

Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?

First Round Table: Principles of Good Governance Common to Administrative Law in Europe

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1 Background Precepts

- 1) This paper will give a brief overview of the rationale for and development of general principles of law, which constitute the legal principles of good governance fashioned primarily by the CJEU, albeit with supplementation from the EU legislature. The extent to which these principles have led to an excessive drive for uniformity, and the extent to which there is growing convergence, will then be tested in more detail by looking closely at issues concerning the EU law of due process and the extent to which the existing admixture of Treaty provisions, case law and EU legislation should be supplemented by a general law on administrative procedure.
- 2) The sources of EU administrative law are eclectic. They are to be found primarily in the Treaty, EU legislation, the case law of the EU courts and decisions made by the European Ombudsman. The administrative law of the Member States has moreover been influential in shaping the EU regime. The Treaty contains Articles that deal with principles, both procedural and substantive, which are directly relevant for judicial review, see, e.g., Article 296 TFEU and the duty to give reasons; Article 15 TFEU that deals with access to information; Article 18 TFEU that contains a general proscription of discrimination on the grounds of nationality; Article 157 TFEU that prohibits discrimination on the grounds of gender. EU legislation made pursuant to the Treaty may also deal with the principles of judicial review. This legislation may flesh out a principle contained in a Treaty article. This was the case in relation to the legislation adopted pursuant to Article 15 TFEU, dealing with access to information. EU legislation may also establish a code of administrative procedure for a particular area. The EU courts have however made the major contribution to the development of administrative law principles. They have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice into the Treaty, and used them as the foundation for judicial review under Articles 263 or 267 TFEU.
- 3) The *travaux préparatoires* for the original Rome Treaty were not available when the ECJ developed the principles of EU administrative law. The influence of French juristic thought is nonetheless clearly imprinted on the grounds of review in Article 263 TFEU. The four heads of review, lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application and misuse of power, resonate with the French mode of administrative law thought.

- 4) The ECJ and later the CFI nonetheless had considerable discretion in shaping the tools of judicial review. This stemmed in part from the fact that while French influence might have dominated the choice of grounds for review, these grounds were then applied within a Community of six Member States. Principles of administrative law and modes of thought in Member States other than France naturally exercised influence on the ECJ's emerging jurisprudence. German thought came to exert considerable influence in this respect.
- 5) The judicial discretion in developing the grounds of review also stemmed in part from the very fact that they are open-textured. This was especially so with respect to the second and third of the categories. Infringement of an essential procedural requirement could be read in a number of ways and gave ample latitude to the EU judiciary to develop it as they saw fit. This was *a fortiori* the case with respect to the third ground of review, infringement of the Treaty or any rule of law relating to its application. The intent might have been to do nothing more than ensure that Commission decision-making should have to comply not only with the primary Treaty articles, but also regulations, directives and decisions passed pursuant thereto. If this had been the intent it could however have been expressed more simply and clearly. The intent might alternatively have been to capture not only compliance with secondary legislation, but also with other 'rules of law relating to the application' of the Treaty that might be developed by the courts. In any event, the very ambiguity in the phrase provided the ECJ with a window through which to justify the imposition of administrative law principles as grounds of review.
- 6) The ECJ was however 'pushing at an open door' when developing these principles. Basic precepts of administrative legality were clearly required in the new Community legal order. If the ECJ had not created them then national courts would have been extremely critical of the EEC for not providing the requisite protections that were analogous to those within Member States. This was more especially so given that the EEC at the outset could and did have a marked impact on individuals and undertakings, both through direct administrative action in the form of decisions concerning matters such as competition and state aids, and in relation to the emerging pattern of shared administration that was to be the norm for service delivery in fields as diverse as agriculture, customs, utilities regulation and the structural funds.
- 7) It will be argued that the existing body of EU administrative law principles does not demand excessive uniformity, but that it does almost inevitably require some modification of some existing principles in some Member States, precisely because the general principles of law have to be crafted for an EU with 28 states. This proposition does not however mean that the content of particular EU administrative law principles is immune from criticism.

2 Status Quo: To What Extent is their Already Convergence between EU Administrative Law and National Administrative Law

- 8) Vertical Dimension: There is, other things being equal, some greater convergence between national systems of administrative law than there was prior to the EU, by reason of the simple fact that EU general principles of law bind Member States when they act within the scope of EU law. It follows that all 28 Member States must apply precepts of, for example, proportionality, legal certainty, legitimate expectations, fundamental rights, due process and the like, irrespective of whether these norms exist within a particular system of national administrative law. This is a mandatory obligation, it is not voluntary, and from the perspective of EU law all organs of the state have a duty to ensure that general principles of law are applied correctly within a particular national legal order. This would be equally true for Councils of State acting in an advisory function: insofar as they give advice they will be under an obligation to ensure that the advice thus given coheres with EU law.
- 9) Horizontal Dimension: it would nonetheless be mistaken to imagine that this has led to uniformity in the procedural and substantive norms that apply in national administrative law regimes. The extent to which such commonality exists depends in part on the level of abstraction with which one poses the question. Thus at an abstract level all national regimes of administrative law have principles of review designed to control error of law, error of fact, discretion, fair procedures and the like. There is nonetheless still significant divergence between systems concerning the more detailed meaning of some such precepts. Three brief examples. First, the very considerable difference between common law and civil law approaches to the damages liability of public bodies, both when there is an element of fault and when there is not. Secondly, the detailed aspects of due process, the fact that there is a right of access to the file, conceptualized as being integral to the rights of the defence, in EU law and some national legal systems, but not in common law regimes, both before the initial determination is made and when it is challenged via judicial review, has a marked impact on the initial hearing before the public body and the subsequent challenge by way of judicial review. Thirdly, courts in civil law countries and the EU generally regard it as unthinkable that review for error of law should be anything other than substitution of judgment by the reviewing court, with no leeway being accorded to the primary decision-maker over the meaning given to the legal term. Common law regimes are more nuanced in this respect, (see USA and Canada). There is also some evidence of this in the UK, at least where the initial determination has been made by a lower judicial type body that has expertise in the particular area, see *Cart* [2011] UKSC 28, and *Jones* [2013] UKSC 19 in the UK Supreme Court.

3 Looking to the Future: To What Extent is More General Codification at EU Level Desirable, at what level of detail and should it bind only EU Institutions or also Member States when they act in the sphere of EU law

- 10) The initial premise to the argument in this section is there is no a priori reason why there should be more codification at EU level. It is not in that sense per se a good thing. If greater 'codification' is to be warranted it must be because there are good practical and normative arguments as to why this should be so in relation to a particular aspect of administrative law. This approach can be tested by considering recent developments/initiatives in relation to a general law on process rights in the EU.
- 11) The desirability of a general law to regulate administrative procedure has been debated for some time in the academic literature. The Committee on Legal Affairs of the European Parliament passed a resolution arguing in favour of the development of such a law, which would apply to all EU institutions, agencies, offices and bodies in relation to direct administration and individual administrative decisions, and this has been affirmed by resolution of the European Parliament. The proposed EU law would establish default principles of administrative procedure where no sector-specific rule existed, but such sectoral rules should not provide less protection than the general procedural law. The proposal is for a set of principles such as legality, proportionality, non-discrimination, legitimate expectations and the like to be set out a relatively high level of generality, with more detailed specification of the process rights that should be applicable in terms of hearings, access to the file, reason giving, rights of the defence and the like. The proposals advanced by ReNEUAL, a research network on EU administrative law, are more far-reaching. They cover procedures relating to rule-making, contracts and mutual assistance between national administrations, and information management as well as individualized decisions. ReNEUAL has produced two versions of the proposal as it relates to single case decision-making, the difference being that Member States would be bound when they act in the scope of EU law under Plan A, whereas under Plan B they would not.
- 12) The principal arguments *in favour* of such a law have been advanced by Jacques Ziller and Oriol Mir-Puigpelat and developed by the ReNEUAL project: it can enhance the clarity of, and facilitate access, to the law; increase the coherence of principles and procedures; set up default procedures to fill gaps in existing law; and establish the functions of administrative procedure. A general law could therefore function as a boilerplate, which could be supplemented by more sector-specific norms that address the needs of particular subject matter areas, and would not. This is more especially so given the prevalence of shared or composite administration in the delivery of EU policy, where there is often uncertainty as to the procedural obligations imposed on national and EU administration respectively, in circumstances where both play a role in the final determination. The current rules on EU administrative law are the result of an admixture of case law combined with sector specific legislation, with the result that there is often significant fragmentation as between sectors, and incompleteness of the relevant procedural precepts within any one sector. This is evident in relation to

matters such as how an application should be made for a benefit under EU law, the nature of the hearing that should be provided, and the relative responsibilities in this regard as between the EU and national administrations in those instances governed by shared administration. The conceptual reality is that most procedural issues are not specific to a single policy area, but the practical reality is that few issues of EU administrative procedure law are subject to a systematic approach across policy areas, with the consequence that most transversal issues are not addressed in a transversal manner.

- 13) The arguments *against* a general law on administrative procedure vary, but two principal strands can be discerned: it is not necessary, and would have detrimental effect on pluralism in administrative procedure in the Member States. The former argument is based on the assumption that the current law is adequate. This conception of adequacy is itself premised on two related assumptions, viz, that the rules of administrative procedure are fine in relation to the types of decision-making to which they are applicable, and that they do not or should not be extended beyond those areas. These assumptions are, however, far less secure the closer we test their conceptual and empirical foundations.
- 14) The legal status quo is that the precepts of administrative procedure apply to administrative decisions that affect an individual or a small number of individuals, through withdrawal of a benefit, imposition of a penalty and the like. The EU courts have done a good job in this area. Their activist jurisprudence has provided the requisites of due process. There is nonetheless much room for further improvement in this area. Most EU lawyers, even specialists in this area, would be hard pressed to articulate in detail the applicable rules on a range of issues that are central to single case decision-making. These include: the procedural norms that regulate the way in which applications should be made; the duties of the administration when in receipt of an application; the way in which complaints should be made; the duties of the administration when managing an administrative procedure; the administration's powers of investigation and inspection; the rules that govern who can be a party to a hearing; the nature of the hearing that must be afforded; and the due process rules that pertain respectively to the EU and national administration when both play a central role in the final decision. Now to be sure the well-trained EU lawyer will, given sufficient time, be able to work out the answers to at least some of these issues. We should not however rest content with a system in which lawyers have to fathom out the answers to such basic issues afresh each time. Nor should we rest content with a system in which hard-pressed administrators and draft legislators have to patch together a package of procedural rules, even assuming that they draw on what are perceived to be relevant rules from analogous areas. There is little doubt that the existing regime could be significantly improved for legal advisers, those devising legislation and those applying it if there was some boilerplate general law of the kind adumbrated in the previous section, which will be explicated in more detail below.
- 15) The other strand of the adequacy argument, to the effect that there is no need for procedural rules beyond their present confines, is equally contestable. Thus the ReNEUAL project on administrative procedure covers, in addition to single case

decision-making, rule-making, public contracts, procedures of mutual assistance between the EU and national administration, as well as between national administrations when they act in the scope of EU law, and information management. Rule-making is not covered by the ECJ's existing law of procedural due process; the procedural norms that should govern public contracts are not well developed outside the confines of public procurement; procedures for mutual assistance exist, but there has been little considered thought as to the general principles that should underlie this area; and the rules on information management are highly complex and difficult to discern, even though information exchange is increasingly common as between national administrations and as between them and the EU administration, and even though it can have significant implications for privacy rights of the individuals concerned.

- 16) Thus, to take but one example, there has been vibrant debate as to whether there should be greater procedural protection for rule-making. The EU courts' jurisprudence on access embodies a normative choice. The right to be heard in relation to individual determinations is regarded as fundamental; it is not dependent on a foundation in a Treaty article, regulation or directive; Union norms will be read subject to the right; and the courts can raise the right of their own motion. The courts' stance in relation to participation or consultation in relation to norms of a legislative nature is markedly different. Such rights will only exist where there is foundation in a Treaty article, regulation, directive or decision; the courts will not lightly interpret these norms as giving rise to such rights; and the fact of participation in their making will not increase the applicant's chance of being accorded standing to seek judicial review. This distinction is contestable, since it may be fortuitous whether a person is affected through an individualized determination, or through a rule. The individualized determination may in any event have precedential impact and establish a rule or principle for a category of cases that impact on a broad range of people: policy can be developed by ad hoc adjudication as well as through rules. Furthermore, the twin rationales used to justify procedural rights in individual adjudication, instrumental and non-instrumental or dignitarian, are equally applicable in the context of rulemaking. According hearing rights in adjudication does not make up for the absence of participation rights when a norm of a legislative nature is made, since while it will enable the individual to be heard as to the application of the rule, it will not enable any input into the content of the rule itself. It should in any event be noted that the EU courts' jurisprudence, even if contestable, is only authority for the proposition that such process must be found in Treaty provisions or EU legislation, and that it will not be judicially developed through general principles of law. The ReNEUAL proposal is however cast in just such terms, as procedural norms that could be enshrined in EU legislation, subject to possible modification through sector specific provisions.
- 17) The procedure to govern mutual assistance provides a further example of an area that will benefit from enhanced procedural clarity. Networks abound in the EU. The Commission will use national networks in policy-making provided that it has a firm hand on the reins of power and provided also that the national networks do not have

formal powers of their own. It is, however, in the sphere of enforcement that such networks are most prevalent. It is not fortuitous that the most formal networks exist where there is the strongest incentive for effective enforcement of EU law across national borders. The Commission will normally be in the driving seat and will press for measures that enhance the enforcement capacities of the relevant national agencies to render the Union regulatory regime more effective. A network of national enforcement agencies may be created as a result of EU legislation, or the EU may use existing agencies. The national agencies are willing to surrender some enforcement autonomy on their own territory, since they gain reciprocal powers of cross-border enforcement in other Member States. This is exemplified by the regimes in customs and agriculture, where problems of cross-border fraud have been especially prevalent. Such legislation will commonly include provisions concerning request for assistance between such authorities, obligations to make information available to another authority and to conduct administrative enquiries concerning operations that constitute breach of the relevant regulatory scheme. EU legislation of this kind will in addition often make provision not only for the horizontal dimension of network cooperation, but also for the vertical dimension concerning relations between the national authorities and the Commission. While some networks have a legislative foundation, others do not. In either instance the procedural principles developed by ReNEUAL will assist in the crafting of the procedural principles that should apply in such areas, subject to the normal caveat that sector specific legislation may modify such norms.

- 18) Let us then turn to the *second argument raised against* a general EU law on administrative procedure, which is that it can stifle national diversity and plurality of value. The proposal from the European Parliament is limited to direct administration by EU institutions, bodies, offices and agencies. If EU procedural norms are confined to direct administration then they will, however, only be applicable to circa 20% of EU policy delivery, since the other 80% takes the form of shared administration. The ReNEUAL proposal applies to all EU administration, whether direct or shared/composite. ReNEUAL in addition produced two versions of the part of the proposal relating to single case decision-making, the difference being that Member States would be bound when they act in the scope of EU law under Plan A, whereas under Plan B they would not. The EU has no competence over purely national action, which would continue to be determined by whatever procedural rules currently exist.
- 19) The proposals from both the European Parliament and ReNEUAL were the result of comparative study of existing national procedural regimes. They should not be regarded as the imposition of some 'EU' solution fashioned in disregard of national procedural norms. Member States are already bound by general principles of EU law when they act within the sphere of EU law. National administrations that operate within a regime of shared or composite administration are already obliged to comply with the principles of fair procedure enunciated by the EU courts, as well as sector specific legislation. Decisions made by national agencies can therefore be challenged via Article 267 TFEU if it is felt that they do not comply with such precepts.

- 20) The salient difference between the status quo and Plan A of the ReNEUAL proposal is that under the current regime a Member State can meet the process requirements of general principles of EU law through application of national administrative law norms, whereas under Plan A in relation to single case decision-making it would have to comply with the procedural requirements laid down in the relevant EU provisions.
- 21) The advantage of Plan A is that it provides those affected by Member State administrative decisions made in the context of EU law with a clear set of procedural rights and also renders it easier for national administration to understand and apply the procedural obligations incumbent on them. They do not have to determine afresh on each occasion whether national procedural rules in court decisions, national codes of procedure or an admixture of the two, suffice to meet the requirements of EU law. The preference for inclusion of Member State administrations was driven by the legal and political reality of shared administration, a reality repeatedly sanctioned by and through EU legislation agreed to by the Member States. If a general law on administrative procedure is to apply to shared/composite administration then to draft such rules without consideration of the national component of the shared schema leads to rules that are more complex, as exemplified by the fact that Plan B is more complex in certain respects than Plan A. If decisions are made to which EU and national administrations contribute albeit in various ways under the different schemes of shared administration, then to confine the procedural rules to one part of the shared schema is never going to make much sense, since it presumes that the respective contributions of the EU and national administration to the relevant decision can be hermetically sealed or differentiated in a way that is often belied by the legal and administrative reality of such schema. The exclusion of national administration from the reach of such rules will make life more complex for claimants, national administration and EU administration. They will have to piece together the appropriate procedural obligations from the general EU procedural law as it applies to the EU administration, with the addition of national procedural norms, insofar as they are consonant with EU general principles of law, being applicable to the national element of the determination. It will inevitably be more difficult to decide, for example, on the type of hearing that is appropriate at the respective levels. The relevant provisions of the ReNEUAL proposals are not therefore intended to limit national diversity, but to reflect the existing regime of shared administration, rather than a world that does not exist.
- 22) Nor in reality is there anything in the content of the proposals that should cause alarm in this respect. The rules were drafted fully cognizant of the analogous provisions on applications, complaints, inspections, hearings and the like contained in existing EU legislation and in national procedural codes. Now to be sure there may well be particular detailed provisions that differ from those in relevant national legislation. But while national diversity is an important value, it should surely be kept in perspective. In an EU of 28, it is commonly the case that Member States have to make compromises in relation to all manner of substantive issues related to trade, goods, services and the like. There is no a priori reason to place national rules of administrative procedure on a higher plane in this regard.

23) The members of ReNEUAL were nonetheless cognizant that there might be doubts as to whether the EU has legal competence to enact a general law on administrative procedure that is applicable to Member States as well as the EU, and that some might feel that when Member States act in the scope of EU law matters should be left to be regulated by national rules on administrative procedure, subject to the duty that these procedures comply with the general principles of EU law laid down by the CJEU, and/or any EU sector specific legislation. This is the rationale for Plan B, wherein the general procedural rules concerning single case decision-making do not apply to national administration, unless EU sector specific legislation renders the rules applicable, or a Member State chooses to adopt them.

4 Competence: What Instruments can be used to advance these ends

24) The previous discussion was predicated on the assumption that the EU has the competence to enact a general law on administrative procedure and that if it does it can be applicable to EU institutions and Member States. This raises complex issues that have been examined elsewhere, the essentials of which are as follows. It is generally accepted that the EU can stipulate norms of administrative procedure that apply to EU institutions *and* national agencies pursuant to specific Treaty articles dealing with different subject matter areas. The sector-specific legislation is often very detailed and mandatory. This sector-specific legislation applicable to Member States is not dependent on any express power to make regulations or directives relating to administrative procedure applicable at national level. The relevant Treaty articles simply contain an explicit competence to make regulations or directives to govern the area, and this was interpreted to include rules relating to national administrative procedure. It cannot therefore plausibly be argued that express Treaty authorization is a condition precedent for competence to make norms regulating national administrative procedure. The underlying principle is that such norms can be made pursuant to a power to make regulations or directives in the relevant area, and will be regarded as legitimate if they are integral to that regulatory regime.

25) A general law on administrative procedure might be grounded in Article 298 TFEU, which was a new addition to the Lisbon Treaty. It provides that, *1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.*

26) Its origins can be traced like much else in the Lisbon Treaty to the Convention on the Future of Europe and the final report of Working Group V on complementary competences, which recommended inclusion of such a clause. These recommendations must be seen in the light of two earlier working documents that

shaped the conclusions. Analysis of the final report and the working documents reveals that there were two dimensions to Article 298, which was in that sense Janus-faced. It was concerned in part with the internal workings of EU administration, the efficiency dimension, and in part with the external impact of EU administration on those affected by it, the procedural rights dimension. There are three possible interpretations of Article 298, as determined by its wording and the *travaux préparatoires*.

- 27) The first and narrowest interpretation would be that Article 298 only empowers the making of regulations relating to the internal workings of the EU institutions, bodies, offices and agencies, and does not authorize regulations specifying process rights for those affected by decisions made by such institutions. The foundation for this view is that Article 298(2) states that the regulations should achieve the end specified in Article 298(1), this being an ‘open, efficient and independent administration’. There are, however, difficulties with this narrow reading: it does not fit with the historical documentation, which clearly provides for an external as well as an internal dimension to Article 298; if Article 298 is limited in this manner then it would be redundant, since the objectives can be attained through Article 336 TFEU, which is the legal foundation for the Staff Regulations; and institutional reforms to improve accountability and efficiency post the resignation of the Santer Commission were achieved when Article 298 TFEU did not exist, the conclusion being that the EU had competence to introduce such measures prior to the creation of Article 298.
- 28) The second interpretation of Article 298 TFEU would be that it provides the foundation for a law of administrative procedure, but it would only be applicable to EU institutions, bodies, offices and agencies, and not Member State administration when it acts in the context of shared administration. The second interpretation appears to be that of the European Parliament and better reflects the framers’ intent, since it is premised on Article 298 having an external as well as an internal dimension.
- 29) The third interpretation builds on the second, but extends it to cover national administration when it acts within the scope of EU law. The textual support for this argument would focus on the wording of Article 298(1), which provides that ‘the institutions, bodies, offices and agencies of the Union shall have the *support* of an open, efficient and independent *European* administration’. This wording can accommodate national administration when it operates within the sphere of EU law, more especially because the latter part of the sentence is couched in terms of European not EU administration. It is not strained to read this to mean that the EU institutions must have support from an open, efficient and independent European administration, connoting both EU bureaucrats *stricto sensu* and also national bureaucrats when they operate in the sphere of EU law. This textual reading coheres with reality, which is that in very many areas of shared administration the national administrations have formal legal duties pursuant to EU policy, which cannot successfully be delivered unless the national administration is open, efficient and independent.
- 30) Article 352 TFEU is the alternative foundation for a general law on administrative procedure. It provides that if action by the EU should prove necessary, within the

framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, then the Council acting unanimously on a Commission proposal can take the appropriate measures, after obtaining the consent of the European Parliament.

- 31) The conditions in Article 352(1) could without difficulty be met in this context. The Treaty values, which include the rule of law, are specified in Article 2 TEU and the Treaty objectives are delineated in Article 3 TEU. The two Treaty provisions are intimately connected. Principles of administrative procedure are central to the rule of law, and therefore satisfy this condition within Article 352.
- 32) The articulation of such principles through a general law can be regarded as necessary within the framework of EU policies in general, not just in a specific substantive area. It can be argued with justification that none of the objectives in Article 3 TEU could be adequately achieved without the existence of such principles, the content, clarity and transparency of which would be enhanced through promulgation of a general law. The principles of administrative procedure should also be capable of being applied to national administrations when they act within the sphere of EU law. In many instances national administrations are truly agents or partners with the Commission in delivering EU policies, and the objectives of applying precepts of administrative procedure to EU bodies *stricto sensu* would be undermined if they were not also applicable to national agencies formally integrated into the delivery of EU policy.