application of competences which have been left to the MS when (indirectly) applying or enforcing a directive. See cases Akerberg Fransson and Textdata Software.

So, in practice the MS are already obliged to apply general principles of Union law as at least minimum standards for good administration and effective judicial protection in policy areas such as migration law, environmental law, services law, parts of tax law and customs law and large parts of socio economic law.

A second top down judge-made influence which has contributed to the convergence of administrative law in Europe is the *limitation* in the case law of the CJEU of the application in Union cases of national principles and fundamental rights which offer more protection than the Union equivalent. As most of you probably will know, the application of national principles which offer more protection, such as the Dutch or German principle of legitimate expectations, is limited considerably by the Union principle of effectiveness.[7] Similarly, the application in Union cases of national fundamental rights, that offer more protection than the Union fundamental rights, is limited by the principles of primacy, effectiveness and unity.[8] So, general principles of Union law do increasingly not only offer binding minimum standards, but also maximum standards.

Finally the process of convergence is favored by an important bottom up development, namely the *voluntary adoption* by the MS of Union principles and standards in purely domestic cases.[9] This influence is also referred to as *spontaneous convergence*. Examples of voluntary adoption can be found in most MS. They are concerned with the principles of good administration,[10] but sometimes also with the principle of effective judicial protection. A famous example in the area of judicial protection is offered by the judgment of the House of Lords in the case *M. v. Home Office*. In this case the House decided to extent the *Factortame* rule[11] – according to which the UK rule that precluded national courts from granting an interim junction against the Crown had to be set aside in Union cases – to purely domestic cases.[12] The reason for the decision was that the House wanted to end 'the unhappy situation that while a citizen is entitled to obtain injunctive relief against the Crown to protect its interests under Community law, he cannot do so in respect of other (national) interests which may be just as important'.
Indeed, preventing 'reverse discrimination' of national claims is an important reason for the MS to voluntary adopt Union principles in purely national cases. Another reason may

[7] See f.i. Joined cases 205/82 to 215/82 (Deutsche Milchkontor), ECR 1983, 2633; Case 5/89 (BUG Alutechnik), ECR 1990, I-3453; Case C-24/95 (Alcan), ECR 1997, I-1591; Case C-383/06 to C-385/06 (Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening), ECR I-1561; Case C-568/11 (Agroferm), judgment of 20 June 2013. See Case C-550/07 P (Akzo & Akcros), judgment of 14 September 2010, for a limitation of the national legal professional privilege (as part of the rights of defense) by the Union requirement of unity.
[8] Case C-399/11 (Melloni), judgment of 26 February 2013. To what extent the application of national fundamental rights will be limited by these requirements in practice, is not yet clear.
[9] Cf. R. Caranta, Judicial Protection against the Member States: a New Jus Commune Takes Shape, CMLRev. 1995, p. 702-726; R. Caranta, Learning from our Neighbours: Public Law Remedies Homogenization from Bottom Up, Maastricht Journal of European and Comparative Law 1997(4), p. 220-247; M.L. Fernandez Esteban, National Judges and Community law: the paradox of Two Paradigms of Law, Maastricht Journal 1997(4), p. 143-151.
[10] F.i. Spain has voluntary adopted the Union principle of proportionality in national cases; France, Luxemburg and the Netherlands have adopted parts of the Union rights of defense in national cases.
[11] Case C-213/89 (Factortame), ECR 1990, I-2433.
[12] Weekly Law Report (WLR), 1993, 3, p. 433-448.

be that MS want to avoid the application of two sets of principles within one legal order, namely Union principles in the growing group of cases 'within the scope of Union law', and national principles in the decreasing group of purely domestic cases.

As a consequence of the influences mentioned, the administrative laws of de EU and the MS have converged at the level of principles and this process will continue in future. At the same time – and that is important to note - there are still differences between the MS as regards the recognition of some principles, the precise content of similar principles and especially as regards the detailed rules by which the principles are operationalized in legislation.

3. Imposed uniformity

A more recent development is that the process of convergence of administrative law is also promoted by statutory Union initiatives. This development is visible in many secondary EU laws which aim at *unifying* aspects of national administrative decision and rule-making or national legal protection in *specific EU sectors*. Typical for this statutory unification – and different from the judge-made convergence which was discussed in section 2 - is that the EU laws in question impose sometimes very detailed rules on the MS. Therefore this development is labeled as 'imposed uniformity'.
Examples of imposed uniformity by Union laws (directives, regulations) are several. The 'imposed' rules are concerned with both administrative decision- and rule-making, and (increasingly also) with legal protection.[13]

- *Decision- and/or rule-making*: see f.i. Framework Directive Telecommunication[14] (rules on participation, publication of decisions and review), Services Directive[15] (rules on time limits, duty to state reasons and one-stop-shop), Aarhus Directive[16] (rules on participation and access to information), Modernized Customs Code[17] (f.i. rules on legitimate expectations), Agricultural Regulations (also rules on legitimate expectations[18]), Competition Regulation[19] (rules on several aspects of the rights of defense) and the Regulation on the Protection of the Financial Interest of the EU[20] (rules on the limitation period and on several guarantees as regards measures and sanctions).
- *Legal protection*: f.i. concerning access to the court (Aarhus Directive[21], Services Directive[22]), evidence (numerous provisions in numerous EU laws[23]), the

[13] See for some examples also, P. Craig, A General Law on Administrative Procedure, Legislative Competence and Judicial Competence, European Public Law 10, no. 3 (2013): 503-524, especially 506-509.
[14] Directive 2002/21/EC, as amended by Directive 2009/140.
[15] Directive 2006/123/EC.
[16] Directive 2003/35/EC, amending Directive 85/337/EEC and Directive 96/91/EC.
[17] Regulation (EC) nr. 450/2008.
[18] Regulation (EC) nr. 796/2004.
[19] Regulation nr. 1/2003.
[20] Regulation (EC, Euratom) nr. 2988/95.
[21] Directive 2003/35/EC, amending Directive 85/337/EEC and Directive 96/91/EC, prescribing wide access to the courts for NGOs in environmental matters;

availability of remedies (public procurement[24]) and judicial scrutiny of certain decisions (Recast Directive on common procedures in asylum cases).[25]

About imposed uniformity one can make many (also positive) remarks, but today I will refrain myself to three, more critical remarks. First, this statutory unification is in general a patchwork codification ('codification of bits and pieces'), driven by the specific needs of the sector concerned and lacks a vision on administrative decision-making or legal protection in general. In some areas – for instance the areas covered by the Services Directive and the Aarhus Directive - the imposed rules strongly favor the interests of individuals, while in others – for instance the area of EU-subsidies and customs - they only aim at an efficient administration. From a general perspective on administrative law, this is not very coherent.
Secondly, the imposed rules do not always fit into the national systems of administrative law and are sometimes detrimental to the coherency of national administrative law. An obvious example is the collision between the German *Schutznorm* requirement as constitutional criterion for access to the German administrative courts and the wide access to the court for NGOs, prescribed in the Aarhus Directive in the case of *Trianel*.[26]
Possibly the judicial *ex nunc* examination in asylum cases, prescribed by the – just mentioned - recast Directive on common procedures in asylum cases, will also lead to collisions between Union law and national administrative law. Such examination deviates considerably from the *ex tunc* examination which is – to my knowledge – the common standard for judicial scrutiny by administrative courts in most MS.
Thirdly, in some areas - for instance in public procurement matters and the area covered by the Aarhus Directive - the imposed rules have led to a juridification of procedural matters and to many 'procedural' preliminary references to the CJEU. One may wonder whether that is a good development.

Especially my first and second remarks lead to the question whether we are in need for a more general administrative law in Union cases. As regards this question there are also two important initiatives.

In the first place, on 15 January 2013 the European Parliament has adopted a Resolution in which it requests the Commission to submit a proposal for a regulation on a *European Law of Administrative Procedure of the EU*.[27] In the regulation the Commission should codify nine general principles that govern the EU administration, including for instance the principles of lawfulness, equal treatment, consistency and legitimate expectations,

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[22] Directive 2006/123/EC, prescribing the system of *silencio positivo* in case of 'administrative silence' when deciding on applications for services permits.
[23] F.i. Directive 2006/54/EC, concerning the burden of proof in cases regarding equal treatment of men and women.
[24] Directive 89/665/EEC, as amended by Directive 2007/66/EC, prescribing the remedies of annulment, interim relief and of liability for damages.
[25] Recast Directive 2013/32/EU, prescribing a full and *ex nunc* examination of both facts and points of law in appeals procedures against asylum decisions before a court or tribunal of first instance.
[26] Case C-115/09 (Trianel), ECR 2011, I-3673.
[27] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024 (INI)).

transparency, fairness and efficiency and service. Furthermore the European regulation should contain quite detailed rules on administrative decision-making. The law will be applicable only to the direct administration of Union law by the EU institutions, but the recommendation explicitly also aims at enhancing spontaneous convergence of national administrative law. To my expectation such convergence is likely to happen because the future codification and also the case law of the CJEU as regards it probably will have a spill-over effect in national cases within the scope of Union law.

A second important initiative is the *Research Network on EU Administrative Law (RENEUAL)*. This academic network – of which the key note speakers of today, Paul Craig and Jean-Bernard Auby are important members - has already drafted a concept version of Model Rules on EU Administrative Procedures. The work of ReNEUAL is still in progress, but a more definite version of the Model Rules is already foreseen in the spring of 2014.
The Model Rules will exist of six books on more or less every aspect of administrative law with an exception of legal protection. The titles of the books are: General Provisions (I); Administrative Rulemaking (II); Unilateral Single Case Decision-Making (III); Contracts (IV) Mutual assistance (V); Information management (VI). These rules will – at least that is the ambition - partly not only be applicable to the EU administration in the strict sense ('direct application'), but also to the national administrations when they act in the scope of Union law. Furthermore, the rules do not only codify general principles in general terms, but will also contain, sometimes detailed, provisions which aim at the operationalization of these principles in the specific context.
Of course, an academic piece of work such as the Model Rules is not legally binding for the MS (although it has this ambition). But the project is supported by both the European Parliament and the Commission. So, it deserves to be taken very seriously.

<u>Questions & discussions</u>

All these developments will be elaborated in further detail in the key note speeches of Paul Craig and Jean-Bernard Auby. They raise many questions which may be addressed by ACA Europe or by individual Councils of State and Supreme administrative Jurisdictions. Of course, one can argue that the developments take place at the Union level and at that level the national Councils of State have no official position. And, of course, one may be of the opinion that national Councils of State have only a reactive role and should restrict themselves to commenting on national statutes in which the Union rules mentioned are or will be implemented.
But, as the Councils of State are the experts *par excellence* as regards the quality of legislation in general and as regards the quality of legislation on administrative and judicial procedures in particular, the ambitions could possibly also be a bit higher. From that perspective it is perhaps possible to develop a more or less common vision on – and a more proactive attitude towards - these developments. So, perhaps the most important question which will be addressed in this seminar, is: how can these developments be promoted or guided and which instruments can be used for this purpose?

Before we come to this question, several other preliminary issues may be addressed. They are partly about awareness of these developments, which includes the question as to what extent convergence of the EU and national administrative laws is already occurring and to what extent the administrative laws of the MS and the EU still diverge. However, most questions are concerned with the assessment of the developments. They include the following questions:

- First, should voluntary adoption of EU principles be encouraged by the Councils of State in their advisory function? Is this already a matter of attention in the Councils of State's advices and/or should it be?
- Secondly, how is the 'patchwork' Europeanization, mentioned in section 3, by Union legislation in specific sectors evaluated? Is this accepted as a fact of life or should it be guided by a more common view on administrative law, possibly enhanced by the Councils of State?
- Thirdly, as a possible outcome of the previous question, is a more general codification of administrative law at the Union level desirable and – if so - to what extent:
  - only of general principles in general terms or more in detail?
  - only of direct EU administration by the Union institutions or also of indirect administration of Union law by the MS, or even of national administrative law in general?
- And, fourthly, should a more general codification also extent to matters of national legal protection and judicial procedures?

I think that these questions will give enough food for discussion and debate. Therefore I am looking forward to the discussions of today.

Thank you for your attention.