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ADMINISTRATIVE PROCEDURAL LAW OF THE EUROPEAN UNION FROM THE VIEWPOINT OF THE COURT OF JUSTICE[1]

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1. First of all, I have to correct the title of my presentation. The correct title should be: Administrative procedural law of the European Union from the viewpoint of a judge and not from the viewpoint of the Court. I cannot talk about the position or the opinion of the Court since these are expressed in judgments which are formulated in the course of very precise, specific procedures, in chambers and if needed by majority votes. This is not the case. On the other hand, you have before you a judge of the Court of Justice of the European Union who has held this office for 13 years now and therefore might have acquired some experience. But the opinions he will express are strictly personal.

2. We have at hand six books which are the result of the efforts of many experts over many years. This has been an enormous undertaking and I pay tribute to all those who have participated in it. I agree with the authors of the Model Rules that the difficulties of transforming these rules into legislative texts should not prevent academic thinking, discussions and drafting. What cannot be used now or in the foreseeable future could be perhaps used later. Nevertheless, I hope it is excusable if I would like to focus on that part of the Model Rules that has a good chance or a better chance of becoming legislation.

3. As for the legal basis of the codification, I am convinced that the only provision in the Treaties that seems to be appropriate is Article 298, paragraph 1, TFEU which provides that "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration" although the Parliament and the Council have not yet fulfilled the task laid down in paragraph 2 of this Article to establish specific provisions. I am convinced that this Article does not confer the power to the Union to adopt legislation establishing binding rules for the Member States. The same interpretation could be drawn from Article 42 of the Charter of Fundamental Rights which establishes a right to good administration since it expressly states that the principles and rules laid down by this Article should be respected "by the institutions, bodies, offices and agencies of the Union". Therefore, Book V and VI seem to have no chance to be put on the legislative agenda for the time being. Certainly the revision of the Treaties may become possible one day, but personally I do not see it coming soon. Now, the Brexit negotiations are the priority.

4. Concerning the four other books, the European Parliament has made a political decision. In its resolution of 9 June 2016, the Parliament called on the Commission to present a legislative proposal and invited that institution to consider the text of a regulation which the Parliament has elaborated itself and annexed to its resolution. I think it was an unusual step from the Parliament but it should be accepted as a political reality. The content of the proposal of the Parliament corresponds to that of Book III of the Model Rules meaning that the Parliament seems to have at this moment no interest to deal with Books I, II and IV. In fact, if Books V and VI are dropped, Book I becomes mostly irrelevant. Book II would lose most of its content because, according to the proposal of the Parliament, delegated and implementing acts and other nonlegislative acts based on the Treaties would not fall within

the scope of the proposed regulation. It is true that the proposed regulation includes two articles (Article 26 and Article 27) on administrative acts of general scope. However, they are of an extremely general nature with very little practical meaning.

5. The Parliament seems to show no interest either for Book IV dealing with the public contracts. Personally, I also have my doubts about the necessity of such codification at this time. While the concept, the theory and the practice of public contracts are well developed in certain Member States, such as in France and in Germany, I am not sure that this is generally the case for the whole of the Union. For example, in this country that is in Hungary, the concept of administrative contracts was only introduced into law for the first time at the beginning of this year and it only applies to contracts that are specifically designated as such by law or decree. In my view such codification or harmonization at Union level only becomes necessary or useful once there is more widespread recognition of the concept of public contracts in the legal orders of the Member States. I have doubts in particular about the category of contracts referred to as "EU contracts solely governed by EU law". I have some difficulties to understand for example Article 4 of Book IV according to which these contracts would be governed in addition to the respective contractual provisions and the sector specific EU legislation by "general principles of EU contract law". I am sorry to say that I simply do not know these general principles of EU contract law. According to the explanation of the Article, in practice the general principles of EU contract law will be derived from the French law on public contracts. However, I do not think that this could be an appropriate solution. Moreover, we have to acknowledge that the public procurement procedure is already well regulated at EU level. On the one hand, the rules of public procurement of EU institutions, bodies, offices and agencies are laid down in the financial regulation applicable to the budget of the EU (at present regulation n° 966/2012) and on the other hand, the public procurement by public bodies of the Member States are regulated by EU directives (Directives n°2014/24 and n° 2014/25) and the case law attached to them. Personally I feel no need for further codifications. In general, I am convinced that in the area of public contracts, the public law and the civil or private law can well coexist. No doubt the rules governing the preparation of these contracts form part of the public law but once the contract is concluded the terms of this contract should govern the relationship between public bodies and private persons and rules expressing a dominant position of public bodies should be avoided as much as possible. I admit that my reluctance might stem from the past, namely from the time before the change of the political regime in Hungary in 1989 and 1990. In that era, the state and the state property had privileges in the area of civil law and the abolition of those privileges was a political achievement.

6. As far as the area of the single case decision making is concerned, it is impossible not to see the very strong similarity between the provisions contained in the Parliament's proposal and Book III of the Model Rules. It is evident that parts of the Parliament's proposal take over the content of book III. It is therefore certain that in this respect, the authors of the Model Rules have already offered a very useful contribution. As an outsider, I am

not entitled to give advice regarding the future work of the authors of the Model Rules, but it seems to me that at this moment, the most efficient contribution could be made by criticizing, commenting on and proposing modifications or supplementary provisions to the text of the Parliament.

Personally, I find the proposal of the Parliament a very good basis for codification. As a starting point, it may be useful to keep in mind the observation or warning laid down in recital 11 of the proposed regulation which states that "an excess as well as a lack of rules and procedures can lead to maladministration". I fully subscribe to it.

7. Looking in more detail at Book III, in conjunction with the reasoning regarding the legal basis, I see no possibility to include provisions on the obligations of the Member States. Consequently, in my view, Article 1, paragraph 2, should be left out as well as provisions on the so called composite procedures. In view of the proposal of the Parliament, the scope of Book III should be reconsidered. In the regulation proposed by the Parliament, large areas are excluded which otherwise fall within the scope of Article 1, paragraph 1 of Book III. The most important exclusion is constituted by the procedures in which the partner of the EU institutions is one of the Member States and which results from the provision that activities based on the provision stating that acts directly based on the Treaties are not within the scope of the regulation. I fully agree with such an exclusion because in the relationship between the Member States and the EU institutions there cannot be any hierarchical superiority. Consequently, the following procedures would be excluded:

- Infringement procedures based on Articles 258, 259, 260 and 265 TFEU;
- State aid procedures based on article 107 TFEU except when the Commission takes measures imposing obligations on undertakings or associations (Article 6a and 6b of Council regulation 659/1999);
- Procedures in the area of economic and monetary policy (Title VIII of Part Three of the TFEU).

By the way, I think that a Member State cannot be considered simply a legal person and therefore a party in the sense of Article 4, point f, of the proposed regulation. It follows that even if an administrative procedure is not based on the Treaties but on the secondary legislation, a procedure involving a Member State is excluded of the scope of the regulation. Such an example is provided by directive 2015/1535 which provides for a procedure for notification by the Member States to the Commission in the field of technical regulations and standards.

8. The approach of the Model Rules and the proposal of the Parliament are essentially identical regarding the relationship of the new rules to the specific EU rules existing or to be adopted. Book I, in Article 1, paragraph 2 states that the Model Rules shall apply where no specific procedurals rules exist, while according to Article 3 of the proposed regulation of the Parliament, the regulation shall apply without prejudice to other legal

acts of the Union providing for specific administrative procedural rules and the regulation shall supplement such legal acts of the Union.

In my view, this is a correct solution but it raises the question about the real need for the general procedural rules presently under consideration. I have no precise information about the workload of the EU institutions, bodies, offices and agencies. On the other hand, I am aware of the caseload of the EU courts namely the General Court and the Court of Justice of the European Union and this provides some indications about the situation at the EU institutions, bodies, offices and agencies in general. Without entering the realm of statistics, I would mention some categories in which the number of litigations is high: intellectual property rights (trade marks), competition, state aid, antidumping measures, and access to documents requests. But in fact, these areas are already well regulated by EU legislation and the case law of the courts. Although I do not exclude that some specific rules now to be elaborated could be applied in the absence of existing EU rules, but in general, to be frank and without the intention of discouraging the academic work, I see no particular need for further regulation.

In my view, it would be very useful to have an inventory of the institutions, bodies, offices and agencies which would apply the new rules and the sectors and fields in which this application would take place. This inventory could demonstrate the lack of regulations or disclose contradictions in regulations in some areas and thus we could come more convincingly to the conclusion that codification is really needed. Certainly this inventory should not be exhaustive, the example could be the list of the public law bodies which are set out in the public procurement legislation of the EU (Annex III of the directive 2004/18/EC).

9. Strictly from a judicial perspective, I can say that we are particularly interested in the legal remedies in the event of a breach of the new rules. It is obvious that the new rules will be valuable if they are respected. It is also clear that the introduction of the new rules includes the potential for judicial reviews and litigations. In this respect, we have to observe that neither Book III nor the Parliament's proposal contain provisions on judicial remedies except for the obligation to mention this possibility, if it exists, in the administrative act concluding the procedures (Article 20, paragraph 4 of the proposed regulation and Article 30, paragraph 2 of Book III). In this way, neither the proposed regulation nor the Model Rules provide for a general right of judicial action in case of violation of the new rules.

It is true that many specific sectors of EU legislation contain provisions on legal remedies. This is the case for example in the area of the trade marks (regulation n° 207/2009), civil aviation (regulation n° 2016/2008), medicinal products (regulation n° 726/2004), chemicals (regulation n° 1907/2006), and financial supervision (regulations nos 1093/2010, 1094/2010 and 1095/2010). But even if there is no specific reference to legal remedies in sectorial legislation, we have Article 263 TFEU which entitles any natural or legal person to institute judicial proceedings against an act addressed to that person or which is of direct and individual concern to that person.

Nevertheless, in case of establishing a new code of procedure for the EU institutions, bodies, offices and agencies, the issue about the possibility or need to provide some rules

for judicial remedies deserves reflection. The starting point should be that according to the case law, the Union has a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the acts of the institutions. Therefore, a text which mentions the obligation of an administrative authority to include in an act the possibility of judicial remedies "where the Union law so provides" might not be correct.

Moreover, to obtain judicial review, the parties must prove the existence of an "acte attaquable" or a "challengeable measure", normally a decision. But only some of the bodies, offices and agencies take challengeable measures, many others only have a preparatory or advisory role, although it is true that this advisory role is sometimes decisive for the final decision. In this field as well, it would be useful to have a clear picture about the acts which are challengeable and which are not.

10. Another question arising concerns the sanctions or consequences of the violations of the procedural rules. This depends largely on the gravity of the violation. There is no doubt that there are differences as regard to the weight of the rules, for example between the obligation to hear the parties in the procedures or the rules about time limits or language requirements. According to the case law of the Court, only the violation of essential procedural requirements can justify an annulment or a declaration of invalidity. As regards other breaches, it should be examined whether in the absence of such a breach, the procedure could have led to a different decision and if not the annulment is not justified. I think that academic work could also take up this question and provide an appreciation of the procedural rules enabling differentiation.

In the end, I would like to say that, of course, the mission of the Court is to interpret and apply European Union law, but the Court does not participate in its formulation. The legislators are the European Parliament and the Council. At Court, we welcome new rules provided that they satisfy a real need, are of good quality, help citizens and businesses in their contacts with the EU administration and also facilitate judicial work.

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