

# The future of Article 298 TFEU

## Administrative procedures for EU institutions and bodies and integrated administration in the EU

Presentation for the  
**EU Ombudsman / ReNEUAL conference**

**Towards an EU administrative procedure law ?**

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## The Situation

### ■ Situation:

- General legislation on Administrative Procedures by EU institutions, bodies and agencies exists in:
  - Financial Regulation
  - Comitology Regulation
  - Access to documents regulation
  - Data protection regulation
  - Language regime decision
- Most provisions are contained in policy specific regulations and directives:
  - e.g. Regulation 695/99 on state aids.

### ■ Reasons include:

- Former lack of legal basis for an EU APA (not Art. 114 or 352 TFEU).
- Only new Art. 298(2) TFEU contains a legal basis for an act for EU “institutions, bodies, offices and agencies of the Union”.

### ■ Result:

- Haphazard nature of policy developments through diverging legislation and case-law.

## Context of administrative procedures for implementing EU law

- EU administration is largely de-central.
  - It follows a specific model of MS implementation of EU policies in absence of any contrary rule on the level of EU law.
  - However:
    - Most policy areas have follow some form of composite administrative procedure (sometimes in coop with private or PIL organisations).
  - Reasons:
    - Subsidiarity in the EU has led to an only limited increase in administrative capacities on the EU level.
    - Networks of administration then asked to undertake trans-territorial decision making.
    - Development of IT technology.
    - But: Individuals rights were often treated as an afterthought only.
- This is a structural challenge to EU law.

## Objectives of possible legislation under Art. 298

- Enhance coherence and consistency and improve transparency and intelligibility of the legal system
  - by reducing the policy specific nature of rights and principles and streamlining case law developments.
  - Acting as default rules to which policy specific provisions may refer to.
  - Clarifying rights and obligations.
- Improving implementation of EU policies from the:
  - **Functional perspective** by ensuring that rights and policy objectives can be pursued (and balanced against each other).
  - **Organisational perspective** by ensuring that institutions and bodies are equipped with means to pursue the tasks.
  - **Procedural perspective** by ensuring that the core values and rights are fulfilled and realised through procedural provisions and forms of act.
  - **Accountability perspective** by ensuring that acts are reasoned and justified, and that there is proper review and control of activities.

## **Material scope of potential codification**

### ■ Approach:

- 'translation' to procedural (administrative) rules of general (constitutional) principles of law which arise from:
  - Case law of the courts
  - Specific legislative provisions in EU policies
  - Comparative insight into national legal systems.
  - This is the work ReNEUAL is currently undertaking.

### ■ Content:

- **Rule-making** (Relation agencies – Commission – comitology, EP, Council? Special issues of participation and accountability)
- **Decision-making** (Content of Code of Good Administrative Behaviour and Article 41 CFR; Challenges especially from composite procedures).
- **Contracts** (Long neglected but practically highly important forms of act. All relations - EU-MS-individuals-international org.- are touched).
- **Information systems** (Tie together the de-central administration, basis for composite procedures, key to trans-territorial activities).

## ***Institutional scope of potential codification***

- Limitation to: “institutions, bodies, offices and agencies of the Union” (Art. 298, 15 TFEU, 41 CFR).
- Points to be considered in this context include:
  - Increasing areas with composite administrative procedures.
  - Common trend in EU policy-specific legislation to prescribe organisational forms and types of act of MS administration.
  - Requirement to ensure effective enforcement of EU law in the face of pre-existing national diversity.
  - Ensure possibilities of:
    - judicial review on the EU and MS levels.
    - review by Ombudsmen (EU and MS).
- Possibilities:
  - Parallel existence of Art 298 legislation and policy specific provisions (which allow also regulating MS).
  - A system of reference to a general EU APA.

## Methods

- Need for an ‘innovative’ codification based on:
  - Identification of key areas of regulatory need and possibilities.
  - Comparison of principles and approaches in various policy areas and states.
  - Identification of examples of generalizable good practice.
  - Keeping in mind the the shortcomings and possible inconsistencies of existing case law based principles – these are often due to limits in standing and subjective rights.
- A possible product will further require careful thinking about:
  - Rules of transition from the old (diverse) to new system with an EU APA.
  - The possibilities of wholesale referencing in policy specific provisions to an EU APA.
  - The possibility of declaring the EU APA as default rule in national judicial review of input into procedures by other jurisdictions.

**Thank you for your attention**