

## **ReNEUAL Model Rules on EU Administrative Procedure**

### **Book II – Administrative Rulemaking**

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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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  - University of Barcelona (UB);
- Florence:
  - Florence Centre for Judicial Cooperation, Law Department, European University Institute (EUI)
- Freiburg i.Br.:
  - Institute for Media and Information Law, University of Freiburg;
- Luxembourg:
  - Centre for European Law, Faculty of Law, Economics and Finance, University of Luxembourg;
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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 <a href="http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf">http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf</a> .
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 Procedures**  
**Book II – Administrative Rulemaking**

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## A. Introduction

- (1) This book addresses rule-making procedures by the EU authorities acting in an executive capacity, i.e. those that remain outside the formal legislative procedures provided for in EU law. The EU executive has increasingly diversified. The **scope of the proposed rules is not limited to rule-making by the Commission**. Importantly, it also includes the making of other non-legislative acts of general application by other EU institutions, bodies, offices and agencies (see Article 1). The **objective of the procedural rules proposed** is to ensure that the constitutional principles of participatory democracy and transparency as well as principles of EU administrative law, in particular, the 'duty of care' (full and impartial assessment of all relevant facts), are observed in procedures leading to the adoption of non-legislative acts of general application. The purpose of the model rules proposed is to ensure a higher degree of legitimacy of rule-making activities, in accordance with Article 11(1) TEU. Greater transparency of input into the procedure as well as the possibility for public debate and deliberation on alternatives will ensure more fully that all the relevant facts and legally protected interests are taken into account, which will contribute to the overall quality of rule-making.
- (2) Book II **aims to fill a gap in the existing legal system of the EU**. It links the provisions, general principles of law and values arising from primary law with the procedure for adoption of non-legislative acts of general application. Progressively over the past decades, a set of constitutional values emerged as general principles of law both in the case law of the CJ and in (incremental) Treaty amendments. Such principles have until now mainly shaped the EU's institutional structures and decision-making procedures with regard to the EU's formalised legislative procedure. Rule-making outside of legislative procedures, the subject matter of this book, has arguably been much less influenced by these constitutional principles. The implementation of such principles is, in any event, scattered across single provisions in some but not all policy areas. The provisions of this book are designed to ensure their systematic infusion into non-legislative rule-making more generally.

## **B. Model Rules**

### **II-1 Scope**

(1) These rules apply to the procedures leading to the establishment, amendment and repeal of legally binding non-legislative acts of general application, including:

- (a) acts adopted by the Commission or the Council under Articles 290 and 291 TFEU;
- (b) legally binding non-legislative acts of the EU institutions, bodies, offices and agencies adopted on the basis of Treaty provisions or legislative acts.

(2) These rules also apply to preparatory acts by EU institutions, bodies, offices and agencies leading to the establishment, amendment and repeal of Acts in the sense of Paragraph 1 of this Article.

(3) These rules do not apply to acts of the Court of Justice of the European Union when acting in its judicial capacity.

### **II-2 Initiative**

An EU authority planning an act mentioned in Article II-1 shall make public

- (a) the draft title of the planned act.
- (b) a short description of its objective and its legal basis.
- (c) the name of the institution, agency, body, or office in charge of drafting the act.

### **II-3 Preparation of the Draft Act**

(1) The EU authority in charge of drafting the act shall:

- (a) carefully and impartially examine the relevant aspects.
- (b) undertake an assessment of the societal and economic impact of the act, as well as its impact on fundamental rights and on other values protected under EU law such as the environment. Impact assessment may include a cost-benefit analysis.
- (c) write an accompanying explanatory memorandum including the impact assessment, explanation of the reasons for the choices made and their alternatives.

(2) If experts or interest groups are heard in the preparatory phase of drafting the act, the explanatory memorandum shall name them and publish their supporting documents indicating the source of such materials.

#### **II-4 Consultation and Participation**

(1) The EU authority in charge of drafting, amending or withdrawing the act, shall give effect to the obligations in Article 11 TEU by consultation in accordance with the following paragraphs.

(2) The draft act and the explanatory memorandum shall be published on a central EU website for consultations and shall

- (a) be accompanied by an open invitation to any person to electronically submit comments in any of the official languages of the Union;
- (b) contain information about the adoption procedure including the deadline for submissions which cannot be shorter than twelve weeks after publication;
- (c) in an annex contain studies, data and other supporting material used for the drafting of the act including the impact assessment; and
- (d) be made available in at least those languages which the EU authority in charge of drafting the act has identified as its working languages.

(3) The EU authority in charge of drafting the act may also identify and address persons who are likely to be affected by the draft act and invite them to comment.

(4) Comments are made public in a way that allows public exchange of views. Natural persons have the right to request their identity to be concealed in duly justified cases.

(5) Where the comments lead to the necessity of substantial revision of the initial draft act, the EU authority in charge of drafting the act must consider whether a new phase of consultation under Article 4 paragraphs 1-5 is necessary.

#### **II-5 Reasoned Report**

(1) After consultation, the EU authority in charge of drafting the act shall create a reasoned report which

- (a) shall be published in the languages referred to in Article 4(2)(d), shall consist of the explanatory memorandum as well as the material listed in

Article 4(2)(c) and shall explain whether and how comments which were made during the consultation were taken into account or, as the case may be, why they were disregarded.

(b) shall be sufficiently reasoned to enable effective administrative and judicial review.

(2) The reasoned report shall add specific mention of changes made to the initial draft act

(a) following consultations with the Council and the European Parliament under Article 290 TFEU or

(b) following consultations with the committee defined in the legal act establishing the power to adopt an implementing act under Regulation No 182/2011 and Article 291 TFEU.

## II-6 Expedited Procedures

(1) Under the expedited procedure, the EU authority in charge of drafting the non-legislative act of general application may proceed to adopt and temporarily put into place an act without prior notification and consultation of the public. In that case, the EU authority in charge of drafting the act

(a) shall make public that the act has been adopted by the expedited procedure and give reasons.

(b) shall start the consultation and participation procedure under Article 4 within a period of 4 weeks after the adoption of the act. After consultation the EU authority in charge of drafting the regulatory act will undertake the necessary amendments.

(2) An act adopted by means of the expedited procedure is valid for a maximum duration of 18 months after its adoption.

## C. Explanations

### II-1 Scope

(1) Regarding the scope of applicability of Book II, the drafting group considered **three main issues**: First, should these model rules be applicable to Union institutions, bodies, offices and agencies only or would they also be applicable to

Member State rule-making activities? Second, should a generic term for rule-making (as opposed to single case decision-making addressed in Book III) be developed? Third, should informal rulemaking be covered by these rules?

- (2) The first question concerns the **institutional scope of the rules** arising from this book. The definition of the institutional scope of applicability is decisive for answering the question whether the rationales of Book II – participation, transparency and the duty of care – would apply not only to rule-making activity of EU institutions, bodies, offices and agencies but also to Member States when giving effect to EU law via rulemaking procedures. Within the drafting group, the necessity of applying these rules to rule-making by the EU was without question. But the drafters were not able, at this stage, to fully consider the possible conflicts that such application could have with national rules of procedure. For this reason, in this initial stage of our work, the rules proposed in this book concern the action of EU authorities and not of Member State authorities.
- (3) Regarding the second question concerning the **term ‘rule-making’**, the drafters of this Book discussed **two alternative formulations**. One was the term ‘Union regulatory act’ which would coincide with the ‘regulatory act’ in Article 263 paragraph 4 TFEU. It has been interpreted by the GC by Order of 6 Sept 2011 in Case T-18/10 *Inuit v EP and Council* [2011] ECR II-nyr, paras 49-56 confirmed on appeal in C-583/11 P as “all acts of abstract general application apart from legislative acts.” The second was the term ‘non-legislative act of general application’, which conveys a formal criterion, insofar as it is the ‘negative mirror’ of legislative acts as defined in the TFEU. The drafters of this book considered the term ‘regulatory act’ inadequate, because it is a term connoted with judicial review, which does not express adequately our focus on the effects of the act. It is defined with a view to establishing which acts are challengeable. For this reason, the term opens up the issue of “direct interest” (as inherent in Article 263(4) TFEU), which is not relevant for our definition of a rule.
- (4) Third, when considering **whether or not to include informal rules such as administrative guidelines and other informal publications** into the scope of applicability of Book II, two important considerations point in opposite directions. On the one hand, informal rules – including guidelines, notices, vademecums and many other forms of act sometimes collectively referred to as ‘soft law’ – play an

important role in the institutional reality of the EU and its Member States. They, for example, fill gaps in formal regulation, structure the interaction between administrations on the European and national levels and inform individuals about the potential future decision-making of the institutions. In these functions, the dividing line between formally binding and formally non-binding acts can be significantly blurred, especially in cases where informal rules are used, for all practical purposes, to replace formal rule-making.

- (5) On the other hand, if the essence of informal rules is the absence of formal rules for their adoption, their informality may in some cases count as an added value for citizens in so far as they can be more flexibly adopted and amended. Although this might need to be confirmed by further studies of those jurisdictions, which have applied the procedural rules designed for formal rule-making procedures also to informal rule-making, the latter consideration prevailed within the drafting group of Book II. As much as the drafters would hope for the ReNEUAL Model Rules to be applied as far as possible, **as a matter of good administrative practice**, to informal acts of general application, at this stage of the procedure, the drafters of the book decided **not to suggest any binding obligation** to do so.

### Paragraph 1

- (6) In view of these general considerations, Article II-1(1) applies to all procedures leading to acts that affect or are intended to affect in a legally binding manner an a priori undetermined group of third parties. Applying the rules only to the of adoption of such acts would be too limited because amendment and even repeal of such acts might have significant impact on rights of individuals or other protected values of EU law. Acts of general application, in any case, should be understood as acts that affect or are intended to affect in a legally binding manner an a priori undetermined group of third parties. Paragraph 1, therefore, highlights **two categories of acts which are specifically covered**:
- (7) The first are **delegated acts** under Article 290 TFEU **and implementing acts** under Article 291 TFEU. Both under Article 290 TFEU and under Article 291 TFEU, the Commission (or the Council in the exceptional cases envisaged by Article 291) prepares a draft act which is then submitted to specific supervisory

procedures. The model rules of Book II are mainly focussed on the phase prior to the presentation of the draft act by the Commission; hence, they apply to the elaboration of the draft act prior to the institutional channels envisaged in the Comitology Regulation (Regulation No182/2011). Since both delegated and implementing acts can be used for executive rule-making, the set of rules we propose apply equally to delegated acts and to implementing acts. If there is need for a simplified set of procedural rules, the expedited procedure envisaged in Article II-5 can be applied.

- (8) The second group concerns **procedures under Treaty as well as EU legislation legal bases** for the adoption of non-legislative acts of general application. See, for instance, Article 43(3) TFEU, on the basis of which the Council adopted Council Regulation 297/2013<sup>1</sup> and Council Regulation 44/2012<sup>2</sup>; and Article 108(4) TFEU, on the basis of which the Commission adopted Commission Regulation 360/2012.<sup>3</sup>
- (9) Acts of general application are also acts of EU institutions, bodies, offices and agencies which have externally binding effect in that they bind Member State administrative bodies in implementation of EU law. **Internal acts** of the administration, by contrast, **are in principle excluded** except if they implicitly or explicitly produce externally binding legal effects.

## Paragraph 2

- (10) **Some rule-making procedures are ‘composite’** in the sense that several different institutions, bodies, offices or agencies are involved in their creation. Paragraph 2 mainly addresses the case where an EU agency prepares a draft of

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<sup>1</sup> Council Regulation (EU) 297/2013 of 27 March 2013 amending Regulations (EU) No 44/2012, (EU) No 39/2013 and (EU) No 40/2013 as regards certain fishing opportunities [2013] OJ L90/10.

<sup>2</sup> Council Regulation (EU) 44/2012 of 17 January 2012 fixing for 2012 the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks which are subject to international negotiations or agreement [2012] OJ L25/55 last amended by Council Regulation (EU) 297/2013 of 27 March 2013 amending Regulations (EU) No 44/2012, (EU) No 39/2013 and (EU) No 40/2013 as regards certain fishing opportunities [2013] OJ L90/10.

<sup>3</sup> Commission Regulation (EU) 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L114/8.

an act to be adopted by the Commission under Article 290 or 291 TFEU (for example, the European Banking Authority is obliged to draft delegated or implementing acts later to be adopted by the Commission). But it also applies to other instances where EU institutions, offices, bodies and agencies adopt preparatory acts which are then subject to formal adoption by another EU authority.

- (11) The establishment of a number of **agencies at EU level** adds to the diversity of composite rule-making procedures. Since in an increasing amount of policy areas the drafting of such non-legislative acts of general application is undertaken in multiple steps, the rules on procedures have to be applicable to all actors involved in the process. For example, the European Banking Authority is obliged to draft delegated or implementing acts later to be adopted by the Commission. The agency as drafter of the act should, therefore, follow the procedure provided for in this article since the drafting is undertaken by the agency even though the formal adoption takes place by the Commission.
- (12) In any case, the drafters of Book II contend that **the administrative organisation should have no effect** on procedural rights and compliance with requirements of participation and transparency. In the cases in which the formal author of the act (e.g. the Commission) merely endorses the preparatory act of another EU authority, there is no reason to double the procedure at the formal adoption phase. Where instead there is substantial revision of the act subject to consultation – e.g. cases in which the Commission changes the draft prior to its submission to the EP and Council in case of acts under Article 290 TFEU or to the competent comitology committee for acts adopted under Article 291 TFEU – paragraph 6 of this Article applies mutatis mutandis.
- (13) In that sense, the provision of paragraph 2 establishes **the basic obligation of compliance** with the rules of this book **by any body in charge of drafting** the actual content of the acts of general application in the sense of Paragraph 1. It must be ensured that the procedural rules set out in this book will be complied with during the actual drafting of the act even if this will become legally binding only at a later stage, for example, though the formal adoption by the Commission.

- (14) The rule established in paragraph 2 becomes all the more relevant since recent **legislative practice shows an attempt to confine the capacity of the Commission to amend or reject the agency inputs**. A first set of limits springs from the imposition upon the Commission of a procedural obligation to state reasons for their amendment or rejection. For example, the European Aviation Safety Agency (EASA) and the European Securities and Market Authority (ESMA)<sup>4</sup> have been empowered to adopt, respectively, opinions and draft and implementing or delegated acts, obliging the Commission to observe certain *procedural requirements* before either rejecting or amending them. Regulations establishing the EASA show an attempt to impose certain *substantial* requirements upon the Commission. Thus the Commission is not free to change any ‘technical’ rules proposed as part of a draft implementing acts without prior coordination with the agency.<sup>5</sup> A second set of limits, established more recently, intends to subject the Commission's capacity of amendment to the goal of making a draft better respect certain substantial principles such as, for instance, the principle of proportionality. See, for example, Recital 23 of the ESMA Regulation.<sup>6</sup>

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<sup>4</sup> Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1.

<sup>5</sup> Regulation (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA) and repealing Council Directive 91/670/EEC [2008] OJ L79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Art 17(2)(b); Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1, Art 10(1).

<sup>6</sup> Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and

### Paragraph 3

- (15) The exclusion of acts of the CJ of the EU from the scope of applicability of Book II follows from the specific procedural rules set out for Court proceedings in the Articles of the TFEU and the Statutes of the Court. This is *lex specialis*, and the exception formulated in paragraph 3 **serves only as restatement** of this legal situation. Acts of other actors or policy areas can be also excluded by *lex specialis* under EU law resulting from Treaty provisions or legislation.

### Further Considerations

- (16) Book II's procedural rules specifically apply to non-legislative acts adopted by EU institutions, bodies, offices and agencies that produce effects external to the EU administration. But many discussions concerning these Model Rules turned on the necessity of a wider and deeper rule-making agenda. **Several categories of further types of act were discussed** especially.
- (17) – **Private regulatory acts**, are an important category of rulemaking and should, in principle, be included in the scope of application of Book II, especially when as a private entity's acts they will be given the authority of public law e.g. by reference in legislation to a standard set by the industry, science or a standardisation organisation. Some procedural rules currently bind private standardisation bodies. They are often established ad-hoc in agreements with the Commission. Yet, this inclusion raises issues that need to be further discussed. The extension of our ReNEUAL Model Rules to these acts may require adjustments that could not be fully considered at this stage. Private rulemaking is, therefore, an important issue to further consider in a future stage of developing model rules for EU administrative procedure.
- (18) – In the same vein, '**interinstitutional**' acts (such as MoU between, for instance, the Commission and agencies) raise relevant issues that should be considered in setting out comprehensive rules of rulemaking procedures. These are, in

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2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1.

principle, internal acts therefore falling outside of the scope of “acts of general application”. They might nonetheless affect third parties in that they establish substantive law or procedural rules. In a next stage of our work a more complete consideration of these kinds of inter-institutional acts should be included.

- (19) – Various **types of non-legislative acts of general application present specific problems** which exclude them from being included in the scope of Book II without further considerations. This is the case for some acts that do not seem to have external effects such as internal rules of procedure<sup>7</sup> and, to a more limited extent, guidelines and plans. Also, acts of general application may present a merely individual rather than a general scope. Plans and guidelines may fall within this category as well.
- (20) – **“Plans”** are a category of acts that **require further consideration** for an additional reason. Plans in certain cases have an “open” nature, being open to an unspecified variety of addressees, for example, in a consultation document,<sup>8</sup> while in others they take the shape of a “closed” communication to other institutions.<sup>9</sup> In both cases, however, the substance of the act –the definition of the steps to implement a given policy and the definition of the time to realise it – does not seem to change. There are, however, also plans of a more binding nature.<sup>10</sup>

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<sup>7</sup> Rules of Procedure adopted by institutions, agencies, bodies and offices establish internal rules to be followed as to convening and attendance of meetings, voting, minutes taking, access to documents, etc. See, for instance Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure [2009] OJ L325/35 last amended by European Council Decision 2010/594/EU of 16 September 2010 amending the list of Council configurations [2010] OJ L263/12; Rules of Procedure of the Commission C(2000)3614 [2000] OJ L308/26 last amended by Commission Decision of 9 November 2011 amending its Rules of Procedure (2011/737/EU, Euratom) [2011] OJ L296/58. On the other hand certain acts such as the Council security rules which are based on the Council's rules of procedure do have external effects for other institutions and third parties.

<sup>8</sup> See for example State Aid Action Plan - Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009, COM(2005) 107 final adopted by the European Commission on June 7, 2005.

<sup>9</sup> See, for instance, Commission Communication State Aid Modernisation to the European Parliament, the Council and the European and Social Committee and the Committee of Regions, COM(2012) 209 final adopted on May 8, 2012, available at [http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html).

<sup>10</sup> 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 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

- (21) – With respect to **guidelines**, similarly, should their inclusion be advocated at a later stage, it is necessary to distinguish whether they are addressed to actors on the Union level (e.g. one Commission service to another Commission service) or towards Member State agencies (e.g. the Commission or EU agencies adopting guidelines and recommendations aimed at guiding the implementing phase at national level). Whether these types of guidelines should be subject to the model rules depends on whether one assumes that Member State agencies should have the same procedural rights as those of individuals protected in this book.<sup>11</sup>
- (22) – During discussions about the model rules presented here, the **issue** was raised whether a **uniform way of regulating rulemaking procedures** was a good approach. Would it not be better to establish, for example, a three-tier procedure since a one-size-fits-all procedure might be too inflexible and not be adapted to the importance or controversial character of the rule to be adopted. It was suggested that a three-tier procedure could contain one set of procedural rules for the vast majority of rules (normal procedure). A second, simplified or fast track procedure could be sufficient for routine rules and minor amendments of limited importance as well as for a limited group of rules requiring expedited procedure. A third set of rules could apply to particularly important or controversial rules which could be adopted in a special manner including a formal hearing procedure and possibly based on a preparation by a working group or a committee. Such an approach would try to associate the complexity of the procedure with the

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procedure with scrutiny — Part Four [2009] OJ L188/14, Art 55 according to which the Commission draws up emergency plans, which it seeks to make more binding.

<sup>11</sup> A procedure for the adoption of guidelines is included in Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1, Art 16. Examples of guidelines of general scope can be found in the Guidance on centrally authorised products requiring a notification of a change for update of annexes adopted by the European Medicines Evaluation Agency (EMA) (EMA/95003/2013) and in EASA's Accepted Means of Compliance. Conversely, "individual" guidelines are the "non-binding framework guidelines" adopted according to Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1 last amended by Regulation (EU) 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision 1364/2006/EC and amending Regulations (EC) 713/2009, (EC) 714/2009 and (EC) 715/2009 [2013] OJ L115/39, Art 6(4).

importance of the matter. The drafting group opted against this for the following reasons: First, these model rules already contain two different procedures which are the ordinary procedure and an expedited procedure proposed in Article II-5. Not least for reasons of difficulties of differentiation between the scope of applicability of various types of procedure, the decision was made not to follow this approach for now. Should however, at a later stage, the scope of applicability of these model rules be enlarged to also take into account types of legal act with a more soft-law effect, this position might need to be reviewed.

- (23) Further, the discussions of the ReNEUAL Model Rules on administrative procedure concerning rule-making also focused on **experiences in various jurisdictions**, including a debate on US rules on executive rule-making. With regard to US rules on rule-making, they – not unlike the provisions in Article II-4 – require a ‘notice and comment’ procedure for draft rule-making. Moreover, they have led to a certain degree of jurisprudence which by some authors has been referred to as ‘ossification’ of rule-making. After in-depth analysis with US scholars of this matter, the drafting group of Book II came to the conclusion that the phenomenon of ‘ossification’, i.e. lengthy rule-making procedures due to frequent involvement of Courts to review compliance of agencies involved in rule-making with participation rights and subsequent obligations of justification of regulatory choices, was less due to the rule-making procedures per se but owed maybe more to specific rules on standing in Court. Given the considerable differences between the judicial procedural rules of the US and the EU, the drawbacks of establishing formal procedural rules for rule-making appeared less relevant. Meanwhile, the benefits are considerable in terms of both the quality of rule-making and the compliance with constitutional provisions strengthened under the Treaty of Lisbon.

## **II-2 Initiative**

- (24) Article II-2 is informed by a **concern for transparency**. Publicity of a planned act is a first important step to ensure the possibility of effective consultation and participation, as envisaged in Article II-4. Various policy areas of the EU offer examples of how to achieve these objectives. For example, the European Aviation Safety Agency’s (EASA) rule-making procedure provides very precise provisions on the preparation of consultation through the early publication of rule-

making intentions. EASA's executive rule-making is preceded in EASA's 4-Year rule-making programme by an indication of the terms of reference of the actual rulemaking activity.<sup>12</sup> The terms of reference are then individually published on the agency's website.<sup>13</sup> The terms of reference, code-named differently according to the specific regulated field, generally include an indication of the subject matter; the problem (statement of issue and justification and reasons for regulatory evolution); the objective, specific tasks and interface issues; the working methods; and, finally, the timescale for the adoption of the intermediary acts as well as of the final measure.

- (25) Inspired by this particularly clear example of preparation of future rule-making, Article 2 provides that the **EU authority** planning an act **must make public the draft title** of the planned act,<sup>14</sup> as well as, for purposes of consultation under Article II-4, give a **short descriptions of its objective**.
- (26) Further, it is established case law that **Union acts must mention the legal basis** upon which they are adopted.<sup>15</sup> Delegated and implementing acts routinely mention their basic act in their title as well as in the text of the act. Agency acts likewise mention their legal basis in the adopted acts. According to this provision, this requirement would simply be extended to a reasoned report. For purposes of legal certainty and transparency, the legal basis chosen should be indicated at an early stage, without prejudice to future changes or additions that may be required following changes to the content of the planned act during the administrative procedure.

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<sup>12</sup> See, for instance, the work programme for year 2013, available at: <http://easa.europa.eu/agency-measures/docs/agency-decisions/2012/2012-013-R/4-Year%20RMP%202013-2016.pdf>.

<sup>13</sup> See <http://easa.europa.eu/rulemaking/terms-of-reference-and-group-composition.php>; See for instance EASA Terms of Reference (TOR) AMC 20/001 of July 22, 2004, on certification of aircraft propulsion systems equipped with electronic engine control systems, available at <http://easa.europa.eu/rulemaking/docs/tor/20/EASA-ToR-20.001-00-17072004.pdf>.

<sup>14</sup> See, for example Commission Implementing Regulation (EU) 354/2013 of 18 April 2013 on changes of biocidal products authorised in accordance with Regulation (EU) 528/2012 of the European Parliament and of the Council [2013] OJ L109/4; Commission Delegated Regulation (EU) 114/2013 of 6 November 2012 supplementing Regulation (EU) 510/2011 of the European Parliament and of the Council with regard to rules for the application for a derogation from the specific CO<sub>2</sub> emissions target for new light commercial vehicles [2013] OJ L38/1 last amended by Commission Delegated Regulation (EU) 482/2014 of 4 March 2014 amending Delegated Regulation (EU) 114/2013 as regards the 2010 average specific CO<sub>2</sub> emissions specified for the manufacturer Great Wall Motor Company Limited [2014] OJ L138/51.

<sup>15</sup> See Case C-203/86 *Spain v Council* [1988] ECR 4563.

- (27) Adding the **name of the EU authority in charge** of drafting the act is another requirement of clarity and transparency especially, because in an increasing amount of policy areas, although a final delegated or implementing act under Articles 290 and 291 TFEU is adopted by the Commission, an EU agency will be in charge of preparing the text of such a legal act. With respect to agency rule-making, it has become standard good practice for EU agencies to provide the information required in Article II-2(c) as ‘terms of reference’ of their future rule-making activities.

### II-3 Preparation of the Draft Act

- (28) Article II-3 is designed, on the one hand, to provide procedures to **ensure good quality rule-making**. Rules in this respect are predominantly inspired by the case law of the CJEU on the basis of the enforcement of general principles of EU law such as principles of good administration and compliance with the principle of proportionality. On the other hand, provisions of Article II-3 are intended to **prepare for meaningful possibilities of consultation and participation** under Article II-4. They are thus predominantly informed by the practical necessities of consultation.
- (29) Amongst the first category of requirements inspired by the case law of the CJEU on general principles of EU law is the duty under Article II-3(1)(a) to comply with **the ‘duty to care’ as a general principle of law** established by the CJ. Although the Court has often stressed mostly its protective dimension towards persons affected by single case decision-making, this principle also has an objective dimension and is now often understood to be part of the rights and principles of good administration. The relevant aspects covered by it could include existing Union law (in particular, but not limited to the basic regulation), technical standards, the objective of cooperation with other EU and international institutions, practical (including time) considerations, a risk assessment,<sup>16</sup> and a cost-benefit analysis.<sup>17</sup>

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<sup>16</sup> See e.g. Decision of the EASA Management Board 08/2007, amending and replacing Decision 7/2003 concerning the procedure to be applied by the Agency for the issuing of options, certification specifications and guidance material (“Rulemaking Procedure”), of 13 March 2012 (based on Regulation (EC) 216/2008 on common rules in

- (30) Although the CJEU has occasionally made reference to **the impact assessment report** as a tool for reviewing compliance with the principle of proportionality, the requirement for undertaking an impact assessment of executive rule-making (next to legislative acts) has been a self-imposed procedural requirement by the Commission. However, the Commission's practice is not uniform. In the different policy fields analysed, there are cases where the proposal for a non-legislative act (typically a delegated act) was accompanied by a fully fledged impact assessment,<sup>18</sup> but there are also cases, where this does not happen.<sup>19</sup>
- (31) The drafters of Book II would submit that it is important to require an impact assessment with regard to non-legislative acts covered by Book II. Although, so far, the main emphasis in the EU is on requiring impact assessments for legislative acts, such legislative acts, however, benefit from public scrutiny within a parliamentary process and by the Council and its working groups. When it comes to **non-legislative acts**, the added value of **impact assessment procedures** which are made public is to introduce a procedural tool for including and making publically visible the inclusion of facts, interests, values and scientific opinions into decision-making.

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the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2008 L 79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Arts 18 and 20), Arts 1-7.

<sup>17</sup> This can be found in Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) 1060/2009, (EU) 1094/2010 and (EU) 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] OJ L153/1, Arts 10 and 15.

<sup>18</sup> See, for example, Commission impact assessment accompanying the document Proposal for a Commission Delegated Regulation supplementing Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events, C(2012) 4529 Final, of July 5, 2012, p 22-47, available at [http://ec.europa.eu/internal\\_market/securities/docs/short\\_selling/20120705-ia\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/short_selling/20120705-ia_en.pdf).

<sup>19</sup> See for example Commission Delegated Regulation (EU) 946/2012 of July 12, 2012, supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions [2012] OJ L282/23.

- (32) During the discussions of the ReNEUAL Model Rules on administrative procedure, the question has been raised whether a per-se requirement of impact assessment for rule-making would be appropriate. The drafters of Book II have decided, after much discussion with academic experts and practitioners alike, to require impact assessment as standard procedure. The reason is that **impact assessments are a flexible procedural tool**. The analysis of an impact does not require the same intensity for all acts. In fact, the impact assessment by nature will be the more extensive, the more potential impact an act will have. The inverse is also true. The less potential impact an act will have, the more limited the assessment of its impact will be. Hence, Article II-3 incorporates impact assessment procedures into the rules followed for the establishment, amendment and repeal of legally binding non-legislative acts of general application.
- (33) Impact assessment **may** – but does not have to in all cases – **include a cost-benefit analysis**. The weighing of interests or values is not easily quantifiable in all cases. It may, therefore, not in all cases be opportune to submit a regulatory matter to a cost-benefit analysis. Cost-benefit analysis should be undertaken when the nature of the content of the planned regulation so permits – i.e. when there is sufficient possibility of quantifying the parameters which need to be evaluated through impact assessment.
- (34) On the other hand, Article II-3 is **strict about the types of values and principles to be taken into account in impact assessment** procedures. It thereby takes inspiration from the standards set in the EU for impact assessment by the Commission, which explicitly include the analysis on fundamental rights, environment, budget, and many other factors including social and societal impact of a planned measure.<sup>20</sup> Not taking these important values into account in the assessment of impacts of non-legislative acts of general application would risk de-legitimisation of EU policies.
- (35) The rules in Book II make it obligatory to **publish** the results of the impact assessment **by means of an explanatory memorandum** according to Article II-

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<sup>20</sup> See European Commission, Communication on Compliance with the Charter of Fundamental Rights in Commission legislative proposals, COM(2005) 172; European Commission, Impact Assessment Guidelines of 15 January 2009, SEC(2009) 92.

3(1)(c) in order to allow for a subsequent informed and therefore meaningful public consultation. Making public the reasons underlying the act not only allows for scrutiny, but it is also crucial to support the consultation phase that follows.

- (36) Additionally, Article II-3(1)(c) requires that the **regulatory choice retained** for the draft non-legislative act of general **application as well as possible alternative solutions** to the problem be explained in the explanatory memorandum. This is currently not established practice but would, in the eyes of the drafters of Book II, be a welcome innovation to the current practice in which agencies are not always required to make their choices and alternative considerations public<sup>21</sup>, and short explanatory memorandums exist also in the case of delegated acts,<sup>22</sup> but not (at least not generally) in the case of implementing acts.
- (37) The requirement of Article II-3(2) to make public the identity and the **material submitted by experts** which had been consulted during the preparation of an act is linked to the principle of transparency. It is normal practice and also desirable, in view of the need to act on the basis of sufficient knowledge and information, that a body drafting an act works with or meets with experts or other third parties. However, these parties need to be identified as an important part of the background information for a rule. It would also appear necessary to make public the nature of the interchange or any data that the outsider has supplied. The considerations that are likely to govern the final act should be made public, and information is best assessed when the author is clear. This also gives incentives for parties to present accurate data because such data can be independently scrutinised upon publication.

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<sup>21</sup> ESMA's consultation papers on draft regulatory technical standards contain explanations of the reasons for the adoption of the act (attached to the different questions submitted to the attention of persons participating in the consultation) do not always analyse the different available alternatives possible. See, for instance, ESMA's Consultation Paper on Draft Technical Standards on the Regulation (EU) xxxx/2012 of the European Parliament and the Council on Short Selling and certain aspects of credit default swap, ESMA/2012/30, of January 24, 2012, available at [http://www.esma.europa.eu/system/files/2012-30\\_0.pdf](http://www.esma.europa.eu/system/files/2012-30_0.pdf).

<sup>22</sup> See for example General Secretariat of the Council (to Coreper/council), "I/A" Item Note regarding Commission Delegated Regulation (EU) No ... of 6.11.2012 supplementing Regulation (EU) 510/2011 of the European Parliament and of the Council with regard to rules for the application for a derogation from the specific CO2 emissions targets for new light commercial vehicles [2012] Council Document, 17168/12.

## II-4 Consultation and Participation

- (38) Article II-4(1) specifies what the general principles listed in Article 11(1) TEU mean with respect to executive rule-making in the EU and restates that the principles of Article 11(1) TEU apply in the process of drafting a legally binding non-legislative act of general application. However, the **Commission and other institutions and bodies of the Union can obviously develop additional means** of exchanging ideas and including the public in their activities.
- (39) The rules of Article II-4 are intended to allow **input** from the interested public at a stage **when the content of the draft act is sufficiently determined**, and, therefore, capable of grounding concrete comments and suggestions on specific solutions (rather than on broad policy options). Envisaging consultation and participation at this stage means that the solutions enshrined in the draft act need to be adjusted in view of the comments received, following the rules on paragraph 5 of this Article.
- (40) Article II-4(2) requires that a **central EU website for consultation and participation** is designed. This would allow for a simplified access for citizens who would, by using a single site, be able to comment on draft rules without being obliged to monitor an indefinite number of websites of agencies and bodies of the Union. Such requirement of publication would standardise the currently diverse practice of consultation on a 'draft act of general application' and its reasoned report,<sup>23</sup> established in the various policy areas of the EU. A univocal practice does not seem to exist.
- (41) The details of such publication need to be designed with a view of ensuring input into rule-making which reflects the various opinions and interests held within pluralistic societies. **No specific group in society should be able to influence**

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<sup>23</sup> See, for example Regulation (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA) and repealing Council Directive 91/670/EEC [2008] OJ L79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Art 6 of the EASA Rulemaking Procedure.

**rule-making unilaterally**, due to privileged possibilities of access to the regulator. One way to guarantee that this does not occur is to harmonise the place of publication, the necessary contents of publication, and the standard deadlines to be applied and to set up rules on the language regime to be followed.

- (42) Regarding the **deadlines**, for example, the deadline indicated in paragraph 2(b) is the one currently defined in the Commission's standards of consultation in the context of impact assessment analyses.<sup>24</sup> Yet, agency practice is not always clear.<sup>25</sup>
- (43) The **language requirement** in paragraph 2(d) is an attempt to balance, on the one hand, the necessity of information being accessible to all Union citizens and, on the other hand, practical requirements of administrative work, which forbid the continuous translation of so many documents in all official languages. It is a compromise solution. Practice seems to favour a restriction in the number of languages, but this practice is not without its critics. For example, the practice of ESMA highlights that the publication in all official languages concern final rather than draft acts<sup>26</sup> At the same time, the practice of EASA to publish many documents only in a few languages was condemned by the EO as an instance of maladministration.<sup>27</sup> The solution we propose refers only to the draft act and to the reasoned report. It is a compromise solution, which follows the judgment,

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<sup>24</sup> See e.g. the formulation in European Commission, Impact Assessment Guidelines of 15 January 2009, SEC(2009) 92, p 19, introducing the possibility of longer consultation periods for justified cases. See also Commission Staff Working Document, "Review of the Commission Consultation Policy", SWD(2012) 422 final, Strasbourg, 12.12.2012.

<sup>25</sup> For one rather clearly defined approach, see e.g. Decision of the EASA Management Board 08/2007, amending and replacing Decision 7/2003 concerning the procedure to be applied by the Agency for the issuing of options, certification specifications and guidance material ("Rulemaking Procedure"), of 13 March 2012 (based on Regulation (EC) 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2008 L 79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Arts 18 and 20), Art 6(4), (5), setting the duration for consultation at between 1 and 3 months.

<sup>26</sup> See for example ESMA, Final Report - Guidelines on Sound Remuneration Policies under the AIFMD [2013] 2013/201, p. 4, available at: <http://www.esma.europa.eu/system/files/2013-201.pdf>.

<sup>27</sup> See for example: Case: 3419/2008/(AF)(BEH)KM, available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/48732/html.bookmark>

according to which both the Treaty references to the use of languages in the EU and the rules contained in secondary legislation, 'cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances'.<sup>28</sup> It may have the undesirable effect of limiting the access to consultation procedures for those who do not master the working languages of the EU authority in charge of drafting the act. Nevertheless, it ought to be stressed that this solution cannot restrict the scope of the language rights enshrined in the Treaty. As such, EU citizens may still "address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language" (Article 20(2)(d) TFEU) and "write to any of the institutions, bodies, offices or agencies (...) and have an answer in the same language" (Article 24(4) TFEU).

- (44) **In parallel to an open call** for comments addressed to the public at large under Article II-4(2), the Commission or the agency in charge may also directly, under Article II-4(3), **target certain parties** which have an interest in the matter in order to incite greater feedback on rule-making proposals. This approach is well established in the concept of consultation contained in the European Commission Impact Assessment Guidelines of 2009. It is also used in legal systems which have an explicit notice and comment procedure, e.g. US administrative law. The idea is to allow for making the consultation period effective by having an open call for comments while at the same time actively seeking comments by known stakeholders in a specific matter. This also appears to be the practice in EASA consultation procedures. The persons affected may also be identified during the phase of public consultation, as the comments received may alert the EU authority in charge of drafting the act to impacts it may initially not be aware of.
- (45) Article II-4(4) seeks to **ensure that all comments received** during the consultation period – whether submitted by the public at large or by persons affected **are published**. However, in specifically justified cases, there may be legitimate concern for the identity of the natural person making comments. The protection of natural persons' identity may be necessary in certain cases where

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<sup>28</sup> Case T-120/99 *Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2001] ECR II-2235, para 58, upheld on appeal (Case C-361/01 P *Christina Kik v Office for Harmonisation in the Internal Market* [2003] ECR I-8283), para 82.

the requirement to publish the identity of the person submitting a comment might compromise the willingness to comment. That might especially be necessary in matters, where the public debate is highly emotional and the individual right to freely stating her or his opinion requires protection. Protecting individuals in this sense will also allow for comments to be made by individuals who might otherwise not be willing to come forward. Thereby this rule might implicitly also serve the interest of the public at large by raising the overall quality of rule-making.

- (46) Article II-4(4) also requires – in the interest of ensuring that under Article 11(1) TEU, citizens and representative associations have the “opportunity to make known and publicly exchange their views” that **subsequent commentators be able to comment on comments made earlier**. This exchange of views will allow for alternative approaches to be developed in a comment section and ensure a more lively and vivid exchange on a Commission proposal than would have been possible if earlier comments were not accessible to later commentators.
- (47) A second consultation may be needed to **avoid the substitution of the act that was subject to consultation**. However, the decision-maker should be given the discretion not to start a new consultation procedure if this becomes too cumbersome. EASA rulemaking procedures provide an example of such practice.<sup>29</sup> This rule was the inspiration for Article II-4(5).

## II-5 Reasoned Report

- (48) Article II-5(1) describes a subsequent step in the procedure of rule-making. It obliges the body to actively **review the comments** received and to **report the results** of that activity. This provision balances the need to ensure that comments received are duly taken into account and the flexibility that ought to be

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<sup>29</sup> Decision of the EASA Management Board 08/2007, amending and replacing Decision 7/2003 concerning the procedure to be applied by the Agency for the issuing of options, certification specifications and guidance material (“Rulemaking Procedure”), of 13 March 2012 (based on Regulation (EC) 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2008 L 79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Arts 18 and 20), Art 7(5).

given to the deciding authority in assessing those comments in the light of the legal mandate it needs to pursue. The public should be able to see which points have been taken into account in the final rule-making proposal. Not all comments will be pertinent and justify a reaction. This provision also does not prevent aggregation of the comments received according to the criteria chosen by the deciding authority (e.g. subject matter).

- (49) The **form of publication** is a reasoned report accompanying the final act. This shall be sufficiently detailed so as to allow for effective administrative and judicial review. This requirement is in accordance with the consistent interpretation of Article 296 TFEU by the CJEU, which applies to the degree of justification of final acts.<sup>30</sup> Although the parallels with the case law of the CJEU are evident, the wording of Article II-5(1)(b) is not designed to require or regulate judicial review. Instead, it requires that the act be reasoned to a degree which makes it possible for effective administrative or judicial forms of review to take place. For this purpose, the main points and the legal issues of the act need to be sufficiently reasoned.
- (50) The **reasoned report** under Article II-5 **does not have to be made part of the preamble** of the final act. This is justified by the need to leave untouched the technique of drafting EU legal acts as drafting approaches may differ. For example, delegated acts under Article 290 TFEU are usually accompanied by a brief explanatory note when they are submitted to P and Council. In contrast, the objectives or goals of implementing acts under Article 291 TFEU can mainly be found in the preamble to the act itself. However, the accompanied reasoned report needs to be publically available and ought to be considered part of the final act.<sup>31</sup>

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<sup>30</sup> See for example Case C-89/08 P *Commission v Ireland* [2009] ECR I-11245, para 77; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, para 63.

<sup>31</sup> See e.g. Decision of the EASA Management Board 08/2007, amending and replacing Decision 7/2003 concerning the procedure to be applied by the Agency for the issuing of options, certification specifications and guidance material ("Rulemaking Procedure"), of 13 March 2012 (based on Regulation (EC) 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2008 L 79/1 last amended by Commission Regulation (EU) 6/2013 of 8 January 2013 amending Regulation (EC) 216/2008 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) 1592/2002 and Directive 2004/36/EC [2013] OJ L4/34, Arts 18 and 20), Art 8(2).

- (51) Article II-5(2) establishes the **link between the set of rules** proposed above **and the procedural mechanisms in place for the adoption of acts under Articles 290 and 291 TFEU**.<sup>32</sup> Making it compulsory to mention the changes made to delegated acts following consultations with the EP and Council may be controversial, given the current inter-institutional disagreements on the role of each of these institutions (and of the Commission) in the adoption of delegated acts. This duty is, however, justified by a reason of transparency. Consultations of the Council, the EP or a committee under Regulation 182/2011, as the case may be, may trump some of the solutions that could have been favoured on the basis of the comments received via public consultation. In current practice, where existent, public consultations of delegated acts precede the institutional consultations (see the 2014 Invitation by the Council to revise the Common Understanding). The rules we propose do not require a change to this practice. But actual compliance with the previous paragraphs of this Article could be compromised in the absence of the duty we now propose.

## II-6 Expedited Procedures

- (52) Expedited procedures are the **exception**, which should be envisaged in order to **give a certain degree of flexibility** to administrative entities in charge of rulemaking, without creating loopholes for circumvention of the standard rule-making process. At the same time, conducting a consultation after the adoption of the act might still indicate areas where the act could be improved *a posteriori* and could be justified by the need to ensure the procedural protection of the legally protected interests affected.
- (53) There are basically **two possible approaches** for delimitating the use of expedited procedures and thereby protecting the ordinary procedure from being circumvented. The first approach is to establish a list of instances in which an

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<sup>32</sup> Such mechanisms are described by the Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM (2009) 673 final) and the Common Understanding between Parliament and Council on Delegated Acts, which can, for example, be found in Council Document 8753/11 of 10 April 2011 or Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.

expedited procedure could be used. The second approach is to design the procedure in a way which does not lend itself to misuse. The drafting team of Book II discussed this issue with many commentators. The problem with the first approach is that any list will either be too vague to give legal certainty or contain a list of cases (in which expedited procedures might be used) which is not complete enough for application in all instances. After much discussion, the drafting team decided to opt for a procedural approach. This envisages the exceptional use of expedited procedures but seeks to protect the ordinary procedure in the following ways. First, a requirement to undertake the ordinary rule-making procedure directly after the adoption of the act under the expedited procedure is included. Second, any amendments to the act in force, which result from the procedure provided under Article 4, is required. Third, a sunset clause, which limits an act adopted under the expedited procedure to a period of twelve months, is included. The text of Article 5 does not, however, exclude that the act adopted once under the expedited procedure might after twelve months be again adopted under an expedited procedure. But this option will most likely be rarely used given that it could be replaced by an act adopted in the ordinary procedure after the mandatory use of the procedure provided in Article 4. The sunset clause proposed in paragraph 2 is designed to ensure that the expedited procedure is not misused by becoming the default procedure since all matters of rule-making may, by definition, be declared urgent.