ReNEUAL Research Network on
EU Administrative Law

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INFORMATION MANAGEMENT IN „INFORMAL" EU NETWORKS OF COOPERATION

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Towards an EU administrative procedure law ?

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A GENERAL STATEMENT, TO START

«The "soft law" approach and alternative dispute resolution in which the European Ombudsman continues to play a crucial role at all levels with the Code of Good Administrative Behaviour should have a positive impact on the administrative culture of the EU administration so long that it is backed up by "hard law" granting **enforceable rights** and remedies to individuals »(*)

(*) Working document "*State of Play and Future Prospects for EU Administrative La*w" drafted by the Working Group on EU Administrative Law of the Committee on Legal Affairs of the European Parliament (19 October 2011), Point 23., p. 33.

INFORMATION MANAGEMENT RULES SHOULD BE CONSIDERED AS PART OF THIS DISCOURSE

THREE "INFORMAL" NETWORKS OF COOPERATION

- ## THE SOLVIT NETWORK

- ## THE EU-PILOT NETWORK

- ## THE PUBLIC PROCUREMENT NETWORK

all three Networks are informal cooperation network without a formal legal basis.

WHAT ARE THE THREE NETWORK USED FOR?

- **SOLVIT** deals with cross-frontier problems faced by individual citizens and organisations caused by bad application of **EC internal market rules**.

- **"EU Pilot"**, (*), aims at testing a new working method between Commission and Member States, in order to improve cooperation and exchange of information on issues concerning the application of EU law

- (*) Operating since mid April 2008 with fifteen volunteer Member States (Austria, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy, Lithuania, The Netherlands, Portugal, Slovenia, Sweden, Spain and the United Kingdom)

- The **Public Procurement Network** aims at providing undertakings with an informal problem solving mechanism (similar to that of SOLVIT) dealing specifically with cross-border public procurement cases.

A) INFORMATION MANAGEMENT
AND THE SOLVIT NETWORK

WHAT IS SOLVIT IN PRACTICE

The SOLVIT system is made up of three 'pillars':

■ - a cooperation network of pre-existing national Centres (cooperation between the Centres is regulated by the 2001 Recommendation on the principles for using SOLVIT and by the Quality and performance standards adopted in 2003);

■ - an on-line data base connecting the Centres;

■ - a set of principles that the Centres have to follow when dealing with the cases (principles which are set out in the 2001 Recommendation on principles for using SOLVIT)

A) INFORMATION MANAGEMENT
AND THE SOLVIT NETWORK

DATA COLLECTION IN THE SOLVIT NETWORK

(**follows the principles set out in the 2001 Recommendation on principles for using SOLVIT**)

- To submit a problem to SOLVIT, all details relevant to the case are requested

- Where available, documents in support of the case will also be added to the file in the database.

- The data will be used:

    - for solving the problem,

    - for quality control of the service provided

    - in certain cases **as supporting evidence** to address structural problems in the functioning of the internal market.

A) INFORMATION MANAGEMENT AND THE SOLVIT NETWORK

SUBJECTS HAVING ACCESS TO THE DATA

- case handlers of the national SOLVIT Centre(s) and of the Commission who are involved in the case,

- officials involved in the case in the public authority complained about (without direct access to the database),

- technical support team at the Commission, if technical difficulties arise with the database.

When SOLVIT needs to refer the case to a different problem solving network or body => permission will be requested for transfer of the data.

A) INFORMATION MANAGEMENT
AND THE SOLVIT NETWORK

■ DO GENERAL RULES ON DATA PROTECTION APPLY TO SOLVIT ?

REGULATION (EC) NO 45/2001 ON DATA PROTECTION
Article 3 - Scope

This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.

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A) INFORMATION MANAGEMENT AND THE SOLVIT NETWORK

Decision of the European Ombudsman of 24.03.2006
(on complaint 1781/2004/OV)

"… The EC Treaty empowers the Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the Ombudsman specifically provides that no action by any other authority or person … may be the subject of a complaint to the Ombudsman"

"… Although the SOLVIT network has been created by the Commission and the Member States in order to solve problems facing EU citizens and businesses due to the misapplication of internal market law the SOLVIT centres themselves are not Community institutions or bodies, but form part of the national Ministries"

A) INFORMATION MANAGEMENT AND THE SOLVIT NETWORK

IT IS TRUE THAT THE CASES ARE HANDLED BY THE SOLVIT CENTRES IN ALL MEMBER STATES (which pertain to the National Administrations)

NEVERTHELESS

- The SOLVIT database, mailbox and mailing list are operated by the European Commission

- The **financing** of the data base and technical support comes from the **EU budget**

- For questions or requests regarding the processing of personal data **the controller** is indicated in the EU Commission

TWO OPEN QUESTIONS, TO CONCLUDE

Art. 3 of Regulation 45/2001 on data protection applies only to "*the processing of personal data by all Community institutions and bodies*":

What about the activities of operating and controlling the SOLVIT database? Are they really not falling within the scope of the Regulation

Inquiries for maladministration of the EU Ombudsman are possible only with regard to "*activities of Community institutions and bodies*":

Is the operating and controlling of   a database NOT an "activity", which could be relevant in this sense?

B) INFORMATION MANAGEMENT
AND THE EU-PILOT NETWORK

WHAT IS EU-PILOT USED FOR?

Launched by the Commission in 2008 to improve **management of infringements**.

EU PILOT – getting quick answers to complaints by citizens and business

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/226&format=HTML
&aged=1&language=EN&guiLanguage=en

■ It is aimed at testing a new working method between Commission and member States => improve cooperation and exchange of information on issues concerning the application of Community law.

B) INFORMATION MANAGEMENT
AND THE EU-PILOT NETWORK

EU-PILOT and SOLVIT

- EU Pilot differs from SOLVIT in terms of the type of issues it handles and the fact that **communication is between the Commission and the relevant Member States** whereas within SOLVIT Member States work together to solve cross border problems.

B) INFORMATION MANAGEMENT
AND THE EU-PILOT NETWORK

PILOT AND DATA PROTECTION'S RULES

- A confidential on-line database has been created for communication between Commission services and Member State authorities.

- A network of contacts has been set up to operate the system

- **Regulation 45/2001   On Data Protection applies to EU PILOT**

C) INFORMATION MANAGEMENT AND THE PPN NETWORK

- The **Public Procurement Network** is made up of the procurement authorities of the Member States (contact points).

- The network has to provide undertakings with **an informal problem solving mechanism** (similar to that of SOLVIT) dealing specifically with cross-border public procurement cases

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C) INFORMATION MANAGEMENT AND THE PPN NETWORK

DATA COLLECTION IN THE PPN NETWORK

- The applicant has to provide to the Centres some background information and a short description of the presumed breach of the public procurement regulations.

- The applicant can make it a precondition that its anonymity should be protected: Companies are very often concerned about getting blacklisted if their name should become known in connection with a complaint.

C) INFORMATION MANAGEMENT
AND THE PPN NETWORK

THE EXCHANGE OF CONFIDENTIAL INFORMATION WITHIN THE NETWORK

- The Center of the Member State where the procurement procedure is taking place has specific information obligations.

- The guidelines specify that both contact points have to make their best efforts to pursue all reasonable available sources of information

- They also have to provide statistical information on the outcome of the treatment of requests for assistance in the framework of the EU-PILOT Project

C) INFORMATION MANAGEMENT
AND THE PPN NETWORK

CONFIDENTIALITY AND ACCESS TO FILES

■ National authorities are under no general legal obligation, according to EU law, to disclose confidential information. Except they are under a general cooperation obligation.

■ As a general rule, national rules of the Member States apply **BUT**, if national rules dealing with the right of citizens to get access to information can hamper the confidentiality of information, notice should be given by the country asking for information to the country in possession of the information

C) INFORMATION MANAGEMENT
AND THE PPN NETWORK

CONFIDENTIALITY AND ACCESS TO FILES

- The case of the Danish supplier of earth moving equipment, including mine clearing and other defense vehicles, who had applied for a call for tenders in the United Kingdom and asked the Danish Competition Authority (PPN contact point) for assistance (it contended that the procurement procedure was in breach of the relevant directives in many respects)

- The outcome of this case was an agreement that the exchange of confidential information only can take place **on the condition that the information received can be kept confidential**

THREE "INFORMAL" NETWORKS OF COOPERATION USING DIFFERENT INFORMATION MANAGEMENT'S TOOLS

- SOLVIT and EU-PILOT are **on-line integrated systems**, structured around a **shared database**, which is designed, among other things, to record part of the information.

- While the PPN contact points **are not connected by an-online data base and there is no recording of information**.

In any case, there is an exchange of information within the EU and therefore information management is hier a very central topic

THREE "INFORMAL" NETWORKS OF COOPERATION USING DIFFERENT INFORMATION MANAGEMENT'S SOLUTIONS

■ Regulation (EC) 45/2001 on data protection does not apply to SOLVIT and to PPN

■ Regulation 45/2001   On Data Protection applies to EU PILOT

Nevertheless, the EU Commission
plays a more or less
active role within all three networks

THREE "INFORMAL" NETWORKS OF COOPERATION USING DIFFERENT INFORMATION MANAGEMENT'S TOOLS

■ National rules concerning access to files apply to all three Networks, but to a very different extent

■ All this is specified in informal documents (guidelines) which are not even easy to be found

The final result is "a mess" of different rules applying to very similar situation

WHAT ABOUT THE FUTURE DEVELOPMENTS?

TWO IMPORTANT RECENT DOCUMENTS as a further point of reference:

1) **The Proposal for a Regulation** of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System ('the IMI Regulation' – doc. COM(2011) 522 final)

in accordance with this proposal, IMI is meant to become a flexible, horizontal system that can support multiple areas of internal market legislation

http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=200762

2) **The Opinion of the European Data Protection Supervisor** of 22 November 2011 on this proposal

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-11-22_IMI_Opinion_EN.pdf

CONTINUED…

According to the Opinion of the European Data Protection Supervisor on that proposal there are different values to be considered when legislating on this specific matter:

A) Consistency, while respecting diversity

16. "… *IMI needs to be built in such a way that users in each of these 27 Member States would be able to comply with their national laws, including national data protection laws, when exchanging personal data via IMI. At the same time, the data subjects must also be reassured that their data will be consistently protected irrespective of transfer of data via IMI to another Member State. Consistency, while at the same time respecting diversity, is a key challenge for building both the technical and the legal infrastructure for IMI*"

B) Balancing flexibility and legal certainty

. 18. "*…The EDPS acknowledges that there is a need for flexibility and takes note of the Commission's desire to make the Regulation 'future-proof'. However, this should not lead to lack of clarity or legal certainty in terms of the functionalities of the system and the data protection safeguards that are to be implemented. For this reason, whenever possible, the Proposal should be more specific and go beyond reiterating the main data protection principles set forth in Directive 95/46/EC and Regulation 45/2001*

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SOME CONCLUSIONS

<u>GENERAL INFORMATION MANAGEMENT'S RULES ARE NEEDED WHICH</u>:

A) SHOULD BE BASED ON A COMPARATIVE ANALYSIS OF WHAT <u>IS OR IS NOT</u> WORKING IN THE EXISTING INFORMAL NETWORKS OF COOPERATIONS

B) SHOULD PERHAPS NOT APPLY FROM THE VERY BEGINNING OF AN INFORMAL COOPERATION, BUT AFTER A CERTAIN PERIOD TIME

C) INFORMALITY OF COOPERATION - WHICH IS VERY OFTEN THE BEST WORKING SOLUTION - DOES NOT NECESSARILY IMPLIES THE ABSENCE OF BASIC COMMON PRINCIPLES GOVERNING INFORMATION MANAGEMENT (S. the above mentioned opinion of the European Data Protection Supervisor)

AND A MORE GENERAL STATEMENT –
to conclude with

IF

(according also to the opinion of the EU Parliament and Council, of the Data Protection Supervisor etc.) GENERAL INFORMATION MANAGEMENT'S RULES ARE NEEDED,

WHY SHOULD SUCH RULES

(in the form of basic common principles)

NOT BE INCLUDED IN A GENERAL LAW ON ADMINISTRATIVE PROCEDURE?

GOING BACK JUST WHERE WE STARTED…

«The "soft law" approach and alternative dispute resolution in which the European Ombudsman continues to play a crucial role at all levels with the Code of Good Administrative Behaviour should have a positive impact on the administrative culture of the EU administration so long that it is backed up by "hard law" granting **enforceable rights** and remedies to individuals »(*)

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