

ReNEUAL Model Rules on EU Administrative Procedure

Book III – Single Case Decision-Making

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Editorial note and acknowledgements

This publication of the Research Network on EU Administrative Law (ReNEUAL) is the result of a cooperative effort by many people and institutions. ReNEUAL was set up in 2009 upon the initiative of Professors Herwig C.H. Hofmann and Jens-Peter Schneider who coordinate the network together with Professor Jacques Ziller. ReNEUAL has grown to a membership of well over one hundred scholars and practitioners active in the field of EU and comparative public law.

The objectives of ReNEUAL are oriented towards developing an understanding of EU public law as a field which ensures that the constitutional values of the Union are present and complied with in all instances of exercise of public authority. It aims at contributing to a legal framework for implementation of EU law by non-legislative means through a set of accessible, functional and transparent rules which make visible rights and duties of individuals and administrations alike. The Model Rules on EU Administrative Procedure are proof that it is possible to draft an EU regulation of administrative procedures adapted to the sometimes complex realities of implementing EU law by Union bodies and Member States in cooperation.

In order to develop the Model Rules, ReNEUAL established four working groups addressing the main aspects of EU administrative procedure in the EU. These working groups were concerned primarily with executive rule-making (chaired by Deirdre Curtin, Herwig C.H. Hofmann and Joanna Mendes; Book II); single-case decision-making (chaired by Paul Craig, Giacinto della Cananea, Oriol Mir and Jens-Peter Schneider; Book III); public contracts (chaired by Jean-Bernard Auby, Ulrich Stelkens and Jacques Ziller; Book IV); and information management (chaired by Diana-Urania Galetta, Herwig C.H. Hofmann and Jens-Peter Schneider; Books V/VI). The design of these working groups reflected the scope of the ReNEUAL project on Model Rules on EU Administrative Procedure. In order to draft the various books the chairpersons of the working groups established drafting teams. In addition to the chairpersons the following scholars acted as drafting team members: Micaela Lottini (Book VI), Nikolaus Marsch (Book VI), Michael Mirschberger (Book IV), Hanna Schröder (Book IV), Morgane Tidghi (Book VI), Vanessa M. Tünsmeier (Books III, V), Marek Wierzbowski (Book III). Edoardo Chiti, Paul Craig and Carol Harlow actively collaborated in the initial drafting of Book II. Detailed information about the chairpersons and the

additional members of the drafting teams are provided in the respective list following this note and acknowledgements.

A steering committee composed of the chairs and most active members of the working groups undertook the task of management of the project and ensuring the consistency of content and drafting and finally acted as the editorial board of these ReNEUAL Model Rules. It was joined by Professor George Berman (Columbia University, New York) as external member.

The working groups' research and drafting activities benefitted from the insights and critical input in terms of time and expertise by many ReNEUAL members as well as civil servants from the EU institutions and bodies and also other experts from Europe and other parts of the world during presentation at workshops and conferences, and as reactions to earlier publications.

ReNEUAL would like to express its particular gratitude to the support from the European Ombudsman and the European Parliament. In 2011 the European Parliament established a sub-committee to the JURI committee under the presidency of MEP Luigi Berlinguer. The committee heard *inter alia* ReNEUAL steering committee members Paul Craig, Oriol Mir and Jacques Ziller as experts. The EP sub-committee prepared the January 2013 EP resolution requesting the Commission to submit a proposal for an EU Administrative Procedures Act. Following this invitation, the European Commission has undertaken hearings to which ReNEUAL Steering Committee members have contributed.

Since 2011 ReNEUAL has closely cooperated with the European Ombudsman initially with Ombudsman Nikiforos Diamandouros and since 2014 with Ombudsman Emily O'Reilly. Both have publicly supported ReNEUAL's efforts to improve EU administrative procedure law. We are especially grateful for the opportunities they offered to discuss the ReNEUAL project in 2012 and 2014 at conferences in the European Parliament organised by the Ombudsman. We would also like to thank Ian Harden, Secretary General, European Ombudsman's office, for his interest and support of the ReNEUAL project.

ReNEUAL would also like to acknowledge the cooperation with ACA-Europe, an association composed of the Court of Justice of the European Union and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union. ACA-Europe's first joint conference with

ReNEUAL was organised in April 2013 at the European Food Safety Authority in Parma, Italy, at which judges from nearly all EU member states of the EU participated and contributed to the discussion of composite decision-making procedures. The meeting had been prepared by a preparatory workshop of members of the French Conseil d'Etat with Herwig Hofmann, under the chairmanship of the vice-President of the Conseil Jean-Marc Sauvé. The second conference in which ACA-Europe cooperated with ReNEUAL was held in Amsterdam (Netherlands) under the Dutch presidency of ACA-Europe with participation of Paul Craig and Jean-Bernard Auby of ReNEUAL, in The Hague in November 2013, in collaboration with the Council of State of the Netherlands.

The European Law Institute (ELI) joined the ReNEUAL project in 2012. In this context, we received many thoughtful comments by members of the ELI Membership Consultative Committee chaired by Marc Clément (Lyon) and Christiaan Timmermans (The Hague) and by participants of two ELI annual general meetings. We would like to thank all individual commentators for contributing their time, energy and knowledge to this joint project as well as ELI for lending its institutional support. A conference organized by the Centre for Judicial Cooperation, Department of Law of the European University Institute in Florence under the directorship of Loïc Azoulay in cooperation with ELI and ReNEUAL in February 2014 allowed for further in-depth discussion. Next to the organisers, we would like to especially thank the participating judges from Member States high jurisdictions.

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Table of Abbreviations

APA(s)	Administrative Procedure Act(s)
Austrian APA	Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist
CFR	Charter of Fundamental Rights of the European Union [2007] OJ C 303/1
CJEU	Court of Justice of the European Union
CJ	Court of Justice
CoE	Council of Europe
CoE Recommendation	Council of Europe Recommendation of the
CM/Rec(2007)7	Committee of Ministers to member states on good administration CM/Rec(2007)7
Commission Communication on contract awards	Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02)
DCFR	Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf .
DG	Directorate-General
Dutch GALA	Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315), in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij Wet van 25 juni 2014, in werking getreden op 1 augustus 2014

ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDPS	European Data Protection Supervisor
EO	European Ombudsman
EO Code	European Ombudsman – The European Code of Good Administrative Behaviour
EP	European Parliament
EP Resolution of 15 January 2013	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))
EU	European Union
EURODAC	European Data Comparison system for the comparison of fingerprints for the effective application of the Dublin Convention established by Council Regulation (EC) No 2725/2000 of 11 December 2000
GALA	General Administrative Law Act
GC	General Court of the Court of Justice of the European Union
German APA	Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist
Italian APA	Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192)
MoU	Memorandum of Understanding
Polish APA	Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz.

	168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183)
RAPEX	Rapid Exchange of Information System
RASFF	Rapid Alert System for Food and Feed
SIRENE	Supplementary Information Request at the National Entry [Regulation (EC) no 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)]
SIS	Schengen Information System
Spanish APA	Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)
Swedish APA	Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223)
US APA	Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFP	European Civil Service Tribunal of the Court of Justice of the Union

ReNEUAL Model Rules on EU Administrative Procedure

Book III – Single Case Decision-Making

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A. Introduction to Book III

- (1) Book III is concerned with single case decision-making, which is central to any regime of administrative procedure. While only some national administrative procedure acts regulate administrative rule-making, as distinct from primary and secondary legislation, there **is no legislative regulation of administrative procedures that neglects single case decision-making**. The legal reality is that much administrative action gives rise to the issuing of individual acts and measures (*décision individuelle*, *provvedimento amministrativo*, *Verwaltungsakt*), with either favourable or unfavourable effects. It is not therefore surprising that the remedies available against such administrative acts and measures are in general tailored on the model of adjudication. The importance of single case decision-making is also a consequence of legal theory, especially for those theories that derive from established doctrines of the separation of powers the implication that administrative acts and measures serve to implement in concrete cases the abstract rules laid down by the legislator. Thus this type of administrative action is at the heart of national systems of public law, in Europe and elsewhere.
- (2) **Single case decision-making has also been central in the development of EU law** for at least three reasons. First, since the constitution of the ECSC the distinction between individual and general decisions has been established by the Treaty of Paris and clarified by the case-law of the ECJ. Second, the system of remedies, as interpreted by EU courts, traditionally makes it much easier to bring an action against an individual measure, as distinct from a measure of general application. Last but not least, it is especially in the vast field of single case decision-making that shared implementation between EU and national administrations has developed, particularly during the last twenty to thirty years. Since a large part of the EU budget is spent in this manner, in areas such as agriculture and regional policy, the Financial Regulation contains provisions dealing with shared management.
- (3) The **rules of Book III are applicable to EU authorities** whenever they make administrative decisions, whether in the context of direct or composite or shared administration. They are only applicable to Member State authorities where EU sector-specific legislation so provides, or where a particular Member State chooses to adopt the rules. There **would be advantages in rendering the rules applicable to Member States** when they act in the scope of EU law. It would

provide those affected by Member State administrative decisions made in the context of EU law with a clear set of procedural rights and also render it easier for the administration to understand and apply the procedural obligations incumbent on them. They would 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.

- (4) It has nonetheless been decided for two reasons that the **rules should only be applicable to Member States when EU sector-specific legislation so provides**, or where a Member State chooses to adopt the rules. First, there are 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. Second, while the application of such a law to Member States would have the advantages set out above it might at this stage of European integration be perceived as an undue intrusion into national legal traditions. It is for this reason that the drafting team adopted at this stage of the project a more cautious approach, which may however serve as a starting point for extension of the scope of application in specific fields of law. Thus for the present national rules on administrative procedure remain applicable, subject to the duty that these procedures comply with the general principles of EU law laid down by the CJEU. If a Member State so chooses, the model rules can however serve as a template for the reform of existing procedural rules, or for the adoption of new procedural rules.
- (5) The model rules do not seek to eliminate the particularities of sector-specific legislation. EU legislation contains procedural and substantive conditions for eligibility to, for example, EU funds. Such conditions are mainly determined on a case-by-case approach. The *lex specialis* applies, but it must be interpreted in the light of the model rules, as established by Book I.
- (6) The principle that informs this Book is that there should be a **clear set of rules applicable to all stages of the administrative procedure**, from its inception, through investigation and hearings to the making of the final decision and obligations flowing therefrom, including a duty to give reasons. 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 for example withdrawal of a benefit or imposition of a penalty. There are also

administrative decisions addressed to a particular person, natural or legal, which may affect a large number of individuals. The **EU courts** have done a good job in this area. Their activist jurisprudence has provided the requisites of due process, and they have supplied the omission of the legislature when the latter has failed to provide for such hearings, or where the standards of procedural rectitude have been insufficiently demanding. **Sector-specific rules** have drawn on the case law and advanced beyond it through provision of more detailed regulatory precepts for different sectoral areas.

- (7) 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 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 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 legal or technical assistance that can be requested; the nature of the hearing that must be afforded; the due process rules that pertain respectively to the EU and national administration when both play a central role in the final decision as dealt with in Article III-24; and the procedural rules applicable when a single decision affects a large number of people.
- (8) These issues lie at the heart of single case decision-making. The well-trained EU lawyer will, given sufficient time, be able to work out the answers to at least some of these issues. But that does not suffice to show that the current system is adequate. **We should not rest content with a system in which the rules on such basic issues are difficult to discern** for the individual claimant. Nor should we rest content with a system in which hard-pressed administrators and draft legislators have to put together a package of procedural rules afresh on each occasion. There is little doubt that the existing regime could be significantly improved for claimants, those devising legislation and those applying it if there was some boilerplate general law of the kind set out below. It provides a clear set of administrative procedures dealing with all the issues set out in the preceding paragraph. It addresses the issues in a straightforward manner, following the sequence of an administrative decision from the time of the initial application or ex officio initiation, through the rules that pertain to management of the

procedure, inspection and investigation, rules of evidence, and onward to the nature of the hearing, and procedural consequences that flow thereafter, such as the duty to give reasons and provision of information about appeals. Book III does not cover all issues that are dealt with in every national administrative procedure act, and it is in any event the case that national APAs vary in terms of the range of issues for which provision is made.

- (9) Chapter 1 contains Articles 1 and 2, which define the **scope of application** of Book III and set out certain **key definitions** used throughout the remainder of the Book.
- (10) Chapter 2 deals with the **initiation and management of procedures**. It begins with Article 3, which sets out the general duty of fair decision-making and rules on impartiality, including in this respect rules relating to conflict of interest. Article 4 deals with provision of online information concerning existing procedures. Article 5 specifies the requirements that pertain when an administrative procedure is initiated, either ex-officio or through an application. Article 6 contains more specific provisions dealing with applications, and this is followed in Article 7 by provisions concerning the official responsible for managing the procedure. Article 8 then deals with the management of the administrative procedure, and Article 9 with the time-limits within which the procedure should be concluded.
- (11) Chapter 3 is concerned with the **investigation as a major preparatory step in each administrative procedure** and selected issues concerning the law of evidence. Article 10 sets out the basic principle underlying administrative investigation, Article 11 the procedural norms that apply when investigations are conducted by request, Article 12 the procedural rules that pertain when an investigation is mandated by the relevant EU rules and Article 13 sets out duties to cooperate between EU and national authorities. Issues concerning legal and professional privilege are dealt with in Article 14 and witnesses and experts in Article 15. Articles 16-21 set out the rules relating to **inspections** which are conceived as a specific instrument of administrative investigations.
- (12) Chapter 4 specifies the **rights relating to the hearing**. Article 22 is concerned with access to the file. Article 23 with the basic principles governing the right to be heard by those adversely affected, this being complemented in Article 24 with the application of such precepts in circumstances where there is a composite

administrative procedure. Article 25 lays down the procedural rules applicable where consultation is used in relation to a single decision that affects a large number of people, and Articles 26 and 27 are concerned respectively with consultation with the Member States and EU authorities.

- (13) Chapter 5 establishes in Articles 28-34 the procedural precepts that apply at the **conclusion of the administrative decision-making**, which include the duty to specify the decision, the duty to give reasons, the duty to indicate available remedies, obligations relating to the notification of decisions, and language requirements.
- (14) Chapter 6 deals with the distinct and complex problems concerning the **withdrawal and rectification of decisions**, with Article 35 addressing issues concerning withdrawal or rectification of decisions that have an adverse effect, while Article 36 is directed towards such withdrawal or rectification where the decisions have a beneficial effect.

B. Model Rules

Chapter 1: General provisions

III-1 Scope of application

(1) Book III applies to administrative procedures by which an EU authority prepares and adopts a decision as defined in Article III-2.

(2) Book III applies to administrative procedures by which a Member State authority prepares and adopts a decision as defined in Article III-2 insofar as EU sector-specific law renders it applicable, or insofar as a Member State chooses to accept it.

III-2 Definitions

(1) 'Decision' means administrative action addressed to one or more individualized public or private persons which is adopted unilaterally by an EU authority, or by a Member State authority when Article III-1(2) is applicable, to determine one or more concrete cases with legally binding effect.

(2) 'Public authority' for the purposes of Book III means an EU authority, and a Member State authority under the conditions specified in Article III-1(2).

(3) 'Party' means the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure. EU sector-specific law may assign the status of party to persons not adversely affected.

(4) 'Interested public' for the purposes of Article III-25 means every natural or legal person and other associations, organizations or groups expressing an interest in an administrative procedure.

(5) 'Inspection' means an on-the-spot check for the purposes of information gathering.

(6) 'Responsible official' means the official charged by the public authority with managing the administrative procedure.

Chapter 2: Initiation and Management of procedure

III-3 General Duty of Fair Decision-making and impartiality

(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by public authorities as specified in these model rules.

(2) The responsible official as set out in Article III-7 has a duty to communicate any financial or familial interest in a decision to his or her superior and shall not take part in that decision.

(3) The responsible official has a duty to communicate any other possible conflict of interest to his or her superior, who should exclude the official from participating in the decision where the impartial and objective exercise of the official's function is compromised.

(4) A party may request as soon as possible that a responsible official affected by a conflict of interest should not take part in the making of the decision. This request should be reasoned and made in writing. The decision whether to exclude the official shall be made by his or her superior after hearing the official.

(5) Any other person involved in a decision on behalf of a public authority shall *mutatis mutandis* be bound by the obligations in paragraphs 2 to 4 above.

III-4 Online information on existing procedures

(1) Public authorities shall promote the provision of updated online information on the existing administrative procedures, wherever possible and reasonable. Priority shall be given to application procedures.

(2) Such information may include, among other things:

- (a) a link to the applicable legislation in its consolidated version,
- (b) a brief explanation of the main legal requirements and its administrative interpretation,
- (c) a description of the main procedural steps,
- (d) the indication of the authority competent to adopt the final decision,
- (e) the indication of the time-limit for the adoption of the decision,
- (f) the indication of remedies available,

- (g) a link to standard forms that may be used by parties in their communications with the public authority within the procedure.
- (3) The information shall be presented in a clear and simple way. Access shall be free of charge.
- (4) The European Commission shall foster the adoption of best practices in the provision of online information and may issue recommendations to that end.

III-5 Initiation

- (1) Administrative procedures can be initiated ex-officio or by an application.
- (2) The initiation of an administrative procedure ex-officio shall be notified to the parties. The notification may take place at a later stage if it might jeopardise the investigation of the case. The notification may be omitted when an immediate decision is strictly necessary in the public interest, or because of the serious risk involved in delay.
- (3) The notification shall indicate:
 - (a) registration number,
 - (b) notice of the rationale for the initiation of the procedure,
 - (c) the name and contact details of the responsible official for the procedure,
 - (d) information referred to in letters (c), (d), (e) and (f) of Article III-4(2),
 - (e) the address of the website mentioned in Article III-4 if such website exists.
- (4) Once an administrative procedure is initiated, the competent authority shall adopt a final decision within the time-limit laid down in Article III-9.

III-6 Special rules on application procedures

- (1) Applications shall not be subject to unnecessary formal and documentary requirements and may be submitted in writing to the competent authority in-person, by mail or by electronic means.
- (2) Applications addressed or transmitted to a non-competent service shall be transferred without delay to the competent one if both of them belong to the same public authority. The service that originally received the application shall notify the applicant of this transfer and shall indicate the contact details of the service to which the file has been passed. In other cases, applications shall be returned and

advice on the competent authority shall be given, wherever possible and reasonable.

(3) Applications shall be acknowledged in writing as quickly as possible. The acknowledgement of receipt shall indicate the information contained in letters (a), (c), (d) and (e) of Article III-5(3). In the event of a defective application, the acknowledgment shall specify the defects or missing documents and give an appropriate period for remedying or producing the missing documents. Pointless or manifestly unfounded applications may be rejected as inadmissible by means of a briefly reasoned acknowledgement of receipt. No acknowledgement of receipt needs to be sent in cases where successive applications submitted by the same applicant are abusive because such applications have a repetitive character.

(4) Where the number of applications to be granted is limited and a competitive award procedure is used the rules laid down in Book IV Chapter 2 Section 3 shall apply *mutatis mutandis*.

III-7 Responsible official

When an administrative procedure is initiated the public authority shall appoint a responsible official, who shall manage it subject to Article III-3(2)-(3), shall respect the rights in Article III-8(1) and shall keep an adequate file containing records of all information and documents produced.

III-8 Management of procedures and procedural rights

(1) The parties shall have the following rights related to the management of the procedure:

- (a) to be given information on all questions related to the procedure in a fast, clear and understandable manner,
- (b) to communicate and to complete, where possible and appropriate, all procedural formalities at a distance and by electronic means, including videoconferencing,
- (c) to use any of the official languages of the EU in accordance with Article III-31,
- (d) to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33,
- (e) to be represented by a lawyer or some other person of their choice having legal capacity,

(f) to pay only charges that are reasonable and proportionate to the cost of the procedures in question.

(2) Without prejudice to the existing legal remedies, the parties shall have the right to file a complaint against the responsible official, the deciding authority, or any other official who takes part in the procedure where they fail to comply with their obligations under these model rules, whether intentionally or through negligence.

(3) Where the number of persons adversely affected is large, and the adverse effect is the same or very similar, they may choose a representative or representatives from the affected group to be parties. If the affected group does not do so, the public authority may require them within a reasonable period to appoint a joint representative where otherwise the regular execution of administrative procedures would be impaired. If these persons do not comply within the period set, the authority may ex-officio appoint a joint representative.

(4) Sector-specific law may stipulate a particular number of persons adversely affected for the purposes of paragraph 3.

III-9 Time-limits for concluding procedures

(1) The public authority shall adopt its decision within a reasonable time and without delay. The time-limits shall be fixed in the relevant sector-specific law. If no time-limit is established in the rules governing the specific procedure for the case at hand the time-limit for adopting the decision shall be three months.

(2) The period shall begin on the date of the receipt of a complete application, or on the date of initiation ex-officio.

(3) When complexity or other obstacles prevent examination of the case within the time-limit the parties shall be informed and the decision shall be taken in the shortest possible time. The public authority shall inform the parties in writing, stating the reasons for the extension, and if possible the predicted time for adoption of the decision. This is without prejudice to any restrictions on the extension of duration of the procedures provided by EU sector-specific law.

(4) EU sector-specific law shall stipulate the consequences for violation of the time-limit.

Chapter 3: Gathering of information

Section 1: General rules

III-10 Principle of investigation

(1) When taking decisions, the public authority shall investigate the case carefully and impartially. It shall take into consideration the relevant factors, including those favourable to the parties, and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The public authority shall use such evidence as, after due consideration, it deems necessary in order to ascertain the facts of the case.

(2) The public authority may under the conditions laid down in Article III-11 and Article III-12 or in other provisions of EU law:

- (a) gather information of all kinds,
- (b) hear the evidence of the parties, witnesses and experts or gather statements in writing or electronically from parties, experts and witnesses,
- (c) obtain documents and records, and
- (d) under the conditions of Article III-16 visit and inspect the premises involved.

(3) Article VI-21 to VI-22 apply to information provided by a public authority to another public authority.

III-11 Investigation by request

(1) In order to fulfil investigatory duties under sector-specific EU law the public authority may request a party to be interviewed or to provide all necessary information.

(2) Notwithstanding the consequences laid down in sentence 3 and 4 in Article III-13(1), the party may refuse to comply with the request. If the party consents to be interviewed or to provide information, he or she may not supply incorrect or misleading information. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incorrect or misleading.

(3) When sending a request for information to a party, the public authority shall state the legal basis and the purpose of the request, specify what

information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in the relevant legislation for supplying incorrect or misleading information.

(4) An EU authority shall without delay forward a copy of the request to the competent authority of the Member State in whose territory the seat of the party is situated and to the competent authorities of other Member States whose territory is affected by that request. In case of an interview the Member State in which the interview takes place may request that its officials assist the officials and other accompanying persons authorised by the EU authority to conduct the interview.

(5) The rules of paragraph 4 apply also in case of a request by a Member State authority if the addressee is situated in another Member State. The affected Member State may refuse the interview by authorities from another Member State, in which case the rules on mutual assistance of Book V become applicable.

(6) When sector-specific EU law grants to the public authority the power to interview a person who is not party, who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation, the procedural rules in this article apply *mutatis mutandis*.

III-12 Investigation by mandatory decision

(1) When sector-specific law grants to the public authority the power to investigate by a mandatory decision, the procedural rules in this article are applicable. The parties or their representatives shall supply the information requested. They may not supply incorrect or misleading information.

(2) The procedural rules laid down in Article III-11(2) sentence 3 to Article III-11(5) apply *mutatis mutandis*. In addition to the obligations laid down in Article III-11(3) the competent authority shall indicate the legal consequences for not responding to a mandatory decision.

III-13 Duties to cooperate of parties

(1) The parties shall assist in ascertaining the facts of the case. In particular they shall state such facts and evidence as are known to them or which can reasonably be expected to be presented by them. If a participant fails to state such facts, the final decision shall be taken on the basis of the information available.

The public authority is obliged to conduct additional investigations ex officio only if additional evidence or issues to be investigated are evident. A more extensive duty to assist in ascertaining the facts, and in particular the duty to appear personally or make a statement, shall exist only where the law specifically requires this.

(2) In application procedures according to Article III-6(3) the applicant supplies in an appropriate form the information specified in EU law. If the applicant so requests before submitting an application, the public authority shall give an opinion on the information to be supplied by the applicant. The public authority shall consult appropriate authorities in accordance with Articles III-26 and III-27 before it gives its opinion. The fact that the public authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the applicant to submit further information. Any public authorities holding relevant information must make this information available to the applicant on his or her specific request and on the condition that the applicant cannot reasonably be expected to provide this information on his or her own.

III-14 Privilege against self-incrimination and legal professional privilege

(1) Where it is within the responsibility of public authorities to establish a violation of EU law and this violation may lead to an administrative sanction, they are under the obligation to respect a private party's privilege against self-incrimination as well as his or her legal professional privilege.

(2) Where the privilege against self-incrimination or the legal professional privilege referred to in paragraph 1 have been violated in the course of gathering information, the information must not be used as evidence in procedures by public authorities if this violation of procedural rights could have had an impact on the content of the decision.

III-15 Witnesses and experts

(1) Witnesses and experts shall be obliged to make a statement or prepare opinions, when the law specifically requires this.

(2) The parties may propose witnesses and experts.

Section 2: Inspections

III-16 Inspection powers of public authorities

- (1) Without prejudice to on-the-spot-checks carried out by the Member States in accordance with their national law, EU authorities shall have the power to inspect premises
- (a) where they have been provided with the necessary powers of inspection in the relevant legislative act, and
 - (b) where this is necessary, to fulfil their duties under EU law.
- (2) Where EU law establishes a power or a duty to inspect for a public authority, it should specify the ways in which the power or duty is exercised. A power or duty to inspect may *inter alia* entail the following powers:
- (a) to enter any premises, land and means of transport or other areas, which can be searched according to the basic act providing for inspection powers,
 - (b) to search for, examine and take or obtain copies or extracts of documents,
 - (c) to ask for explanations,
 - (d) to take samples,
 - (e) to exchange information gathered by an inspection under the conditions laid down in Book VI, and
 - (f) to seal premises or documents.
- (3) In order to allow the public authority to carry out inspections, it shall be granted access to relevant premises, land, means of transport or other areas. Those affected shall cooperate with the EU officials in their investigation.

III-17 Duties of inspecting officials

- (1) Public authorities shall ensure that their inspectors act in accordance with EU law, and in particular respect the European Union Charter of Fundamental Rights and comply with EU and national provisions on the protection of personal data.
- (2) Inspectors and other authorized officials shall exercise their power only on production of a written authorization showing their identity and position, together with a notification according to Article III-5(3) or a copy thereof. Unless otherwise

indicated in EU law, the inspectors must comply with relevant national procedural rules, provided that these are consistent with EU law.

(3) Public authorities shall take all necessary steps to ensure the confidentiality of the information communicated or obtained in the course of an inspection.

(4) Where public authorities decide to carry out inspections under EU law, they shall ensure that similar inspections are not being carried out at the same time in respect of the same facts by other EU or Member State officials.

(5) Inspectors shall draw up a report with the results of the inspection, which shall be included in the file.

III-18 Duties of sincere cooperation during inspections by EU authorities

(1) Where an inspection by an EU authority is mandated or authorized by EU law the inspection shall be prepared and conducted in close cooperation with the authorities of the Member State concerned. To that end, the officials of the Member State concerned may participate in the inspections, unless the Member State itself is being inspected and participation of its officials would endanger the purpose of the inspection.

(2) Before carrying out such an inspection in a Member State EU authorities shall inform the Member State authorities in good time of an inspection, unless the Member State itself is being inspected and notification would endanger the purpose of the investigation.

(3) Where EU authorities conduct such an inspection they shall be required to inform the Member State authorities of the result of such inspections. Inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which they are used, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. Where an inspection is carried out jointly, pursuant to the paragraph 1, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the EU inspectors.

(4) Subject to the agreement of the Member State concerned, EU authorities may seek the assistance of officials from other Member States as observers and

call on outside bodies acting under their responsibility to provide technical assistance. The EU authorities shall ensure that these officials and bodies guarantee the necessary technical competence, independence, observance of professional secrecy and are subject to the same professional duties of impartiality as EU officials. Where they seek such outside assistance, EU authorities remain responsible for any misconduct or damage caused by these officials and bodies in the course of an inspection. The EU authorities shall inform the Member State concerned, in good time and in writing, of the identities of the authorized officials and experts.

(5) In accordance with the duty of sincere cooperation, the Member State on whose territory an inspection mandated or authorized by EU law takes place shall provide any assistance necessary, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable the EU authorities to conduct their inspection. If such assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

(6) Where authorization as referred to in paragraph 5 is applied for, the national judicial authority shall ensure that the authorization of the inspection is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In subjecting the coercive measures to proportionality control, the national judicial authority may ask the EU authorities, directly or through the Member State authority, for detailed explanations of: the grounds for suspecting a violation of EU law; the seriousness of the suspected infringement; and the nature of the involvement of the subject being inspected. However, the national judicial authority may not call into question the necessity for the inspection, nor demand that it be provided with the information in the assembled file.

III-19 Participation of EU authorities in Member State inspections

EU officials may participate in an inspection conducted by and under the responsibility of officials of a Member State on the basis of an agreement with the respective Member State, or if so provided by sector-specific EU law. In this case they shall have access to the same premises and to the same documents as national officials. EU officials may only participate in Member State inspections where they are able to produce written authorization stating their identities and their functions. They may not, on their own initiative, use the powers of inspection conferred on national officials or be present at inspections based on national criminal law.

III-20 Joint inspections of Member State authorities

(1) In cases where an inspection is necessary to fulfil the tasks of several Member State authorities under EU law, an inspecting authority of each Member State may participate in jointly carried out inspections on the basis of an agreement with the respective Member State, or if so provided by sector-specific EU law. The authority in whose territory the inspections are conducted (the host authority) shall invite the inspecting authority of each Member State (the invited authority) to take part in the respective joint inspection. The host authority shall respond to the request of another authority to participate in the operations without delay.

(2) A host authority may, in compliance with its own national law, and with the invited authority's authorisation, confer executive powers, including investigative tasks on the invited authority's members or staff involved in joint operations. The invited authority may exercise executive powers only under the guidance and, as a rule, in the presence of members or staff from the host authority. The invited authority's members or staff shall be subject to the host supervisory authority's national law. The host authority shall assume responsibility for the actions of the invited authority.

III-21 Relation to Book V

At the request of an EU authority or an authority of another Member State, a Member State may conduct inspections in accordance with its national law and subject to the rules formulated in Book V. In such cases, the Member State authority undertakes the requested inspection on behalf of another authority and not in its own interest.

Chapter 4: Right to a Hearing and inter-administrative consultations

Section 1: Access to the File

III-22 Access to the File

- (1) Every party has a right of access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.
- (2) If documents contain confidential information or professional or business secrets, the public authority must, where possible, provide a non-confidential version or summary of the documents.
- (3) Every party shall have the opportunity to examine all documents in his or her file, which may be relevant for its defence, including incriminating and exculpatory evidence, before the decision is taken.
- (4) The way in which access to the file is provided is for the public authority to determine, and may be regulated through sector-specific legislation, provided that it does not undermine the substance of the right. Subject to this caveat, access to the file may be provided either through copies of documentation, or the opportunity to study the file in the office of the public authority, or a combination of both.
- (5) The right of access to the file does not cover access to documentation that is irrelevant and bears no relation to the allegations of fact or law in the particular case.

Section 2: Hearing, participation and consultation

III-23 Right to be heard by persons adversely affected

- (1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.
- (2) The hearing prior to the taking of the individual decision may be omitted when an immediate decision is strictly necessary in the public interest or because of the serious risk involved in delay, but a hearing shall be provided after the decision was taken, unless there are very compelling reasons to the contrary. The public authority shall provide reasons as to why these conditions are applicable and has the burden of proof in relation to showing that the evidence supports the reasons given.
- (3) Every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning,

in order that the party can effectively make known its views on the matter and can exercise its rights of defence.

(4) Every party must have adequate time in which to respond after notice in accord with paragraph 3 has been provided. The public authority should set clear time-limits within which the response is to occur.

(5) The public authority has discretion as to the form and content of the hearing. This includes the choice as to whether the hearing should be written or oral, whether to allow cross-examination and the nature of the evidence. In choosing how to exercise this discretion the public authority should take into account the objectives of the legislation, the legislative provisions, the importance of the person's interests, the importance of the additional process right for protection of the person's interest, and the costs of granting such rights.

III-24 Right to be heard in composite procedures

(1) The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this Article. The application of the right to be heard will depend on the division of responsibility in the decision-making process.

(2) In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector-specific legislation renders the procedural rules in Book III applicable. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(3) In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23(5) by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority.

(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5). Where sector-specific legislation renders Book III applicable

to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the recommendation. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(5) In a case of composite procedure, where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority, the right to be heard before the decision is taken shall include knowledge of the recommendation and the ability to contest its findings. Where sector-specific legislation renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the decision pursuant to a recommendation made by another public authority. In the absence of such legislation, or any other EU legislation specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with EU general principles of law concerning fair hearings.

(6) For the avoidance of doubt, this Article is also applicable to cases of composite procedure where EU law imposes legal obligations on Member State authorities to coordinate or co-operate action that leads to individual decisions.

III-25 Consultation of the interested public

(1) An EU authority making the decision may give effect to the obligations in Article 11 TEU by consultation of the interested public in accordance with the following paragraphs. Where sector-specific legislation renders Book III applicable to a Member State authority making the decision it may give the interested public the opportunity to make known and publicly exchange their views by consultation. This is without prejudice to the obligation in Article III-23(1).

(2) The public authority may choose to consult through provision of a public hearing. This hearing must be notified through public announcement, which must be posted on an official website. The relevant documentation, including expert opinions, shall be available for inspection prior to the hearing, unless excluded for legally defensible reasons. The notification must be given in sufficient time, which should not be less than two weeks, to enable those who wish to participate to be able to do so and to study the relevant documentation. The notification must be

given and a public hearing must be held in sufficient time before the decision is made.

(3) If a public hearing pursuant to paragraph 2 is held it should be organized such that there is opportunity for those attending to express their views orally, subject to practical and organizational limits. Provision should be made for those who wish to express their views in writing, either prior to or instead of attendance at the public hearing. The written views should be available online in a clearly accessible part of the relevant website. The minutes of the public hearing should be available for public inspection online within a reasonable time after the end of the oral hearing, and there should be an opportunity for the persons involved to raise objections during two weeks thereafter about the alleged incompleteness or incorrectness of the minutes.

(4) The public authority may choose to conduct an online consultation exercise. This must be posted on an official website. The relevant documentation, including expert opinions, shall be available for inspection, online unless excluded for legally defensible reasons. The notification and documentation must be given in sufficient time to enable those who wish to participate to be able to do so. The notification must be given in sufficient time before the decision is made.

(5) The website must be clear, simple and easy to use. The website should be so designed as to enable users to see the views of those who have already offered written comments.

(6) If consultation is mandated by Union law which provides no indication as to the form of the consultation, then it will be for the public authority to decide whether to fulfill this obligation by provision of a public hearing or an online consultation exercise. The relevant provisions of this Article will then apply accordingly.

III-26 Consultation with Member States

When consultation with the Member States is required or permitted by EU law the EU authority shall inform without delay the Member States about initiation of any such consultation. It shall make available to the Member States all information that is required for the Member States to submit properly informed views on the subject-matter of the consultation exercise. The Member States must have adequate time in which to respond to the consultation.

III-27 Consultation with EU authorities

(1) Consultation with EU authorities shall take place when it is required by the constituent treaties, general principles of EU law or sector-specific legislation, and the consultation shall be in accord with the source of the obligation where that is specified.

(2) Where the format for the consultation is not specified then the following principles should apply. The bodies taking part in the consultation shall be given all information that is required to enable them to express a properly informed view on the subject matter of the consultation exercise. The bodies must have adequate time in which to respond to the consultation.

Chapter 5: Conclusion of the procedure

III-28 Duty to specify the decision

A decision made by the public authority shall be clearly specified in order to enable the parties to understand their rights or duties.

III-29 Duty to give reasons

(1) The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review.

(2) The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24.

III-30 Duty to indicate available remedies

- (1) Decisions shall provide information to the addressee concerning:
- (a) the possibility of administrative appeal, where this exists, including cases where an appeal can be made to a public authority other than that which adopted the decision, and
 - (b) the time-limit for making an appeal.

(2) Decisions shall also inform the addressee of the possibilities of judicial challenge, including the time-limits within which this can be brought, and of possible recourse to an Ombudsman.

III-31 Formal and language requirements

(1) Decisions shall be in writing, shall be signed and identify the deciding authority.

(2) Where the decision is made by an EU authority it shall be written in the language chosen by the addressee, provided it is one of the official languages of the EU.

III-32 Decisions in electronic form

(1) A decision in written form may be replaced by electronic form unless otherwise stipulated by a legal provision. In this event, it must be provided with a qualified signature.

(2) If the addressee claims to be unable to process the electronic document communicated by the public authority, the latter shall send it again in a suitable electronic format or as a written document.

III-33 Notification of a decision

(1) Decisions shall be notified to the parties as soon as they are adopted. They shall take effect for a party upon notification.

(2) A decision may be publicly promulgated where this is permitted by EU law.

III-34 Correction of obvious inaccuracies in a decision

(1) The public authority that adopted a decision may at any time correct typographical mistakes, errors in calculation and similar obvious inaccuracies in a decision.

(2) Such corrections may be requested by the addressees of that decision. If the corrections are carried out ex-officio, the addressees shall be informed before any correction is implemented.

Chapter 6: Rectification and withdrawal of decisions

III-35 Rectification and withdrawal of decisions that have an adverse effect

(1) The public authority may rectify or withdraw an unlawful administrative decision which adversely affects a party. Rectification or withdrawal shall have retroactive effect.

(2) The public authority may rectify or withdraw a lawful administrative decision which adversely affects a party. Rectification or withdrawal shall have prospective effect.

(3) The public authority may exercise the power in paragraphs 1 and 2 ex-officio, or following a request by that party. The power may be exercised outside the time-limits for legal challenge.

(4) The public authority when exercising the power in this Article shall take into account the effect of the rectification or withdrawal on other parties and on third parties.

(5) Rectification or withdrawal pursuant to this Article constitutes an administrative procedure as defined in Article I-4(2).

III-36 Rectification and withdrawal of decisions that are beneficial

(1) The public authority may rectify or withdraw an unlawful decision that is beneficial to a party. It may exercise this power ex-officio, or following a request by another party. This power may be exercised outside the time-limits for legal challenge.

(2) The public authority shall take into account the extent to which a party has a legitimate expectation that the decision was lawful and the extent to which a party has relied on it when deciding,

(a) whether to exercise the power in paragraph 1,

(b) whether, if the power to rectify or withdraw is exercised, it should have retroactive or prospective effect.

(3) The public authority may rectify or withdraw a lawful decision that is beneficial to a party. It may exercise this power ex-officio, or following a request by another party. This power may be exercised outside the time-limits for legal challenge in the following circumstances:

- (a) where it is permitted by sector-specific law,
- (b) where the party has not complied with an obligation specified in the decision, or has not done so within the time-limit set for compliance,
- (c) in order to prevent or eliminate serious harm. The public authority shall upon application make good the disadvantage to the party affected deriving from reliance on the continued existence of the decision to the extent that this merits protection.

(4) The public authority when exercising the power in this Article shall take into account the effect of the rectification or withdrawal on other parties and on third parties.

(5) Rectification or withdrawal shall have retroactive effect only if it occurs within a reasonable time.

(6) Rectification or withdrawal pursuant to this Article constitutes an administrative procedure as defined in Article I-4(2).

C. Explanations

Chapter 1: General provisions

III-1 Scope of application

- (1) Chapter 1 of Book III contains two general provisions. While Article III-1 concerns the scope of application of Book III, Article III-2 defines some key concepts of Book III and provides definitions of the following terms: decision, public authority, party, interested public, inspection and responsible official.
- (2) **Article III-1 specifies the boundaries of Book III.** The first paragraph stipulates that the scope of application of Book III is limited to the “administrative procedures by which an EU authority prepares and adopts a decision”, while the

second paragraph adds that the model rules only apply to the public authorities of the Member States when EU sector specific legislation so provides.

III-2 Definitions

- (3) Article III-2(1) is concerned with decisions, which may be addressed either to a State or a group of States, or to an individual or a group of individuals, insofar as the latter is determined or can be determined ex ante. This is exemplified by (i) the decision taken by the Commission as to whether or not a State aid is to be regarded as compatible with the common market (Article 107 TFEU); (ii) the decision by which the Commission finds that an agreement between undertakings is incompatible with the prohibition laid down by Article 81 TFEU; (iii) the decision to grant or to refuse subsidies or loans in the framework of the Common agricultural policy or of the EU structural funds; and (iv) the decision concerning funding of a project in the framework of the EU policy aiming at promoting research and development.
- (4) **Article III-2(1) excludes several kinds of acts and measures.** It excludes (i) legislative acts which lie outside the scope of application of the model rules considered as a whole; (ii) non-legislative acts of general application which are subject to the rules established in Book II; (iii) judicial decisions; (iv) contracts are mainly regulated by Book IV which refers for their preparation to some specific articles of Book III.
- (5) Under Article III-2(1) **“decision”** therefore has four main features. It is adopted in the context of administrative action, and therefore excludes legislative and judicial acts. It is addressed to one or more individualized public or private persons, and therefore includes acts of a collective nature such as those addressed to a group of people, but excludes administrative rule-making. It is adopted unilaterally, unlike a contract, although this does not necessarily preclude some form of agreement on the content of the decision that is made formally or informally between the public authority and private parties. Finally, it is important to note that decisions for the purpose of this Book ‘determine’ one or more concrete cases with legally binding effects. This Book regulates certain aspects that are preparatory to the final decision, such as a decision that a responsible official should be excluded from the administrative procedure, but these do not constitute themselves constitute decisions for the purposes of this

Book, because they do not determine the concrete case with legally binding effect. The definition of decision also means that decisions made by the Commission pursuant to an infringement procedure against a Member State are not covered by Book III.

- (6) A “**public authority**” means both an EU authority and a Member State authority, under the conditions set by Article III-1(2). This may include also a private body fulfilling a public function, if it is entrusted with the power to take a decision, in the sense of Article III-2(1). Reference should also be made to the definition of public authority in Book I, Article I-4(7) and the Explanations attached to this Article.
- (7) The following definition, that of “**party**”, refers to (i) the addressee of the intended decision and (ii) other persons, as defined in Book I Article I-4(6), who are adversely affected by it and who request to be involved in the procedure. The definition of “party” does not cover persons who are merely interested. A person who is merely interested does not qualify as being adversely affected merely because he or she subjectively thinks that this is so. It is an objective test, determined by the body providing the procedure, albeit subject to judicial review.
- (8) It is **only those “adversely” affected** by the intended decision who enjoy procedural rights. This is in accord with the criterion enshrined in Article 41(2)(a) CFR. This formulation does not require that the contested measure should be initiated against the claimant, although some requirement of this kind is included in some other language versions of the CFR. The case law in different areas varies, with some judgments framed in terms of the need to show that the case was initiated against the claimant. The general trend of the case law is however towards an emphasis on adverse impact, either by expanding the notion of initiated against, or by not requiring it in certain types of cases. It should moreover be noted that the person adversely affected must request to take part in the procedure, which thereby serves to limit the number taking part. In addition Article III-8(3) makes provision for the choice of a representative or representatives to take part in the procedure where there are many who are adversely affected in the same manner.
- (9) A related, but distinct, concept is that of “**interested public**”. Article III-2(4) specifies that this concept is relevant for the purposes of Article III-25 and that it means “every natural or legal person and other associations, organizations or

groups expressing an interest in an administrative procedure“. This definition is justified by the fact that the effects of the intended decision can sometimes be very far-reaching and affect the collective interests of a community. If a large number of people is affected by such a decision, the procedure should allow the public to be consulted, albeit with discretion as to how this should be done, and this is the rationale for the broad definition of “interested public“.

- (10) **‘Inspection’** means an on-the-spot check for the purposes of information gathering.
- (11) The definition of **‘responsible official’** serves to identify the person who has the primary responsibility for managing the administrative procedure from the stage when it is initiated.

Chapter 2: Initiation and Management of procedures

- (12) According to the procedural approach adopted, the present Book is structured on the sequence of a standard procedure leading to an administrative decision: initiation, gathering of all information needed to take a sound and lawful decision – including the hearing and consultation of the public and of other public authorities –, and conclusion of the procedure.
- (13) Chapter 2 focuses on the initiation stage and contains also some general rules related to the management of the procedure, such as the duty to appoint a responsible official, the rights of the parties that shall be respected when managing the procedure and the mandatory time-limit within which the final decision is to be adopted.
- (14) The Chapter also deals with two other issues: the general duty of fair decision-making, with a particular emphasis on the duty of impartiality of all persons who are involved in making a decision on behalf of a public authority, and the provision of online information on the administrative procedures envisaged by the legislation.

III-3 General Duty of Fair Decision-making and impartiality

- (15) The first substantive Article of Book III begins by reproducing paragraph 1 of Article 41 CFR. This is considered to be the **umbrella principle of good administration** at the EU level, from which the courts and the legislator may derive more specific procedural rights, which go beyond the concrete rights listed in Article 41(2) CFR. The whole Book is thus intended to develop the fundamental right to good administration with regard to single-case decision-making. The title of Article III-3 aims to highlight this approach.
- (16) A particular right of Article 41(1) CFR, the **right to be treated impartially** by EU authorities, is regulated in more detail in paragraphs 2-5 of Article III-3. Currently, the duty of impartiality is regulated at EU level in the Financial Regulation and in the Staff Regulations.¹ However, it is also necessary to address this central issue, which is also connected to the principles of equality and non-discrimination,² from a procedural perspective, in order to ensure adequate protection of the (other) parties. Similar rules on impartiality are indeed contained in many national APAs.³

¹ Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002 [2012] OJ L298/1 last amended by Regulation (EU, Euratom) 547/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU, Euratom) 966/2012 on the financial rules applicable to the general budget of the Union [2014] OJ L163/18, Art 57; Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ('Staff Regulations') [1962] OJ 45 last amended by Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union [2013] OJ L287/15, Art 11(a).

² Charter of Fundamental Rights of the European Union [2007] OJ C 303/1, Arts 20, 21.

³ See for example Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist (§§ 7 and 36a); Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315) in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij Wet van 25 juni 2014, in werking getreden op 1 augustus 2014, Art 2:4; Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, §§ 20, 21; Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Arts 28, 29.

- (17) According to paragraph 2, the official responsible for managing the procedure⁴ and any other person involved in a decision on behalf of a public authority shall abstain from participating in the procedure where they have any financial or familial interest in that decision. Such conflicts of interest are considered particularly relevant and are not therefore left to the superior's interpretation. The affected official must abstain in any case after communicating the conflict of interest to his or her superior.
- (18) All other possible conflicts of interest shall be examined by the superior, who shall decide whether to exclude the official or not. The exclusion is mandatory where the impartial and objective exercise of the official's function is compromised.⁵
- (19) In coherence with the procedural perspective mentioned before and with the right to be treated impartially of Article 41(1) CFR, paragraph 4 expressly grants the right of the parties to request the exclusion of an official affected by a conflict of interest.⁶ This request should be made as soon as possible, as soon as the requesting party knows the potential conflict of interest, in order to avoid undue delay of the procedure.⁷
- (20) Paragraph 5 extends the impartiality obligations laid down in the previous paragraphs to any other person involved in a decision on behalf of a public authority. This includes *inter alia* any other official – different from the responsible official – who participates in the management of the procedure or the person or persons in charge of adopting the final decision. The obligations are extended *mutatis mutandis* because it may happen, for example, that the affected person

⁴ On the responsible official see paras 33 and 34 of the explanations.

⁵ This criterion is taken from Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002 [2012] OJ L298/1 last amended by Regulation (EU, Euratom) 547/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU, Euratom) 966/2012 on the financial rules applicable to the general budget of the Union [2014] OJ L163/18, Art 57(2).

⁶ Paragraph 4 is inspired by 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)), Recommendation 4.3.

⁷ See for example Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (codified version) ('Community trade mark Regulation') [2009] OJ L78/1 last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012] OJ L112/6, Art 137(3).

does not have a superior strictly speaking; if this is the case, the decision whether to exclude this person shall be taken by the appointing authority or by the collegiate body to which he or she belongs.⁸

III-4 Online information on existing procedures

- (21) The provisions laid down in Article III-4 are not yet very common from a comparative law perspective,⁹ but seem necessary to adapt the regulation of administrative procedures to the information society and to fulfil the expectations of citizens with regard to e-government. The general idea behind this Article is that public authorities should use the internet intensively in order to inform the citizens in a clear and simple way on the different administrative procedures envisaged by the legislation. Such online information is important to make a reality the **principle of citizen access to the regulation** emphasized by the Mandelkern Report on Better Regulation,¹⁰ and goes beyond the official websites with consolidated legislation that have proliferated in the last years at EU and at national level.¹¹
- (22) The creation and update of well-designed informative websites requires many resources. For this reason, it is left to the public authorities' discretion to decide when and how to implement them. However, it seems that **priority should be given to application procedures**, in order to relieve the many potential applicants from the burden of finding out which is the applicable legislation and the legal requirements that have to be fulfilled, and in order to avoid the public authority the costs of informing the applicants individually.¹² Ex-officio procedures (such as penalty procedures or sanctions) are of course also very important and may adversely affect citizens, but information rights of the addressees may be

⁸ See for example Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (codified version) ('Community trade mark Regulation') [2009] OJ L78/1 last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012] OJ L112/6, Art 137(4).

⁹ Wide online information duties on administrative procedures are laid down at the very beginning of the Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946), § 552(a).

¹⁰ Mandelkern Group on Better Regulation, Final Report (13 November 2011), available at: http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf, p 10, pp 40-46.

¹¹ The EUR-Lex website of the EU being one of the more advanced examples.

¹² See the information duties imposed on the public authority according to Art III-6(3) and Art III-8(1)(a).

satisfied by imposing on public authorities the duty to inform them individually about the procedure when it is initiated.¹³ The demand on online procedural information is higher with regard to application procedures. In fact, the official websites that already exist inform mainly on application procedures, and often allow citizens to submit their application online.

- (23) Paragraph 2 contains a **non-exhaustive and non-compulsory list of information items** that are considered particularly relevant. The websites should not only describe the main procedural steps and indicate the authority competent to adopt the final decision, the time-limit and the remedies available, but also provide a link to the applicable legislation in its consolidated version,¹⁴ a brief explanation of the main legal requirements and its administrative interpretation¹⁵ and a link to standard forms that may be used by parties in their communications with the public authority within the procedure.¹⁶
- (24) Considering the importance that online information on administrative procedures may have to promote the effective exercise of the EU internal market freedoms and to achieve a real European administrative space, the **European Commission is best placed to foster best practices** and to issue recommendations that might be followed by other EU and Member State authorities.

¹³ See Art III-5(2), (3).

¹⁴ Source of inspiration are the Recommendations on the access to regulation contained in the Mandelkern Group on Better Regulation, Final Report (13 November 2011), available at: http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf, (p. 40-46).

¹⁵ Source of inspiration Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 7. Para 3 is also inspired by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 7(3), (5).

¹⁶ See for example Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 70(4); Spanish Act 11/2007 on electronic access of the citizens to public services (Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los Servicios Públicos, BOE núm. 150, de 23.6.2007, modificada por última vez por la Ley 2/2011, de 4 de marzo, de Economía Sostenible, BOE núm. 55, de 5.3.2011), Art 35.

III-5 Initiation

- (25) Paragraph 1 of Article III-5 lists the two ways administrative procedures may be initiated according to sector-specific legislation: ex-officio or by an application.¹⁷ And paragraphs 2-4 – and Article III-6(3) – regulate two relevant legal consequences that derive from both forms of initiation.
- (26) The first consequence is the **duty of the public authority to inform the parties** about the procedure that will be carried out. In ex-officio procedures this information takes place through the notification envisaged in paragraphs 2 and 3, while in application procedures it is provided through the acknowledgement of receipt regulated in Article III-6(3). The information that has to be given is the same in both cases, with only one difference: in ex officio procedures the parties must be informed about the rationale for the initiation of the procedure, while in application procedures this is not necessary. If an ex-officio procedure aims, for example, at the detection of possible violations of EU law, it is important that the concerned individual can discern this at the very beginning of the procedure.¹⁸ This notice of the rationale for the initiation should be distinguished from the more intense duty to give reasons established in Article III-29 with regard to the final decision of the procedure. It is important that parties are informed about the available remedies already at this early stage of the procedure, since the authority may not adopt the final decision and thus the remedies will not be indicated pursuant to Article III-30.¹⁹
- (27) Paragraph 2 contains **two exceptions** to the duty to notify immediately the initiation in ex-officio procedures. First, the notification may take place at a later stage if an immediate notification might jeopardise the investigation of the case. This can occur, for example, when an unannounced inspection is needed to obtain evidence. In this case, the previous notification of the initiation might jeopardise the effectiveness of the inspection and of the whole investigation; to

¹⁷ This twofold distinction is envisaged by 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)), Recommendation 4.1; Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 12; and by many national APAs.

¹⁸ With regard to inspections e.g. Joined Cases C-97/87 to C-99/87 *Dow Chemical Ibérica and Others v Commission* [1989] ECR 3165, paras 12, 26, 45-47; Case C-94/00 *Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission* [2002] ECR I-9039, paras 47-48.

¹⁹ Source of inspiration Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 13(4).

avoid this risk, the notification can therefore take place at the very moment the inspection is carried out (see Article III-17(2)). The second exception addresses situations of urgency where an immediate decision may be adopted under certain strict conditions.²⁰ An example would be emergency measures adopted by the Commission in the field of food safety.²¹ This immediate decision shall be notified in accordance with Article III-33(1). In such cases also the hearing may be omitted (see Article III-23(2)).

- (28) The second legal consequence of both forms of initiation is the **duty of the public authority to manage the corresponding procedure and to adopt a final decision within the mandatory time-limit** laid down in Article III-9.²² According to Article III-9(2), the time-limit fixed in sector-specific law, or the default time-limit of three months established in Article III-9(1), shall begin on the date of the receipt of a complete application in application procedures, or on the date of initiation ex-officio. This duty to decide is excluded in case of pointless, manifestly unfounded or abusive applications (Article III-6(3)).

III-6 Special rules on application procedures

- (29) Article III-6 contains some special rules on the initiation of application procedures and is therefore closely related to Article III-5. In line with the **non-formalistic approach** of the whole Book, paragraph 1 establishes that applications shall not be subject to unnecessary formal and documentary requirements. This paragraph also allows applicants to submit their applications by electronic

²⁰ Source of inspiration *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 28(2).

²¹ Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1 last amended by Regulation (EC) 596/2009 of the European Parliament and of the Council of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Four [2009] OJ L188/14, Art 53.

²² The duty of EU authorities to adopt a definitive decision within a reasonable time derives implicitly from Art 265 TFEU (giving a remedy for undue delays in decision-making) and has been affirmed by the ECJ in many occasions (even with regard to complaints, see for example Case C-282/95 P *Guérin automobiles v Commission* [1997] ECR I-1503, para 37). At national level see for example Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 42(1).

means, in accordance with the general right to communicate and to complete all procedural formalities by electronic means laid down in Article III-8(1)(b).

- (30) Paragraph 2 deals with the problem of **applications submitted to non-competent services**. Such applications shall be transferred ex-officio without delay to the competent one, but only if both services belong to the same public authority.²³ A more ambitious option would be to extend the transfer duty to services belonging to *other* authorities of the EU or of the Member States, but considering the large number, complexity and diversity of the authorities that exist in Europe such a solution could jeopardize administrative efficiency.²⁴
- (31) Paragraph 3 imposes the **duty to provide the applicant with an acknowledgement of receipt** containing relevant information about the procedure.²⁵ Sentences 3, 4 and 5 of this paragraph regulate **how authorities should react when receiving a defective application**. Their duties depend on the importance of the defect. As a general rule, they shall specify in the acknowledgment of receipt the existing defects or missing documents and give an appropriate period for remedying or producing them. Pointless or manifestly unfounded applications may however be rejected as inadmissible by means of a briefly reasoned acknowledgement of receipt. No acknowledgement of receipt needs to be sent at all in cases where successive applications submitted by the same applicant are to be considered abusive because of their repetitive character. This paragraph is complemented by Article 13(2), which allows applicants, before submitting an application, to request an opinion of the public authority on the information to be supplied by them.²⁶

²³ The expression “public authority” is used in this context instead of the more precise of “legal person”, because at EU level – and in many Member States – the different administrations are not granted legal personality.

²⁴ Paragraph 2 is inspired by the European Ombudsman – The European Code of Good Administrative Behaviour, Art 15; 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)), Recommendation 3 (“Principle of efficiency and service”); Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 13(3).

²⁵ See paras 39-42 of the explanations.

²⁶ Art III-6(3) is inspired by European Ombudsman – The European Code of Good Administrative Behaviour, Art 14; 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)), Recommendation 4.2; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 13(5); Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 13(4).

- (32) Paragraph 4 refers *mutatis mutandis* to the **competitive award procedure** regulated in Book IV Chapter 2 Section 3 – with regard to the conclusion of EU contracts – where the number of applications to be granted is limited and such a competitive procedure is to be used, in order to grant a fair competition between all possible candidates.²⁷

III-7 Responsible official

- (33) Article III-7 includes an **innovative provision** imported from the Italian APA:²⁸ the duty of the public authority to appoint an official responsible for managing the procedure, whose name and contact details are communicated to the parties at the very moment of its initiation.²⁹ This official may be the person who adopts the final decision or a different one. The rationale of this provision is therefore not to grant the separation between the managing of the procedure and the adoption of the final decision and hence to reinforce the impartiality of the deciding authority.³⁰ It aims rather to strengthen procedural transparency, to avoid the dilution of responsibilities that may occur when no particular person is formally denoted as responsible for management of the procedure³¹ and hence to **promote a better management of the procedure** and a stronger protection of the parties' procedural rights. The responsible official is the visible face of the procedure and the contact person of the parties throughout.
- (34) When managing the procedure, the responsible official shall **respect and actively promote the rights** listed in Article III-8(1) as well as the other procedural rights of the parties granted in other parts of Book III. Article III-7 also obliges him or her to **keep an adequate file** containing records of all information

²⁷ Paragraph 4 is inspired by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 12(1).

²⁸ Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Arts 4-6. See also European Ombudsman – The European Code of Good Administrative Behaviour, Art 14(2).

²⁹ See Art III-5(3)(c) and Art III-6(3), second sentence.

³⁰ The ECJ has rejected a general duty of separation between both functions, even in administrative penalty procedures, see for example Case 100/80 *Musique Diffusion Française v Commission* [1983] ECR 1825, paras 6-7.

³¹ This is what happens for example in Spain according to Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 41.

and documents produced during the procedure,³² which is crucial to ensure transparency and administrative efficiency, to allow the parties to exercise their rights of defence and to enable judicial review.

III-8 Management of procedures and procedural rights

- (35) Paragraph 1 of Article III-8 lists some **general rights of the parties** that shall be respected in all stages of the procedure.³³ They **complement other rights** of the parties related to specific stages of the procedure such as the right to be notified of the initiation ex-officio (Article III-5(2)), the right to receive an acknowledgement of receipt in application procedures (Article III-6(3)), the right to request the exclusion of non-impartial officials (Article III-3(4)), the right to propose witnesses and experts (Article III-15(2)), the right to access the own file (Article III-22), the right to confidentiality and to professional and business secrecy (Article III-22 paragraphs 1 and 2), the right to be heard (Articles III-23 and III-24), the right to be given reasons for the final decision (Article III-29), the right to be informed of the available remedies (Article III-30) or the right to be notified of the final decision (Article III-33).
- (36) The Services Directive contains interesting provisions on administrative procedures that should also be applicable to the procedures managed by EU authorities.³⁴ It inspires some of the rights listed in paragraph 1. This is the case for the right to be given information on all questions related to the procedure in a fast, clear and understandable manner. This right does not include legal advice in individual cases, but only general information on the way in which requirements

³² See 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)), Recommendation 3 (“Principle of transparency”) and European Ombudsman – The European Code of Good Administrative Behaviour, Art 24.

³³ A similar general list is contained in the Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 35.

³⁴ Regulation (EC) 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC [2008] OJ L218/21, Art 6 also establishes some interesting general procedural standards for the Member States which have been taken into consideration when drafting the present Book.

are usually interpreted or applied.³⁵ It is also the case for the right to communicate and to complete, where possible and appropriate, all procedural formalities at a distance and by electronic means,³⁶ including videoconferencing,³⁷ and for the right to pay only charges that are reasonable and proportionate to the cost of the procedures in question.³⁸

- (37) Paragraph 1(e) allows lay representation when it grants the **right to be represented** not only by a lawyer, but also by some other person of his or her choice having legal capacity according to national law.³⁹ Paragraph 3 addresses the problem of procedures where the number of persons adversely affected is large by allowing the public authority to appoint ex-officio a joint representative for all those parties affected in a similar way.⁴⁰
- (38) In order to reinforce the rights listed in paragraph 1 and in the rest of the Book, paragraph 2 explicitly grants **the right of the parties to file a complaint** against the responsible official, the deciding authority, or any other official who takes part in the procedure where they fail to comply with their obligations under the model rules, whether intentionally or through negligence.⁴¹ Purely private disputes are not covered.

³⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 7. See also 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)), Recommendation 3 (“Principle of efficiency and service”) and European Ombudsman – The European Code of Good Administrative Behaviour, Arts 10(3), 15(3) and 22.

³⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 8(1). This right shall not apply for example to the inspection of premises or of equipment used or to physical examination of the capability or of the personal integrity of the interested party (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 8(2)).

³⁷ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L261/15, Art 9.

³⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Art 13(2); see also Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 16.

³⁹ See for example Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 32(2).

⁴⁰ This provision is inspired by the *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, §18.

⁴¹ See for example Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de

III-9 Time-limits for concluding procedures

- (39) If there are no time limits for making decisions it can lead to legal uncertainty for the individuals concerned, and can also foster inefficiency by the administration. It is for this reason that time limits are common in sector specific legislation and national legislation.
- (40) Paragraph 1 establishes a **default time-limit** where no specific time limit has been set elsewhere.⁴² This is a time-limit regulating the duration of administrative procedures, irrespective of whether they are concluded by an administrative decision, or with the decision on closing of the proceedings, as is the case for many investigations.
- (41) Paragraph 3 establishes an **exception to the general rule** set in paragraph 1 if 'complexity or other obstacles' prevent the authority from completing its examination in the required time period. The spectrum of situations may be wide and range from *vis maior* to the unwarranted length of proceedings. Other examples are a) justified suspension of the proceedings b) delays caused by the party c) time spent on waiting for delivery of the documents requested from the

27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Arts 35(j), 41(2); Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, Art 23(4). The material liability standard is taken from Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ('Staff Regulations') [1962] OJ 45 last amended by Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union [2013] OJ L287/15, Art 86(1) on disciplinary liability of EU officials.

⁴² See 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)), Recommendation 4.6; Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 42(3); *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, §42a(2); Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Art 2.

party or other relevant entities or authorities, which are necessary to decide the case.⁴³

- (42) As a way of securing the concept of fair proceedings (Article 41 CFR), the **legislature may consider** including a **maximum number of possible extensions** of proceedings into sector-specific law. However, it should be noted that the setting of such a maximum time-limit for expansion, or a maximum number of extensions, may in practice not always be realistic.
- (43) First and foremost, it is important to highlight that **paragraph 4** does not exclude liability for damages of the EU by virtue of legal/non-legal actions stipulated in the Treaties (Article 263 read with Articles 268 and 340 of the TFEU). National legislation and EU sector-specific law provide a variety of consequences for the violation of a particular time-limit, including for instance a penalty for the responsible officer, the payment of damages or even an *implied decision* in favour of the applicant (also called *tacit authorization* in Article 11(4) Regulation 1829/2003).⁴⁴ There are however conflicting imperatives here. On the one hand, setting up certain limits without specifying the consequences of violating them would strongly diminish the significance of such limits. On the other hand, for any consequences to be realistic they must be different depending on the facts of the specific case. For example, an *implied decision* is the most far reaching solution for protecting the interests of the applicant, but it may not work in cases where there is more than one addressee, and they have conflicting interests. The lack of a written decision might also lead to serious doubts as to the content of the implied decision and it might be difficult for a party to prove its existence.

⁴³ Inspired by Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz. 168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183), Art 35.

⁴⁴ Regulation of the European Parliament and the Council (EC) 1829/2003 on genetically modified food and feed [2003] OJ L268/1 last amended by Regulation (EC) 298/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) 1829/2003 on genetically modified food and feed, as regards the implementing powers conferred on the Commission [2008] OJ L97/64, Art 11(4).

Chapter 3: Gathering of information

- (44) The gathering of information and evidence is a **centre piece of any administrative procedure** leading to the adoption of a single case decision. 'Administrative procedure' can thus be understood as a structured process of choice between different alternatives through acquiring, processing and evaluating information. The ReNEUAL Model Rules set out in Chapter 3 of this book an investigatory concept of procedure as the generally applicable standard.
- (45) The **Chapter is split into two sections**. The first section establishes a set of general rules, the second section deals with specific issues relating to an especially important instrument of investigation, i.e. inspections. Therefore, inspections are not conceived as an alternative to investigations, but as an important subcategory of the instruments needed for performing effective investigations. This supplementary relationship between the two sections is also highlighted in Article III-10(2)(d). It should be emphasized that, as already highlighted in the explanations to Book I, procedures which do not end in a formal, final, act but are initiated with the intent to potentially formulate such an act serve the preparation of the act and are consequently also covered by the rules of Book III.⁴⁵

Section 1: General rules

III-10 Principle of investigation

- (46) In accordance with the general approach explained above Article III-10 (1) establishes the **principle of investigation as the general standard for administrative information gathering**. Its wording is based on several sources of inspiration from EU as well as national law.⁴⁶ It reflects the jurisprudence of the

⁴⁵ See Book I, paragraph 19 of the explanations and para 62 of the explanations.

⁴⁶ Wording taken from European Ombudsman - The European Code of Good Administration (2013), Art 9 with one addition from *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, §24(2). See also *Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315)*, in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij *Wet van 25 juni 2014*, in werking getreden op 1 augustus 2014, Art 3:2; *Legge 7 agosto 1990 n. 241*, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Sec.

CJEU on the duty of careful consideration,⁴⁷ which is a counterpart to the principle of investigation. As the CJEU has established in its jurisprudence this procedural right to a careful investigation has to be distinguished from substantive questions of law. It should not be used in such a way as to minimize substantive, administrative discretion.

- (47) The duty of careful investigation is an **important element of the principle of good administration**, and as such implied in Article 41(1) CFR. In other words, the duty of careful investigation is a centre-piece of procedural impartiality and fairness. Nevertheless, the authority does not bear the responsibility for accurate fact finding alone. According to Article III-13 the parties are obliged to assist the authority in this regard.
- (48) It is **important to differentiate the duty of careful investigation from the administrative instruments created to fulfil this duty**. Information gathering can interfere with fundamental rights of private parties. According to the principle of legality as laid down in Article 52(1)1 CFR, such interference needs a specific legislative justification. By contrast, the duty of careful investigation itself does not provide such a legal basis. For this reason Article III-10(2) refers to the conditions under which such instruments may be used, which are laid down in other (specific) model rules within Book III or in other provisions of EU law.

III-11 Investigation by request

III-12 Investigation by mandatory decision

- (49) Article III-11 and Article III-12 codify **two typical investigatory powers** widely used in many sectors of administrative investigations. Their wording is inspired mainly by provisions in competition law.⁴⁸ It must be highlighted that the model rules follow a differentiated approach with regard to these two provisions and

6(1)(b); see also Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz. 168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183), Arts 77-79.

⁴⁷ Case C-269/90 *TU München v Hauptzollamt München-Mitte* [1991] ECR I-5469, para 14. See Case T-13/99 *Pfizer Animal Health v Council of the EU* [2002] ECR II-3305 on the integration and consideration of scientific know-how.

⁴⁸ Compare Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Arts 18, 19.

instruments. While Article III-11 empowers public authorities directly to investigations on the basis of a simple request, Article III-12 only establishes a “standby-power” to conduct investigations by a mandatory decision. Sector-specific law must explicitly grant a public authority this “standby-power”. This differentiation is justified as individuals cannot legally be forced to provide information by a simple request (see Article III-11(2) sentence 1), while a mandatory decision to provide information is a legally enforceable act (compare Article III-12(1) sentence 2 and (2) sentence 2). In accordance with these significantly different legal consequences, investigations by simple request are even accepted as an inherent power of investigating authorities in some fields of EU law. The first sentence of Article III-12(2) refers to the procedural rules stipulated in Article III-11 as far as they are adequate in the context of a mandatory decision concerning investigations. It does not refer to all other procedural rules of Book III. As existing sector-specific law like Article 27(1) Regulation 1/2003⁴⁹ shows, this would not be an adequate general rule for this sort of decision. Consequently, it is for the sector-specific provisions to render applicable additional model rules.

- (50) An important aspect of both instruments concerns the **interaction of the investigating EU authority with the authorities of the Member State** in whose territory the seat of the relevant party is situated and with the competent authorities of other Member States whose territory may be affected by a specific investigation. These aspects are regulated for investigations by request in Article III-11(4). Article III-12(2) sentence 1 refers to this provision in case of investigations by mandatory decisions. The objective of these rules is the protection of national sovereignty and the building of mutual trust between the respective authorities. In times of e-government such an obligation should not be very burdensome. If it proves to be too burdensome in a specific field of law, specific procedural rules can provide an exemption (Article I-2).
- (51) Article 11(5) provides a similar rule in case of **an investigatory request by a Member State authority**. This rule shall not compromise the limited applicability of Book III to national authorities in accordance with Articles I-2(2) and III-1(2). Therefore, it is only applicable under the conditions set in Article III-1(2).

⁴⁹ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1.

III-13 Duties to cooperate of parties

- (52) Article III-13 establishes duties to cooperate for the parties with regard to information gathering. Such rules **supplement but must not compromise the principle of investigation**. Public authorities continue to bear the final responsibility. This relationship between the two principles is highlighted in the wording of Article III-13(1) sentence 1 (“assist”). Consequently, the authority shall consider statements made according to Article III-13, but not without carefully evaluating them. For instance, this means that the authority cannot blindly trust information provided by an applicant but has to scrutinize the statements. Useful instruments in this regard are specifications for the private fact-finding to be agreed upon beforehand, or the contrasting of the applicant’s statement with information from expert witnesses or from third, potentially adversely affected, parties as well as the conduct of investigations by the authority itself.
- (53) The **duty to cooperate varies in different types of administrative procedures**. The duty is intensified in application procedures (see paragraph 2) but it also exists in all other procedures (see paragraph 1) although to a more limited extent.
- (54) **Paragraph 1 stipulates the generally applicable standards** for the duty to cooperate in order to balance administrative efficiency and procedural fairness. These standards are based on the assumption that each party shall inform the authority about facts which are known to this party or which can reasonably expected to be presented by it. The latter is the case with regard to facts within the “sphere” of this party. Examples are its state of health, its income, its personal qualifications, experiences or other personal affairs. Such a duty is not very burdensome whereas it may be very cumbersome for the authority to investigate such facts. Sentences 2 and 3 stipulate that the authority does not neglect its duty of careful investigation if it takes its decision on the basis of the information available⁵⁰ and refrains from further investigations concerning such

⁵⁰ The wording of sentence 3 is inspired by Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union [1999] OJ L83/1 last amended by Council Regulation (EU) 734/2013 of 22 July 2013 amending Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15, Art 13(1).

facts as long as they are not evidently required. Nevertheless, the authority has a duty to investigate non-evident but noticeable facts itself in accordance with Article III-10(1), if those facts cannot reasonably be expected to be presented by a party. This is for instance the case for information on public affairs, or on affairs of persons who are not a party to the proceeding. It should be highlighted that these rules are purely procedural.

- (55) Paragraph 2 regulates important issues with regard to **intensified duties to cooperate of applicants** in application procedures. It supplements the basic rule in Article III-6(3) sentence 3. In this context, intensified duties to cooperate relate primarily to information duties. Sentence 1 refers to EU law for the concrete standards of cooperation. This is justified as the concrete information to be supplied by the applicants depends on the subject matter of an application and can therefore only be regulated in sector-specific law.⁵¹ The other sentences specify certain standards for information and advice which must be provided to the applicant by public authorities. They thereby concretise the general right to be given information on all questions related to the relevant procedure under Article III-8(1)(a). These rules balance objectives of service orientation with objectives of independent and impartial performing of administrative investigations.

III-14 Privilege against self-incrimination and legal professional privilege

⁵¹ For example Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1 last amended by Directive 2008/27/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, as regards the implementing powers conferred on the Commission [2008] OJ L81/45, Arts 4(2),13(2)(b) read in conjunction with Annex II; Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67 last amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012 amending Directive 2001/83/EC as regards pharmacovigilance [2012] OJ L299/1, Art 8(3), Annex 1; Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) 1013/2006 [2009] OJ L140/114, Art 3; now Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1, Art 3.

- (56) The privilege against self-incrimination and legal professional privilege are **two important facets of the rights of defence**. Other notions which are usually subsumed under the heading defence rights *inter alia* include the right to be heard (see Articles III-23, III-24), the right of access to file (see Article III-22) or the right to have proceedings concluded within an adequate period of time (see Article III-9) as well as the protection of (private) premises. The EU courts have highlighted the need for the Commission to comply with the rights of defence in administrative procedures in which administrative sanctions of a punitive nature may be imposed.⁵² This includes the obligation to ensure that such rights are not being “irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence”.⁵³ By limiting the scope of this article to administrative sanctions which are imposed in administrative procedures, but are at least partially punitive measures, the Article is both in line with Article 6 ECHR⁵⁴ and respects the need of EU authorities (or their agents) to investigate possible violations of EU law. The two privileges featured in Article III-14 also apply to legal persons, for instance in the area of competition law.⁵⁵
- (57) The drafting team decided against including detailed provisions on the privilege against self-incrimination and legal professional privilege for two reasons: First, while the case-law of the CJEU (in the area of competition law) and the ECtHR in this area has been extensive, it is not completely homogenous. Second, both privileges are closely related to administrative sanctions, and should therefore be addressed in detail in a comprehensive set of rules on administrative sanctions which could be provided at a later stage as a separate Book of these model rules. However, the drafting team decided to include at least a basic provision on these issues in order to highlight their importance even where a sanction procedure has not yet been formally initiated. The privileges in this article should therefore be understood as providing a minimum procedural standard. Nothing stated within these model rules prevents legislatures or courts from extending the scope of protection.

⁵² Case C-511/06 P *Archer Daniels Midland Co. v Commission* [2009] ECR I-5843, para 84. Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, para 70.

⁵³ Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859, para 15, 16.

⁵⁴ *Engel and Others v The Netherlands*, Applications 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976) Series A No 22, para 82-83.

⁵⁵ Compare Case 347/87 *Orkem v Commission* [1989] ECR 3283; Case 155/79 *AM&S Limited v Commission* [1982] ECR 1575.

- (58) Paragraph 2 applies where defence rights have been violated and the information in question could otherwise not have been gathered and affected the content of the decision. To **prohibit the use as evidence** of information under such circumstances is a logical consequence of the protection of said rights. Moreover, it is the only way to adequately ensure a private party's defence rights under such circumstances. Currently, jurisprudence protects defence rights at a later stage in the proceedings, namely through annulment of the contested act if it can be established that "had it not been for such an irregularity, the outcome of the procedure might have been different".⁵⁶

III-15 Witnesses and experts

- (59) According to Article III-10 (1) sentence 3 it is the authority that takes the final decision as to which experts and witness shall be asked for a statement. Therefore, the parties may propose such experts and witnesses without thereby legally binding the investigating authority. However, the authority is obliged under Article III-10 to consider whether a proposed expert or witness should be interviewed in order to investigate the case carefully.

Section 2: Inspections

- (60) Section 2 of Chapter 3 focusses on **one of the main instruments of information gathering**, inspections. Inspections mainly serve **two functions**: An inspection may serve as a control mechanism with regard to citizens, and especially undertakings, and their obligations according to EU Law. Or it may constitute a supervisory power of EU bodies in controlling the compliance of national bodies with EU obligations. In both cases these inspections are one expression of the many ways in which Member States and the Union frequently cooperate in the implementation of Union law. Indeed, EU inspections occur in Member State territory and are therefore inherently cooperative. Where such cooperation occurs, rules are needed to provide authorities with sufficient guidance on how to operate.
- (61) This being said, it is the **degree of cooperation between Member State and EU authorities** which **varies**, depending on the sector in which it occurs and the respective division of competences under EU law. To create a comprehensive

⁵⁶ Case C-301/87 *French Republic v Commission* [1990] ECR I-307, para 31.

set of rules applicable to all aspects of inspections cannot therefore be the objective of this section. Instead, Section 2 provides a set of basic rules which primarily focus on the duties of Member State and EU officials in their cooperation with each other.

(62) **Inspections are part of the decision-making process** and rules of administrative procedure should exist that regulate how they are carried out. Where inspections provided for by Union law fall within the scope of Book III they are covered by the proposed rules, regardless of whether they are referred to as inspections, on-the-spot checks or on-site monitoring visits. The scope of Section 2 is limited to inspections which take place within an administrative procedure intended to end in a decision “with legally binding effect” (see Article III-2 (1)). Book III therefore does not cover OLAF inspections,⁵⁷ as long as reports following from these inspections are not considered as legally binding by the CJEU⁵⁸ and conclude the OLAF procedure. This differentiates the OLAF procedures from administrative procedures as defined in Article I-4(2). This definition and consequently Book III also cover **procedures which do not end** in a formal final act, but only if they are initiated with the potential intent of adopting such an act.⁵⁹

(63) As far as the **structure of Chapter 3 Section 2** is concerned, a line can be drawn between Articles 16 and 17 and Articles 18-21. Articles III-16 and III-17 establish both the powers of inspecting officials and their obligations, thereby taking the need to protect subjective rights into account. Articles III-18 to III-21 coordinate inspections, which must take place on Member State territory by necessity and thereby automatically occur in a multilevel system. To coordinate the ensuing interaction implies rules regulating certain aspects of Member State actions. In line with the limited scope of Book III under III-1(2) this is however conditional on the agreement of the respective Member State and must be provided for in sector-specific law.

⁵⁷ OLAF inspections instead are subject to a number of legal instruments, such as Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999 [2013] OJ L248/1.

⁵⁸ In line with the Court of First Instance in Case T-193/04 *Hans-Martin Tillack v Commission of the European Communities* [2006] ECR II-3995, para 69.

⁵⁹ See Book I, para 19 of the explanations to Book I.

III-16 Inspection powers of public authorities

III-17 Duties of inspecting officials

- (64) **Article III-16** limits an EU authority's power to undertake an inspection through **two conditions**: First, EU law must provide an EU authority with the powers of inspection in the respective area and second, the inspection must be necessary to fulfil its duties under EU law. The underlying notion behind this provision is the fact that while EU authorities may have been granted the power to conduct an investigation, an inspection may not be necessary in a specific case in order to achieve the relevant objective. As such it is an innovative addition. As far as the inspection powers themselves are concerned, paragraph 2 provides a non-exhaustive list of powers which may be subsumed under the power to inspect.⁶⁰ The specific inspection powers of an authority can differ, depending on the EU law provision on which they are based. In relation to the premises to be inspected these can be both the premises of Member States authorities and those of private parties, depending on the purpose of the inspection. In light of the fact that the home enjoys a stronger protection than business premises, the relevant legal basis needed under Article III-16(1)(a) must regulate whether they are covered by the respective power to inspect.
- (65) **Article III-17** includes a number of important **duties for inspecting officials**. In line with the principle of legal certainty, the word 'production' in Article III-17(2) obliges the authorities to show their authorization to the affected persons prior to inspecting the premises. The second obligation to present a notification guarantees the coherence with Article III-5(2) and (3). Article III-17(4) is directed at the inter-administrative level. Its purpose is to ensure that the different

⁶⁰ Compare Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Art 20(2); Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 7(1); Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L83/1 last amended by Council Regulation (EC) 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania [2006] OJ L363/1, Art 22(2).

authorities cooperate and coordinate in order to avoid unnecessary burdens for inspected persons as well as duplications of inspections jeopardizing administrative efficiency.⁶¹ It is not meant to prevent a parallel inspection if the same facts lead to different infringements of EU law or where EU law foresees parallel inspections.⁶² Article III-17(5) in turn obliges the inspecting officials to **draft a report**.⁶³ These reports summarize the results of an inspection as a step before the authority adopts a formal, legally binding decision or refrains to do so, for instance because an inspection reveals that there is no infringement of EU law. Relevant material and supporting documents can be annexed to these reports. The reports may also be used to inform other authorities (see also Article III-18(3)) or – if legally justified – the wider public.

III-18 Duties of sincere cooperation during inspections by EU authorities

III-19 Participation of EU authorities in Member State inspections

III-20 Joint inspections of Member State authorities

III-21 Relation to Book V

(66) **With regard to EU inspections** four forms of cooperation exist which structure Section 2: (i) EU authorities need to conduct an inspection on Member State territory to fulfil their tasks and require the cooperation of one or more Member

⁶¹ Compare Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Recital (13), Art 3.

⁶² For example Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) 352/78, (EC) 165/94, (EC) 2799/98, (EC) 814/2000, (EC) 1290/2005 and (EC) 485/2008 [2013] OJ L347/549 last amended by Regulation (EU) 1310/2013 of the European Parliament and of the Council of 17 December 2013 laying down certain transitional provisions on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), amending Regulation (EU) 1305/2013 of the European Parliament and of the Council as regards resources and their distribution in respect of the year 2014 and amending Council Regulation (EC) 73/2009 and Regulations (EU) 1307/2013, (EU) 1306/2013 and (EU) 1308/2013 of the European Parliament and of the Council as regards their application in the year 2014 [2013] OJ L347/865, Art 59(4).

⁶³ Sources of inspiration Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 8(2); Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999 [2013] OJ L248/1, Art 11(1); see also para 83 of the explanations.

States (Article III-18);⁶⁴ (ii) a Member State conducts an inspection on its own territory to fulfil a task which has a Union dimension (Article III-19);⁶⁵ (iii) several Member States need to conduct a joint inspection to fulfil their tasks (Article III-20),⁶⁶ or (iv) an EU or Member State authority may request an authority from another Member State to conduct an inspection to be able to fulfil its task (Article III-21 and Book V).⁶⁷

III-18 Duties of sincere cooperation during inspections by EU authorities

- (67) Where an **inspection is undertaken by an EU authority in the territory of a Member State**, Article III-18 establishes basic cooperation duties both for Member State as well as for EU authorities: EU and Member State authorities are obliged to prepare and conduct inspections in close cooperation with each other under **paragraph 1**. This paragraph also gives Member State officials the option to participate in EU inspections.⁶⁸ This **presence of Member State officials during EU inspections** will not only facilitate the inspection itself, but it may also have the added benefit of fostering mutual trust which in turn can strengthen the effective implementation of Union law.
- (68) According to **Article III-18(2)**, EU authorities are under the **obligation to inform the respective Member State authorities of the planned inspection**.⁶⁹ This is

⁶⁴ See paras 67-71 of the explanations.

⁶⁵ See para 72 of the explanations.

⁶⁶ See paras 73 of the explanations.

⁶⁷ See para 74 of the explanations.

⁶⁸ Compare Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, Art 13(5).

⁶⁹ Compare Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Art 20(3); Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, Art 13(3); Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests [1995] OJ L312/1 last amended by Corrigendum to Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (Official Journal of the European Communities L 312 of 23 December 1995) [1998] OJ L36/16, Art 9(2); Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union [1999] OJ L83/1 last amended by Council Regulation (EU) 734/2013 of 22 July 2013 amending Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15, Art 22(3).

subject to a narrow exception, namely where the notification would endanger the purpose of the investigation.

- (69) **Article III-18(3)** obliges EU authorities to **inform the respective Member State about the results** of the inspection. For this purpose the EU authority may use the report according to Article III-17(5). In drafting these reports the inspector should also be aware of his duty under Article III-18(3) to take the national law of the Member State in whose territory the inspection takes place into account.⁷⁰ This is connected to the idea that these reports should also be allowed as admissible evidence in national administrative or judicial proceedings in accordance with the relevant law. The underlying intent here is to ensure that individuals are treated in a manner which is equal to how they would have been treated had the situation occurred in a purely national context.
- (70) **Article III-18(4)** regulates cases where EU authorities intend to seek outside assistance for a specific inspection.⁷¹ **Outside assistance** is made conditional on the agreement by the Member State in whose territory the inspection occurs. However, according to Article I-2 there might be cases in which specific legislative acts could mandate the participation of outside assistance; in such cases these more specific rules take precedence over the model rules. Such outside assistance may be provided either by authorities of another Member State, or outside bodies such as private parties and third country officials. The participation of such outside experts could be warranted if *inter alia* they possess special expertise or knowledge linked to the case. However, it is important that

⁷⁰ Sources of inspiration Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999 [2013] OJ L248/1, Art 11(2); Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 8(3).

⁷¹ For example Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 6(2). The wording "other accompanying persons" in Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Art 20(3) and Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, Art 12(2) is less clear but suggests that these two instruments also leave the Commission with the option to contract assistance from persons who are not Commission officials.

the participation of these experts does not lower procedural standards. Thus, these officials have to observe the same standards of professional secrecy⁷² as EU officials and similarly to EU officials carefully investigate with objectivity. To further safeguard the procedural standards established in Book III, paragraph 4 provides that EU authorities remain responsible for any misconduct or damage caused by the external officials.⁷³

- (71) **Article III-18(5)** sets out the obligation of Member States to provide **enforcement assistance** to EU authorities, where such assistance is needed to guarantee that an inspection can be undertaken. This is complemented by **paragraph 6** which focusses on setting guidelines for national judicial control where such control is necessary under national law before the Member State concerned can provide enforcement assistance. Of course, this does not create judicial control for Member State courts independent of the parameters set in paragraph 5.⁷⁴ As is emphasized in Article V-1(4) and in the introduction to Book V,⁷⁵ enforcement assistance is not covered by the rules on mutual assistance. As a consequence, paragraphs 5 and 6 complement Book V in this respect, at least with regard to inspections in single-case decision-making.

III-19 Participation of EU authorities in Member State inspections

- (72) Inspections may be conducted by Member State authorities in their own name in order to be able to fulfil their tasks under national or EU law. These may have a Union dimension in the sense that they have either been prepared together with Union authorities, or are of special interest to a Union authority. In these cases, EU officials may participate so long as they adhere to the rules set out in III-19.

⁷² Compare Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 6(2).

⁷³ This is an innovative proposal.

⁷⁴ Sources of inspiration for paragraphs 5 and 6: Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 last amended by Council Regulation (EC) 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1, Art 20(6), (7), (8); Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, Art 13(6), (7), (8). Compare Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests [1995] OJ L312/1 last amended by Corrigendum to Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (Official Journal of the European Communities L 312 of 23 December 1995) [1998] OJ L36/16, Art 9(2).

⁷⁵ See Book V, para 8 of the introduction.

Its applicability is dependent on either a sector-specific legislative provision or Member State agreement.⁷⁶ They have to carry written authorization with them and have to respect the relevant national law, considering that the inquiry is conducted under the responsibility of the respective Member State authorities.⁷⁷

III-20 Joint inspections of Member State authorities

- (73) Different Member State authorities may also decide to undertake an inspection jointly. This form of horizontal cooperation, where both act in their own name and in order to fulfil their tasks, is regulated by **Article III-20**. This article constitutes an innovative proposal. It is dependent on either a sector-specific legislative provision or Member State agreement.⁷⁸ Article III-20 provides authorities with basic rules which will structure such an inspection. Its source of inspiration is Article 56 of the Commission Proposal for a General Data Protection Regulation.⁷⁹ The national law of the Member State in whose territory the inspection takes place is the applicable law. Moreover, the host authority remains responsible for actions of the visiting authority vis-à-vis third parties in its territory. A division of judicial control depending on the nationality of the inspector would inevitably threaten the rights of the affected individual and should be avoided. The more detailed arrangements to ensure a smooth exercise of any joint inspection should be laid down by the host authority in the respective agreement where it is not laid down already in the national law.

III-21 Relation to Book V

- (74) Finally, there are inspections which a Member State authority conducts in its name but on request of another authority, in accordance with the rules of Book V on mutual assistance. Under these rules the Member State authority is obliged to assist another authority by conducting an inspection. **Article III-21** clarifies the relationship between Book III and Book V.

⁷⁶ This is consistent with the limited scope of this Book (see paras 3-5 of this explanation).

⁷⁷ This is consistent with the limited scope of this Book (see paras 3-4 of this explanation).

⁷⁸ This is consistent with the limited scope of this Book (see paras 3-5 of this explanation).

⁷⁹ Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final, Art 56.

Chapter 4: Right to a Hearing and inter-administrative consultations

Section 1: Access to the File

III-22 Access to the File

- (86) Article III-22(1) establishes that a party has a right of access to his or her file, subject to the legitimate interests of confidentiality and of professional and business secrecy.
- (87) The right of access to the file is **embodied in Article 41(2)(b) CFR**. It is dealt with by a separate Article in Book III, because the right of access to the file may be relevant independent of whether there is a right to be heard.
- (88) Article III-22(2)-(5) sets out more specific rules concerning the application of the right of access to the file. These **rules are derived from the case law of the CJEU**.⁸⁰

Section 2: Hearing, participation and consultation

III-23 Right to be heard by persons adversely affected

- (89) Article III-23 deals with the procedural rights associated with the hearing. **The core right** is provided in Article III-23(1), which accords a right to be heard by a public authority to every party before a decision is made that would adversely affect that person. This formulation is in accord with that in Article 41(2)(a) of the English language version of the CFR. It does not require that the contested measure should be initiated against the claimant, although some requirement of this kind is included in some other language versions of the CFR. The legal reality is that **the CJEU case law is mixed in this respect**, with some cases containing the requirement that the contested measure should be initiated

⁸⁰ The leading decision is Case C-204-205/00 *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123.

against the claimant, while other cases either do not contain this requirement, or interpret it in different ways. The general trend in the case law was towards an emphasis on adverse impact, either by expanding the notion of initiated against, or by not requiring it in certain types of case.

- (90) Article III-23(2) provides an **exception** for the need to hold a hearing when an immediate decision is strictly necessary in the public interest or because of the serious risk involved in delay.⁸¹ It is incumbent on the public authority to provide reasons and evidence as to why these conditions are applicable. This exception is then qualified by the obligation to hold a hearing thereafter, unless there are very compelling reasons to the contrary.
- (91) Article III-23(3) is concerned with **notice of the core issues that will be dealt with at the hearing**. The case law of the CJEU is authority for such an obligation.⁸² The formulation in Article III-23(3) is designed to ensure that the person adversely affected has sufficient notice of the nature of the case that is to be brought against him or her, which is an essential condition precedent to being able to exercise the right of defence, while at the same time not being unduly burdensome on the public authority. This is the rationale for the formulation that is cast in terms of the addressee being informed of the 'central issues' that are to be decided by the public authority and the 'core arguments' that underlie its reasoning. This obligation may depending on the nature of the case be met through discharge of the duty imposed by Article III-5(3)(b).
- (92) Article III-23(4) is designed to ensure that the person adversely affected has **adequate time** in which **to respond** to the draft decision. This is a fundamental aspect of administrative procedure. It is not possible to specify precise time limits, because of the very great variety of draft decisions that fall within the ambit of EU law. However each public authority should insofar as possible set clear time-limits.

⁸¹ Compare *Verwaltungsverfahrensgesetz* in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 28(2). This exception coheres with the exception to notify the initiation of ex-officio procedures established in Art III-5(2), third sentence.

⁸² See for example Cases C-48 and 66/90 *Netherlands and Koninklijke PTT Nederland NV and PTT Post v Commission* [1992] ECR 565; Case C-135/92 *Fiskano AB v Commission* [1994] ECR I-2885; Cases C-402 and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I- 6351.

(93) Article III-23(5) deals with the **nature of the hearing**. The first two sentences reflect the existing case law of the CJEU. They stipulate that the public authority has discretion as to the form and content of the hearing, including the choice as to whether the hearing should be written or oral, and whether to allow cross-examination and the nature of the evidence. The last sentence specifies factors that should influence a public authority when deciding how to exercise its discretion. There is no direct articulation of this test in the case law of the CJEU, but it is nonetheless consistent with that case law and captures the approach of the CJEU. There is moreover a virtue in providing legal guidance to the public authority as to the factors that it should take into account when exercising its discretion.

III-24 Right to be heard in composite procedures

(94) Article III-24 deals with the right to be heard in composite procedures between the EU and Member States, and **Article III-24(1) states the general principle** that application of the right to be heard in such procedures will depend on the division of responsibility in the decision-making process.

(95) Administration in many areas is shared between the EU and the Member States. The rules of Book III do not apply to Member States, unless they are rendered applicable in whole or in part by sector-specific legislation. It is nonetheless **necessary within the framework of Book III** to deal with this type of administrative interaction. The strategy throughout this Article has therefore been to **address three issues**. First, to specify the procedural obligations incumbent on the EU authorities when they engage in such procedures. Second, to set out the obligations of Member State authorities where sector-specific legislation renders Book III applicable to them. Thirdly, to clarify the procedural obligations of Member States where no such sector-specific legislation exists.

(96) Article III-24(2) exemplifies the way in which these three issues are dealt with in relation to one form of **composite procedure**, which is that **in which the final operative decision is made by the EU authority or the Member State authority**. Firstly, it provides that where the EU authority makes the relevant decision it must comply with the requirements in Article III-23. Secondly, that where the relevant decision is made by a Member State authority it must comply with Article III-23 where sector-specific legislation renders Book III applicable.

Thirdly, where there is no such legislation Member State authorities apply national rules of procedure, although these must comply with EU general principles of law concerning fair hearings, since these principles have been deemed applicable to Member States by the CJEU when they act in the scope of EU law.

- (97) Article III-24(3) contains a **guiding principle** that informs the remainder of Article III-24, which covers **more complex forms of composite procedure**. The guiding principle is that in deciding on the form and content of the hearing to be provided by the public authority that makes the decision pursuant to Article III-23(5) regard should be had to the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings.
- (98) Article III-24(4) deals with the situation where the public authority that makes **the decision is legally bound by a recommendation from another EU authority**. The logic here is that the principles of due process guaranteed in Article III-23 must be observed by the body that makes the recommendation, since it is in effect making the operative determination. The same principle applies *mutatis mutandis* in circumstances where a Member State authority makes the recommendation, if there is sector-specific legislation rendering the rules of Book III applicable. Where no such legislation exists the administrative procedure requirements are determined by national law, subject to compliance with the general principle of fairness that is part of EU law.
- (99) Article III-24(5) deals with a variant of the situation covered in the preceding paragraph. This is the situation where there is a **recommendation** from another public authority, but it is **not formally binding** on the public authority that makes the final decision. If there was no hearing before the public authority that made the recommendation, the right to be heard before the decision is taken includes knowledge of the recommendation and the ability to contest its findings before the public authority that makes the decision. Where sector-specific legislation renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the decision pursuant to a recommendation made by another public authority. If there is no such legislation, the Member State authority applies national rules of administrative procedure, which must, as in the previous instances, comply with EU general principles of law concerning fair hearings.

III-25 Consultation of the interested public

- (100) The subject matter dealt with by Article III-25 is close to that covered by Book II, insofar as it establishes rules concerning consultation for interested public. The distinguishing feature is however that Book II is concerned with rules that may affect a large number of people, whereas Article III-25 is concerned with decisions on a particular issue in relation to which the public may be interested, the classic example being a decision that may have wide-reaching environmental impact on which sector-specific legislation exists.⁸³ Such sector-specific legislation may be framed in mandatory or non-mandatory terms. Article III-25 is however framed in discretionary terms, for the following reason. While Article 11 TEU is framed in obligatory terms, there is also discretion accorded to the EU institutions, as manifest in language such as ‘by appropriate means’, within Article 11(1) TEU. It is as yet unclear how the CJEU will interpret Article 11 TEU. It was therefore felt to be advisable at this stage of the development of EU law to frame Article III-25 in discretionary terms, in the sense that public hearings or online consultation could be ways in which the duties established in Article 11 TEU could be fulfilled, albeit without prejudice to the possibility that these duties might be met in other ways.
- (101) Article 11 TEU imposes an obligation on EU institutions to give by appropriate means citizens and representative institutions the opportunity to make known and publicly exchange their views in all areas of Union action. It also imposes an obligation on the European Commission to carry out broad consultations with parties concerned to ensure that the Union’s actions are coherent and transparent. Article III-25 provides an authority with **two different solutions** to the logistical problems which are inherent in a consultation exercise that involves the interested public and thereby a higher number of individuals. The first is a form of consultation through a public hearing mechanism. The second is essentially an online consultation mechanism. Where Book III is made applicable to Member States, they may decide to allow the interested public to participate in

⁸³ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1, Art 6; Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to environment and amending with regard to public participation and access to justice council directives 85/339/EEC and 96/61/EC [2011] OJ L 156/2003.

a procedure by means of one of the modes of consultation provided for in the model rules.

- (102) Article III-25(2)-(3) specifies the administrative procedure requirements that must be satisfied where the public authority opts for a **public hearing**. There is an obligation for the hearing to be notified through public announcement posted on an official website, with documentation available for inspection prior to the hearing.⁸⁴ This notification must be given in sufficient time, which should not be less than two weeks, to enable those who wish to participate to be able to do so and to study the relevant documentation. The notification must be given and a public hearing must be held in sufficient time before the decision. The Article is also designed to ensure that there is an opportunity for those attending the public hearing to express their views orally, subject to practical and organizational limits, and for the minutes of the public hearing to be available for public inspection online within a reasonable time after the end of the oral hearing⁸⁵.
- (103) Article III-25(4)-(5) specifies the administrative procedure requirements that must be complied with where the public authority opts for **an online consultation exercise**.⁸⁶ Notification of such an exercise must be posted on an official website, and there is once again an obligation to make the documentation available for inspection online, this being done in sufficient time to enable those who wish to participate to be able to do so.

⁸⁴ Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 67 is the inspiration for the second sentence of Article III-25(2); Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist, § 44a. (1) and 44b.(2) have also been considered.

⁸⁵ See for example Polish Telecommunications Law of 2004 (Prawo telekomunikacyjne), Arts 15-17a.

⁸⁶ Directive 2002/21/EC on a common regulatory framework for electronic communications [2009] OJ L108/33 last amended by Corrigendum to Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2013] OJ L241/8, Art 6.

III-26 Consultation with Member States

- (104) Article III-26, in contrast to III-25, considers inter-administrative consultations which occur in a vertical relationship, more specifically between EU and Member State authorities. In this case Member States should be informed of the views of other Member States and given the opportunity to consider them. The analogy here would be with the way in which consultation exercises are generally conducted at present, meaning that parties can access the views of others. If this is so for individuals, then it should apply a fortiori for Member States.

III-27 Consultation with EU authorities

- (105) This article complements Article III-26 and approaches the vertical relationship in inter-administrative consultations from the opposite angle: while Article III-26 establishes rules for when an EU authority is obliged to consult Member State authorities, Article III-27 establishes a number of basic principles which should apply where the method of consultation is not specified further.

Chapter 5: Conclusion of the procedure

- (104) As observed earlier,⁸⁷ a general feature of Book III is the focus on procedures, as distinct from “acts”. However, three lines of reasoning suggested that at least **few provisions should concern the “acts”** or measures that are adopted at the end of an administrative procedure. They are the legal constraints on power, a trend that is common to most codes of administrative procedure and, more specifically, the tradition of EC/EU law.
- (105) The view that public authorities enjoy wide decision-making powers, which permit them to take discretionary choice with respect to a variety of interests, public and private, is premised – in liberal democracies – ultimately on the assumption that all such powers are exercised in the respect of the existing criteria of legal validity. Viewed from this perspective, a variety of constraints on power is introduced by modern legal orders. Some such constraints, such as the duty to give reasons, are concerned with the connection between the decision-making

⁸⁷ See para 13 of the introduction.

process and the final act or measure. Other constraints relate to the final act or measure in itself. There can be formal irregularities, which do not affect the validity of the choices made by the public authority but that must be corrected. There can also be formal or substantive errors that lead to the invalidity of the act. In this perspective, as the ECJ held in *Algera* (1957) unlawful acts can be withdrawn,⁸⁸ the background principle being the rule of law.

- (106) It is therefore necessary to ensure that formal and substantive legal requirements are duly respected. For example, an obligation to state the reasons that justify a certain decision can help to ensure that the rationales for the action has been duly considered and that administrators are diligently implementing political will. From the perspective of affected parties, an obligation to give reasons can not only enable them to know why a measure was adopted, but also the obligation to notify it in a certain manner is an important safeguard. From the perspective of the courts, the existence of reasons facilitates judicial review of administrative action.⁸⁹
- (107) There is, finally, a **tradition of procedural constraints on power** within the EC/EU. The Treaty of Rome encapsulated an important process right, the duty to provide reasons, in Article 190, for all kinds of acts having binding force. Another requirement was that “decisions shall be notified to those to whom they are addressed and shall take effect upon such notification” (Article 191). These procedural requirements have been interpreted and applied by EU courts. More recently, other requirements have emerged through EU case law and the EO Code.⁹⁰

III-28 Duty to specify the decision

III-29 Duty to give reasons

- (108) **Articles III-28 and 29** have common and distinctive aspects. They **have a common rationale**, that is to say the need that public authorities comply with the duties of care and transparency, so as to avoid any misuse or abuse of power.

⁸⁸ Joined Cases 7/56, 3/57, 7/57, *Algera and others v. Common Assembly of the ECSC* [1957-1958] ECR 39 (English special edition), Section III (p 61) affirming that „only unlawful administrative measures are revocable, lawful measures remaining irrevocable“.

⁸⁹ Case 222/86, *UNECTEF v. Heylens* [1987] ECR 4097, establishing that national authorities must state the reasons for any limitation of the rights stemming from the legal order of the EC.

⁹⁰ European Ombudsman – The European Code of Good Administrative Behaviour

Another important aspect is the emphasis placed on clarity. The decision taken by a public authority under Article III-28 must be “clearly specified in order to enable the parties” to understand their rights and duties. Any public authority must likewise state the reasons for its decision in a “clear, simple and understandable manner”. However while Article III-28 concerns the decision as such, and thus refers to all its elements, Article III-29 deals specifically with the giving reasons requirement.

- (109) Precisely because the giving reasons requirement is laid down by Article III-29 and **Article III-28** must be intended as referring to all elements of a decision, it seems reasonable to argue that the latter also refers to the content of the decision. It would otherwise be impossible for the parties to understand their rights or duties, which are influenced by the favourable or unfavourable effects ensuing from that decision. In this respect, Article III-29 is very similar to some national norms.⁹¹ This does not imply that the parties may express a subjective judgment as to whether the decision is adequately or sufficiently clearly specified. It is, rather, an objective test, determined by the public authority and subject to review by either the courts or other public agencies.
- (110) Whether we regard the **duty to give reasons** as a requirement of a legal-rational bureaucracy or as a rights-based constraint on the exercise of power, that is to say as a right to a reasoned decision, or as a manifestation of democracy, Article III-29 has some innovative features. A helpful way to shed some light on them is to begin by illustrating briefly the traditional norm governing reasons.
- (111) **Article 296(2) TFEU** provides that “Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties”.⁹² This generates two obligations. The first is a procedural requirement, in the sense that what is required is to give

⁹¹ See *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 37(1); and the *Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992)*, modificada por última vez por la *Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)*, Art 53(2).

⁹² This is not the only provision of the Treaty that considers reasons. For example, under Art 225 TFEU, if the European Parliament requests the Commission to submit any appropriate proposal, if the Commission does not submit any proposal, “it shall inform the European Parliament of the reasons”. An identical requirement is established by Art 241 TFEU with regard to Council’s requests.

reasons, as distinct from a more substantive requirement, consisting in giving adequate or good reasons. The second requirement is procedural in another sense, because it implies that all the documents which were legally necessary and which influenced the final act are referred to, in order to ensure the transparency of administrative action. The settled case law of EU courts has specified that the statement of reasons must be appropriate to the act at issue. The intensity of this fundamental requirement thus varies as a function of both the interests that are affected by the measure adopted by the public authority and its content.⁹³

- (112) An obvious **difference between the provision of the Treaty and Article III-29(1)** is that the former's scope of application is much broader, it applies to regulations, directives and other "legal acts", while the latter only applies to decisions, as defined by Article III-2(1). There are three other distinctive elements as regards the content of Article III-29(1). First, following the jurisprudence of EU courts, it goes beyond the procedural obligation to state reasons, by specifying that such reasons must be stated "in a clear, simple and understandable manner". Since there is no specification of the contents of the statement of reasons, this requirement should be regarded as referring to both elements of fact and law.⁹⁴ Second, Article III-29(1) codifies the jurisprudential view that the statement of reasons "must be appropriate to the decision". In this regard attention must be focused not only as to how the legal order of the EU regulates a certain type of decision, but also as to how that specific decision was taken, particularly in view of the interest that the addressees and other parties may have in obtaining explanations. Third, the requirement of clarity is reinforced by the obligation that the reasoning used by the public authority should be disclosed in an "unequivocal fashion" because it enables the affected parties to ascertain the reasons that lie behind the decision and facilitates judicial review. While this reveals the lasting influence of an instrumentalist approach to the giving reasons

⁹³ This is settled case-law, see Case C-367/95 P, *Commission of the European Communities v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL* [1998] ECR I-1719; Case C-301/96, *Commission v. Germany* [2003] ECR I-9919.

⁹⁴ See Art 18(1) of the European Code of Good Administrative Behaviour, providing that „Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision“. See also the *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 39, establishing that the "statement of grounds must contain the chief material and legal grounds led the authority to take its decision".

requirement, the importance of an obligation to provide not only reasons, but adequate and clear reasons should not be underestimated.⁹⁵

(113) **Article III-29(1) also has distinctive features by way of comparison to national APAs.** First, unlike some APAs, its scope of application has no limitation concerning a specific kind of act or matter.⁹⁶ Nor is there any exception to the requirement if, for example, the decision-maker deems that it is unnecessary.⁹⁷ Second, Article III-29(1) does not require any dissenting opinion to be reported.⁹⁸ Thirdly, there is no reference to the results of the preliminary phases of the procedure.⁹⁹ However, the duty of diligence can be interpreted as obliging the public authority to refer to them.

(114) **Article III-29(2) deals with the duty to provide reasons in cases of composite administrative procedures.** Since such procedures are characterized, in a variety of ways, by the involvement of both EU and national authorities Article III-29(2), following the approach in Article III-24, provides that the duty to state reasons will be “shaped” by their respective roles in making the decision. The underlying assumption is, therefore, that reasons must always be given, coherently with the general principle of law recognized by the CJEU.

⁹⁵ The fifth principle of public service, according to the EU Ombudsman’s Code of Good Administrative Behaviour is transparency (implying that “Civil servants should be willing to explain their activities and to give reasons for their actions”).

⁹⁶ See for example *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 39(2) and the *Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992)*, modificada por última vez por la *Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)*, Art 54.

⁹⁷ A power of this kind is provided by *Förvaltningslag (1986:223) Utfärdad: 1986-05-07*, last amended by *Lag (2014:630) om ändring i förvaltningslagen (1986:223)*, Section 20 (1)); and the *Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192)*, Art 21-*octies* (2), in the latter case due to the controversial interpretation of “form” followed by some lower administrative courts.

⁹⁸ See for example *Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991)* das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist, § 58 (2); *Förvaltningslag (1986:223) Utfärdad: 1986-05-07*, last amended by *Lag (2014:630) om ändring i förvaltningslagen (1986:223)*, Section 19.

⁹⁹ See *Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991)* das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist, § 60.

III-30 Duty to indicate available remedies

- (115) While the previous model rule reiterates an obligation that derives directly from the Treaties, **Article III-30 introduces a new obligation**, by analogy with several national APAs of EU Member States.
- (116) The **precise nature of this obligation varies depending on the national statute**. Sometimes, it simply requires that the decision-maker indicates the judicial remedies that are available against its decision. In other cases, a more elaborate requirement is established, including indication of the way in which to seek judicial protection.¹⁰⁰ A more extensive formulation may require consideration of judicial and non-judicial remedies, such as filing of a complaint to an Ombudsman or to another public agency.
- (117) **Article III-30 is based on the last of these models**. It requires the public authority to enshrine in the decision information concerning the possibility of administrative appeal, both direct and indirect (that is to say to another public authority) and, if so, of the time-limits for making such an appeal. It also requires the addressees to be informed of the possibilities of judicial review, with the related time-limits, as well as of filing a complaint to an Ombudsman.
- (118) It is important nonetheless to note that **Article III-30 does not introduce any innovation with regard to existing judicial and non-judicial remedies at EU level**. Rather, it facilitates their use by interested parties, by introducing an obligation to provide information about them. It confirms, in this respect, Article 19 EO Code.¹⁰¹

III-31 Formal and language requirements

- (119) Article III-31 deals with **formal and language requirements**, which have different implications.

¹⁰⁰ See Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Art 3(4); Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist, § 61 also requires the “prerequisites” for an application for judicial review to be indicated.

¹⁰¹ European Ombudsman – The European Code of Good Administrative Behaviour

- (120) **National APAs** deal with formal requirements in a variety of ways. Some APAs do not prescribe any specific form, though establishing that where any such requirement is established by the law, its infringement renders the act void or voidable.¹⁰² Other APAs are more directly prescriptive, to the extent to that they require either a specific form or stipulate matters¹⁰³ such as signature.¹⁰⁴
- (121) **Article III-31(1) opts for the latter model.** Not only does it require that decision shall be in writing, but it also requires that the decision be signed and the identification of the authority that makes the decision. The former can be regarded as a manifestation of the general rule enshrined into Article 297 TFEU¹⁰⁵, while the latter is a consequence of the obligation to respect the competence of the various institutions and bodies,¹⁰⁶ which is confirmed by the inclusion of competence among the grounds for judicial review of the acts of the Union.¹⁰⁷
- (122) **There are a variety of rules concerning linguistic requirements in national APAs.** Some give the issue little attention,¹⁰⁸ while others regulate the translation of acts and documents, both during and at the end of an administrative procedure.¹⁰⁹

¹⁰² See Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Art 21-*octies* (2).

¹⁰³ See the Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 55.

¹⁰⁴ *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 34.*

¹⁰⁵ Art 297(2) TFEU provides that non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

¹⁰⁶ Art 5 TEU.

¹⁰⁷ Art 263(2) TFEU.

¹⁰⁸ *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 23.*

¹⁰⁹ *Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223), Section 8; Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 36 (dealing with the issue of diversity of official languages that may be chosen by the parties in certain parts of Spain).*

- (123) The **need to accommodate linguistic diversity is obviously stronger in the EU**, due to its multi-national and multi-lingual social base. This is acknowledged by Article 22 CFR, according to which “the Union shall respect cultural, religious and linguistic diversity”. The centrality of language was apparent from the very outset of the EEC, as evidenced in Regulation 1 of 1958, which determined the languages to be used by the EEC. It finds expression once again in Article 41(4) CFR, which provides that “Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language”, and this obligation is echoed by Article 13 EO Code.¹¹⁰
- (124) Coherently with the CFR’s emphasis on linguistic diversity, Article III-31(2) requires that a decision taken by an EU authority shall be written in the language chosen by the addressee. No distinction is made in this respect between procedures initiated by private parties and *ex officio*. This rule is, however, subject to **two limitations**. The first derives from the circumstance that the model rule only refers to decisions issued by EU authorities. A second limitation derives from the circumstance that Article III-31(2) refers to the “official languages of the EU”.

III-32 Decisions in electronic form

- (125) Article III-32 concerns the instruments by which public authorities can communicate acts and measures. The basic rule is that decisions must be notified in a **written form**, and in accord with modern technology public authorities are encouraged or obliged to promote the use of electronic communications.¹¹¹ The consequence is that there are legal frameworks to regulate the adoption, signature and transmission of electronic documents.¹¹² In line with this trend, the EU has laid down a common framework for **electronic signatures**.¹¹³

¹¹⁰ European Ombudsman – The European Code of Good Administrative Behaviour

¹¹¹ See for example Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Art 3-*bis*.

¹¹² See for example *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 3a and Spanish Act 11/2007 on electronic access of the citizens to public services (Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los Servicios Públicos, BOE núm. 150, de 23.6.2007, modificada por última vez por la Ley 2/2011, de 4 de marzo, de Economía Sostenible, BOE núm. 55, de 5.3.2011).

¹¹³ See Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2000] OJ L13/12

- (126) **Drawing on this common background**, the model rules set out a general rule and an exception. The general rule set by Article III-32(1) is that a decision in written form may be replaced by electronic form. A legal provision may, however, establish otherwise, in which case a qualified signature is required. Secondly, under Article III-32(2), if the addressee of the decision makes a reasonable claim to be unable to process the electronic document sent by the public authority, the latter must send it again either in a suitable electronic format or as a written document.¹¹⁴

III-33 Notification of a decision

- (127) **National APAs** regulate the notification of individual acts and measures. There are **common** and distinctive **elements**. The former include rules according to which (i) an administrative act must be made known, or capable of being known, by the person to whom it is addressed or who is affected by it,¹¹⁵ (ii) as a matter of principle, the effect of the act can take place only after the notification,¹¹⁶ which is relevant also for judicial protection and (iii) only in the circumstances specified by legal provisions may other forms of communication, including publication,¹¹⁷ be used. The latter distinctive aspects include the way in which the notification is

last amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part One [2008] OJ L311/1.

¹¹⁴ Art III-32 was inspired by *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 3a.

¹¹⁵ Legge 7 agosto 1990 n. 241, *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192), Art 7 includes notification within the duties of the responsible official.

¹¹⁶ *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 41(1).

¹¹⁷ *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 41(3) (distinguishing between an individual and a general order, which can be published); *Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315)*, in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij *Wet van 25 juni 2014, in werking getreden op 1 augustus 2014, Art 3:40*; *Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992)*, modificada por última vez por la *Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)*, Arts 59(6) and 60.

carried out, the period within which it must be done,¹¹⁸ and the deadlines or time-limits at the expiry of which a presumption of knowledge may arise.¹¹⁹

- (128) **Article 297(2) TFEU** is coherent with rules (i) and (ii). It provides that decisions which specify to whom they are addressed shall be notified to them and take effect upon such notification. This does not prevent a decision from being published in the Official Journal, but this does not dispense with the need for notification, which is the only way to render the act enforceable against those to whom it is addressed. Further rules are established by the last section of Article 263 TFEU concerning judicial review.¹²⁰ The EO Code confirms the first rule and adds another, according to which the responsible officer must abstain from communicating the decision to others, until the person or persons concerned has received it.¹²¹
- (129) The **model rules are coherent with the three common elements mentioned earlier**. Article III-33(1) establishes that (i) decisions shall be notified to all the parties (and specifies that this must be done “as soon as possible”) and (ii) clarifies that it is only after the notification has been carried that decision “shall take effect”. The third rule is implemented by Article III-33(2), which provides for promulgation where this is permitted by EU law.

¹¹⁸ The Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013), Art 58(2) indicates a time-limit of ten days.

¹¹⁹ For example, the *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 41(2) requires three days after posting.

¹²⁰ It provides that “The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be”. See Case T-296/97 *Alitalia - Linee aeree italiane SpA v Commission* [2000] ECR II-3871.

¹²¹ European Ombudsman – The European Code of Good Administrative Behaviour, Art 20.

III-34 Correction of obvious inaccuracies in a decision

- (133) Article III-34 allows for the **correction of obvious inaccuracies** in a decision. This rule is inspired by many national APAs.¹²² The correction of such obvious inaccuracies does not conflict with legitimate expectations of any party. Therefore, this matter is regulated in a distinct Article.

Chapter 6: Rectification and withdrawal of decisions

III-35 Rectification and withdrawal of decisions that have an adverse effect

III-36 Rectification and withdrawal of decisions that are beneficial

- (134) **Articles III-35 and III-36 regulate the power of a public authority to withdraw a formally adopted and notified decision.** The power includes the option to withdraw a decision completely, or to rectify only certain aspects of a decision which cannot be qualified as obvious inaccuracies as regulated in Article III-34.
- (135) Any withdrawal of a decision may **conflict with the protection of legitimate expectations and the principle of legal certainty.** The protection of legitimate expectations is an accepted general principle of EU law according to the jurisprudence of the CJEU. This is especially the case with regard to the withdrawal of formal Commission decisions. The CJEU differentiates in this regard between lawful and unlawful decisions and between favourable decisions or decisions which confer rights or similar benefits on one side and non-favourable decisions.
- (136) The ReNEUAL Model Rules follow this structure and **differentiate between withdrawal of decisions that have an adverse effect (Article III-35) and decisions that are beneficial (Article III-36).** If a decision has adverse effects to

¹²² See for instance *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102)*, das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 42; *Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223)*, Section 26; *Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992)*, modificada por última vez por la *Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)*, Art 105(2).

one party and is beneficial to another party the authority has to balance the conflicting interests of both parties (Articles III-35(4) and III-36(4)). Within these two basic categories the model rules differentiate further between lawful decisions (Articles III-35(2), III-36(3)) and unlawful decisions (Articles III-35(1), III-36(1), (2)). The model rules provide a set of different legal requirements for a lawful withdrawal of a decision for the four categories following from this structure. These requirements reflect the jurisprudence of the CJEU and translate the complex case law in a transparent legal structure.

- (137) **Even in the case of an unlawful decision** that has an adverse effect the authority is not strictly obliged to withdraw that decision, but has been **left with discretion**. Otherwise, time-limits for legal challenges of unlawful decisions would become meaningless. On the other hand, the expiry of a time-limit does not prohibit an authority from withdrawing an unlawful decision (Articles III-35(3) and III-36(3)). In case of an unlawful decision that is beneficial the authority may choose to withdraw that decision either with retrospective effect, only with prospective effect or not at all (Article III-36(2)). This set of different actions provides for an adequate balancing of the interests of the public with those of the beneficiary. Important criteria for this balancing test are the extent to which the illegality that besets the decisions is obvious, whether the beneficiary had provoked the earlier decision through false or incomplete information and the extent to which the beneficiary undertook irreversible investments because he or she relied on the decision.
- (138) The withdrawal of lawful decisions that are beneficial is an especially important and delicate category, because the respective beneficiaries generally have increased legitimate expectations. Therefore, Article III-36(3) sentence 3 empowers public authorities only under very restrictive conditions to withdraw such a decision. Alternative (b) reflects settled case law of the CJEU.¹²³ Alternative (c) is inspired by national law.¹²⁴ The provision allows a withdrawal of a lawful decision in case of serious harm to public or private interests which outweigh the legitimate expectations of the beneficiary. In order to provide a fair

¹²³ Case 54/77 *Herpels v Commission* (1978) ECR 585, para. 38; Case T-81/95, *Interhotel-sociedade Internacional de Hotéis SARL v Commission* (1997) ECR II-1265, paras. 42, 46-47, 61-62.

¹²⁴ Compare *Verwaltungsverfahrensgesetz* in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 49 (2) sentence 1 no. 5 with (6) sentence 1.

balance the legitimate expectations of the beneficiary might demand a (financial) compensation of his or her disadvantages deriving from reliance on the continued existence of the decision.

- (139) The **time-limit** set in Article III-36(5) for a withdrawal with retroactive effect restates the existing case law.¹²⁵ In accordance with the jurisprudence the time-limit starts with the notification of the decision to the relevant party. Under such circumstances it is not suitable to set a definite time-limit.¹²⁶ Therefore, the ReNEUAL Model rule provides for a flexible time-limit, which is used by the courts and allows the taking into account of the circumstances in the individual case.
- (140) Articles III-35(5) and III-36(6) clarify that the procedural rules provided by Book III apply to procedures to prepare a **decision** to withdraw or rectify an earlier decision.

¹²⁵ Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v High Authority of the European Coal and Steel Community* [1962] ECR 253 (English special edition); Case 15/85 *Consorzio Cooperative d'Abruzzo v Commission* [1987] ECR 1005, para 12.

¹²⁶ Compare in contrast *Verwaltungsverfahrensgesetz* in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist, § 48(4) which set a time-limit of one year. On the other side the German courts held that the time-limit does not start before the authority has investigated all factors which are important for the decision whether to withdraw the earlier decision or not.