Early Career Researchers Workshop

Convergence and Differentiation in European and Comparative Administrative Law

Université libre de Bruxelles – 14 February 2020

First panel: Implementing EU policies

1. Tools

Discussant: Prof. Karl-Peter Sommermann (FÖV Speyer)

*Delegated and implementing acts under EU law***, Zamira Xhaferri (The Hague University of Applied Sciences)**

The paper focuses on the distinction between delegated and implementing acts adopted by the European Commission. The main goal of the contribution is to examine the criteria taken into account by the EU institutions to choose between the legislative procedure and delegation to the European Commission and, in the latter case, the reasons behind the choice of a delegated or an implementing act. The paper adopts a case-based method, further analyzing those questions in the health and food sectors. In a context where there are no criteria mentioned in the Treaty regarding the choice for delegation and between delegated and implementing acts, the contribution suggests that political reasons guide such choices. Political agreements are reached by negotiations between Council, Parliament and Commission. If the first two wish to control the Commission work more, they use delegated and not implementing acts.

Minimum harmonisation – a 'relative newcomer' to the field of European integration?, **Philipp Schmitt (Max Planck Institute for European Legal History)**

The contribution examines from a historical perspective the technique of minimum harmonization, which is a common tool for differentiation in the EU. Minimum harmonization consists for the EU in defining a threshold of harmonization below which the Member States cannot go, without preventing them from adopting more demanding provisions. The paper brings evidence that the emergence of such a technique in the EU appeared sooner than commonly admitted, namely in 1979 after the Cassis de Dijon ruling. More specifically, the contribution identifies some evidence of minimum harmonization "avant la lettre" as soon as 1961, in the field of agriculture. The use of this technique grew in the seventies, in various domains (drinking water, petrol, etc.). The contribution highlights that minimum harmonization is generally a counterweight to detailed provisions contained in an EU law instrument and makes it easier to build a consensus among the Members States. It is also a response to a growing number of infringement procedures that have been initiated by the Commission since 1977. Minimum harmonization is therefore a flexible solution that leaves some margin of appreciation / leeway to the Member States when they

implement EU legislation in their national legal order. That is why, by the end of the seventies, minimum harmonization was already a common technique of legislation in the EU.

Strengthening the "Administrative Capacity Building" of the EU Member States, **Dr. Sabrina Tranquilli (University of Salerno)**

The contribution aims to analyze the implementation of thematic objective 11 of EU Regulation 1303/2013, which sets administrative capacity building as an eligible area of spending for the European Structural and Investment Funds. The lack of efficiency of administrations at the national level may indeed affects negatively the implementation of EU law and compromises the efficient spending of EU subsidies. More specifically, the contribution examines the national measures required by the EU and adopted by Italy to improve its administrative capacity in order to assess the efficiency of those measures. The measures taken in Italy to reinforce administrative capacity were part of a broader national plan of investment. The execution of this Administrative Reinforcement Plan has been monitored and financed – at least partially – by the EU. In the end, the undertaken reforms have had a positive impact on the coordination and management capacity of structural investment funds by the Italian administration. However, the Italian administration is still lacking human resources and expertise in management to optimize the spending of EU funds. This deficit is especially strong at the local level, where public bodies have less resources and are less staffed than at the national level.

2. Sectoral approaches

Discussant: Prof. Mariolina Eliantonio (Maastricht University)

Convergence and Differentiation of National Rules within the Future EU Rural Development Policy, **Luchino Ferraris (European Commission and Sant'Anna School of Advanced Studies)**

The contribution focuses on EU rural development policy and discusses the potential shift of paradigm inducted by the on-going "Hogan" reform regarding the repartition of the responsibilities between the EU and the Member States in this field. The regulation currently applicable in this sector, Regulation 1305/2013, leaves little room for maneuver for the Member States. The Commission seems to be very prescriptive, even where the text of the Regulation gives, in principle, some leeway to the Members States. The Commission has used delegated and implementing acts to restrict the power of the Members States further. The contribution argues that the "Hogan" ongoing reform will bring more subsidiarity as far as EU rural development policy is concerned. The new draft regulation recognizes more freedom to the Members States by allowing them to adopt differentiated measures. It is characterized by a "result-based" approach more than under the current regime. According to the author, such a shift of paradigm can be explained by the need for the EU to regain legitimacy by taking into account "national particularisms" to a greater degree. However, promoting a shared management system which relies more on the Members States may challenge the administrative capacity of the latter. Greater responsibilities for the Member States increase the administrative burden at the national level. The Commission will be in charge of monitoring that the goals of the regulation are achieved, which might be difficult considering the margin of appreciation left to the Member States. The "Hogan"

reform represents therefore both a great challenge and a great opportunity for the Members States and the EU alike.

Differentiation in the GDPR: accommodating diversity and promoting unity, **Michael Hübner (University of Utrecht)**

The purpose of the contribution is to show why differentiation is important in the EU and to identify some European tools that may be used to achieve differentiation. The GDPR is used as a case-study. It appears that differentiation is a necessity in the EU, considering the diversity of culture, language, legal traditions, etc. among the Members States. If the EU initially tried to achieve integration through uniformity, later developments of the Union suggest that differentiation is important for the Members States, and therefore for the EU as well. Various tools may be used to take differences between Members States into account. Recognizing diversity within the legislative framework is one of such tools. The protection of diversity within a legislative instrument can take several forms, such as minimum harmonization, the recognition of policy options or of elaboration discretion to the Member States, as the GDPR shows. The goal of these tools is mainly to improve the quality of the legislation. In the case of data protection, the replacement of the former applicable directive by a Regulation – the GDPR – is an attempt to uniformize the legislation of the Members States, while ensuring legal certainty. However, these goals are not met. The GDPR leaves considerable freedom to the Members States to differentiate. More than 70 provisions of the GDPR give leeway to the Members States. This adds a new complex layer of potentially divergent national norms, especially in federal countries such as Germany, where the Federal State and the Länder are competent to adopt provisions concerning data protection. It might be difficult, in that context, for the citizen to identify which legislation is applicable and this might furthermore result in conflict of laws.

The European Directive on Environmental Liability: a law and economics plea for better convergence, **Francesca Leucci, (Università di Bologna - Erasmus Universiteit Rotterdam – Hamburg Universität)**

The contribution investigates the efficiency of the 2004/35 Directive on Environmental Liability from an economic perspective. The starting point of the European harmonization of the regime of liability for environmental damage is to be found in the events of Chernobyl and Sandoz. These events led to a resolution of the Council adopted in 1986, enjoining the Commission to tackle the issue of environmental damages. After several Directive proposals, Green and White Papers, the Commission ended up with the 2004/35 Directive, based on the "polluter-pays" principle, to prevent and restore environmental damages. The Directive was transposed with delays in many Members States because of their difficulties to adapt their national legislation to the new provisions of the Directive. The contribution highlight that the Directive grants leeway to the Members States on many aspects of the liability for environmental damage. For example, the definition of "environmental damage" itself is interpreted more broadly in some Members States than in others. This leeway results in a lack of legal certainty. More specifically, there are no guidelines to assess the extent of a given environmental damage. From an economic prospective, this uncertainty prevents the Directive from reaching one of its goals, namely to give incentives to undertakings to prevent damages to the environment. Adopting guidelines for damage assessment at European

level could reinforce the economic efficiency of the Directive by increasing legal certainty for the economic actors.

Second panel: The relations between State and market under European influence

Discussant: Prof. A. Young (University of Cambridge)

Competition in EU health law and policy – what role for Member States?, **Dr. Mary Guy (Lancaster University)**

After introducing the EU legal framework on competition in healthcare services, the contribution focuses on how EU health law and policies are implemented by the Member States. Attention must be paid to Article 168(7) TFEU which provides for a "subsidiarity" clause for healthcare, as well as a greater EU level intervention in healthcare sector in comparison to its previous formulation in Article 152(5) EC. An analysis of the case law regarding competition in national healthcare systems reveals that EU-level intervention is at least desirable to avoid divergent interpretations of EU competition law at the national level. Examples from the Netherlands and the United Kingdom have shown that many reforms have been adopted borrowing EU competition law concepts and terminology and led to the creation of sector-specific competition rules. Further examples from Italy, France and Finland show that the EU-level influence may expand to a more active intervention regarding competition reforms of national healthcare systems via the fiscal control mechanisms of the European Semester, specifically through the Country-Specific Recommendations (CSRs). All the above leads to the observation that Member States are less free to experiment with competition and marketisation reforms when receiving CSRs than when they are not and that the analysis of Member State-level insights is interesting inasmuch that it can outline the need for a more coherent EU-level approach to competition in healthcare.

*Continuity of public service - from the diffusion of a French legal concept to the creation of a European core of continuity***, Antoine Mayence (ULB)**

The contribution focuses on the legal notion of "public service activity" and the European-wide convergence of the solutions put in place to guarantee the continuity of such activities at the national level. The "public service activity" has been defined as an activity of crucial importance for citizens, the interruption of which is likely to cause major disruption to life in society. Given their importance, the need for their continuity is recognized at the national, supranational and international levels. Within the EU, national solutions as to how to guarantee continuity of activities in the general interest have converged, both vertically and horizontally. In this context, the contribution focuses on the influence of EU law and of the European Convention of Human Rights on national laws. Such influence takes two main forms: negative, when a solution developed under national legal orders is found to be contrary to EU / ECHR law, and positive, when States are bound under European law to adopt measures providing for regularity in the provision of public services. The contribution discusses several examples of these two scenarios. The impossibility to declare French public undertakings (such as La Poste) bankrupt in order to guarantee the continuity of their activities has been found by the European Court of Justice to be contrary to EU state aid law. Similarly, the impossibility to seize property from Belgian public bodies has been found to be in violation of the ECHR (1995, Dierckx v. Belgium). On the other

hand, examples of positive influence are: a) art 3(3) of Directive 97/67/EC establishing standards for Member States to ensure regularity of postal service; b) the ECHR case Di Sarno v. Italy (2012), where the malfunctioning of the waste collecting services in Naples (Italy) has been considered to be in violation of the obligation to ensure regularity of waste collection service. The contribution shows that both the EU and the ECHR play an important role in shaping how the continuity of activities in the general interest can be secured at the national level.

Dispute resolution mechanisms in administrative contracts, **Bojana Todorovic (University of Belgrade)**

The contribution highlights firstly that the notion of "administrative contract" in the Serbian legal order is the result of a specific choice by the Serbian legislator to follow the model given by the French notion of "contrat public". The paper analyzes further the regulation of dispute resolution mechanism under French and German administrative contracts law, considered as two opposite poles. The experiences of Croatia and Slovenia are also discussed, since they have been both part of former Yugoslavia (as Serbia), but they are EU Member States; moreover their economies are comparable to that of Serbia. The contribution addresses three questions: how is this influence of EU law in this field taking place? What are the experiences in the considered Member States? Is it possible, or even necessary, to establish a uniform European dispute resolution model? The purpose of the contribution is to examine the Serbian law applicable to dispute resolution mechanisms in administrative contracts through the prism of EU standards. "Europeanization" of this field of law can be observed. Such a process takes place through secondary rules (remedies directives), the case-law of the European Court of Justice, as well as through instruments of soft law, and the spontaneous convergence by Member States through for instance the role of the EU Ombudsman.

Third panel: Administrative law and procedure: common trends and national reception

Discussant: Prof. *emeritus* Jean-Bernard Auby (Sciences Po Paris)

Procedural Rights in Lithuanian Administrative Law - (Still) An Uncharted Territory?, **Agnė Andraijauskaite (FÖV Speyer)**

The purpose of the contribution is to analyze the current state of procedural administrative protection in the Lithuanian legal system. The contribution firstly focuses on article 19 of the Lithuanian law on public administration, which gives the following definition of "administrative procedure": *"the administrative procedure shall comprise of mandatory actions performed pursuant to this Law by an entity of public administration while considering a person's complaint about a violation, allegedly committed by acts, omissions or administrative decisions of the entity of public administration, of the rights and legitimate interests of the person referred to in the complaint and adopting a decision on administrative procedure"*. It is a very narrow definition which leaves many other types of administrative action out of its scope. This is due to an antagonistic perception of the interaction between citizens and public authorities stemming from the country's communist past and from the relatively late development of administrative law doctrine in the country. The notion has been implemented over the years by the case-law: however, in the author's opinion, judicial paths may not be the optimal solution to make up for gaps in positive law, since in this way legal clarity and accessibility - which are

constitutional values - are seriously undermined. The author concludes by stressing the need for a re-thinking of the notion. This is not only important for precluding arbitrary action by public authorities, turning 'good administration rhetoric' into practice but also for equipping national agencies with efficient and responsive procedural tools for dealing with urgent matters within the framework of EU law.

A European Administrative Procedure Act – Lessons to learn from Member States codification experiences, **Dr. Laura Hering (Max Planck Institute for Comparative Public Law and International Law)**

The aim of the contribution is to identify the commonalities and the differences in the codification process of the law applicable to administrative procedures in two European states: Germany and France. The codification of administrative procedures in both countries is relatively recent: it took place in Germany in 1967 and in France in 2016. In recent years a "renaissance" of codification can be observed. The drafting of article 298 TEU in 2009 led to the creation of a network of EU academics and practitioners who published a sort of template for the codification of administrative procedure in 2014. In both Germany and France, codification processes developed following a very similar pattern. Indeed, it is possible to discern a pre-codification and a codification phase. The pre-codification phase is characterized by demands for codification and academic debate. Essentially it is a phase of academic work. The codification-phase can in turn be divided into three phases. First expert committees or commissions are set up, which also serve to overcome differences of opinion. The proposals then go to the ministries and subsequently to parliament. It is not uncommon for a delay in the legislative process to take place and modifications to be carried out. Moreover, it is possible to observe that the French and the European administrative procedural law and its codification process share important structural elements: both procedural laws are largely of judicial origin and have only been partially standardized in different areas. However, at the EU level, the time is not ripe yet for codification of the field of indirect administrative implementation. Apart from the lack of a legal basis, the main obstacle is the considerable need for coordination between the different national implementation systems.

The EU general principle of effective judicial protection before the Conseil d'État and the UK Supreme Court: a comparative study, **Giulia Gentile (King's College London)**

The principle of effective judicial protection is one of the cornerstones of the EU legal order. Such a principle, being also an EU fundamental right, requires that everyone whose EU-derived rights have been breached shall have a right to access a court to obtain judicial recognition and/or enforcement of his/her rights. Its introduction occurred in the 1980s with the seminal judgment *Johnston* (C-222/84), as a mechanism grounded in "the constitutional traditions common to the Member States" and developed by the European Court of Justice to ensure the effectiveness of EU law whenever national or the EU legal systems do not provide for 'judicial reparation' for breaches of EU law. The contribution analyses through the analytical comparative method and a case law review, both ex-ante convergence of the French and British legal systems, and ex-post convergence, i.e. how judicial protection as an EU general principle and fundamental right is implemented and understood in both legal orders. The analysis takes as a comparative benchmark article 47 of the EU Charter of Fundamental Rights. The selection of case-studies was grounded in the fact the UK and France are largely recognized as two opposite poles in administrative law.

In particular, the author suggests that in France the principle of effective judicial protection is understood as "fair trial" but not as "effective remedy". There remains a discrepancy between the French and he European approaches, whereas convergence exists between the EU and ECHR levels. Moreover, France seems to apply the notion of effective judicial protection even beyond the scope of EU law, however avoiding judicial dialogue on its content. On the other hand, in the United Kingdom, the principle of effective judicial protection is grounded in natural justice principles and its essential content requires access to court, access to legal assistance, confidential communication with legal counsel; it is interpreted both as "fair trial" and "effective remedy", thus showing a certain degree of convergence with the European approach. The author concludes by indicating that the existence of different contextual understandings on the principle of effective judicial protection is a threat to the uniformity of EU law, and, potentially, the protection of rights derived from EU law.

Report written by Alberto Nicotina (University of Antwerp) and Antoine Mayence (ULB).