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THE RENEUAL MODEL RULES – MAIN POINTS OF THE GERMAN DISCUSSION

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1. INTRODUCTION

The "ReNEUAL Model Rules on EU Administrative Procedure" (hereafter referred to as ReNMR) have received special attention in Germany and led to an intense discussion, in regards to both: the relation between the German and European administrative procedure law and the various aspects imminent in the system of the German procedure law. On 5 and 6 November 2015, a conference took place at the highest German administrative court, the Federal Administrative Court – or "Bundesverwaltungsgericht" in Leipzig. On this occasion the ReNMR were presented in various lectures to the German expert audience. The conference presentations are compiled in a conference transcript.

The following contribution shall give an overview of the perceived value of the ReNMR and the discussion around this model in Germany in three parts: firstly, we will give a brief overview of the German administrative procedure law. We will continue with some remarks on the discussion of the ReNMR in Germany and – thirdly – we shall close with a few comments on the possible effects of the Model Rules on Germany.

2. OVERVIEW OF THE GERMAN ADMINISTRATIVE PROCEDURE LAW

To begin, we will describe very briefly the landscape of the German administrative procedure law. Without knowing the role and significance of administrative procedure law within the German legal system, the German discussion on ReNEUAL cannot be understood properly.

International administrative science distinguishes between different types of administrative culture, Germany belonging to the so-called legalistic type of administrative culture.[1] This means that all action of officials and their decisions are strongly determined and controlled by legal norms and administrative provisions. The essential nature of the legalistic administrative culture means that by definition administrative procedure law has a strong significance. Accordingly, in Germany, the legal regulation of administrative procedures is differentiated horizontally and vertically:

- The horizontal perspective is firstly divided into the so-called three pillars of administrative procedure law,[2] and secondly into general and specific procedural law.[3] The first two of the three pillars cover codification of two specific policy areas; the tax administration[4] and the social administration.[5] The third pillar consists of the codification of procedural law for all other administrative areas; it is the so-called general administrative procedure law.

1 See König 2014, 13 (19–22).
2 Cf. Schmidt-Assmann 2008, § 27 (12).
3 Ziekow 2006, 247.
4 Fiscal Code.
5 Book X of the Social Insurance Code.

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This general administrative procedure law is stipulated in the Administrative Procedure Acts of the Federation and of the 16 federal states, the so called "Länder". This article will refer only to this general administrative procedure law.

- The second horizontal differentiation is related to the distinction between general administrative procedure law and specific administrative procedure law. In addition to the provisions of the Administrative Procedure Act (APA), many specific administrative laws, for example the environmental law, include special provisions related to administrative procedure. This special administrative procedure law takes precedence over the APA.[6] However, the specific procedural provisions never provide for a comprehensive regulation of the administrative procedure in full; so for issues of administrative procedure that are not covered therein, the APA applies.

The vertical differentiation relates to the federal structure of Germany: the Federal Government and the 16 Länder. As per the German constitution, the Federal Government and the Länder have separate administrative functions.[7] This is why the Federal Government and each of the federal states have their own particular Administrative Procedure Acts. Nonetheless, on a voluntary basis, the Federation and the states develop their Administrative Procedure Acts via "the concept of simultaneous legislation" in parallel with nearly identical general laws, thereby easing the application of the law and avoiding any divergent developments.

Because of this horizontal and vertical differentiation of German administrative procedure law, from the beginning, the legal discussion is characterized by the comparison of the sectoral and federal legal subsystems, the necessity to coordinate between these partial legal orders and, in addition, is shaped by the need to examine whether any given subsystem should adopt innovations from another subsystem.

From a vertical perspective, the EU and Germany both face the complex situation of having two layers, a superordinate one in the Union or the Federation and a subordinate layer of Member States. Horizontally they both face an intricate mosaic of specific regulations and gaps not covered by specific regulations. Therefore, the approach of the ReNMR is very familiar to the German way of thinking on procedural law because the ReNMR also follow an approach of 'innovative codification'.[8] The Model Rules bring together in one source numerous existing principles which are usually scattered across different laws and regulations as well as in the case law of courts.[9]

[6] Ziekow 2013, § 1 margin ref. 17–20.

[7] Cf. Art. 83 sqq. German Basic Law.

[8] ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book I (4), (17).

[9] ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book I (4), (17).

3. DISCUSSION OF THE RENEUAL MODEL RULES IN GERMANY

3.1 General Notes

As already mentioned, the approach of the ReNMR corresponds to the development of German administrative procedure law to a great extent. The senior official responsible for the further legal development of the APA has concluded that the Model rules "basically meet German requirements".[10] The idea that in a multi-level system, the administrative process of the supranational level, that is the EU administration, is bound to codified legal rules, and that the other levels, here the Member States, have their own administrative procedure rules corresponds to the German tradition. The President of the German Federal Administrative Court has connected these to the idea of competition, the exchange of arguments, and learning from the best solutions,[11] which all is deeply rooted in the German federalism. For a long time, these ideas have been a driving force for the legal development in Germany. The principle is to analyse the different legal subsystems and through comparative analysis identify congruent components and extract the best elements in order to establish an optimal system on a higher level, one which subsequently establishes a set of propositions to guide the further development of the different legal subsystems. This approach follows the "counterflow principle".

It is therefore no surprise that in Germany the ReNMR were unanimously received very positively in both science[12] and legal practice.[13] Criticisms and resulting debate are primarily limited to individual questions. Therefore, in the following, we will give an overview of the key aspects of the discussions within Germany on the single books of the ReNMR.

3.2. Aspects of the Single Books

3.2.1. Preamble and Book I (General Provisions)

In regard to the relation between EU law and Member State law the ReNEUAL drafters opted for an asymmetric scope of application, generally limiting it to the EU authorities while excluding administrative actions of the Member States' authorities.[14] To the Member States the Model Rules are applicable only if sector-specific law renders them applicable[15] or if they apply as defined in Articles V-1 and VI-1.[16]

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[10] Cf. Schmitz 2016, 56 (61).
[11] Cf. Rennert 2016a, 69 (71).
[12] Cf. Augsberg 2017, 1 (3).
[13] Cf. Rennert 2016a, 69 (72); Stüer 2016, 100 (105).
[14] Cf. ReNEUAL Model Rules – 2014 online publication, 2014, Explanations to Book I (4).
[15] Article I-1 (2) MR.
[16] Article I-1 (3) MR.

As far as Member State's law provides for discretion concerning the concrete design of administrative procedures by the competent authorities or leaves normative gaps, Article I-3 reminds Member States' officials that they can find guidance in the ReNMR. Thereby, officials can set up and apply their procedures under their own Member State law yet in accordance with European best practices.[17]

The core elements of these application frameworks of the Model Rules correspond with the relationship between the administrative procedure acts of the Federation and the Länder in Germany. However, concerns have been voiced with regards to the principle of legal clarity. The recommendations of Articles 1 to 3 ReNMR that Member State authorities may use these model rules as guidance when implementing Union law in accordance with their national procedural law may risk creating an unclear blend of legal systems, a "hybrid law".[18] Going even further, the concern has been expressed that this might be an attempt to cover up the lacking competence of the EU for national administrative processes and bring about a convergence of the national administrative legal systems.[19] On the other hand, voices have also been raised to point out that such convergence is not enforced, it is but a mere offer.[20]

3.2.2. Book II (Administrative Rulemaking)

Book II addresses rule-making procedures by EU authorities acting in an executive capacity. As a result of its narrow interpretation of administrative procedure in § 9 APA, Germany lacks a general regulation on administrative rulemaking in its Administrative Procedure Act. Some regulations comparable to Book II of the Model Rules can be found in the joint rules of procedure of the federal ministries (GGO). Yet, these joint rules of procedure do not have the binding effect of an act.

While the legal regulation of administrative rulemaking procedures in Germany has long been discussed, it has not been regarded as being necessary.[21] Still, the Model Rules in Book II are seen as a reasonable proposition,[22] just not yet fully convincing.[23] Especially the central focus given to consultation and participation is seen as too narrow.[24] Thus, criticism has been voiced over:

- the absence of regulations on the course of procedures, especially the initiation and the end of the rulemaking procedure;[25]

[17] ReNEUAL Model Rules – 2014 online publication, 2014, Explanations to Book I (4).
[18] Cf. Ellerbrok 2016, 6.
[19] On bottom-up convergence in the EU cf. for example Widdershoven 2014, 5 (9).
[20] See Rennert 2016a, 7.
[21] See Schmitz 2016, 56 (62).
[22] Cf. Ruffert 2016, 111 (111).
[23] Cf. Schmitz 2016, 56 (62–63).
[24] Cf. Wallrabenstein 2016, 118 (125).
[25] Cf. Wallrabenstein 2016, 118 (119).

- over the absence of material principles – such as those named in the preamble: equal treatment, legal certainty, fairness, objectivity and others[26]
- and to the absence of regulations on how to react to illegal acts.[27]
- Further concerns were expressed regarding the openness of participation procedures and whether regulations to prevent the capture of the rule-making procedures by stakeholders might be useful.[28]

3.2.3. Book III (Single Case Decision Making)

Moving on to Book III, this book is concerned with single case decision making, which is central to any regime of administrative procedure.[29] One might generally notice that many innovations found in Book III have to do with communications and especially new means of communication, ones which were not present in the 1970s when the German Procedure Act came into being but which have now found their way into the Procedure Act in recent years.[30]

Book III is regarded as a largely successful effort at systematization. The discussion mainly revolves around details. Nonetheless there are discussions on whether the use of too many ambiguous terms in the Model rules may be detrimental to the principle of legal transparency.[31]

From the German perspective, Art. III-8 (1) (e) ReNMR is regarded as having unnecessarily weakened the position of the citizen. Pursuant to this rule, every party has the right to be represented by a lawyer or some other person of their choice who has legal capacity.[32] According to the German Administrative Procedure Act, however, every citizen may arrange to be represented by any person whom he or she trusts, even if this person is not legally trained. [33]

One quite general point of criticism on the part of German scholarly jurisprudence was the omission of general rules for the exercise of discretion by the administration.[34] German scholars also noted the omission of binding indications as to the sanctions of non-compliance,[35] and, in relation to this, regulations on the validity of an act and on the cure or irrelevance of defects in procedure and form.[36] The drafters decided not to incorporate non-compliance rules as they thought that EU courts as well as national courts were managing just fine to

[26] Cf. Wallrabenstein 2016, 118 (119–120).
[27] Cf. Wallrabenstein 2016, 118 (120–121).
[28] Cf. Ruffert 2016, 111 (117).
[29] ReNEUAL Model Rules – 2014 online publication, 2014, Introduction to Book III (1).
[30] For more details see Siegel 2017, 24 (24).
[31] Cf. Kraft 2016, 154 (157).
[32] Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book III (37).
[33] § 14 APA: Authorised representatives and advisers.
[34] Cf. Fehling 2016, 143 (152).
[35] Cf. Fehling 2016, 143 (153); Kraft 2016, 154 (161).
[36] Cf. Fehling 2016, 143 (153).

adjudicate the appropriate sanctions for non-compliance with the law.[37] Within Germany there are doubts about the sufficiency of this approach.[38]

3.2.4. Book IV (Contracts)

From the perspective of German administrative law, the most exciting – in a positive sense – book of the Model Rules is Book IV on contracts.[39] Member States apply very different national concepts to public contracts regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising both public and private law elements.[40] This heterogeneity makes it quite clear that there are many differences between Book IV and the corresponding German law provisions. However, it should be mentioned that some ideas for a renovation of the German system that have been discussed for over 15 years did become part of the Model Rules.[41]

The decisive factors, as far as the Model Rules are concerned, are the contracting parties and their legal nature, not the contents of the contract.[42] Thus the Model Rules do not recognize any distinction between public and private law. Germany follows a very different concept. Whether or not a contract falls within the scope of administrative law is determined in Germany by the subject of the contract. Administrative contracts are only those whose subject is a public duty or right.[43] Other contracts, regardless of the legal nature of their parties, fall under civil law and are covered largely by provisions of the German Civil Code. Most German scholars would welcome the regulation of all administrative contracts under an Administrative Procedure Act irrespective of whether these contracts and their parts belong to public or private law.[44]

The focus of German law on the substantive admissibility of a public contract has lead the provisions to be called a collection of safeguards against the abuse of state power.[45] The structure of the ReNEUAL Model Rules is, by contrast, based on the idea of a rough division of the 'life' of a public contract into three phases, of which the core elements are usually common to all legal systems. These are:

1. An administrative procedure leading to the conclusion of a public contract (which is governed by administrative procedure and public procurement rules)

[37] Cf. ReNEUAL Model Rules – 2014 online publication, Introduction to Book I (18).
[38] Cf. Fehling 2016, 143 (153).
[39] Cf. Rennert 2016b, 19 (22).
[40] Cf. Stelkens 2016, 165 (166).
[41] Cf. Stelkens 2004, 193–227; Ziekow 2001b, 114–197.
[42] See Art. IV-1 ReNMR.
[43] Cf. § 54 APA: "legal relationship under public law".
[44] Cf. Burgi 2016, 182 (190).
[45] Cf. Ossenbühl 1979, 681 (684).

2. The conclusion of the contract (which is governed by the rules establishing the prerequisites for the validity of a contract and the right to invoke invalidity), and
3. The execution and end (expiration) of the contract.[46]

This distinction between several phases of the contract is maintained also where the Model Rules deal with infringements of the law.[47] This idea was highly valued by German commentators. There was praise for the regulation that stipulated that in the case of an error at the first stage the authority may terminate the respective administrative decision on the first stage, while not alone or automatically impacting the second stage.[48] Instead the administration is simply obliged on the second stage to react by amending or terminating the contract (referred to in Article IV -8 (4) and Article IV-31 et sec.).[49] This approach of graduating the consequences of errors makes it possible to take into consideration the legitimate interests of the possibly trustful contract partner.[50] It also allows for errors to be declared as irrelevant in cases where they did not have any effect on the conclusion of the contract – the idea of error causality in the scope of procedural errors, which is controversially discussed in Germany.[51]

In the case of deficiencies related to contents of the contract, German law only recognizes two possibilities: Either the contract is void, because one of the grounds for invalidity exhaustively listed in the law is applicable, or the contract is, although illegal, legally effective[52] and the obligations therein are to be met by the contracting parties. Only on the ground that the circumstances which determined the content of the agreement have altered (§ 60 APA, comparable to Art. IV-28 ReNMR) legal consequences as the right to claim for an adaptation, or the right to terminate the agreement is provided.[53]

From the German perspective, a real innovation, therefore, constitute the substantive legal provisions of the Model Rules on the fulfilment of Union law treaties in Article IV-32 and the substantive legal right for adaptation contained therein, with view on the legal consequences of illegal administration contracts.[54] This solution seems suitable for coping with the conflicts between the principle of lawfulness and legality of administrative action on the one hand, and the core principle of German law "pacta sunt servanda", on the other hand.[55]

The ReNEUAL draft breaks new ground in that Article IV-6 elaborates on the general terms of contracts and the necessary adaptations to the rulemaking procedure of Book

46 ReNEUAL Model Rules – 2014 online publication, Introduction to Book IV (5).
47 Cf. Rennert 2016a, 69, (72).
48 Cf. Rennert 2016a, 69, (72).
49 Cf. Rennert 2016a, 69, (72).
50 Cf. Rennert 2016a, 69, (72).
51 Cf. Rennert 2016a, 69, 72.
52 Cf. Ziekow 2013, § 59 margin ref. 2.
53 Cf. Burgi 2016, 182 (190).
54 Cf. Burgi 2016, 182 (188).
55 Cf. Burgi 2016, 182 (188).

II; the reason it does so is that in public contract law the elaboration of general terms of contracts may serve as a substitute for administrative rulemaking.[56] This is expected to ensure compliance in the drafting phase with the constitutional principles of participatory democracy and transparency as well as with the principles of EU administrative law – specifically participation and the obligation of full and impartial assessment of all relevant facts (the so-called 'duty of care').[57] German law, at least in the German Administrative Procedure Act, contains no special provisions for general terms of contracts. According to the general rule the respective provisions of the Civil Code for general terms of contracts have to apply.[58] An introduction of rules on general terms of contracts could also make things easier for the German administration, especially when there is a power imbalance between the parties.[59]

3.2.5. Books V and VI (Mutual Assistance, Administrative Information Management)

Book V contains regulations on mutual assistance such as exchange of information, conducting inspections and serving documents. It is supplemented by Book VI on Administrative Information Management.[60] Both books are perceived as an innovative and reasonable approach for legal recording of exchanges between administrative authorities. The inclusion of EU institutions in a uniform EU-wide rule on data protection was particularly welcomed.[61]

Including data protection rules into the general provisions on EU administrative law can contribute to the overall simplification of the legal system in that sector-specific law. Integrating data protection rules might, instead of re-regulating data protection rules, in future enable to refer to the general rules on administrative procedure.[62] On the other hand, it is precisely because of this issue, which relates to legal transparency, that the relationship between the General Data Protection Rules, to be fulfilled by the national authorities, and the Model Rules, to be fulfilled by the EU, have been criticized. Such a fragmentation of the data protection law would not be advisable.

There are doubts as to whether Book VI is currently at the point where the regulations therein could really be adopted.[63] Book VI addresses a new unconventional form of information management and cooperation, as opposed to Book V which covers conventional forms of mutual assistance.[64] Nonetheless, it might be possible to use its regulations as some kind of "best practice" models that could be introduced via sector-specific regulations.[65]

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56 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book IV (18).
57 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book IV (19).
58 Cf. Ziekow 2013, § 62 margin ref. 13.
59 Cf. Burgi 2016, 182 (191).
60 Cf. Hofmann–Schneider 2015, 29.
61 Cf. Caspar 2016, 209 (213).
62 ReNEUAL Model Rules – 2014 online publication, Introduction to Book VI (8).
63 Cf. Schneider 2016, 197, 198–199.
64 Cf. ReNEUAL Model Rules – 2014 online publication, Explanations to Book V (5).
65 Cf. Schneider 2016, 197 (199).

4. POSSIBLE EFFECTS OF THE RENEUAL MODEL RULES ON GERMANY

In conclusion, we would like to summarize some effects which may come about with the ReNEUAL Model Rules. From the German perspective, it would be welcomed if the Model Rules evolved into a general law of EU-administration.[66] The chances of this being implemented, however, seem to me as not being particularly high. A range of issues still to be addressed, from the legal basis in the EU treaties to the imperative of legal clarity, which, from the German perspective, still needs some optimization, as I have stated on numerous occasions.

Irrespective of the subject of normative implementation, there is the question of the relationship between the ReNMR and the administrative procedure laws of the member states and their further development. The Member States are sovereign states with a right to administrative autonomy. Throughout its history, the EU has assumed that a variety of national administrative systems is legitimate and compatible with membership and that different arrangements can do equally well in implementing EU legislation.[67] The Member States' preference for administrative autonomy has to be balanced against the Union's need for effective and uniform implementation.[68]

Hardly anybody in Germany who deals with administrative procedure law believes that national procedural law will be substituted with a uniform EU administrative procedure law.[69] It is rather a question of possible impacts and spill-over effects that the Model rules could have on national procedural law.

From the German perspective the ReNMR are in any case, whether they become EU law or not, an enormously important source of impetus for the contemplation of necessary, or at least reasonable, advancements in German administrative procedure law. The enormous work that has gone into the comparison of national legal systems of procedural law and the evaluation of sector-specific EU rules, as well as the occasionally innovative propositions for regulations, constitute a source of material for background and discussion that previously was not available. The ReNMR could be used as a toolbox, like the common frame of reference for European private law,[70] which might then feed into the diverse national legal systems.

Of course, in theory it would be possible for the authorities of the Member States to apply the ReNMR when acting in the scope of Union law, and to apply their national codification in purely domestic cases. However, in practice such a division is hard to make in many areas, for instance in the area of environmental law, where some decisions are in the scope of Union law – because they implement a Union environmental standard – while others

[66] Cf. von Danwitz 2016, 247 (254).
[67] Cf. Olsen 2003, 506, 513–514.
[68] Cf. Olsen 2003, 506 (514).
[69] Schwarze 2016, 261 (265).
[70] Timmermans 2013, 7.

are purely domestic.[71] It is not realistic to expect Member State officials to observe one set of administrative processes for the making and implementing of EU law and another for the making and implementing of domestic law.[72] This is why the intended guidance for the interpretation of national administrative legal systems has to be looked at quite critically.

5. CONCLUSION

To sum up: the ReNEUAL Model Rules were very well received in Germany. They are considered as an extremely beneficial contribution to debates and discussions around procedural law. Hereby, the ReNMR can initiate a competition of ideas about procedural law that will continue well into the future.

71 Widdershoven 2014, 5 (14–15).
72 Bermann 2010, 595 (601).

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