Bundesverwaltungsgericht

ACA-Europe Colloquium
ReNEUAL II – Administrative Law in the European Union
Administrative Information Management in the Digital Age

Leipzig, Germany

Answers to questionnaire: Serbia

Activity co-financed by the Justice Programme of the European Union

ACA-Colloquium
ReNEUAL II – Administrative Law in the European Union
Administrative Information Management in the Digital Age

11 May 2020

Bundesverwaltungsgericht (Federal Administrative Court), Leipzig

Questionnaire

Introduction:

National legal orders and European Union law are in many fields closely linked. Both underlie mutual influences. The jurisdiction of the European Court of Justice is not only relevant and binding as the interpretation and application of European Union law is concerned. Also, its jurisdiction partly affects the interpretation and application of national law. This phenomenon can be observed e.g. in the law of administrative procedure or of administrative court procedure.

On the other hand, European Union law is founded on the national jurisdictions of the member states. From an optimistic point of view it ought to be an essence of the best the national legal orders have to offer. In this line of thinking the European Court of Justice considers the national legal orders as source of inspiration in determining the general principles of European Union law which traditionally, i.e. before the Charter of Fundamental Rights came into force, were the sole source of fundamental rights within the jurisdiction of the European Court of Justice (cf. ECJ Case 4/73 (Nold), ECLI:EU:C:1974:51, p.507-508). Accordingly, the European Court of Justice has deducted many procedural rights in administrative procedure from the national legal orders. It is in the interest of the member states that the relationship between European Union law and the national legal orders remains one of mutual interchange, better: a dialectic process.

This is especially the case in evolving new legal fields like the law of composite and interlinked information management between various national authorities as well as between national and European Union administrative bodies. Such inter-administrative information management is a major component of administrative procedures implementing European Union law. It reflects the need of public authorities for reliable and up-to-date information from various sources in cases concerning cross-border public or private activities within the internal market. In order to provide such information the European Union has established sets of mechanisms for cross-border and/or multi-level exchange of information. Prominent examples are rapid alert systems providing information about risks for consumers caused by dangerous food or feed or other products, the Internal Market Information System (IMI), information systems in the field of customs and taxation, and the growing number of information

systems concerning migrants or travellers (Schengen Information System, Visa Information System, Eurodac). More recently, discussions arise that these systems may evolve into semi- or even fully automated decision-making systems.

This integration of various databases and other sources of information raises a number of legal questions: Can a decision-making body rely on information from partners of the information network or are they obliged to scrutinize them themselves? Who is liable for any damage caused by malfunctioning of those systems or by false information entered into the system by a partner institution? Is there a need for new legal safeguards of effective legal protection?

The ReNEUAL Model Rules on European Union Administrative Procedure contain in Book VI draft rules on inter-administrative information management which concern types of information exchange beyond the basic rules of mutual assistance covered by Book V of the Model Rules. The rules of Book VI shall inform the discussions at the 2020 colloquium in Leipzig in a similar way as the draft model rules of Book III concerning single case decision-making stimulated the seminar in Cologne at the end of 2018. In addition, the colloquium is supposed to recall the discussion within ACA concerning digital technology and the law with a stronger view on the decision making at the colloquium in The Hague on 14 May 2018.

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed. The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book VI (Administrative Information Management) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

In contrast to the 2018 Cologne seminar, we will not discuss a resolution adopted by the European Parliament in 2016 on a proposal for a regulation for an open, efficient and independent European Union administration (EP-No. B8-0685/2016 / P8_TA-PROV(2016)0279). This draft focusses for good political reasons on single case decision-making and does not cover the topic of the Leipzig colloquium.

The colloquium 2020 to be held in Leipzig aims at further investigating into the national legal orders in order to assess their principles more profoundly and on a wider scale. ReNEUAL is very much aware of the fact that Book VI contains the most innovative part of the Model Rules. In addition, Book VI covers a highly dynamic field of law. Thus, Book VI itself will certainly evolve during the next years and ReNEUAL has already set up a new working group in order to update the existing rules and to investigate the need and the options for additional rules, especially concerning automated decision-making and the use of artificial intelligence in administrative procedures.

In line with this, the purpose of the Leipzig colloquium is to achieve a better understanding of the existing (additional) approaches of the national legal orders, to discover similarities and/or differences in order to promote the dialectic process mentioned above and thus both contribute to a better understanding of the principles of the European Union legal order derived from the essence of the member states' legal orders and enable a mutual learning process as well between national legal orders among themselves as between the national legal orders and the European Union's legal order.

Wherever you consider it appropriate, it would be helpful if you not only described your national legal order, but also compared your national legal order with the relevant provisions of Book VI of the ReNEUAL Model Rules. For this purpose the questionnaire makes reference to single provisions of Book VI in order to facilitate the links.

I. Shared databases, structured information mechanisms or duties to inform of national authorities and the case law of your court or other courts of your country

Background: Book VI establishes in Art. VI-2 (1)-(3) three categories of (advanced) inter-administrative information management not covered by the (more basic) rules for information exchange under the obligations of mutual assistance regulated in Book V (in order of their level of integration): structured information mechanism; duties to inform, and (shared) databases. They are defined in Art. VI-2 (see also Introduction to Book VI paras 17-23 and paras 5-8 of the explanations of Book VI).

1. Does your national legal order establish mechanisms of information exchange among authorities within your country which are similar to those categories as defined in Book VI? If so, please provide the most important examples from a range of legal domains, describe how they work and classify them into the categories as defined in Book VI as far as feasible.

- The mechanism of information exchange between the administrative authorities has been established by Article 9 of the Law on General Administrative Procedure, within the principle of effectiveness and economy of the procedure. It states that the relevant authority is, in accordance with the law, ex officio obliged to control the data on facts which are necessary for the decision-making and for which the official records are kept, and also to collect and process those data. The relevant authority can also demand from a party to provide only those data which are necessary for his/her identification, as well as documents confirming the facts which are not logged in the official records.
  In terms of the data categories, the public authority may, pursuant to the law, control, collect and process the data on the facts contained in the official records which are necessary for the decision-making.

In case the records are kept by other authority, the authority conducting the procedure is obliged to demand the relevant data without undue delay, while the authority that is requested to provide the data is obliged to release the data at no charge within the period of 15 days, unless otherwise specified. In case the data can be obtained electronically, the requested authority shall provide the data in the shortest time possible.

This practically means that, in case a party in the administrative procedure institutes the procedure to exercise the right to child benefit, the authority in charge of the procedure shall obtain all the necessary data through official means. However, in case the party is requested to provide the residential lease agreement, it should be provided by the relevant party since the competent authority does not hold such information. The said exchange between the administrative authorities shall be carried out ex officio, but the citizens shall still pay the administrative fees for the issuance of each document at their personal request.

In relation to the Law on General Administrative Procedure, which basically prescribes that the party in the administrative procedure shall be relieved of obligation to collect the data for which the public administrative authorities keep the official records, the Law on e-Government ("Official gazette of the Republic of Serbia", No. 27/2018 from 6th April 2018), being an independent law, prescribes that the activities of the public administration authorities and organizations, authorities and organizations of autonomous provinces, authorities and organizations of local self-government units, agencies, public enterprises, specialized authorities through which the regulatory function of legal and natural persons entrusted with public jurisdictions (hereinafter referred to as "authority") are achieved by the use of information and communication technologies, that is the conditions for the establishment, maintenance and use of interoperable information and communication technologies of the authorities (hereinafter referred to as "e-Government").

Accordingly, the provisions of this law are also applied to other activities of public authorities conducting the procedure in electronic form, unless otherwise specified by other laws.

The competent authority is obliged to conduct the administrative procedure electronically and communicate in accordance with this law and provisions passed on the basis of it. The provisions of this law also regulate electronic communication among the public authorities, within the field and jurisdiction of public authorities which are not related to the administrative procedures, unless otherwise specified by separate laws.

Apart from this, in November 2017 The Ministry of Justice and the Ministry of Public Administration and Local Self-Government have signed the Agreement on electronic exchange of data, which provides for the electronic exchange of data from the Registry of Births, Deaths and Marriages among the Ministry of Public Administration and Local Self-Government and competent courts, public prosecutor's offices and notaries public, which came into force in the beginning of April 2018. Apart from the data exchange, the Agreement also provides that the offices of vital records directly obtain

the data from the courts in case of final court decisions related to the determining the facts of maternity, fraternity or death.

2. Are there additional mechanisms of information exchange among authorities within your country which are not covered by those categories? If so, please provide examples, describe how they work and explain their specifics in relation to the ReNEUAL categories.

- Electronic administrative procedures conducted by the competent authorities do not include procedures related to the acts for which, pursuant to the provisions of separate laws, other procedures in terms of information exchange are prescribed. For instance, the Law on Data Confidentiality prescribes separate procedure for the protection and processing of confidential data of interest for the national and public safety, defence, internal and foreign affairs of the Republic of Serbia, protection of confidential data, access to the confidential data and cessation of data confidentiality, jurisdiction of the authorities and supervision over the implementation of this law, as well as responsibility in case of failure to fulfil the obligations provided by the law and other issues which are of importance for the protection of data confidentiality.

3. In your country, do there exist legal obligations or a political practice to conduct an impact assessment before such advanced forms of information exchange are established?

- Prior to the enactment of the Law on e-Government (“Official Gazette of the Republic of Serbia” No. 27/18), the competent Ministry of Public Administration and Local Self-Government has passed the draft law along with the explanatory note which was the subject of public discussion, thus allowing the professional and wider public to provide proposals, suggestions and comments on the draft law. After the expiration of the public discussion deadline, the competent state authority (Public Policy Secretariat of the Republic of Serbia) has conducted the Analysis of the effects of Law on e-Government, which incorporates the answers to the following questions: which problems should the Law address; what are the desired goals of the Law implementation; have the potentials to solve the pending problems without the passing of the acts been considered; why is the passing of the acts the best solution to the problems; who will be influenced by legal solutions and in which manner; what costs will the implementation of the Law cause for the citizens and the economy, especially small and medium enterprises; do the positive results of the new law justify the accumulated costs; does the law support the creation of new business entities and market competition; have all the interested parties been given an opportunity to provide their opinion on the Law; which measures will be taken during the implementation of the Law in order to achieve all that the Law prescribes. After the positive evaluation of the effects achieved by the Law, the draft law was forwarded to the Government of the Republic of Serbia, which, acting as an authorized legislator, forwarded the proposal of the Law to the National Assembly of the Republic of Serbia for the enactment.

4. Has your court (or other courts of your country) pronounced judgements on such mechanisms of advanced information exchange among authorities within your country? Are you aware of ongoing court proceedings concerning such matters? What are most important cases or principles established in this case law?

- So far, the Administrative Court of the Republic of Serbia hasn't had any cases related to this type of administrative procedure.
  At the moment, it is still too early to talk about this type of procedure, since the electronic administrative procedure is still developing in the Republic of Serbia, considering the fact that the implementation of the new Law on General Administrative Procedure started on July 1st 2017, while the Law on e-Government was enacted on April 14th 2018. However, there is a deadline for the enactment of by-laws (six months – which are mainly passed), a deadline for the exchange of data from the registries of the authorities (12 months), a deadline for the establishment of the service bus for the exchange of data among the registries of the authorities (12 months), a deadline for the establishment of metaregistry (12 months), a deadline for the development of software solutions, a deadline for the administrative e-government and a deadline for the transition of registries and information systems to the servers of the Republic of Serbia (12 months).
  Plenty of activities have been initiated, some of which have recently been completed, even though a maximum deadline provided by the legislators for the establishment of the parts of system and transition to the e-government is three years.

5. a) Can a decision-making body in your country rely on information from partners of such national (!) information networks or is it obliged to scrutinize the information itself?

- The Law on e-Government provides that the authority shall obtain the data from the registries and records in electronic form without additional check-up, in accordance with the Law. Exceptionally, if there is a doubt in terms of the accuracy of data contained in the registries and electronic records kept by a competent authority, it is obliged to perform the check-up and mark the data with the status: "The data are in the review process".
  The data marked with the status: "The data are in the review process" are not taken over.
  Insight into the data and their takeover is accomplished through the service bus of the relevant authority or via other accepted solutions on the basis of unified codebook and identifiers of the electronic administration service data of which are processed by the authority within its jurisdiction.
  Unified identifiers are data from the registries and records in electronic form on the basis of which the users' data can be compared. Such data are kept by the authori-

ties in accordance with specific laws and they include: personal identification number, unique student code, unique social security number for social security contribution payers and insured persons, personal insurance number, company registration number and tax identification number.
The relevant authority is obliged to provide the data from electronic records to other authority keeping the registry, according to the law, in case such data are necessary for the registry-keeping and for the purpose of conducting the activities within their jurisdiction.
The authority competent for the registry-keeping is obliged to submit the data necessary for electronic administrative procedures immediately, and not later than three working days from the date the request was submitted, including other registries as well.
The competent authority is obliged to keep the record of each access and insight into the electronic documents and data within its jurisdiction, including the data on the identity of an authorized person (personal identification number and name), access date and time and also the group of data which have been accessed.
The manner in which the competent authorities access, collect, process and disclose data, that is, provide the data on the facts for which the official records are kept within the electronic registries, and which are of importance for the decision-making in administrative procedure, is precisely determined by the ministry in charge of the activities performed by the public administration.

Background: In Case C-503/03 Commission v Kingdom of Spain [2006] the CJEU established an obligation for users of the Schengen Information System (SIS) to take advantage of the so-called SIRENE offices in the system in order to validate sensitive information provided through the SIS. This jurisprudence inspired Art. 25(2) SIS II-Regulation (EC) 1987/2006 and the general draft rule in Art. VI-21 of the ReNEUAL Model Rules.

b) If a decision-making body in your country is obliged to scrutinize information obtained from a national information network, what does this mean in practice? How far does this obligation reach?

Executive official of the state authority which requests the data for decision-making in the electronic administrative procedure appoints authorized officials to collect such data, while an executive official in charge of official record-keeping appoints officials who may disclose the data.
Executive officials in charge of decision-making in electronic administrative procedure and the authorities in charge of official record-keeping send to each other, as well as the competent authority, the notification on the officials authorised to collect and disclose of data and documents which are necessary for the decision-making, before the authorized officials can access those data.

The relevant authority collects personal data necessary for the decision-making in administrative procedure, including: personal identification number, name, address, telephone number and e-mail of the authorized officials.
Personal data are kept permanently.
In relation to the receipt of the request, which is a legal basis for the institution of administrative procedure, the relevant authority is obliged to:
1. inform the user of the e-Government service on all the data which, according to the law, have to be obtained for the purpose of conducting an administrative procedure, and also on the obligation of the relevant authority to collect the data ex officio from the official records;
2. allow the user of the e-Government service to state that they are personally going to collect the personal data from the official records;
3. inform on necessary data which refer to a third party (family member, that is a member of family household or similar) and which, in accordance with the law, have to be obtained for the purpose of conducting an administrative procedure and also to inform that the access to these data is only possible on the basis of the consent of that person, pursuant to the law.
The authorities in charge of the official record-keeping establish technical conditions for the collection and disclosure of data and documents electronically, while the authority in charge provides the exchange of those data and documents via the service bus.
Each time the data and documents are accessed, an authorized representative of the authority requesting the data needed for the decision-making in the electronic administrative procedure submits an inquiry for the access which contains the following data:
1. identity of an authorized person;
2. administrative procedure and the case number for which it is necessary to access the data;
3. access date and time.

The authority competent for the official record-keeping records the data on each separate access.
In case the access is conducted via the e-Government portal (“eUprava”), each access is recorded by a competent authority.
An authorized official of the authority requesting the data needed for the decision-making in electronic administrative procedure downloads the data and documents into the relevant authority’s information system which are consequently integrated into the case file.

6. In case of an information exchange between national authorities which concerns the transfer of personal data:

a) Does your national legal order provide for the automatic (i.e. without request) information of the person concerned?

- No, it is necessary to provide the request submitted by interested parties.

b) Does you national legal order provide for an enforceable right of the person concerned that he/she be informed of such an exchange upon request?

- Yes, at personal request, especially if the data refer to a natural person, the competent authority is obliged, at the request of that person and according to the Law on Personal Data Protection, provide an information on personal data processing.

7. Who is liable for any damage caused by malfunctioning of those national information networks or by false information entered into the system by a partner institution?

- In terms of misdemeanours, a person authorized for electronic registry-keeping is deemed responsible.

Background: In the legal framework of some European information systems the legislator established a substitutional liability or subrogation mechanism (Art. 48 SIS II-Regulation (EC) 1987/2006; see also Art. 116(2) Convention Implementing the Schengen Agreement; Art. 40(2), (3) CIS-Regulation 515/97). Art. VI-40 ReNEUAL Model Rules formulates a general rule along these lines in order to enhance the protection of individuals facing damages caused by such mechanisms. In addition, Art. VI-40(2) provides for a compensation mechanism among the participating authorities in order to provide incentives to comply with their respective legal obligations.

8. In you national legal order, are there any specific safeguards or legal remedies of individuals considering information about them to be false or an exchange of information about them to be illegal? Is there a political or academic discussion about (further) needs for new or more specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

- Legal protection is provided by provisions of separate laws, depending upon the field of administrative law involved.

II. Cross-border and multi-level information sharing and the case law of your court or other courts of your country

1. Has your court (or other courts of your country) pronounced judgements on such EU mechanisms of advanced cross-border or multi-level information exchange among European authorities? Are you aware of ongoing court proceedings concerning such matters? What are most important cases or principles established in this case law?

- We don't have any case law on cross-border exchange of information.

2. Has your court (or other courts of your country) delivered judgements drawing on the CJEU case law in Case C-503/03 Commission v Kingdom of Spain [2006] or on Art. 25(2) SIS II-Regulation (EC) 1987/2006?

- We don't have any case law based on the CJEU case law in Case C-503/03 Commission v Kingdom of Spain [2006] or on Art. 25(2) SIS II-Regulation (EC) 1987/2006.

Background: see Question I.5.

3. Has your court (or other courts of your country) delivered judgements drawing on a substitutional liability or subrogation mechanism in accordance with Art. 48 SIS II-Regulation (EC) 1987/2006, Art. 116(2) Convention implementing the Schengen Agreement, Art. 40(2), (3) CIS-Regulation 515/97) or similar provisions of EU law?

- We don't have any case law based on the substitutional liability or subrogation mechanism in accordance with Art. 48 SIS II-Regulation (EC) 1987/2006, Art. 116(2) Convention implementing the Schengen Agreement, Art. 40(2), (3) CIS-Regulation 515/97) or similar provisions of EU law.

Background: see Question I.7.

4. In your national legal order, are there any new or specific legal safeguards with regard to cross-border or multi-level information sharing? Is there a political or academic discussion about (further) needs for new or specific legal safeguards in this context? Are there any recent legislative proposals on this topic?

- Legal protection is provided through provisions of separate laws, depending upon the field of administrative law involved and under the condition that such type of protection requires special protection measures.

Background: At least in some sector-specific secondary EU law new approaches are developed in order to avoid either gaps of judicial oversight or to minimize factual burdens for concerned citizens to initiate effective judicial review. One of these new instruments allows for trans-national representative legal action (compare Art. 111(1) Convention Implementing the Schengen Agreement; Art. 36 (5) CIS-Regulation 515/97).