

ReNEUAL Model Rules on EU Administrative Procedure

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Structure

| | |
|---|-----|
| Foreword by the European Ombudsman..... | III |
| Joint statement by ReNEUAL and ELI..... | V |
| Editorial note and acknowledgements..... | VII |
| Members of the Drafting teams..... | XII |
| Table of Abbreviations | XIX |
| Book I – General Provisions..... | 1 |
| Drafting Team: | |
| Paul Craig, Deirdre Curtin, Giacinto della Cananea, Herwig C. H. Hofmann, Oriol Mir, Jens-Peter Schneider, Marek Wierzbowski, Jacques Ziller | |
| Book II – Administrative Rulemaking..... | 42 |
| Drafting Team: | |
| Deirdre Curtin, Herwig C. H. Hofmann, Joana Mendes | |
| Book III – Single Case Decision-Making..... | 68 |
| Drafting Team: | |
| Paul Craig, Giacinto della Cananea, Oriol Mir, Jens-Peter Schneider, Vanessa M. Tünsmeier, Marek Wierzbowski | |
| Book IV – Contracts..... | 145 |
| Drafting Team: | |
| Jean-Bernard Auby, Michael Mirschberger, Hanna Schröder, Ulrich Stelkens, Jacques Ziller | |
| Book V – Mutual assistance..... | 201 |
| Drafting Team: | |
| Diana-Urania Galetta, Herwig C. H. Hofmann, Jens-Peter Schneider, Vanessa M. Tünsmeier | |
| Book VI – Administrative Information Management..... | 235 |
| Drafting Team: | |
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Foreword by the European Ombudsman

When I gave the oath of office as European Ombudsman at the Court of Justice in October 2013, I said that my ambition is to help the EU institutions to live up to their own best selves. That is in the interest of the institutions and their staff. It is in the interest of persons who have direct dealings with the institutions. But above all, it is in the interest of European citizens generally.

As European Ombudsman, the gap between the governing institutions of the European Union and its citizens is my particular concern. Those of us who work in the institutions need to understand that we face a crisis of European citizenship. And one key aspect of that crisis is that many citizens see the EU and its institutions as remote and alien.

The enormous work the Research Network in European Union Administrative Law (ReNEUAL) undertook and successfully accomplished in drafting Model Rules of administrative procedure helps makes more visible, and more understandable, the administrative framework through which the EU institutions carry out their functions.

No set of rules can possibly hope to cover every conceivable issue or situation. There must always be room for the exercise of good judgment in applying principles. The law should not become a shield for the administration to hide behind by saying that a particular action is not expressly allowed or forbidden. It is therefore of fundamental importance that ReNEUAL succeeded in avoiding rules that are excessively detailed. The Model Rules do not invite a box ticking approach, nor do they create an obstacle course that inhibits sound judgment or defies common sense.

The Model Rules make sense both as a basis for possible future legislation and as a persuasive synthesis of principles to be found in the existing law. I am convinced that they could have a significant long-term impact in helping the EU institutions to live up to their own best selves. They will certainly provide a valuable source of inspiration in carrying out the Ombudsman's mission to serve democracy by working with the institutions of the European Union to create a more effective, accountable, transparent and ethical administration.

Emily O'Reilly
European Ombudsman

Joint Statement of the European Law Institute (ELI) and the Research Network on EU Administrative Law (ReNEUAL)

ReNEUAL was set up in 2009. Its mission was to develop a set of model rules on EU administrative procedure. These model rules are meant to reinforce general principles of EU law and to codify best practices identified in existing EU legislation or national legal orders. One of the objectives of the ELI – founded in 2011 – is to strengthen the dialogue between academia and legal practitioners in order to make an informed contribution to European law-making on issues of a truly European dimension. In order for the proposed EU administrative procedural law to reach the broadest possible audience and achieve the best possible results ReNEUAL and ELI decided in 2012 to cooperate on the development of the Model Rules on EU procedure, which were drafted and developed by ReNEUAL. In 2012 ELI agreed to cooperate on the ReNEUAL project „Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law”.

For the ELI this type of cooperation was an experiment with an unconventional format. The fact that ReNEUAL had already worked for several years on developing the project, meant that it was possible for ReNEUAL to move to the final stages before the ELI could fully follow its own internal procedures to substantively review and adopt all the detailed provisions of the Model Rules.

Publication of the Model Rules therefore takes place without the Model Rules being put formally in the format of an „ELI instrument“. Nevertheless, important substantive elements of the ELI method, such as diversity and inclusion of academics and practitioners, were included.

The ELI and ReNEUAL recognize this process as mutually beneficial and enriching. The joint process meant that various bodies established by the ELI including a membership consultative committee were included in the discussion. Amongst the joint activities special mention is made of a conference organized in cooperation with the European University Institute’s Centre for Judicial Cooperation in Florence in February 2014. This enabled discussion with high-level national and European judges and contributed constructively to the development of the Model Rules.

The ReNEUAL Model Rules 2014 have greatly benefited from the ELI/ReNEUAL joint efforts. This cooperation is now the basis for further joint activities in order to improve EU administrative procedure law.

Both the ELI and ReNEUAL are convinced about the benefits of their future cooperation and collaboration.

Diana Wallis

President of the European Law Institute

Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller

ReNEUAL coordinators

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. The printed version of the ReNEUAL Model Rules (2015) contains minor amendments by comparison to the online version published on September 1st 2014. These amendments result from clarifications introduced in the process of the translation of the original text drafted in English into French, German, Italian, Polish and Spanish.

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. These working groups were concerned primarily with executive rule-making (chaired by Deirdre Curtin, Herwig C.H. Hofmann and Joana 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 The Hague (Netherlands) in November 2013 under the Dutch presidency of ACA-Europe, in collaboration with the Council of State of the Netherlands and with participation of Paul Craig and Jean-Bernard Auby of ReNEUAL.

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 Azoulai 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.

ReNEUAL is grateful for the financial and material support from various sources including contributions from the host universities of the professors involved. We would like to especially acknowledge the contributions from the

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 - Amsterdam Centre for European Law and Governance ACELG,
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- Barcelona:
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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;
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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 http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf . |
| 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 Alert System for Non-Food Dangerous Products |
| 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 |

Introduction to the ReNEUAL Model Rules / Book I – General Provisions

Structure

| | |
|---|----|
| A. Introduction to the ReNEUAL Model Rules..... | 2 |
| Executive summary of the introduction..... | 2 |
| I. Background and mission of the ReNEUAL project: EU administrative procedures and constitutional principles | 4 |
| II. Law of administrative procedure in the EU – characteristics and challenges | 8 |
| III. Models for the codification of EU law on administrative procedure? | 11 |
| IV. Legal bases for EU codification..... | 14 |
| V. The six Books of the ReNEUAL Model Rules on EU Administrative Procedures | 21 |
| VI. The approach..... | 24 |
| B. Model Rules | 30 |
| Preamble..... | 30 |
| I-1 Scope of application..... | 30 |
| I-2 Relation to specific procedural rules of the European Union .. | 30 |
| I-3 Relation to Member State law | 31 |
| I-4 Definitions | 31 |
| C. Explanations | 32 |
| Preamble..... | 32 |
| I-1 Scope of application..... | 33 |
| I-2 Relation to specific procedural rules of the European Union .. | 34 |
| I-3 Relation to Member State law | 36 |
| I-4 Definitions | 36 |

B. Model Rules

Preamble

Public authorities are bound in administrative procedures by the rule of law, the right to good administration and other related principles of EU administrative law.

In the interpretation and development of these model rules, regard should be had especially to equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality, participation, proportionality, protection of legitimate expectations, transparency, and due access to effective remedies.

Public authorities shall have regard to efficiency, effectiveness and service orientation.

Within European administrative procedures due respect must be given to the principles of subsidiarity, sincere cooperation, and clear allocation of responsibilities.

I-1 Scope of application

- (1) These model rules are applicable to all EU authorities when they are implementing Union law through administrative action.
- (2) These model rules do not apply to Member State authorities unless sector-specific EU law renders them applicable.
- (3) The model rules of Books V and VI are applicable to Member State authorities as defined in Articles V-1 and VI-1.

I-2 Relation to specific procedural rules of the European Union

- (1) These model rules shall apply where no specific procedural rules exist in EU law.
- (2) Specific procedural rules in EU law shall be interpreted in coherence with and may be complemented by these model rules.

I-3 Relation to Member State law

Member State authorities may use these model rules as guidance when they are implementing EU law in accordance with their national procedural law.

I-4 Definitions

For the purpose of these model rules the following definitions apply to all Books:

- (1) `Administrative action` means activity of a public authority as defined in paragraph (7) that results in:
 - (a) a legally binding non-legislative act of general application as defined in Book II,
 - (b) a decision as defined in Book III,
 - (c) a contract as defined in Book IV,
 - (d) mutual assistance as defined in Book V,
 - (e) information management activities as defined in Book VI.
- (2) `Administrative procedure` means the process by which a public authority prepares and formulates administrative action as defined in paragraph (1) lit. a. to c.
- (3) `Competent authority` means the public authority in the sense of paragraph (7) which is responsible for performing administrative action according to the applicable law.
- (4) `Composite procedure` means an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent. A composite procedure may also mean the combination of two administrative procedures that are directly linked.
- (5) `EU authority` means an institution, body, office or agency of the Union. Other bodies are also to be considered as EU authorities when they are entrusted with administrative action on behalf of the EU.
- (6) `Person` means any natural or legal person. Other associations, organizations or groups may be considered as a person on the basis of sector-specific EU law or the case law of the Court of Justice of the European Union.

(7) 'Public authorities' means EU authorities according to paragraph (5) and Member State authorities, insofar as these model rules apply to them.

C. Explanations

Preamble

- (1) As highlighted in the introduction,¹⁰ as well as by the EP's resolution of 15 January 2013,¹¹ rules on EU administrative procedures must be based on **constitutional principles**. These principles **are already laid down in various provisions of the EU treaties** and the ReNEUAL Model Rules do not intend to duplicate those provisions. Instead, the preamble briefly refers to them in order to remind all addressees and other readers of the constitutional background of the detailed rules which must be interpreted "in the light" of these principles. Paragraph 1 refers to the rule of law and the principle of good administration as these are fundamental standards of administrative procedural law.
- (2) The **list in paragraph 2 pinpoints more specific principles**, some of which are more concrete manifestations of the two fundamental principles mentioned before. The list follows, in principle, the approach of the EP's resolution of 15 January 2013. Paragraph 3 lists principles which are additional important guidelines for administrative action. Paragraph 4 highlights principles which are especially important for the design of composite procedures, but are also applicable to other types of European administrative procedures. The principle of clear allocation of responsibilities is very important with regard to composite procedures in order to provide due access to effective judicial review and other remedies. Responsibilities further have to be allocated clearly, not only between different public authorities, but also within institutions, bodies, offices and agencies, especially if they are powerful authorities such as the European Commission.

¹⁰ See paras 11-14, 62 of the introduction.

¹¹ 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)); see also the Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

ReNEUAL Model Rules on EU Administrative Procedure
Book II – Administrative Rulemaking

Structure

| | |
|---|----|
| A. Introduction to Book II..... | 43 |
| B. Model Rules | 44 |
| II-1 Scope..... | 44 |
| II-2 Initiative..... | 44 |
| II-3 Preparation of the Draft Act..... | 44 |
| II-4 Consultation and Participation..... | 45 |
| II-5 Reasoned Report..... | 45 |
| II-6 Expedited Procedures..... | 46 |
| C. Explanations | 46 |
| II-1 Scope..... | 46 |
| II-2 Initiative..... | 55 |
| II-3 Preparation of the Draft Act..... | 57 |
| II-4 Consultation and Participation..... | 61 |
| II-5 Reasoned Report..... | 64 |
| II-6 Expedited Procedures..... | 66 |

B. Model Rules

II-1 Scope of application

(1) Book II applies 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 EU authorities adopted on the basis of Treaty provisions or legislative acts.

(2) Book II also applies to preparatory acts by EU authorities leading to the establishment, amendment and repeal of Acts in the sense of Paragraph 1 of this article.

(3) Book II does 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 EU authority 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 establishing, amending or repealing 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 paragraphs 1-4 of this article 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 II-4(2)(d), shall consist of the explanatory memorandum as well as the material listed in

Article II-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 II-4 within a period of four weeks after the adoption of the act. After consultation the EU authority in charge of drafting the act will undertake the necessary amendments.

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

C. Explanations

II-1 Scope of application

(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 should they also be applicable

ReNEUAL Model Rules on EU Administrative Procedure

Book III – Single Case Decision-Making

Structure

| | |
|--|----|
| A. Introduction to Book III..... | 72 |
| B. Model Rules | 77 |
| Chapter 1: General provisions | 77 |
| III-1 Scope of application..... | 77 |
| III-2 Definitions..... | 77 |
| Chapter 2: Initiation and Management of procedure | 78 |
| III-3 General Duty of Fair Decision-making and impartiality..... | 78 |
| III-4 Online information on existing procedures..... | 78 |
| III-5 Initiation..... | 79 |
| III-6 Special rules on application procedures..... | 79 |
| III-7 Responsible official..... | 80 |
| III-8 Management of procedures and procedural rights..... | 80 |
| III-9 Time-limits for concluding procedures..... | 81 |
| Chapter 3: Gathering of information..... | 82 |
| Section 1: General rules | 82 |
| III-10 Principle of investigation..... | 82 |
| III-11 Investigation by request..... | 82 |
| III-12 Investigation by mandatory decision..... | 83 |
| III-13 Duties to cooperate of parties..... | 83 |
| III-14 Privilege against self-incrimination and legal professional privilege..... | 84 |
| III-15 Witnesses and experts..... | 84 |
| Section 2: Inspections..... | 85 |
| III-16 Inspection powers of public authorities..... | 85 |
| III-17 Duties of inspecting officials | 85 |
| III-18 Duties of sincere cooperation during inspections by EU authorities | 86 |

| | | |
|-----------------------|---|-----|
| III-19 | Participation of EU authorities in Member State inspections... | 87 |
| III-20 | Joint inspections of Member State authorities | 88 |
| III-21 | Relation to Book V | 88 |
| Chapter 4: | Right to a Hearing and inter-administrative consultations | 88 |
| Section 1: | Access to the File..... | 88 |
| III-22 | Access to the File..... | 88 |
| Section 2: | Hearing, participation and consultation | 89 |
| III-23 | Right to be heard by persons adversely affected..... | 89 |
| III-24 | Right to be heard in composite procedures | 90 |
| III-25 | Consultation of the interested public | 91 |
| III-26 | Consultation with Member States..... | 92 |
| III-27 | Consultation with EU authorities..... | 92 |
| Chapter 5: | Conclusion of the procedure | 93 |
| III-28 | Duty to specify the decision..... | 93 |
| III-29 | Duty to give reasons | 93 |
| III-30 | Duty to indicate available remedies..... | 93 |
| III-31 | Formal and language requirements..... | 94 |
| III-32 | Decisions in electronic form | 94 |
| III-33 | Notification of a decision | 94 |
| III-34 | Correction of obvious inaccuracies in a decision | 94 |
| Chapter 6: | Rectification and withdrawal of decisions | 95 |
| III-35 | Rectification and withdrawal of decisions that have an adverse effect | 95 |
| III-36 | Rectification and withdrawal of decisions that are beneficial .. | 95 |
| C. Explanations | | 96 |
| Chapter 1: | General provisions | 96 |
| III-1 | Scope of application..... | 96 |
| III-2 | Definitions | 97 |
| Chapter 2: | Initiation and Management of procedures | 99 |
| III-3 | General Duty of Fair Decision-making and impartiality | 99 |
| III-4 | Online information on existing procedures | 102 |
| III-5 | Initiation | 103 |
| III-6 | Special rules on application procedures..... | 105 |

| | | |
|------------|--|-----|
| III-7 | Responsible official..... | 107 |
| III-8 | Management of procedures and procedural rights | 108 |
| III-9 | Time-limits for concluding procedures..... | 110 |
| Chapter 3: | Gathering of information..... | 111 |
| Section 1: | General rules | 112 |
| III-10 | Principle of investigation..... | 112 |
| III-11 | Investigation by request / III-12 Investigation by mandatory decision | 113 |
| III-13 | Duties to cooperate of parties | 114 |
| III-14 | Privilege against self-incrimination and legal professional privilege | 116 |
| III-15 | Witnesses and experts..... | 117 |
| Section 2: | Inspections..... | 118 |
| III-16 | Inspection powers of public authorities / III-17 Duties of inspecting officials..... | 119 |
| III-18 | Duties of sincere cooperation during inspections by EU authorities / III-19 Participation of EU authorities in Member State inspections / III-20 Joint inspections of Member State authorities / III-21 Relation to Book V | 121 |
| Chapter 4: | Right to a Hearing and inter-administrative consultations..... | 125 |
| Section 1: | Access to the File..... | 125 |
| III-22 | Access to the File..... | 125 |
| Section 2: | Hearing, participation and consultation | 126 |
| III-23 | Right to be heard by persons adversely affected..... | 126 |
| III-24 | Right to be heard in composite procedures | 128 |
| III-25 | Consultation of the interested public | 129 |
| III-26 | Consultation with Member States..... | 131 |
| III-27 | Consultation with EU authorities..... | 132 |
| Chapter 5: | Conclusion of the procedure | 132 |
| III-28 | Duty to specify the decision / III-29 Duty to give reasons..... | 133 |
| III-30 | Duty to indicate available remedies..... | 136 |
| III-31 | Formal and language requirements..... | 137 |
| III-32 | Decisions in electronic form | 139 |
| III-33 | Notification of a decision | 140 |
| III-34 | Correction of obvious inaccuracies in a decision | 141 |

| | | |
|------------|---|-----|
| Chapter 6: | Rectification and withdrawal of decisions | 141 |
| III-35 | Rectification and withdrawal of decisions that have an adverse effect / III-36 Rectification and withdrawal of decisions that are beneficial..... | 141 |

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B. Model Rules

Chapter 1: General provisions

III-1 Scope of application

- (1) Book III applies to administrative procedures by which an EU authority prepares and adopts a decision as defined in Article III-2.
- (2) Book III applies to administrative procedures by which a Member State authority prepares and adopts a decision as defined in Article III-2 insofar as sector-specific EU law or the respective Member State law renders it applicable.

III-2 Definitions

- (1) `Decision´ means administrative action addressed to one or more individualized public or private persons which is adopted unilaterally by an EU authority, or by a Member State authority when Article III-1(2) is applicable, to determine one or more concrete cases with legally binding effect.
- (2) `Public authority´ for the purposes of Book III means an EU authority, and a Member State authority under the conditions specified in Article III-1(2).
- (3) `Party´ means the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure. Sector-specific EU law may assign the status of party to persons not adversely affected.
- (4) `Interested public´ for the purposes of Article III-25 means every natural or legal person and other associations, organizations or groups expressing an interest in the administrative procedure.
- (5) `Inspection´ means an on-the-spot check for the purposes of information gathering.
- (6) `Responsible official´ means the official charged by the public authority with managing the administrative procedure.

Chapter 2: Initiation and Management of procedure

III-3 General Duty of Fair Decision-making and impartiality

(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by public authorities as specified in these model rules.

(2) The responsible official as set out in Article III-7 has a duty to communicate any financial or familial interest in a decision to his or her superior and shall not take part in that decision.

(3) The responsible official has a duty to communicate any other possible conflict of interest to his or her superior, who should exclude the official from participating in the decision where the impartial and objective exercise of the official's function is compromised.

(4) A party may request that a responsible official affected by a conflict of interest should not take part in the making of the decision. This request must be filed as soon as possible and should be reasoned and made in writing. The decision whether to exclude the official shall be made by his or her superior after hearing the official.

(5) Any other person involved in a decision on behalf of a public authority shall *mutatis mutandis* be bound by the obligations in paragraphs 2 to 4 above.

III-4 Online information on existing procedures

(1) Public authorities shall promote the provision of general updated online information on the existing administrative procedures, wherever possible and reasonable. Priority shall be given to application procedures.

(2) Such information may include, among other things:

- (a) a link to the applicable legislation in its consolidated version,
- (b) a brief explanation of the main legal requirements and its administrative interpretation,
- (c) a description of the main procedural steps,
- (d) the indication of the authority competent to adopt the final decision,
- (e) the indication of the time-limit for the adoption of the decision,
- (f) the indication of remedies available,

- (g) a link to standard forms that may be used by parties in their communications with the public authority within the procedure.
- (3) The information shall be presented in a clear and simple way. Access shall be free of charge.
- (4) The European Commission shall foster the adoption of best practices in the provision of online information and may issue recommendations to that end.

III-5 Initiation

- (1) Administrative procedures can be initiated ex-officio or by an application.
- (2) The initiation of an administrative procedure ex-officio shall be notified to the parties. The notification may take place at a later stage if it might jeopardise the investigation of the case. The notification may be omitted when an immediate decision is strictly necessary in the public interest, or because of the serious risk involved in delay.
- (3) The notification shall indicate:
 - (a) registration number,
 - (b) notice of the rationale for the initiation of the procedure,
 - (c) the name and contact details of the responsible official for the procedure,
 - (d) information referred to in letters (c), (d), (e) and (f) of Article III-4(2),
 - (e) the address of the website mentioned in Article III-4 if such website exists.
- (4) Once an administrative procedure is initiated, the competent authority shall adopt a final decision within the time-limit laid down in Article III-9.

III-6 Special rules on application procedures

- (1) Applications shall not be subject to unnecessary formal and documentary requirements and may be submitted in writing to the competent authority in-person, by mail or by electronic means.
- (2) Applications addressed or transmitted to a non-competent service shall be transferred without delay to the competent one if both of them belong to the same public authority. The service that originally received the application shall notify the applicant of this transfer and shall indicate the contact details of the service to which the file has been passed. In other cases, applications shall be returned and

advice on the competent authority shall be given, wherever possible and reasonable.

(3) Applications shall be acknowledged in writing as quickly as possible. The acknowledgement of receipt shall indicate the information contained in letters (a), (c), (d) and (e) of Article III-5(3). In the event of a defective application, the acknowledgment shall specify the defects or missing documents and give an appropriate period for remedying or producing the missing documents. Pointless or manifestly unfounded applications may be rejected as inadmissible by means of a briefly reasoned acknowledgement of receipt. No acknowledgement of receipt needs to be sent in cases where successive applications submitted by the same applicant are abusive because such applications have a repetitive character.

(4) Where the number of applications to be granted is limited and a competitive award procedure is used the rules laid down in Book IV Chapter 2 Section 3 shall apply *mutatis mutandis*.

III-7 Responsible official

When an administrative procedure is initiated the public authority shall appoint a responsible official, who shall manage it subject to Article III-3(2)-(3), shall respect the rights in Article III-8(1) and shall keep an adequate file containing records of all information and documents produced.

III-8 Management of procedures and procedural rights

(1) The parties shall have the following rights related to the management of the procedure:

- (a) to be given information on all questions related to the procedure in a fast, clear and understandable manner;
- (b) to communicate and to complete, where possible and appropriate, all procedural formalities at a distance and by electronic means, including videoconferencing;
- (c) to use any of the official languages of the EU in accordance with Article III-31;
- (d) to be notified of all procedural steps and decisions that may affect them in accordance with Article III-33;
- (e) to be represented by a lawyer or some other person of their choice having legal capacity;

(f) to pay only charges that are reasonable and proportionate to the cost of the procedure in question.

(2) Without prejudice to the existing legal remedies, the parties shall have the right to file a complaint against the responsible official, the deciding authority, or any other official who takes part in the procedure where they fail to comply with their obligations under these model rules, whether intentionally or through negligence.

(3) Where the number of persons adversely affected is large, and the adverse effect is the same or very similar, they may choose a representative or representatives from the affected group to be parties. If the affected group does not do so, the public authority may require them within a reasonable period to appoint a joint representative where otherwise the regular execution of administrative procedure would be impaired. If these persons do not comply within the period set, the authority may ex-officio appoint a joint representative.

(4) Sector-specific EU law may stipulate a particular number of persons adversely affected for the purposes of paragraph 3.

III-9 Time-limits for concluding procedures

(1) The public authority shall adopt its decision within a reasonable time and without delay. The time-limits shall be fixed in the relevant sector-specific EU law. If no time-limit is established in the rules governing the specific procedure for the case at hand the time-limit for adopting the decision shall be three months.

(2) The period shall begin on the date of the receipt of a complete application, or on the date of initiation ex-officio.

(3) When complexity or other obstacles prevent examination of the case within the time-limit the parties shall be informed and the decision shall be adopted in the shortest possible time. The public authority shall inform the parties in writing, stating the reasons for the extension, and if possible the predicted time for adoption of the decision. This is without prejudice to any restrictions on the extension of duration of the procedures provided by sector-specific EU law.

(4) Sector-specific EU law shall stipulate the consequences for violation of the time-limit.

Chapter 3: Gathering of information

Section 1: General rules

III-10 Principle of investigation

(1) When taking decisions, the public authority shall investigate the case carefully and impartially. It shall take into consideration the relevant factors, including those favourable to the parties, and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The public authority shall use such evidence as, after due consideration, it deems necessary in order to ascertain the facts of the case.

(2) The public authority may under the conditions laid down in Article III-11 and Article III-12 or in other provisions of EU law:

- (a) gather information of all kinds,
- (b) hear the evidence of the parties, witnesses and experts or gather statements in writing or electronically from parties, experts and witnesses,
- (c) obtain documents and records, and
- (d) under the conditions of Article III-16 visit and inspect the premises involved.

(3) Article VI-21 to VI-22 apply to information provided by a public authority to another public authority.

III-11 Investigation by request

(1) In order to fulfil investigatory duties under sector-specific EU law the public authority may request a party to be interviewed or to provide all necessary information.

(2) Notwithstanding the consequences laid down in sentence 3 and 4 in Article III-13(1), the party may refuse to comply with the request. If the party consents to be interviewed or to provide information, he or she may not supply incorrect or misleading information. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incorrect or misleading.

(3) When sending a request for information to a party, the public authority shall state the legal basis and the purpose of the request, specify what

information is required and fix the time-limit within which the information is to be provided, and indicate the penalties provided for in the relevant EU law for supplying incorrect or misleading information.

(4) An EU authority shall without delay forward a copy of the request to the competent authority of the Member State in whose territory the seat of the party is situated or the party resides and to the competent authorities of other Member States whose territory is affected by that request. In case of an interview the Member State in which the interview takes place may request that its officials assist the officials and other accompanying persons authorised by the EU authority to conduct the interview.

(5) The rules of paragraph 4 apply also in case of a request by a Member State authority if the addressee is situated in another Member State. The affected Member State may refuse the interview by authorities from another Member State, in which case the rules on mutual assistance of Book V become applicable.

(6) When sector-specific EU law grants to the public authority the power to interview a person who is not party, who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation, the procedural rules in this article apply *mutatis mutandis*.

III-12 Investigation by mandatory decision

(1) When sector-specific EU law grants to the public authority the power to investigate by a mandatory decision, the procedural rules in this article are applicable. The parties or their representatives shall supply the information requested. They may not supply incorrect or misleading information.

(2) The procedural rules laid down in Article III-11(2) sentence 3 to Article III-11(5) apply *mutatis mutandis*. In addition to the obligations laid down in Article III-11(3) the competent authority shall indicate the legal consequences for not responding to a mandatory decision.

III-13 Duties to cooperate of parties

(1) The parties shall assist in ascertaining the facts of the case. In particular they shall state such facts and evidence as are known to them and which can reasonably be expected to be presented by them. If a participant fails to state such facts, the final decision shall be taken on the basis of the information available.

The public authority is obliged to conduct additional investigations ex officio only if additional evidence or issues to be investigated are evident. A more extensive duty to assist in ascertaining the facts, and in particular the duty to appear personally or make a statement, shall exist only where the law specifically requires this.

(2) In application procedures according to Article III-6(3) the applicant supplies in an appropriate form the information specified in EU law. If the applicant so requests before submitting an application, the public authority shall give an opinion on the information to be supplied by the applicant. The public authority shall consult appropriate authorities in accordance with Articles III-26 and III-27 before it gives its opinion. The fact that the public authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the applicant to submit further information. Any public authorities holding relevant information must make this information available to the applicant on his or her specific request and on the condition that the applicant cannot reasonably be expected to obtain this information on his or her own.

III-14 Privilege against self-incrimination and legal professional privilege

(1) Where it is within the responsibility of public authorities to establish a violation of EU law and this violation may lead to an administrative sanction, they are under the obligation to respect a private party's privilege against self-incrimination as well as his or her legal professional privilege.

(2) Where the privilege against self-incrimination or the legal professional privilege referred to in paragraph 1 have been violated in the course of gathering information, the information must not be used as evidence in procedures by public authorities if this violation of defense rights could have an impact on the content of the decision.

III-15 Witnesses and experts

(1) Witnesses and experts shall be obliged to make a statement or prepare opinions, when the law specifically requires this.

(2) The parties may propose witnesses and experts.

Section 2: Inspections

III-16 Inspection powers of public authorities

- (1) Without prejudice to on-the-spot-checks carried out by the Member States in accordance with their national law, EU authorities shall have the power to inspect premises
- (a) where they have been provided with the necessary powers of inspection in the relevant legislative act, and
 - (b) where this is necessary, to fulfil their duties under EU law.
- (2) Where EU law establishes a power or a duty to inspect for a public authority, it should specify the ways in which the power or duty is exercised. A power or duty to inspect may *inter alia* entail the following powers:
- (a) to enter any premises, land or means of transport, which can be inspected according to the basic act providing for inspection powers,
 - (b) to search for, examine and take or obtain copies or extracts of documents,
 - (c) to ask for explanations,
 - (d) to take samples,
 - (e) to exchange information gathered by an inspection under the conditions laid down in Book VI, and
 - (f) to seal premises or documents.
- (3) In order to allow the public authority to carry out inspections, it shall be granted access to relevant premises, land or means of transport. Those affected shall cooperate with the EU officials in their investigation.

III-17 Duties of inspecting officials

- (1) Public authorities shall ensure that their inspectors act in accordance with EU law, and in particular respect the European Union Charter of Fundamental Rights and comply with EU and national provisions on the protection of personal data.
- (2) Inspectors and other authorized persons shall exercise their power only on production of a written authorization showing their identity and position, together with a notification according to Article III-5(3) or a copy thereof. Unless otherwise indicated in EU law, the inspectors must comply with relevant national procedural rules, provided that these are consistent with EU law.

(3) Public authorities shall take all necessary steps to ensure the confidentiality of the information communicated or obtained in the course of an inspection.

(4) Where public authorities decide to carry out inspections under EU law, they shall ensure that similar inspections are not being carried out at the same time in respect of the same facts by other EU or Member State officials.

(5) Inspectors shall draw up a report with the results of the inspection, which shall be included in the file.

III-18 Duties of sincere cooperation during inspections by EU authorities

(1) Where an inspection by an EU authority is mandated or authorized by EU law the inspection shall be prepared and conducted in close cooperation with the authorities of the Member State concerned. To that end, the officials of the Member State concerned may participate in the inspection, unless the Member State itself is being inspected and participation of its officials would endanger the purpose of the inspection.

(2) Before carrying out such an inspection in a Member State EU authorities shall inform the Member State authorities in good time of an inspection, unless the Member State itself is being inspected and notification would endanger the purpose of the investigation.

(3) Where EU authorities conduct such an inspection they shall be required to inform the Member State authorities of the result of such inspections. Inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which they are used, in the same way and under the same conditions as reports drawn up by national administrative inspectors. Where an inspection is carried out jointly, pursuant to the paragraph 1, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the EU inspectors.

(4) Subject to the agreement of the Member State concerned, EU authorities may seek the assistance of officials from other Member States and call on outside bodies acting under their responsibility to provide technical assistance. The EU authorities shall ensure that these officials and bodies guarantee the necessary technical competence, independence, observance of professional

secrecy and are subject to the same professional duties of impartiality as EU officials. Where they seek such outside assistance, EU authorities remain responsible for any misconduct or damage caused by these officials and bodies in the course of an inspection. The EU authorities shall inform the Member State concerned, in good time and in writing, of the identities of these officials and bodies.

(5) In accordance with the duty of sincere cooperation, the Member State on whose territory an inspection mandated or authorized by EU law takes place shall provide any assistance necessary, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable the EU authorities to conduct their inspection. If such assistance requires authorisation from a judicial authority according to the law of the Member State concerned, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

(6) Where authorization as referred to in paragraph 5 is applied for, the national judicial authority shall ensure that the authorization of the inspection is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In subjecting the coercive measures to proportionality control, the national judicial authority may ask the EU authorities, directly or through the Member State authority, for detailed explanations of: the grounds for suspecting a violation of EU law; the seriousness of the suspected infringement; and the nature of the involvement of the subject being inspected. However, the national judicial authority may not call into question the necessity for the inspection, nor demand that it be provided with the information in the assembled file.

III-19 Participation of EU authorities in Member State inspections

EU officials may participate in an inspection conducted by and under the responsibility of officials of a Member State on the basis of an agreement with the respective Member State, or if so provided by sector-specific EU law. In this case they shall have access to the same premises and to the same documents as national officials. EU officials may only participate in Member State inspections where they are able to produce written authorization stating their identities and their functions. They may not, on their own initiative, use the powers of inspection conferred on national officials or be present at inspections based on national criminal law.

III-20 Joint inspections of Member State authorities

(1) In cases where an inspection is necessary to fulfil the tasks of authorities from several Member States under EU law, inspectors of each Member State concerned may conduct a joint inspection on the basis of an agreement, or if so provided by sector-specific EU law. The authority in whose territory the inspections are conducted (the host authority) shall invite inspectors of each Member State (invited inspectors) to take part in the respective joint inspection. The host authority shall respond to the request of an authority from another Member State to participate in the operations without delay.

(2) A host authority may, in compliance with its own national law, and with the agreement of the invited inspector's authority, confer executive powers, including investigative powers on the invited inspector. The invited inspector may exercise executive powers only under the guidance and, as a rule, in the presence of inspectors from the host authority. The invited inspector shall be subject to the host authority's national law. The host authority shall assume responsibility for the actions of the invited inspector.

III-21 Relation to Book V

At the request of an EU authority or an authority of another Member State, a Member State authority may conduct inspections in accordance with its national law and subject to the rules formulated in Book V. In such cases, the Member State authority undertakes the inspection on behalf of the requesting authority and not in its own interest.

Chapter 4: Right to a Hearing and inter-administrative consultations

Section 1: Access to the File

III-22 Access to the File

(1) Every party has a right of access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

(2) If documents contain confidential information or professional or business secrets, the public authority must, where possible, provide a non-confidential version or summary of the documents.

(3) Every party shall have the opportunity to examine all documents in his or her file, which may be relevant for its defence, including incriminating and exculpatory evidence, before the decision is taken.

(4) The way in which access to the file is provided is for the public authority to determine, and may be regulated through sector-specific EU law, provided that it does not undermine the substance of the right. Subject to this caveat, access to the file may be provided either through copies of documentation, or the opportunity to study the file in the office of the public authority, or a combination of both.

(5) The right of access to the file does not cover access to documentation that is irrelevant and bears no relation to the allegations of fact or law in the particular case.

Section 2: Hearing, participation and consultation

III-23 Right to be heard by persons adversely affected

(1) Every party has the right to be heard by a public authority before a decision, which would affect him or her adversely, is taken.

(2) The hearing prior to the taking of the individual decision may be omitted when an immediate decision is strictly necessary in the public interest or because of the serious risk involved in delay, but a hearing shall be provided after the decision was taken, unless there are very compelling reasons to the contrary. The public authority shall provide reasons as to why these conditions are applicable and has the burden of proof in relation to showing that the evidence supports the reasons given.

(3) Every party has the right to notice of the central issues that are to be decided by the public authority and the core arguments that inform its reasoning, in order that the party can effectively make known its views on the matter and can exercise its rights of defence.

(4) Every party must have adequate time in which to respond after notice in accord with paragraph 3 has been provided. The public authority should set clear time-limits within which the response is to occur.

(5) The public authority has discretion as to the form and content of the hearing. This includes the choice as to whether the hearing should be written or oral, and whether to allow cross-examination. In choosing how to exercise this discretion the public authority should take into account the objectives of the legislation, the legislative provisions, the importance of the person's interests, the importance of the additional procedural safeguards for protection of the person's interest, and the costs of granting such specific procedural safeguards.

III-24 Right to be heard in composite procedures

(1) The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this article. The application of the right to be heard will depend on the division of responsibility in the decision-making process.

(2) In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector-specific EU law renders the procedural rules in Book III applicable. In the absence of such sector-specific EU law, or any other EU law specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings.

(3) In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23(5) by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority.

(4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5). Where sector-specific EU law renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the recommendation. In the absence of such an EU provision, or any other EU law specifying applicable procedural requirements,

the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings.

(5) In a case of composite procedure, where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority, the right to be heard before the decision is taken shall include knowledge of the recommendation and the ability to contest its findings. Where sector-specific EU law renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the decision pursuant to a recommendation made by another public authority. In the absence of such an EU provision, or any other EU law specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings.

(6) For the avoidance of doubt, this article is also applicable to cases of composite procedure where EU law imposes legal obligations on Member State authorities to coordinate or co-operate action that leads to individual decisions.

III-25 Consultation of the interested public

(1) An EU authority making the decision may give effect to the obligations in Article 11 TEU by consultation of the interested public in accordance with the following paragraphs. Where sector-specific EU law renders Book III applicable to a Member State authority making the decision it may give the interested public the opportunity to make known and publicly exchange their views by consultation. This is without prejudice to the obligation in Article III-23(1).

(2) The public authority may choose to consult through provision of a public hearing. This hearing must be notified through public announcement, which must be posted on an official website. The relevant documentation, including expert opinions, shall be available for inspection online prior to the hearing, unless excluded for legally defensible reasons. The notification must be given in sufficient time, which should not be less than two weeks, to enable those who wish to participate to be able to do so and to study the relevant documentation. The notification must be given and a public hearing must be held in sufficient time before the decision is made.

(3) If a public hearing pursuant to paragraph 2 is held it should be organized such that there is opportunity for those attending to express their views orally, subject to practical and organizational limits. Provision should be made for those

who wish to express their views in writing, either prior to or instead of attendance at the public hearing. The written views should be available online in a clearly accessible part of the relevant website. The minutes of the public hearing should be available for public inspection online within a reasonable time after the end of the oral hearing, and there should be an opportunity for the persons involved to raise objections during two weeks thereafter about the alleged incompleteness or incorrectness of the minutes.

(4) The public authority may choose to conduct an online consultation exercise. This must be posted on an official website. The relevant documentation, including expert opinions, shall be available for inspection online, unless excluded for legally defensible reasons. The notification and documentation must be given in sufficient time to enable those who wish to participate to be able to do so. The notification must be given in sufficient time before the decision is made.

(5) The website referred to in the previous paragraphs of this article must be clear, simple and easy to use. The website should be so designed as to enable users to see the views of those who have already offered written comments.

(6) If consultation is mandated by Union law which provides no indication as to the form of the consultation, then it will be for the public authority to decide whether to fulfill this obligation by provision of a public hearing or an online consultation exercise. The relevant provisions of this article will then apply accordingly.

III-26 Consultation with Member States

When consultation with the Member States is required or permitted by EU law the EU authority shall inform without delay the Member States about initiation of any such consultation. It shall make available to the Member States all information that is required for the Member States to submit properly informed views on the subject-matter of the consultation exercise. The Member States must have adequate time in which to respond to the consultation.

III-27 Consultation with EU authorities

(1) Consultation with EU authorities shall take place when it is required by the constituent treaties, general principles of EU law or sector-specific EU law, and the consultation shall be in accord with the source of the obligation where that is specified.

(2) Where the format for the consultation is not specified then the following principles should apply. The bodies taking part in the consultation shall be given all information that is required to enable them to express a properly informed view on the subject matter of the consultation exercise. The bodies must have adequate time in which to respond to the consultation.

Chapter 5: Conclusion of the procedure

III-28 Duty to specify the decision

A decision made by the public authority shall be clearly specified in order to enable the parties to understand their rights or duties.

III-29 Duty to give reasons

(1) The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review.

(2) The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24.

III-30 Duty to indicate available remedies

(1) Decisions shall provide information to the addressee concerning:

- (a) the possibility of administrative appeal, where this exists, including cases where an appeal can be made to a public authority other than that which adopted the decision, and
- (b) the time-limit for making an appeal.

(2) Decisions shall also inform the addressee of the possibilities of judicial challenge, including the time-limits within which this can be brought, and of possible recourse to an Ombudsman.

III-31 Formal and language requirements

- (1) Decisions shall be in writing, shall be signed and identify the deciding authority.
- (2) Where the decision is made by an EU authority it shall be written in the language chosen by the addressee, provided it is one of the official languages of the EU.

III-32 Decisions in electronic form

- (1) A decision in written form may be replaced by electronic form unless otherwise stipulated by a legal provision. In this event, it must be provided with a qualified signature.
- (2) If the addressee claims to be unable to process the electronic document communicated by the public authority, the latter shall send it again in a suitable electronic format or as a written document.

III-33 Notification of a decision

- (1) Decisions shall be notified to the parties as soon as they are adopted. They shall take effect for a party upon notification.
- (2) A decision may be publicly promulgated where this is permitted by EU law.

III-34 Correction of obvious inaccuracies in a decision

- (1) The public authority that adopted a decision may at any time correct typographical mistakes, errors in calculation and similar obvious inaccuracies in a decision.
- (2) Such corrections may be requested by the addressees of that decision. If the corrections are carried out ex-officio, the addressees shall be informed before any correction is implemented.

Chapter 6: Rectification and withdrawal of decisions

III-35 Rectification and withdrawal of decisions that have an adverse effect

- (1) The public authority may rectify or withdraw an unlawful decision which adversely affects a party. Rectification or withdrawal shall have retroactive effect.
- (2) The public authority may rectify or withdraw a lawful decision which adversely affects a party. Rectification or withdrawal shall have prospective effect.
- (3) The public authority may exercise the power in paragraphs 1 and 2 ex-officio, or following a request by that party. The power may be exercised outside the time-limits for legal challenge.
- (4) The public authority when exercising the power in this article shall take into account the effect of the rectification or withdrawal on other parties and on third parties.
- (5) Rectification or withdrawal pursuant to this article constitutes an administrative procedure as defined in Article I-4(2).

III-36 Rectification and withdrawal of decisions that are beneficial

- (1) The public authority may rectify or withdraw an unlawful decision that is beneficial to a party. It may exercise this power ex-officio, or following a request by another party. This power may be exercised outside the time-limits for legal challenge.
- (2) The public authority shall take into account the extent to which a party has a legitimate expectation that the decision was lawful and the extent to which a party has relied on it when deciding,
 - (a) whether to exercise the power in paragraph 1,
 - (b) whether, if the power to rectify or withdraw is exercised, it should have retroactive or prospective effect.
- (3) The public authority may rectify or withdraw a lawful decision that is beneficial to a party. It may exercise this power ex-officio, or following a request by another party. This power may be exercised outside the time-limits for legal challenge in the following circumstances:
 - (a) where it is permitted by sector-specific EU law,

- (b) where the party has not complied with an obligation specified in the decision, or has not done so within the time-limit set for compliance,
 - (c) in order to prevent or eliminate serious harm. The public authority shall upon application make good the disadvantage to the party affected deriving from reliance on the continued existence of the decision to the extent that this merits protection.
- (4) The public authority when exercising the power in this article shall take into account the effect of the rectification or withdrawal on other parties and on third parties.
- (5) Rectification or withdrawal shall have retroactive effect only if it occurs within a reasonable time.
- (6) Rectification or withdrawal pursuant to this article constitutes an administrative procedure as defined in Article I-4(2).

C. Explanations

Chapter 1: General provisions

III-1 Scope of application

- (1) Chapter 1 of Book III contains two general provisions. While Article III-1 concerns the scope of application of Book III, Article III-2 defines some key concepts of Book III and provides definitions of the following terms: decision, public authority, party, interested public, inspection and responsible official.
- (2) **Article III-1 specifies the boundaries of Book III.** The first paragraph stipulates that the scope of application of Book III is limited to the “administrative procedures by which an EU authority prepares and adopts a decision”, while the second paragraph adds that the model rules only apply to the public authorities of the Member States when EU sector specific legislation so provides.

ReNEUAL Model Rules on EU Administrative Procedure

Book IV – Contracts

Structure

| | |
|--|-----|
| A. Introduction to Book IV | 149 |
| I. Problems of a restatement of EU law with regard to Public Contracts..... | 149 |
| II. The starting point..... | 150 |
| III. The ‘life’ of public contracts in a nutshell..... | 150 |
| IV. Between ambition and self-restraint: The decision on the scope of the draft | 151 |
| V. EU contracts solely governed by EU law and EU contracts governed by the law of a Member State..... | 153 |
| VI. Background on the application of Member State law | 154 |
| VII. Rules on transactions, settlements and mediation?..... | 155 |
| B. Model Rules..... | 157 |
| Chapter 1: General provisions | 157 |
| IV-1 Scope of application..... | 157 |
| IV-2 Definitions | 157 |
| IV-3 Determination of the law applicable to an EU contract | 158 |
| IV-4 Rules applicable to EU contracts solely governed by EU law | 159 |
| IV-5 Rules applicable to EU contracts governed by Member State Law..... | 159 |
| Chapter 2: Procedures for the conclusion of contracts..... | 160 |
| Section 1: Preparation of general terms of contracts..... | 160 |
| IV-6 Procedure for drafting general terms of contract | 160 |
| Section 2: General rules on procedure..... | 161 |
| IV-7 Applicability of Book III | 161 |
| IV-8 Effects on judicial procedure | 162 |
| Section 3: Competitive award procedure | 162 |
| IV-9 Scope..... | 162 |
| IV-10 General principles | 163 |

| | | |
|---------------|---|-----|
| IV-11 | Prior advertising | 163 |
| IV-12 | Content of the advertisement and the contract documents... | 164 |
| IV-13 | Cases justifying use of the negotiated procedure without prior advertisement | 164 |
| IV-14 | Equal access for economic operators from all Member States..... | 165 |
| IV-15 | Limit on the number of participants invited to submit a tender | 165 |
| IV-16 | Equal treatment..... | 165 |
| IV-17 | Contracts of low value..... | 166 |
| IV-18 | Contract award decision..... | 166 |
| IV-19 | Standstill period before signature of the contract..... | 167 |
| Chapter 3: | Execution and validity of EU contracts | 167 |
| Section 1: | General provisions | 167 |
| IV-20 | Representation of EU authorities and formal requirements for EU contracts | 167 |
| IV-21 | Claims of the EU authority in the context of contracts | 168 |
| IV-22 | Decisions of the EU authority on an extra-contractual basis | 168 |
| IV-23 | Review by the European Ombudsman..... | 169 |
| IV-24 | Arbitration Clauses..... | 169 |
| IV-25 | Exclusion of compensation..... | 170 |
| Section 2: | EU contracts governed by EU law..... | 170 |
| Subsection 1: | Execution and performance..... | 170 |
| IV-26 | Good faith and fair dealing | 170 |
| IV-27 | Contractual rules..... | 170 |
| Subsection 2: | Change of circumstances and related clauses | 171 |
| IV-28 | Change of circumstances..... | 171 |
| IV-29 | Termination to avoid grave harm to the common good..... | 171 |
| IV-30 | Termination for non-performance | 171 |
| Subsection 3: | Consequences of illegality and unfair terms | 172 |
| IV-31 | Termination due to an infringement of the provisions of Chapter 2 | 172 |

| | | |
|----------------------|---|-----|
| IV-32 | Renegotiation due to an infringement of the specific obligations of EU authorities as public authorities..... | 173 |
| IV-33 | Invalidity..... | 173 |
| IV-34 | Unfair terms | 173 |
| Section 3: | EU contracts governed by Member State Law | 174 |
| IV-35 | Applicable Law..... | 174 |
| IV-36 | Contractual clauses for compliance with EU Law | 174 |
| Chapter 4: | Subcontracts..... | 175 |
| IV-37 | Admissibility and scope of subcontracts..... | 175 |
| IV-38 | Choice of the law applicable to subcontracts..... | 175 |
| IV-39 | Duties of the EU authorities towards subcontractors | 175 |
| C. Explanations..... | | 177 |
| Chapter 1: | General provisions | 177 |
| IV-1 | Scope of application..... | 177 |
| IV-2 | Definitions | 178 |
| IV-3 | Determination of the law applicable to an EU contract | 179 |
| IV-4 | Rules applicable to EU contracts solely governed by EU law | 180 |
| Chapter 2: | Procedures for the conclusion of contracts..... | 181 |
| Section 1: | Preparation of general terms of contract | 181 |
| IV-6 | Procedure for drafting general terms of contract | 181 |
| Section 2: | General rules on Procedure | 182 |
| IV-7 | Applicability of Book III | 182 |
| IV-8 | Effects on judicial procedure | 182 |
| Section 3: | Competitive award procedure | 184 |
| IV-9 | Scope..... | 184 |
| IV-10 | General Principles..... | 186 |
| IV-11 | Prior Advertising..... | 186 |
| IV-12 | Content of the advertisement and the contract documents... | 186 |
| IV-13 | Cases justifying use of the negotiated procedure without prior advertisement | 186 |
| IV-14 | Equal access for economic operators from all Member States..... | 186 |
| IV-15 | Limit on the number of participants invited to submit a tender | 187 |

| | | |
|---------------|---|-----|
| IV-17 | Contracts of low value..... | 187 |
| IV-18 | Contract award decision..... | 187 |
| IV-19 | Standstill period before signature of the contract..... | 187 |
| Chapter 3: | Execution and validity of EU contracts | 187 |
| Section 1: | General Provisions..... | 187 |
| IV-20 | Representation of EU authorities and formal requirements of EU contracts | 187 |
| IV-21 | Claims of the EU authority in the context of contracts | 188 |
| IV-22 | Decisions of the EU authority with extra-contractual basis ... | 188 |
| IV-23 | Review by the European Ombudsman..... | 189 |
| IV-24 | Arbitration clauses..... | 189 |
| IV-25 | Exclusion of compensation..... | 192 |
| Section 2: | EU Contracts governed by EU law | 192 |
| Subsection 1: | Execution and performance..... | 192 |
| IV-27 | Contractual Rules..... | 192 |
| Subsection 2: | Change of circumstances and related clauses | 193 |
| IV-28 | Change of Circumstances..... | 193 |
| IV-29 | Termination to avoid grave harm for the common good | 194 |
| IV-30 | Termination for non-performance | 194 |
| Subsection 3: | Consequences of illegality and unfair terms | 195 |
| IV-31 | Termination because of an infringement of the provisions of Chapter 2..... | 195 |
| IV-32 | Renegotiation because of an infringement of the specific obligations of EU authorities as a public authority and IV-30 Invalidation | 195 |
| IV-36 | Unfair terms | 196 |
| Chapter 4: | Subcontracts..... | 197 |
| IV-37 | Admissibility and scope of subcontracts..... | 198 |
| IV-38 | Choice of the law applicable to subcontracts..... | 199 |
| IV-39 | Duties of the EU authorities towards subcontractors | 199 |

B. MODEL RULES

Chapter 1: General provisions

IV-1 Scope of application

- (1) Book IV applies to all contracts and legally binding agreements concluded
 - (a) between an EU authority and a private entity;
 - (b) between an EU authority and a Member State authority, if the Member State authority acts as a service provider on the market and concludes the contract with an EU authority as a private person would.
 - (c) Book IV applies also to contracts between an EU authority and a Member State authority other than those mentioned in (b) if these rules are appropriate in view of the nature of the contract constituting an arrangement relating to administrative organisation.
- (2) Paragraph (1)(a) and (b) of this article applies *mutatis mutandis* to contracts between EU authorities.
- (3) Where an EU contract involves subcontracting, only the special rules of Chapter 4 of Book IV shall apply to the latter.
- (4) Book IV does not apply to agreements concluded by EU authorities under public international law.

IV-2 Definitions

- (1) 'Contract' means an agreement between two or more parties which is intended to create a binding legal relationship or to have some other legal effect.
- (2) 'Contractor' means the person that has entered into a contractual relationship with an EU authority.
- (3) 'EU contract' means all contracts as defined in Article IV-1(1) and (2).
- (4) 'General terms of contract' means contractual terms which have not been individually negotiated. A term shall be regarded as not individually negotiated where it has been drafted in advance by one of the parties and the other party has therefore not been able to influence the substance of the term.

(5) 'Participant' means any person that made an application or a tender in a competitive award procedure in the sense of Chapter 2 Section 3 of Book IV.

(6) 'Party' means the EU authority or the contractor as parties of an EU contract

(7) 'Potential Contractor' means any person that expressed an interest in concluding an EU contract in cases where a competitive award procedure in the sense of Chapter 2 Section 3 of Book IV did not take place or where he or she was excluded from the participation in such a procedure.

(8) 'Specific obligations of EU authorities as public authorities' mean the obligations of an EU authority to comply with fundamental rights in accordance with Article 6 TEU as well as with general principles of EU Law, with EU rules applicable to the conclusion of contracts, EU budgetary and financial rules, and with other general or specific obligations imposed under EU law on EU authorities as public authorities.

(9) 'Subcontractor' means any person who has entered into a contractual relationship with the contractor for the purpose of implementing an existing EU contract.

(10) 'Third party' means any person who is not a party to the EU contract.

IV-3 Determination of the law applicable to an EU contract

(1) An EU contract is governed by either EU law or by the law of a Member State or by the law of a Third State. Where an EU legal act determines the law applicable to contracts, the parties cannot choose to submit a contract to another law.

(2) An EU contract is governed solely by EU law in the following cases:

- (a) if explicitly provided for by an EU legal act;
- (b) if the contract is a contract within the meaning of Article IV-1(1)(c);
- (c) if the contract is modifying or abrogating pre-existing EU law relations between the parties;
- (d) if the obligations of the EU authority can only be fulfilled through an act within the meaning of Article 288 TFEU or through similar measures implying the exercise of public authority conferred on the EU authority by EU law;
- (e) if an EU legal act establishes homogeneous rules regarding the principal obligations under the respective contract which are directly binding upon

the contracting parties. The present rule applies in particular when unilateral powers to modify the contract or to enforce the contractual obligations are not explicitly enshrined in contractual clauses.

(3) For the purpose of paragraph (2)(e) of this article, the following contracts in particular are to be considered as contracts governed solely by EU law:

- (a) staff contracts within the meaning of the EU Staff Regulations;
- (b) grant agreements within the meaning of the EU Financial Regulations;
- (c) grant agreements within the meaning of the EU Regulations implementing Framework Programmes on Research.

(4) If an EU contract is not governed by EU law, it is governed by the law of a Member State chosen by the parties pursuant to the criteria under Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I). To the extent that the applicable Member State law has not been chosen by the parties, or if the choice of law clause is invalid, the criteria of Regulation (EC) No 593/2008 shall be applied to determine which Member State law is applicable.

(5) All 'public contracts' within the meaning of Article 101(1) of Regulation (EU, EURATOM) No. 966/2012 on the financial rules applicable to the general budget of the Union are to be considered as contracts subject to paragraph (4) of the present article.

(6) The law of a Third State shall apply to a contract in the case of paragraph (4) of the present article, if the application of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) stipulates this result. All the rules of Book IV pertaining to EU contracts governed by Member State law shall apply accordingly to EU contracts governed by the law of third countries.

IV-4 Rules applicable to EU contracts solely governed by EU law

EU contracts in the sense of Article IV-3(2) are governed by the rules of Book IV, by their respective contractual provisions, by sector-specific EU law, by general principles of EU contract law as well as other general principles of EU law.

IV-5 Rules applicable to EU contracts governed by Member State Law

(1) If an EU contract is governed by the law of a Member State, the EU authority shall enjoy the most extensive legal capacity accorded to legal persons under the law of the respective Member State pursuant to Article 335 TFEU. The EU authority cannot refer to the exercise of public authority conferred by the law

of the respective Member State on its own public authorities. Article 343 TFEU on privileges and immunities shall remain unaffected.

(2) The applicability of Member State law to an EU contract cannot relieve the EU authority of its obligations to comply with fundamental rights in accordance with Article 6 TEU, general principles of EU Law, with EU rules applicable to the conclusion of contracts, EU budgetary and financial rules, and with other general or specific obligations imposed under EU law on EU authorities as public authorities.

Chapter 2: Procedures for the conclusion of contracts

Section 3: Preparation of general terms of contracts

IV-6 Procedure for drafting general terms of contract

(1) The rules of Book II shall apply *mutatis mutandis* to the procedure for drafting general terms of the contract by the EU authority. This does not apply

- (a) to general terms of contracts corresponding to model contracts which are part of a legislative act or an act of general application in the sense of Article II-1(1);
- (b) to non-substantial modifications of general terms of contracts especially if such modifications serve to adapt contracts to new legislation or jurisprudence, or if they are solely advantageous for the contractor.

(2) General terms of contract can be adopted through the expedited procedure of Article II-6. In such a case they may only be used for eighteen months after their first use. If new general terms of contract are adopted following the regular rule-making procedure, the EU authority is obliged to offer its contractor the opportunity to change the contract in order to incorporate the new general terms of contract. The second sentence of this paragraph is not applicable

- (a) if the contract has been fully performed by both parties;
- (b) if the new general terms of contract are disadvantageous for the contractor in comparison to the general terms of contract adopted in the expedited procedure.

(3) The second and third sentence of paragraph (2) shall apply *mutatis mutandis*

- (a) if the general terms of contract included in an EU contract have not been drafted according to paragraph (1) of the present Article, or if the general

terms have been adopted before the entry into force of these Model Rules;

- (b) if the act of general application referred to in paragraph (1)(a) of the present article can be adopted through the expedited procedure of Article II-6.

(4) General terms of contract submitted by the EU authority and not individually negotiated may be invoked against the contractor only if the contractor was aware of them, or if the EU authority took reasonable steps to draw the contractor's attention to these terms, before or during the conclusion of the contract. A mere reference to such terms within a contractual document will not suffice for these to be considered as brought to the contractor's attention in a sufficient manner, even if the contractor signs the document. Section 3 of Chapter 3 of Book IV remains unaffected.

Section 4: General rules on procedure

IV-7 Applicability of Book III

(1) The following articles of Book III shall apply *mutatis mutandis* to the decision of an EU authority on whether or not to conclude an EU contract unless stipulated otherwise in Book IV:

- Article III-3 – General Duty of Fair Decision-making and impartiality;
- Article III-5 – Initiation;
- Article III-6 – Special rules on application procedures;
- Article III-7 – Responsible official;
- Article III-8 – Management of procedures and procedural rights;
- Article III-10 – Principle of investigation;
- Article III-11 – Investigation by request;
- Article III-13 – Duties to cooperate of parties;
- Article III-14 – Privilege against self-incrimination and legal professional privilege;
- Article III-15 – Witnesses and experts;
- Article III-22 – Access to the File;
- Article III-23 – Right to be heard by persons adversely affected;
- Article III-29 – Duty to give reasons;
- Article III-30 – Duty to indicate available remedies;
- Article III-31 – Formal and language requirements;
- Article III-32 – Decisions in electronic form.

(2) Paragraph (1) of this article applies *mutatis mutandis* to the decision of an EU authority to suggest or to accept a modification of an existing contract, or its cancellation. Article IV-9(3) remains unaffected.

IV-8 Effects on judicial procedure

(1) The refusal to conclude or to modify a contract is a decision in the sense of Article III-2 of the present Model Rules.

(2) Any person having participated in a competitive award procedure or having expressed an interest in concluding the contract may institute proceedings within the meaning of Article 263 TFEU against the contract award decision in the sense of Article IV-18, in cases where a correct procedure did not take place, even if the decision is not addressed to that person.

(3) The time limit established under Article 263 TFEU shall begin after the notification of the decision leading to the conclusion of the contract to the plaintiff, or in the absence thereof, on the day in which the decision came to the knowledge of the plaintiff.

(4) A contracting EU authority whose decision leading to the conclusion of an EU contract, has been declared void by the Court of Justice of the European Union is required to render the contract ineffective in compliance with the judgment, if the contractor has not fully met his part of the contractual obligations. This duty only allows the contracting EU authority to terminate or modify the contract, or to claim its invalidity under the conditions laid down in Chapter 3 of the present book. This duty shall not affect any obligation which may result from the application of Article 340(2) TFEU.

Section 5: Competitive award procedure

IV-9 Scope

(1) The competitive award procedure is applicable to the conclusion of EU contracts

- (a) if the contracting EU authority is not legally obliged to conclude an EU contract with every person satisfying the criteria for the award;
- (b) if the contracting EU authority is not legally bound by a framework contract, decision or otherwise to conclude the contract with a specific person.

(2) The special rules regarding award procedures applicable to EU contracts in the sense of Article IV-3(3) and (5) as well as any other rules on competitive award procedures laid down in sector-specific EU law, take precedence over the rules of this section.

(3) A substantial modification of the provisions of an EU contract during its term shall be considered as a new award subject to the provisions of this section. A modification shall be considered substantial, where it renders the contract substantially different from the one initially concluded. Modifications arising from the rights provided under Article IV-6(2) and (3), Article IV-8(4), Article IV-23(3), Article IV-24(3), Article IV-28, Article IV-32 should in general not be deemed substantial.

IV-10 General principles

(1) The rules in Article IV-7(1) are applicable in a residual way to competitive award procedures.

(2) The rules of the present section will be considered as respected if the contracting EU authority applies the rules mentioned in Article IV-9(2) *mutatis mutandis* in appropriate cases. This includes provisions relating to exceptions from obligations resulting from the rules mentioned in Article IV-9(2).

IV-11 Prior advertising

(1) The contracting EU authority has to ensure the publication of a sufficiently accessible advertisement prior to the award of the contract in order to guarantee competitive tendering and impartiality of the award procedure. An advertisement is sufficiently accessible if, in light of the relevant market, every person who may have a reasonable interest in the contract has access to appropriate information prior to its award, which enables this person to express his or her interest in obtaining the contract.

(2) The contracting EU authorities are responsible for deciding the most appropriate medium for advertising the contracts. Their choice should be guided by an assessment of the relevance of the contract for the respective market, in particular in view of the subject matter and value of the contract as well as the customary practices in the relevant sector.

(3) Adequate means of publication include:

- Advertisements on the website of the EU authority,
- Publication in the Official Journal of the European Union/ TED (Tenders Electronic Daily),
- Publication in National journals specializing in public procurement announcements, newspapers with national or regional coverage, or specialist publications where there is only a local, regional or specialized market for the contract in question.

IV-12 Content of the advertisement and the contract documents

(1) The advertisement may be limited to a short description of the essential details of the contract and of the award method along with an invitation to contact the respective EU authority. If necessary, it might be complemented with additional information available on the Internet, or accessible upon request from the contracting EU authority. The advertisement and any additional documentation should provide as much information as is reasonably necessary for the persons interested to be able to make a decision on whether to express their interest in obtaining the contract.

(2) The subject matter of the contract shall be described in a non-discriminatory manner within the contract documents. The description of the characteristics required of a product or service should not refer to a specific make or source, a particular process, or to trade marks, patents, a specific origin or types of production, unless such a reference is justified by the subject matter of the contract and is accompanied by the words 'or equivalent'.

IV-13 Cases justifying use of the negotiated procedure without prior advertisement

Contracting EU authorities may award EU contracts by means of a negotiated procedure without prior advertisement in the following cases:

- (a) when for technical or artistic reasons, or for reasons pertaining to the protection of exclusive rights, the contract may only be awarded to a particular person;
- (b) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the EU authority in question, the rules laid down in this section cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting EU authority;
- (c) in similar cases, especially if the EU authority has developed and applies an award procedure pursuant to Article IV-10(2).

IV-14 Equal access for economic operators from all Member States

- (1) The contracting EU authority shall only impose conditions which do not cause direct or indirect discrimination against persons who might be interested in the contract.
- (2) If participants are required to submit certificates, diplomas or other forms of written evidence, documents from all Member States certifying an equivalent level of guarantee must be accepted.
- (3) Time limits for expressing interest and for submitting offers should be long enough to allow persons from all Member States to make a meaningful assessment and prepare their tender.
- (4) All participants must have prior access to the applicable rules along with the certainty that these rules shall apply without discrimination.

IV-15 Limit on the number of participants invited to submit a tender

- (1) The contracting EU authority may take measures to appropriately limit the number of participants, provided this is done in a transparent and non-discriminatory manner. The respective EU authority must apply objective factors, such as the experience of the participants in the relevant sector, the size and infrastructure of their business, their technical and professional abilities, or other factors. Contracting EU authorities may opt for a drawing lots procedure, either exclusively or in combination with other selection criteria. In any event, the number of shortlisted participants shall take account of the need to ensure adequate competition.
- (2) Alternatively, EU authorities may establish qualification systems where a list of qualified persons is compiled by means of a sufficiently advertised, transparent and open procedure. In the event of an award of individual contracts falling within the scope of this system, the EU authority may select the persons to be invited to submit a tender from the list of qualified persons on a non-discriminatory basis, in particular by drawing in rotation from the list.

IV-16 Equal treatment

- (1) While the competitive award procedure is running, all contacts between the contracting EU authority and the participants shall satisfy conditions ensuring

transparency and equal treatment. Such contacts shall not lead to an amendment of the terms and conditions of the contract or of the original tender.

(2) In procedures allowing for negotiation with shortlisted participants, negotiations should be organized in a way that gives all participants access to the same amount of information, excluding any unjustified advantages for a specific participant.

IV-17 Contracts of low value

(1) Contracts of low value may be awarded without prior advertisement on the basis of an appropriate market analysis and, if appropriate, through a negotiated procedure based on an adequate number of applications. The threshold for contracts of low value shall be established and published on a regular basis by each EU authority. In the absence of a published threshold, the threshold established by the Commission for the implementation of the EU Financial Regulations shall apply.

(2) For the purpose of this article the contracting EU authority should accept unsolicited applications and establish open lists with qualified persons. If it comes to the knowledge of the EU authority that a number of qualified persons are interested in concluding such low value contracts, the contracts should be awarded on the principle of rotation where the offered prizes and terms of contracts are similar, and where the negotiated procedure would be inappropriate with respect to the value of the contracts.

IV-18 Contract award decision

(1) The final decision awarding the contract has to comply with the procedural rules laid down at the outset as well as with the principles of non-discrimination and equal treatment.

(2) The contracting EU authority shall notify simultaneously all participants whose application or tender have been rejected of the grounds on which the decision was taken. The contracting EU authority shall notify all participants meeting the exclusion and selection criteria who make a request in writing, the characteristics and relative advantages of the successful tender along with the name of the participant to whom the contract is awarded. Article III-32 on decisions in electronic form applies *mutatis mutandis*. However, specific details need not be disclosed if their disclosure would hinder the application of the law,

would be contrary to the public interest or would harm legitimate business interests or could distort fair competition.

(3) The contracting EU authority shall invite all participants and known potential contractors to present their concerns or make their comments within the standstill period provided under Article IV-19.

IV-19 Standstill period before signature of the contract

(1) The contracting EU authority shall not sign the contract with the successful participant until 14 calendar days have elapsed. This period shall begin to run after the simultaneous dispatch of the notifications to successful and unsuccessful participants.

(2) If necessary, the contracting EU authority may suspend the conclusion of the contract for the purpose of additional examination if this is justified on the grounds of requests or comments made by unsuccessful or aggrieved participants or potential contractors or on the grounds of any other relevant information received.

(3) The non-observance of the standstill period or its expiry has no effect on the time limit mentioned in Article IV-8(3), or on the obligation of the contracting EU authority to render the contract ineffective pursuant to Article IV-8(4) and Article IV-31.

Chapter 3: Execution and validity of EU contracts

Section 6: General provisions

IV-20 Representation of EU authorities and formal requirements for EU contracts

(1) The representation of EU authorities and the question whether a person is able to legally bind an EU authority are solely governed by EU law.

(2) Any provision pertaining to the form of an EU contract which is laid down in an EU legal act is to be understood as a rule limiting the representative power of the person representing the EU authority.

IV-21 Claims of the EU authority in the context of contracts

Procedures which lead to the EU authority's exercise of contractual rights or its claim of invalidity shall be subject to the principles of good administration, in particular those enshrined in the following Articles of Book III:

- Article III-3 – General Duty of Fair Decision-making and impartiality;
- Article III-5 – Initiation;
- Article III-7 – Responsible Official;
- Article III-8 – Management of procedures and procedural rights;
- Article III-10 – Principle of investigation;
- Article III-11 – Investigation by request;
- Article III-13 – Duties to cooperate of parties;
- Article III-14 – Privilege against self-incrimination and legal professional privilege;
- Article III-15 – Witnesses and experts;
- Article III-22 – Access to the File;
- Article III-23 – Right to be heard by persons adversely affected;
- Article III-29 – Duty to give reasons;
- Article III-30 – Duty to indicate available remedies;
- Article III-31 – Formal and language requirements;
- Article III-32 – Decisions in electronic form.

IV-22 Decisions of the EU authority on an extra-contractual basis

(1) Neither the terms of an EU contract nor Member State law applicable to such a contract can exclude the exercise of public authority powers on extra-contractual grounds by an EU authority. Such powers may not be misused by the EU authority in its intention to suspend or cease its own contractual obligations. The exercise of public authority powers by EU authorities, which are unrelated to contracts, shall leave unaffected:

- the rights of parties under Article 340(2) TFEU;
- any claim by the contractor on the basis of the contract.

(2) If the powers referred to in paragraph (1) are executed by means of a decision that is enforceable within the meaning of Article 299 TFEU, and if the pecuniary obligation imposed by this decision is also contractually due, the contractual obligation shall be deemed fulfilled if the contractor complies with the decision.

IV-23 Review by the European Ombudsman

- (1) The scope of review by the European Ombudsman includes the fulfilment of EU authorities' obligations arising both from Article IV-21 and from EU contracts.
- (2) The recommendation issued by the European Ombudsman does not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.
- (3) A conclusion by the European Ombudsman that his inquiry has revealed an instance of maladministration on the part of the EU authority does not affect the validity of the contract or its terms and clauses, nor the validity of claims pursuant to Article IV-21. The EU authority has to remedy its maladministration by using its contractual powers or by accepting offers from the contracting party to re-negotiate or modify the respective contract, or by means of financial compensation.

IV-24 Arbitration Clauses

- (1) The validity of an arbitration clause within the meaning of Article 272 TFEU is solely determined by EU law even if the EU contract is governed by Member State law. The clause shall be incorporated into the written contract. If the arbitration clause is not incorporated into the contract, the parties can still conclude it by signing a separate document with reference to the contract. If there is no written arbitration clause whatsoever, it shall be presumed irrefutably that no arbitration clause has been concluded. The written form can be replaced by an electronic form. Article III-32 on decisions in electronic form applies *mutatis mutandis*.
- (2) An arbitration clause within the meaning of Article 272 TFEU can be concluded until an application for court proceedings has been submitted.
- (3) The EU authority shall agree to annul an arbitration clause within the meaning of Article 272 TFEU upon the request of the contractor:
 - (a) if the arbitration clause has not been individually negotiated;
 - (b) if the jurisdiction of courts or tribunals of the Member States or a Third State would be more appropriate in view of the law applicable to the contract and the principle of effective legal protection;
 - (c) if the request has been made shortly after the contractor became aware of the intention of the EU authority to file an action based on the clause before the Court of Justice of the European Union.

A decision of the EU authority refusing the annulment of an arbitration clause shall give reasons as to why the conditions under b) of the present paragraph were not deemed to be fulfilled.

IV-25 Exclusion of compensation

Compensation as provided for in this chapter is excluded if the contractor

- (a) has obtained the award of the contract or a beneficial contractual position through false pretences, threat or bribery;
- (b) has obtained the award of the contract or a beneficial contractual position by providing substantially incorrect or incomplete information;
- (c) was aware of the illegality of the contract or was unaware thereof due to gross negligence on his part.

Section 7: EU contracts governed by EU law

Subsection 1: Execution and performance

IV-26 Good faith and fair dealing

- (1) The contracting parties have a duty to act in accordance with good faith and fair dealing when performing an obligation, exercising a right to performance, pursuing or disputing a remedy for non-performance, or when exercising a right to terminate an obligation or the contractual relationship.
- (2) The duty under paragraph (1) may not be excluded or limited by contract.

IV-27 Contractual rules

- (1) The EU authority should ensure that any EU contract solely governed by EU law contains a provision specifying a law of obligations, or specific model rules, applicable on a complementary basis to issues not covered by the rules mentioned in Article IV-4, such as the place and time of performance, remedies for non-performance, refusal of performance, termination, damages and interest, and limitation rules.
- (2) In order to guarantee uniformity in the execution of EU contracts, the EU authority should ensure that the provision introduced in paragraph (1) refers to

the same law of obligations or model rules in all contracts serving the same purposes.

Subsection 2: Change of circumstances and related clauses

IV-28 Change of circumstances

If the circumstances which determined the content of an EU contract have changed so substantially since the conclusion of the contract that one of the parties cannot reasonably be expected to adhere to the original contractual provisions, this disadvantaged party may request the adaptation of the agreement or, where such an adaptation is not possible or cannot reasonably be expected of the other party, the disadvantaged party may terminate the contract.

IV-29 Termination to avoid grave harm to the common good

(1) The EU authority may also terminate an EU contract in order to avoid or eliminate a risk of grave harm to the common good. The termination shall have no retroactive effect.

(2) Following an application, the EU authority shall compensate any disadvantage suffered by the contractor which resulted from its reliance on the continued existence of the EU contract, provided such reliance deserves protection (legitimate expectation) and only to the extent that such reliance merits protection.

IV-30 Termination for non-performance

(1) Each party may terminate the contract if the other party's non-performance of a contractual obligation is fundamental. A non-performance of a contractual obligation is fundamental:

- (a) if it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or
- (b) if it is intentional or reckless and gives the creditor reason to believe that the other party's future performance cannot be relied upon.

(2) Each party may terminate the contract in a case of delay in performance of a contractual obligation which is not in itself fundamental if the party gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period. If the period fixed is unreasonably short, termination is possible only after a reasonable period from the time of the notice.

(3) Each party may terminate the contract before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental.

(4) Each party which reasonably believes that there will be a fundamental non-performance of a contractual obligation by the other party may terminate if it has requested an adequate assurance of due performance and no such assurance has been provided within a reasonable time.

(5) The right to seek damages is not excluded by the termination.

Subsection 3: Consequences of illegality and unfair terms

IV-31 Termination due to an infringement of the provisions of Chapter 2

(1) For the purpose of complying with Article IV-8(4), or if the EU authority becomes aware that the rules on the procedure regarding the conclusion of an EU contract have not been respected to the detriment of a third party, the EU authority may terminate the contract in order to re-open this procedure.

(2) This right of termination does not apply

- (a) if there is no possibility that the infringement has influenced the decision on the matter;
- (b) if the contract award decision has become definitive due to the expiration of the time limit for the actions provided under Article IV-8(2);
- (c) if the award decision has been confirmed by court;
- (d) if the contractor has irreversibly executed his main obligations in whole or in substantial part.

(3) A termination in the sense of paragraph (1) has no retroactive effect.

(4) The EU authority shall compensate the other party for a disadvantage suffered due to its reliance on the existence of the EU contract provided such

reliance deserves protection (legitimate expectation) and only to the extent that such reliance merits protection. The contractor cannot request to be treated as if the contract had been fulfilled.

IV-32 Renegotiation due to an infringement of the specific obligations of EU authorities as public authorities

(1) If the content of an EU contract is illegal due to the non-observance of the specific obligations of the EU authority as a public authority, the EU authority may request that the content of the agreement be adapted to restore lawful conditions.

(2) If the content of the contract is illegal because the unobserved rules intended to protect the rights and interests of the other party, then that party may request that the content of the agreement be adapted to restore lawful conditions.

(3) These adaptations may consist *inter alia* in a change of terms and clauses, price adjustments, modifications of the main obligations, or in the cancellation of the agreement with or without compensation.

(4) If the competitive award procedure was applicable to the contract, only a cancellation of the agreement with compensation may be negotiated. A change of terms and clauses is only possible if the modification is not substantial in the sense of Article IV-9(3).

IV-33 Invalidity

An EU contract is invalid

- (a) if an equivalent contract between private persons would be considered invalid and thus not binding in accordance with the general principles common to the laws of the Member States;
- (b) if a single case decision of the EU authority with equivalent content would be nonexistent.

Each party may request the other party to confirm the invalidity.

IV-34 Unfair terms

EU legislation on unfair terms in consumer contracts shall apply *mutatis mutandis* if the contractor is a consumer within the meaning of this legislation.

Section 8: EU contracts governed by Member State Law

IV-35 Applicable Law

(1) The conditions for the validity and termination of EU contracts governed by the law of a Member State shall be determined by the respective Member State law.

(2) If an EU contract infringes EU law, this shall not be considered a ground for invalidity or termination of the contract if a similar contract concluded between private parties would be considered valid and binding in accordance with the applicable Member State law.

(3) If the exercise of contractual rights of the EU authority is effective according to the law of the Member State in spite of an infringement of the rules mentioned in Article IV-5(2), this shall not preclude the obligation of the EU authority, which follows from its duties mentioned in Article IV-5(2), to conclude or re-negotiate the contract with the contractor, or to compensate the contractor by other means for the damage he or she suffered because of the illegal decision.

IV-36 Contractual clauses for compliance with EU Law

(1) The exercise of public authority by an EU authority may not give rise to contractual obligations on the part of the contractor. The specific obligations of an EU authority as a public authority may only entail direct consequences for the validity or termination of the contract if they have been made constituent components of that contract. The EU authority shall ensure that an EU contract includes a clause enabling the EU authority to terminate the contract where it is subsequently established that the specific obligations of the EU authority as a public authority have not been complied with.

(2) The validity of the standard terms and clauses described in paragraph (1) is determined in accordance with the Member State law applicable to the contract. These standard terms and clauses should provide adequate protection for the legitimate expectations of the contractor to the extent that his reliance on the continued existence of the contract merits protection.

Chapter 4: Subcontracts

IV-37 Admissibility and scope of subcontracts

(1) The contractor may subcontract the performance of the EU contract in whole or in part without the EU authority's consent, unless personal performance is required under the EU contract. Any subcontractor so engaged must be of adequate competence. The contractor must ensure that any tools and materials used for the performance of the EU contract are in conformity with the EU contract and the applicable laws, and fit to achieve the particular purpose for which they are to be used. The EU Financial Regulations are applicable to the contractor's choice of subcontractors and to the financial accountability of the contractor.

(2) A contract concluded for the performance of an EU contract by the contractor with a subcontractor does not create any direct relationship between the subcontractor and the relevant EU authority in the absence of an explicit provision within the EU contract indicating the scope and consequence of such a relationship.

(3) The contractor remains responsible for performance of the EU contract. Nothing can limit the contractor's liability vis-à-vis the contracting EU authority for the breach of contractual duties caused by a subcontractor.

(4) The EU authority is not liable to third parties for the negligence of a subcontractor.

IV-38 Choice of the law applicable to subcontracts

(1) In the absence of a specific provision on the law applicable to subcontracts, such law shall be determined by the law applicable to the contractor's activities.

(2) Article IV-37(1) remains unaffected.

IV-39 Duties of the EU authorities towards subcontractors

(1) The absence of a direct relationship between an EU authority and a subcontractor, and the limitations that derive thereof for the standing of subcontractors in actions based upon Articles 263, 265 and 340 TFEU, shall not

exempt that authority from its duties to apply the principles of good administration, especially those established in Book III under the following articles:

- Article III-3 – General Duty of Fair Decision-making and impartiality;
- Article III-5 – Initiation;
- Article III-7 – Responsible Official;
- Article III-8 – Management of procedures and procedural rights;
- Article III-9 – Time limits for concluding procedures;
- Article III-10 – Principle of investigation;
- Article III-11 – Investigation by request;
- Article III-13 – Duties to cooperate of parties;
- Article III-14 – Privilege against self-incrimination and legal professional privilege;
- Article III-15 – Witnesses and experts;
- Article III-22 – Access to the File;
- Article III-23 – Right to be heard by persons adversely affected;
- Article III-29 – Duty to give reasons;
- Article III-30 – Duty to indicate available remedies;
- Article III-31 – Formal and language requirements;
- Article III-32 – Decisions in electronic form.

(2) The EU authority shall ensure that the contractor informs the subcontractor of the applicability of principles of good administration.

(3) A subcontractor shall have the right to know of any criticism by the EU authority which is party to the EU contract regarding his or her performance. The subcontractor shall also have the right to be heard in relation to such criticism. If the EU authority intends to request the replacement of a subcontractor, it shall inform the latter of its intention and give reasons for doing so. The request shall only be made to the contractor after the subcontractor has had an opportunity to present his or her observations.

(4) In order to also protect subcontractors, the EU authority shall check a contractor's financial stability before awarding it an EU contract, and shall continue to do so throughout the term of the contract.

ReNEUAL Model Rules on EU Administrative Procedure

Book V – Mutual assistance

Structure

| | |
|--|-----|
| A. Introduction to Book V | 202 |
| I. The concept of mutual assistance in the ReNEUAL Model Rules | 202 |
| II. Scope of Book V | 202 |
| III. Justification for covering mutual assistance in the ReNEUAL Model Rules | 206 |
| B. Model Rules | 208 |
| V-1 Scope and application of Book V | 208 |
| V-2 General concept of mutual assistance | 208 |
| V-3 Duties of the requesting authority | 209 |
| V-4 Duties of the requested authority | 210 |
| V-5 Right of a person concerned to be informed | 211 |
| V-6 Allocation of costs | 212 |
| C. Explanations | 212 |
| V-1 Scope and application of Book V | 212 |
| V-2 General concept of mutual assistance | 215 |
| V-3 Duties of the requesting authority | 219 |
| V-4 Duties of the requested authority | 223 |
| V-5 Right of a person concerned to be informed | 230 |
| V-6 Allocation of costs | 233 |

B. Model Rules

V-1 Scope of application

- (1) Book V applies to requests for mutual assistance which are sent from
 - (a) an EU authority to a Member State authority,
 - (b) a Member State authority to an EU authority, or
 - (c) a Member State authority to an authority of another Member State,when the requesting authority is implementing EU Law through administrative action.
- (2) An act of mutual assistance may take one of the following forms:
 - (a) the transmission of information which is either already in the possession of the requested authority or which is gathered specifically in order to comply with the request for assistance.
 - (b) the conduct of an inspection
 - (c) the service of documents
- (3) Book V does not apply when Member State authorities provide information as a party to a proceeding according to Articles III-11 to III-13.
- (4) Book V does not apply to judicial assistance or enforcement assistance. The model rules of Book V are without prejudice to provisions on mutual assistance in criminal matters and leave obligations arising out of the principle of sincere cooperation unaffected.

V-2 General concept of mutual assistance

- (1) In order to receive the assistance necessary to fulfil its tasks under EU law, the requesting public authority may ask a Member State or EU public authority (the requested authority) for support, provided it cannot reasonably be expected to execute the necessary task itself.
- (2) Any communication shall be in written form and where possible by electronic means. Where provided for in EU law, a communication may be oral in urgent cases, especially by phone, on the condition that it will be confirmed in writing as soon as possible.
- (3) Except where otherwise agreed upon between the public authorities involved, requests and follow-up communication shall be conducted by the requesting authority in one of the official languages of the requested authority, or

shall be accompanied by a translation in one of those languages. The requested authority shall formulate its response in one of its official languages. If necessary, the requesting authority shall provide a translation into another language. In the case of vertical mutual assistance, any communication must be undertaken in (one of) the official language(s) of the Member State unless otherwise agreed between the EU and Member State authorities involved.

(4) Neither the requesting nor the requested authorities shall use mutual assistance to circumvent obligations or limitations existing under their applicable law.

(5) In accordance with the principle of sincere cooperation, public authorities shall strive for an amicable solution to any dispute arising out of mutual assistance.

V-3 Duties of the requesting authority

(1) A request for assistance shall

- (a) state the provisions which provide the legal basis for the relevant administrative task of the requesting authority;
- (b) state the provisions which provide the legal basis for the request itself;
- (c) state the purpose of the requested assistance, its intended and desired use as well as reasons why the requesting authority could not conduct the necessary tasks itself. The request shall include relevant facts already known to the requesting authority and shall indicate if a similar request has been made to another public authority;
- (d) contain sufficient information to enable a requested authority to fulfil the request. In case of a request for the service of documents, the relevant documents shall be the original or certified copies thereof, and the request shall indicate the name, address and any other relevant information for identifying the addressee, as well as a short summary of the attached document to be served, the purpose of the request and the period within which it should be served.

(2) Where the request is not to be transmitted through information systems, or not to be sent to a designated contact or liaison point, the request should be sent through suitable ministerial channels. If the requested information is of a sensitive nature, the request may only be handled by specific authorities identified in the applicable law or it should be sent through suitable ministerial channels. Member States and EU authorities shall make suitable authorities as easily identifiable to outside authorities as possible.

(3) The requesting authority may, at any time, withdraw the request for assistance which it has sent to the requested authority. The decision to withdraw shall be transmitted to the requested authority immediately. In the case of a request for the service of documents, the originals transmitted to the requested authority shall be returned forthwith. A request for the service of documents cannot be withdrawn once such documents have been served to the addressee. The requested authority shall inform the requesting authority immediately if this is the case.

(4) The information transmitted in the course of mutual assistance may only be used for the purposes for which it was exchanged.

(5) Any information, documents, findings, statements, certified true copies collected or information communicated in the course of mutual assistance may be invoked or used as evidence by all authorities of the Member State receiving it on the same basis as similar information or documents obtained within that State. An exception to such use exists where the requested authority has stated otherwise in accordance with EU law. Both the national laws of the requested and the requesting authority may prohibit the use of information as evidence if procedural or defence rights of the person concerned have been violated in the course of collecting the information.

(6) The requested authority may ask the requesting authority to report back to it on the results of the assistance provided. In such cases the requesting authority is under an obligation to send a report.

V-4 Duties of the requested authority

- (1) The requested authority shall
- (a) acknowledge the receipt of the request for assistance as soon as possible;
 - (b) comply with the request within the shortest possible period of time. Where the requested authority cannot comply with the request, it shall inform the requesting authority thereof and of the reasons for its failure to do so. In case of difficulties in meeting a request, the requested authority shall promptly inform the requesting authority with a view to finding a solution. Where the addressed authority is not the authority competent to comply with the request, it shall forward the request to the competent public authority within its jurisdiction and inform the requesting authority thereof;
 - (c) inform the requesting authority if it has evidence to suggest that information transmitted is inaccurate, or if it has been transmitted unlawfully.

- (2) In order to comply
- (a) with a request for information, the requested authority shall provide any pertinent information in its possession or obtain the information sought. To obtain the information sought, the requested authority, or the public authority to which it has recourse, shall proceed as though acting on its own account or, if the requested authority is a Member State authority, at the request of another authority in its own Member State;
 - (b) with a request for an inspection, the Member State authority shall conduct the inspection requested subject to existing constraints under national law and in accordance with EU law, or transfer the information required where it is already in its possession;
 - (c) with a request for the service of documents, the requested authority shall in accordance with the rules governing the notification of similar instruments in its own Member State, provide the addressee with all of the documents which it has received for the purpose of service.
- (3) The requested authority is obliged to comply with any lawful request for assistance. It shall refuse to provide personal data where the transfer would infringe applicable EU or national data protection law.
- (4) It may refuse to comply in the following cases:
- (a) where the request does not comply with the requirements of Article V-3 (1);
 - (b) to comply with the request would lead to the disclosure of a commercial, industrial or professional secret, or of information the disclosure of which would be contrary to public policy or national security;
 - (c) the requesting authority could have reasonably been expected to fulfil the task itself;
 - (d) to comply would pose a disproportionate administrative burden on the requested authority;
 - (e) the law of the requested authority does not authorise the competent authority to carry out these enquiries or to collect or use that information for the requested authority's own purposes, and the refusal is in accordance with EU law.

V-5 Right of a person concerned to be informed

- (1) Where the transfer of data has been requested the person concerned as defined in Article VI-2(7) has a right to be informed by the requested authority of the intended transmission. The requested authority is not obliged to inform the

person concerned where this would threaten the purpose for which assistance is sought, and where the decision not to inform such person is proportionate.

(2) Information communicated in any form in the course of mutual assistance shall enjoy the protection extended to similar information under the national law of the receiving Member State and the corresponding provisions applicable to EU authorities.

V-6 Allocation of costs

Member States and EU authorities shall renounce all claims against each other for the reimbursement of costs arising from any mutual assistance acts, except where mutual assistance involves particular problems leading to excessive costs. In such cases the requesting and requested authorities may agree on special reimbursement arrangements. A similar exception may be made, where appropriate, with respect to fees paid to outside actors, such as experts and translators.

C. Explanations

V-1 Scope of application

Paragraph 1

(1) Book V creates a **set of minimum rules for mutual assistance**, which is applicable between authorities – both horizontally, between authorities belonging to different Member States, as well as vertically, between a Member State and an EU authority. The rules drafted equip administrative authorities with a set of **default rules**. They structure EU mutual assistance proceedings and provide authorities with a greater amount of clarity in their inter-administrative dealings. They apply to requests for mutual assistance which are sent when the requesting authority is implementing EU law through administrative action in the sense of Article I-4(1)(a)-(c). Book V does not regulate questions of judicial procedures.

Paragraph 2

(2) Paragraph 2 contains a **non-exhaustive list of forms of mutual assistance**. This does not exclude that other forms of mutual assistance exist. On the

ReNEUAL Model Rules on EU Administrative Procedure

Book VI – Administrative Information Management

Structure

| | |
|--|-----|
| A. Introduction to Book VI | 239 |
| I. Scope and application of Book VI and its relation to Books II to V | 239 |
| II. Relation to general data protection law and freedom of information rights | 240 |
| III. Reasons for a Legal Framework for composite information management activities | 242 |
| IV. Types of information management activities and adequate regulatory standards | 243 |
| V. Rights, obligations and organisational structures | 245 |
| B. Model Rules | 247 |
| Chapter 1: General Provisions | 247 |
| VI-1 Scope and application of Book VI | 247 |
| VI-2 Definitions | 247 |
| VI-3 Need for a basic act | 248 |
| VI-4 Evaluation of information management activities | 249 |
| VI-5 Duties of sincere cooperation with regard to information systems | 249 |
| VI-6 Competent authorities | 250 |
| VI-7 Contact points | 250 |
| VI-8 Management authorities for IT systems | 250 |
| VI-9 Principle of transparent information management | 251 |
| VI-10 Principle of data quality | 252 |
| Chapter 2: Structured information mechanisms | 252 |
| VI-11 Standards for structured information mechanisms | 252 |
| Chapter 3: Duties to inform other public authorities without prior request and databases | 253 |
| Section 1: General standards for duties to inform and databases | 253 |

| | | |
|---------------|---|-----|
| VI-12 | General standards for duties to inform | 253 |
| VI-13 | General standards for databases | 253 |
| VI-14 | Verification | 254 |
| Section 2: | Management of information..... | 254 |
| Subsection 1: | Access to data and information..... | 254 |
| VI-15 | Information and access for persons concerned | 254 |
| VI-16 | Access for competent authorities | 255 |
| VI-17 | Access management rules in information systems | 256 |
| Subsection 2: | Alteration and deletion of data and information | 256 |
| VI-18 | Competences to alter and delete data..... | 256 |
| VI-19 | Obligations to update, correct or delete data | 256 |
| Subsection 3: | Use of data and information | 257 |
| VI-20 | Duty to use information in activities and to consult databases..... | 257 |
| VI-21 | Duty to independently assess information provided through information systems | 257 |
| VI-22 | Duty to take specific action as a result of information | 257 |
| VI-23 | Exemption clause..... | 258 |
| VI-24 | Restrictions on the use of data and information..... | 258 |
| Subsection 4: | Data protection and information security..... | 258 |
| VI-25 | General data protection duties | 258 |
| VI-26 | Storage, blocking and deletion of data exchanged under a duty to inform | 259 |
| VI-27 | Storage, blocking and deletion of data beyond procedures associated with a duty to inform | 259 |
| VI-28 | Confidentiality | 260 |
| VI-29 | Security standards for IT systems | 260 |
| Chapter 4: | Supervision and dispute resolution | 261 |
| Section 1: | General supervision and dispute resolution..... | 261 |
| VI-30 | Establishment of a Supervisory Authority | 261 |
| VI-31 | Mediation procedure between participating authorities..... | 261 |
| VI-32 | Binding inter-administrative decisions | 262 |
| VI-33 | Power to grant access to data and to alter or delete data..... | 262 |
| Section 2: | Data protection supervision of databases..... | 262 |
| VI-34 | Internal supervision by Data Protection Officers..... | 262 |

| | | |
|---------------|--|-----|
| VI-35 | Cooperative external data protection supervision of databases | 263 |
| VI-36 | External supervision by the European Data Protection Supervisor..... | 263 |
| VI-37 | External data protection supervision by National Supervisory Authorities..... | 264 |
| VI-38 | Cooperation between National Supervisory Authorities and the European Data Protection Supervisor | 264 |
| VI-39 | Data protection supervision of databases by the European Data Protection Board..... | 265 |
| Chapter 5: | Remedies and Liability..... | 266 |
| VI-40 | Right to compensation in relation to composite information management activities | 266 |
| VI-41 | Penalties for unlawful data processing | 267 |
| C. | Explanations | 268 |
| Chapter 1: | General provisions | 268 |
| VI-1 | Scope and application of Book VI..... | 268 |
| VI-2 | Definitions | 269 |
| VI-3 | Need for a basic act | 273 |
| VI-4 | Evaluation of information management activities..... | 275 |
| VI-5 | Duties of sincere cooperation with regard to information systems | 276 |
| VI-6 | Competent authorities / VI-7 Contact points / VI-8 Management authorities for IT systems | 277 |
| VI-9 | Principle of transparent information management / VI-10 Principle of data quality | 281 |
| Chapter 2: | Structured information mechanisms | 283 |
| VI-11 | Standards for structured information mechanisms..... | 283 |
| Chapter 3: | Duties to inform other public authorities without prior request and databases | 284 |
| Section 1: | General standards for duties to inform and databases | 285 |
| VI-12 | General standards for duties to inform | 285 |
| VI-13 | General standards for databases | 286 |
| VI-14 | Verification | 287 |
| Section 2: | Management of information..... | 289 |
| Subsection 1: | Access to data and information..... | 289 |

| | | |
|---|--|-----|
| VI-15 | Information to and access for persons concerned | 289 |
| VI-16 | Access for competent authorities | 293 |
| VI-17 | Access management rules in information systems | 293 |
| Subsection 2: Alteration and deletion of data and information | | 294 |
| Subsection 3: Use of data and information | | 299 |
| Subsection 4: Data protection and information security | | 302 |
| Chapter 4: | Supervision and dispute resolution..... | 307 |
| Section 1: | General supervision and dispute resolution..... | 309 |
| Section 2: | Data protection supervision of databases..... | 310 |
| Chapter 5: | Remedies and Liability | 321 |
| VI-40 | Right to compensation in relation to composite information management activities | 321 |
| VI-41 | Penalties for unlawful data processing | 323 |

B. Model Rules

Chapter 1: General Provisions

VI-1 Scope of application

(1) Book VI applies to the following information management activities of public authorities based on EU law

- (a) exchange of information according to a structured information mechanism,
- (b) exchange of information under a duty to inform without prior request,
- (c) establishment and use of a database.

Book VI does not apply to information management activities legally confined to a single Member State with no information exchange with either another Member State or an EU authority.

(2) Rules in books I to V of these model rules on other information management activities remain unaffected.

(3) EU law and national laws on access to documents remain unaffected.

VI-2 Definitions

(1) 'Structured information mechanism' means a pre-defined workflow allowing authorities to communicate and interact with each other in a structured manner beyond the general obligations of mutual assistance according to Book V.

(2) 'Duty to inform' means an obligation for an authority which exists under EU law to provide data or information to another authority without prior request.

(3) 'Database' means a structured collection of data supported by an IT system and managed by a competent authority, which provides at least one other competent authority at EU or Member State level with access to stored data without prior request.

(4) 'Information system' means either a specific software or IT infrastructure (IT system) or an organizational infrastructure and supports inter-administrative information exchange or establishes a database.

(5) 'Participating authority' means any authority taking part in an information management activity within the scope of this book, be it as a competent authority, a contact point, a management authority, a verification authority or a general supervisory authority.

(6) 'Data supplying authority' means a competent authority supplying data to other competent authorities according to a duty to inform or entering data into a database.

(7) 'Person concerned' means any natural or legal person identifiable, directly or indirectly, by reference to data exchanged or stored by an information management activity within the scope of this book.

VI-3 Need for a basic act

(1) A basic act shall be adopted before an information management activity within the scope of this book may be performed. No duty to perform such an activity shall exist without a basic act.

(2) A basic act may take the form of a regulation, directive, decision, or any other instrument which has binding legal effect.

(3) Notwithstanding additional requirements in other articles of this book, the basic act shall clearly establish

- (a) either the power or the duty to perform the relevant information management activity,
- (b) the purpose of the relevant information management activity,
- (c) the competent authorities according to Article VI-6 and their responsibilities, or a power to designate such an authority,
- (d) the Management Authority according to Article VI-8,
- (e) the Supervisory Authority according to Article VI-30,
- (f) limitations on the right to exchange and receive information or to store data in a database,
- (g) the applicable law,
- (h) any specific requirements concerning the mechanism for exchanging information including the structure and security requirements of information systems, and
- (i) additional aspects specified in other articles of this book.

(4) By way of derogation from paragraphs 1 to 3 an information management activity may be performed without a basic act provided that the action falls within

the competences of the Union and is performed in order to implement a pilot project of an experimental nature designed to test the feasibility of an action and its usefulness. The relevant information management action may be performed without a basic act for not more than two consecutive years.

VI-4 Evaluation of information management activities

(1) The Commission or another body adopting the relevant basic act shall produce an overall evaluation of each information management activity; the evaluation shall be transmitted to the European Parliament and the Council. The interval for evaluations shall be defined in the basic act.

(2) If applicable, the Management Authority under Article VI-8 shall submit to the Commission regular reports on the relevant IT system's technical functioning, communication infrastructure, technical and information security and the bilateral and multilateral exchange of information through the IT system. If a Supervisory Authority has been established pursuant to Article VI-30, it shall submit to the Commission regular reports on its findings resulting from its supervisory activities. These reports shall be annexed to the overall evaluation.

(3) With respect to the processing of personal data in databases, a joint report shall be established by the National Supervisory Authorities and the European Data Protection Supervisor and shall be sent to the European Parliament, the Council, the Commission and the concerned Management Authority or Supervisory Authority at regular intervals. If the legislator has assigned the external supervision to the European Data Protection Board according to Article VI-39(1) and (3) the board shall establish the report. The report shall take into account the results of data protection audits according to Articles VI-36(3) and VI-37(3).

VI-5 Duties of sincere cooperation with regard to information systems

(1) Public authorities using an information system shall ensure the efficient functioning of the system within their jurisdiction.

(2) Public authorities using an information system shall ensure effective communication between themselves and with the Management Authority.

VI-6 Competent authorities

(1) For every information management activity each relevant Member State shall establish or designate an authority, or authorities, which will be responsible for performing that activity. Each Member State shall communicate to the Commission or, if established, to the Management Authority a list of these competent authorities, as well as any amendments thereto, as soon as possible. If a Member State designates more than one competent authority the Member State shall clearly define the respective allocation of responsibilities in that list.

(2) The Commission shall maintain a list of all competent EU authorities. If the Union designates more than one competent authority the Commission shall clearly define their respective responsibilities in that list.

(3) The Commission shall maintain an aggregated list of all competent authorities for each information management activity, and shall distribute that list to all participating authorities. Where applicable the aggregated list shall also contain the allocation of responsibilities according to the preceding paragraphs. This aggregated list shall be reviewed and updated at regular intervals and at least once a year.

VI-7 Contact points

(1) If laid down in a basic act each Member State involved and the Union shall designate a contact point.

(2) Contact points shall support

- (a) competent authorities in performing their designated information management activities,
- (b) the resolution of conflicts,
- (c) and coordinate the use of information systems.

(3) Contact points shall ensure the availability of an on-duty officer reachable outside office hours for emergency communications on a 24-hour/7-day-a-week basis.

VI-8 Management authorities for IT systems

(1) If an information management activity is supported by an IT system a management authority is established or designated in the basic act. The

management authority can be the European Agency for the operational management of large-scale IT systems.

(2) The management authority shall be responsible for the operational management of the respective IT system. The tasks of the management authority include:

- (a) ensuring the security, continuous and uninterrupted availability, high quality of service for users, high level of data protection, maintenance and development of the respective IT system,
- (b) registering the competent authorities according to Article VI-6 and, if applicable, the contact points, and granting them access to the respective IT system,
- (c) performing processing operations on personal data in the respective IT system, only where provided for in the respective basic act,
- (d) supporting the evaluation tasks of the Commission or the body adopting the relevant basic act in accordance with Article VI-4(1). For the purposes of performing this evaluation task, the management authority shall have access to the necessary information relating to the processing operations performed in the respective IT system.

(3) The management authority shall not participate in information management activities involving the processing of personal data except where required by EU law.

(4) Each basic act may provide for more detailed rules serving the specific needs of an IT system, and may confer additional operational tasks on the management authority.

VI-9 Principle of transparent information management

(1) Information management activities are undertaken in accordance with the principle of transparent and retraceable data processing.

(2) Data processed as a result of an information management activity performed through an IT system shall be tagged. In the absence of detailed regulation within the basic act or implementing acts, the tag shall contain:

- (a) a record of the data supplying authority, the source of data collection, the authority which collected the data if this is not the data supplying authority, and whether restrictions on the exchange or subsequent use apply to that data,
- (b) a record of each information exchange between competent authorities or access to data stored in a database, the subsequent use of that data, as

- well as the corresponding legal basis for each of these information management activities,
- (c) a flag as provided for in Article VI-19(5) or Article VI-14(3).

Where various data are linked, the tag shall identify such linkage, the authority having requested it, and the corresponding legal basis.

VI-10 Principle of data quality

The data supplying authority shall be responsible for ensuring that the data are accurate, up-to-date and lawfully recorded.

Chapter 2: Structured information mechanisms

VI-11 Standards for structured information mechanisms

- (1) A basic act establishing a structured information mechanism should, when applicable, indicate the use of agreed workflows, the use of forms, dictionaries, tracking mechanisms and other standardising instruments for the members of the network to exchange the relevant information and to cooperate internally.
- (2) With regard to information exchanged through a structured information mechanism the duties to update information laid down in Article VI-19 apply *mutatis mutandis*.
- (3) Structured information mechanisms must be subject to a comprehensive data protection framework as provided for in the basic act in line with the principles underlying Articles VI-19, VI-25 to VI-29, VI-34 to VI-39. In any event the obligation to respect the applicable general data protection law remains unaffected.

Chapter 3: Duties to inform other public authorities without prior request and databases

Section 1: General standards for duties to inform and databases

VI-12 General standards for duties to inform

(1) The exchange of information under a duty to inform may either be regular, at certain time intervals, or triggered by an event as specified in the basic act. Personal data may only be exchanged if they are relevant and limited to the minimum necessary in relation to the purposes of the data exchange.

(2) Where a duty to inform exists, information may be exchanged using a variety of notification types. The data supplying authority selects the appropriate notification mechanism, taking into account the nature of the information, the circumstances and aim of its provision, and the specific rules laid down in the basic act and in national implementing rules which establish the duty to inform.

(3) Information may be exchanged by using notification types including:

- (a) emergency notifications,
- (b) standard alert notifications,
- (c) simple information notifications,
- (d) information notifications requiring action, and
- (e) follow-up notifications responding to an existing notification.

(4) In principle, the information will be exchanged in electronic form, including by entering data into an information system designed for the purpose of information exchange. In exceptional and duly justified cases, information may be exchanged in other forms.

VI-13 General standards for databases

(1) Data may only be entered into a database for legitimate purposes as specified in the basic act. Personal data may only be entered if they are relevant and limited to the minimum necessary in relation to the purposes of the database.

(2) Data entered into a database is subject to predefined storage times in accordance with Articles VI-26 and VI-27.

VI-14 Verification

- (1) A basic act may provide that data and information exchanged between competent authorities under a duty to inform, or entered into a database, shall be verified *ex ante* by a separate verification authority. This verification authority may be the Supervisory Authority according to Article VI-30.
- (2) The basic act shall specify a time limit for verification. If no limit is specified, the verification authority shall verify the data within the shortest time possible.
- (3) Where, due to the nature of the exchange or to time constraints in urgent or emergency situations, it is not possible to verify data before its communication, it shall be flagged by either the verification or the data supplying authority as unverified and efforts shall be made after dissemination to verify the information transmitted.
- (4) The basic act shall specify the verification standards. If no standard is specified, the verification authority shall evaluate whether the information is complete, formally accurate, not evidentially false and legible.

Section 2: Management of information

Subsection 1: Access to data and information

VI-15 Information and access for persons concerned

- (1) The data supplying authority shall inform the person concerned in accordance with applicable data protection law about the storage and processing of data relating to him or her. The information shall at least include the categories of data relating to him or her being processed, the data supplying authority, the recipients of the data, and the purpose for which the data will be processed, including the legal basis for such processing in accordance with the relevant provisions of national law.
- (2) The person concerned shall have the right to obtain from the data supplying authority or, subject to the conditions laid down in Articles VI-30 and VI-33, from the supervisory authority at any time, on request, confirmation as to whether or not data relating to the person concerned are being processed. Where personal data are being processed, the authority shall provide information

in accordance with applicable data protection law. Paragraph (1) sentence 2 applies *mutatis mutandis*.

(3) The data supplying authority shall inform the person concerned of his or her rights to access data relating to him or her, including the right to request either that inaccurate data is corrected or that unlawfully processed data is deleted as soon as possible, and the right to receive information on the procedures for exercising these rights.

(4) The supervisory authority shall ensure that persons concerned can effectively exercise their right of access in accordance with applicable data protection law.

(5) Information may only be withheld in the context of paragraphs 1 and 2 for the purpose of:

- (a) prevention, investigation, detection and prosecution of criminal offences;
- (b) national security, public security or defence of the Member States;
- (c) protection of important economic or financial interests of a Member State or of the Union, including monetary, budgetary and taxation matters;
- (d) protection of the rights and freedoms of others.

The authority is obliged to inform the person concerned about the grounds of withholding of information and rights of recourse to the competent data protection supervisor. Article 20(3) to (5) Regulation (EC) No 45/2001 applies *mutatis mutandis*.

VI-16 Access for competent authorities

(1) Access to information supplied under a duty to inform or stored in a database shall be restricted to those authorities for which access is essential for the performance of their duties, and limited to the extent that the data is necessary for the fulfilment of their tasks in accordance with the purposes for which the information was shared.

(2) Clear and comprehensive rules regarding the authorities which may access and use such information, and the conditions under which access and use is permissible, shall be laid down in the basic act and in relevant implementing provisions for each duty to inform or database.

VI-17 Access management rules in information systems

For each information system through which public authorities exchange data under a duty to inform or which establishes a database, clear and comprehensive access management rules shall be established in the basic act and in relevant implementing provisions.

Subsection 2: Alteration and deletion of data and information

VI-18 Competences to alter and delete data

- (1) Information contained within a database may be altered or deleted by:
 - (a) the competent authority which has supplied data under a duty to inform or entered data into a database,
 - (b) the Supervisory Authority under Article VI-33.
- (2) Where explicitly authorised by the basic act, the right to alter or delete information within a database may also be conferred on one of the bodies listed pursuant to Article VI-6.

VI-19 Obligations to update, correct or delete data

- (1) If the data supplying authority finds that information transmitted to other authorities, or that data entered into a database are inaccurate or were processed contrary to the relevant national or EU law, it shall check the information or data and, if necessary, correct or delete them immediately.
- (2) The basic act may create an obligation for data supplying authorities to update information at specified regular intervals.
- (3) Any person concerned may request that data relating to him or her which are inaccurate shall be corrected and that data recorded unlawfully or which may no longer be stored shall be blocked or deleted by the data supplying authority without delay.
- (4) If a participating authority which did not supply the data has evidence to suggest that data are inaccurate or were processed contrary to the relevant national or EU law, this body must inform the data supplying authority immediately. The data supplying authority shall check the data and, if necessary, correct or delete them immediately.

(5) In cases where the person concerned or another participating authority contests the accuracy of the data but the accuracy cannot be established, the data shall, at the request of the person concerned, be marked by the data supplying authority with a flag denoting this dispute. If a flag exists, it may be removed only with the permission of the person concerned or of the other participating authority. Without prejudice to this limitation, a flag may be removed in accordance with a decision of the competent court or an independent data protection authority.

(6) The respective powers of the Supervisory Authority under Article VI-33 remain unaffected.

Subsection 3: Use of data and information

VI-20 Duty to use information in activities and to consult databases

Competent authorities are obliged to consider information supplied by other competent authorities under a duty to inform or entered into a database when carrying out their activities. They are particularly obliged to search for and to consult information available in databases.

VI-21 Duty to independently assess information provided through information systems

(1) Information provided through information systems must be subject to a separate assessment by the competent authority considering an administrative action based on such information. Where the acting competent authority doubts the validity of the information, it shall immediately consult the competent authority supplying that information through the information system.

(2) Competent authorities shall ensure that full use is made of the relevant features of an information system so as to obtain a clear and complete picture of the information and to avoid false statements of facts.

VI-22 Duty to take specific action as a result of information

Where an obligation to act as a result of a notification exists, the competent authorities shall ensure that measures as specified in the basic act are carried

out and, where required, inform other relevant competent authorities of the actions taken by sending a follow-up notification.

VI-23 Exemption clause

In exceptional cases, competent authorities may be exempt from complying with the duties listed in Articles VI-21 and VI-22. Such non-compliance must be restricted to a limited number of justified situations which are clearly specified in the basic act or in relevant implementing rules.

VI-24 Restrictions on the use of data and information

(1) Competent authorities shall exchange and process data only for the purposes defined in the relevant provisions of EU law providing for the exchange of such information.

(2) Processing for other purposes shall be permitted solely with the prior authorisation of the data supplying authority and subject to the applicable law of the receiving or retrieving competent authority. The authorisation may be granted insofar as the applicable law of the supplying authority permits.

(3) The dissemination of data and information shared between public authorities to third parties requires a specific legislative authorisation.

Subsection 4: Data protection and information security

VI-25 General data protection duties

(1) All information management activities must comply with the requirements of specific data protection applicable to the matter.

(2) The basic act shall clearly define for each regulated information management activity the categories of data and information which may be gathered, exchanged and stored. Before supplying information, the competent authority shall ensure that the information falls within those categories of data and information.

VI-26 Storage, blocking and deletion of data exchanged under a duty to inform

(1) Data relating to a person concerned and stored in a database as a result of an information exchange under a duty to inform, shall be accessible only for so long as necessary to achieve the purposes for which they were supplied. If a duty to inform is triggered by a specified event the data shall only be accessible until the administrative tasks connected with that event are accomplished and no longer than six months after the formal closure of the relevant procedure. After that period the data shall be blocked. The basic act shall set rules for the standard and maximum period within which data are accessible.

(2) Blocked data shall, with the exception of their storage, only be processed for purposes of proof of an information exchange with the consent of the person concerned, unless processing is necessary for a subsequent court proceeding or is requested for overriding reasons in the public interest.

(3) Blocked data shall not be searchable or accessible to competent authorities using the database. Searches which result in blocked data shall return a negative result to the requesting authority.

(4) Blocked data shall automatically be deleted three years after the start of the blocking period. Any decision to retain data for a longer period must be based on a comprehensive case-specific assessment, and shall regularly be reviewed.

(5) Nothing in this article shall prejudice the right of a Member State to keep national files of data relating to a particular notification issued by that Member State, or a notification in connection with which action has been taken on the Member State's territory. The duration of such data storage shall be governed by national law.

VI-27 Storage, blocking and deletion of data beyond procedures associated with a duty to inform

(1) Data may be accessible through databases irrespective of the limits set out in Article VI-26 in accordance with the rules of the basic act for the respective database.

(2) Without prejudice to the maximum data retention period provided for in the basic act, data stored in a database shall regularly be reviewed by the data supplying authority in order to assess whether they are still required for the purpose for which they were lawfully stored.

(3) Data relating to a person concerned and stored in a database shall be blocked by the supplying authority as soon as they are no longer necessary for the purpose for which they were lawfully stored or after the maximum total storage time provided for in the basic act.

(4) Sentence 4 of paragraph (1) and paragraphs (2) to (5) of Article VI-26 apply to databases *mutatis mutandis*.

(5) This article shall not exclude the possibility of deleting data earlier than the established storage time subject to an explicit request of the data supplying authority and the consent of the person concerned. Such a deletion must be notified to all participating authorities.

VI-28 Confidentiality

Public authorities, their officials and other servants, including independent experts or bodies appointed by a public authority, shall not disclose information which they have acquired through information management activities and which is covered by the obligation of professional secrecy or other equivalent duties of confidentiality. This obligation shall also apply after members of staff leave office or employment, or after the termination of their activities.

VI-29 Security standards for IT systems

For each IT system through which public authorities exchange data under a duty to inform or which establishes a database, clear and comprehensive standards for risk adequate security measures shall be established in the basic act and in relevant implementing provisions.

Chapter 4: Supervision and dispute resolution

Section 1: General supervision and dispute resolution

VI-30 Establishment of a Supervisory Authority

- (1) If an information management activity is supported by an information system, the relevant basic act shall establish or designate a Supervisory Authority and regulate its organisational structure.

- (2) The Functions of the Supervisory Authority shall be:
 - (a) to supervise the information management activities of all participating authorities in order to ensure compliance with these model rules, the basic act and the relevant EU law,
 - (b) to resolve conflicts between participating authorities through mediation procedures according to Article VI-31, or through binding inter-administrative decisions according to Article VI-32,
 - (c) to assume the role of the appeal authority if EU law establishes an administrative appeal procedure,
 - (d) to assume the role of a verification authority pursuant to Article VI-14 if the relevant EU law requires the verification of data or information,
 - (e) notwithstanding the competences of external data protection supervisory authorities according to Section 2 of this chapter, to ensure compliance with the relevant data protection laws. The Supervisory Authority shall cooperate with the data protection authorities in order to establish an effective and efficient data protection supervision,
 - (f) to hear complaints about refusal of access to documents in a database as defined in Article VI-2(3), and to grant such access in accordance with the applicable EU law.

VI-31 Mediation procedure between participating authorities

- (1) Where a participating authority is of the opinion that a measure taken by another participating authority is either incompatible with the basic act or is likely to affect the objectives of the information management activity, it shall refer the matter to the Supervisory Authority. The Supervisory Authority shall serve as mediator.

- (2) The relevant participating authorities and the Supervisory Authority shall make every effort to solve the problem.

(3) Participating authorities concerned by the outcome of a mediation shall report on follow-up measures undertaken.

VI-32 Binding inter-administrative decisions

(1) The Supervisory Authority shall be vested with the power to review the legality of information management activities against the standards laid down in the basic act and other rules and principles arising from EU law. The Supervisory Authority may adopt a decision to order participating authorities to comply with the relevant provisions.

(2) The Supervisory Authority may act either on its own initiative or on the basis of a request lodged by a participating authority. The Supervisory Authority shall strive to resolve a conflict through a mediation process as per Article VI-31 before adopting a binding inter-administrative decision. The model rules of Book III apply *mutatis mutandis*.

(3) Save for the powers pursuant to Article VI-33, the Supervisory Authority shall hear and investigate complaints of concerned persons with respect to information management activities.

VI-33 Power to grant access to data and to alter or delete data

(1) On the request of a person concerned, the Supervisory Authority shall inform the respective person concerned in accordance with Article VI-15 about his or her data introduced into an information system.

(2) On the basis of a request by a person concerned pursuant to Article VI-19 (3), or following a decision by a Data Protection Authority, or a judicial authority, the Supervisory Authority shall be afforded the right to delete or alter inaccurate or unlawful data introduced into an information system.

Section 2: Data protection supervision of databases

VI-34 Internal supervision by Data Protection Officers

(1) All public authorities participating in a database shall appoint at least one person as data protection officer.

(2) For the appointment and tasks of the data protection officers, Article 24 of Regulation (EC) No 45/2001 applies insofar as no specific rules are applicable, in case of Member State authorities *mutatis mutandis*.

VI-35 Cooperative external data protection supervision of databases

If the legislator does not assign the external data protection supervision of databases to the European Data Protection Board under Article VI-39 the external data protection supervision of databases is organized in a cooperative structure according to Articles VI-36 to VI-38.

VI-36 External supervision by the European Data Protection Supervisor

(1) With respect to the processing of personal data in databases, the European Data Protection Supervisor shall be responsible for ensuring, in accordance with Regulation (EC) No 45/2001 and any other EU law relating to data protection, that the fundamental rights and freedoms of natural persons, and in particular their right to protection of personal data as established in Article 8 of the Charter of Fundamental Rights and Article 16 of the Treaty on the Functioning of the European Union, are respected by the EU authorities.

(2) With respect to the processing of personal data in databases, the European Data Protection Supervisor shall independently monitor the lawfulness of the processing of personal data by EU authorities, especially the data's transmission to and from the database. If a management authority is set up pursuant to Article VI-8, the European Data Protection Supervisor shall particularly monitor the exchange and further processing of supplementary information or actions undertaken by the management authority.

(3) The European Data Protection Supervisor shall ensure that an audit of the personal data processing activities of participating EU authorities is carried out in accordance with international auditing standards at least every four years. The participating authorities shall supply any information requested by the European Data Protection Supervisor, grant him access to all documents and records, and allow him access to all their premises, at any time.

(4) For the purpose of this article, the European Data Protection Supervisor shall fulfill the duties provided for in Article 46, and exercises the powers granted in Article 47 of Regulation (EC) No 45/2001.

VI-37 External data protection supervision by National Supervisory Authorities

(1) With respect to the processing of personal data in databases, the authority or authorities designated in each Member State and endowed with the powers referred to in Article 28 of Directive 95/46 or Article 25 of Council Framework Decision 2008/977/JHA (the "National Supervisory Authority") shall independently monitor the lawfulness of the processing of personal data by actors of their Member States, including the data transmission to and from the database and the exchange and further processing of supplementary information.

(2) The National Supervisory Authority of the Member State in which the data subject is located and, where necessary, the National Supervisory Authority of the Member State which transmitted the data, shall assist the data subject and, if requested, advise him or her on exercising his or her right to correct or erase data. Both national supervisory authorities shall cooperate to this end. Requests for such assistance may be made to the national supervisory authority of the Member State in which the data subject is located. This authority shall communicate the requests to the National Supervisory Authority of the Member State which transmitted the data.

(3) The National Supervisory Authority shall ensure that an audit of the personal data processing activities by participating Member State authorities is carried out in accordance with international auditing standards at least every four years. The participating authorities shall supply any information requested by the respective National Supervisory Authority, give it access to all documents and records, and allow it access to all their premises, at any time.

VI-38 Cooperation between National Supervisory Authorities and the European Data Protection Supervisor

(1) With regard to the processing of personal data in databases, the National Supervisory Authorities and the European Data Protection Supervisor, both acting within the scope of their respective competences, shall cooperate actively in the context of their responsibilities, and shall ensure coordinated supervision of the databases. To this end, they shall exchange relevant information, assist each other in carrying out audits and inspections, examine difficulties of interpretation or implementation of the applicable data protection rules, study problems related to the exercise of independent supervision or to the exercise of the rights of data subjects, draw up harmonised proposals for joint solutions to any problems and promote awareness of data protection rights, as necessary. If an incompetent authority is addressed by a data subject with a request, the incompetent authority

shall transfer the request to the competent authority and shall inform the data subject of the transmission.

(2) Each supervisory authority shall take all appropriate measures necessary to attend to the request of another supervisory authority without delay and no later than one month after having received the request. Such measures may include, in particular, the transmission of relevant information on the course of an investigation, or enforcement measures to bring about the cessation or prohibition of processing operations contrary to the applicable law.

(3) Book V on mutual assistance shall apply without prejudice to the above paragraphs.

(4) The legislator can assign the supervision of the whole internal data processing in a database either to the European Data Protection Supervisor, a National Supervisory Authority or a group of Supervisory Authorities (representative supervision).

VI-39 Data protection supervision of databases by the European Data Protection Board

(1) With respect to the processing of personal data in databases, the legislator may assign the entire external supervision of such a database to a European Data Protection Board. The Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor and it shall take decisions by a simple majority of its members. If a European Data Protection Board is set up by general EU data protection law, the supervision of databases can only be assigned to this Board. In this case, the Board shall establish at least one subgroup for the supervision of databases. In no case, the Commission shall have the right to participate in the activities and meetings of the Board concerning the supervision of databases.

(2) The national supervisory authorities and the EDPS shall ensure that the European Data Protection Board or the subgroup is vested with adequate human, technical and financial resources, premises and infrastructure for the effective performance of its duties and tasks.

(3) The European Data Protection Board shall fulfill the tasks and duties provided for in Articles VI-36 and VI-37 and shall exercise the powers granted in these articles. For this purpose it shall adopt a supervision plan for each database every year. In this plan parts of the tasks and duties, namely the supervision of Member States activities, can be delegated to particular national

supervisory authorities, groups of national supervisory authorities or the EDPS. In case of a delegation, the national supervisory authorities and the EDPS are bound by the delegation and other decisions of the Board. The delegation can be revoked at any time.

(4) For the purpose of fulfilling its tasks and contributing to foster consistency in the application of the rules and procedures for data processing, the European Data Protection Board shall cooperate as necessary with other supervisory authorities.

Chapter 5: Remedies and Liability

VI-40 Right to compensation in relation to composite information management activities

(1) Any person suffering damage from unlawful processing operation in the context of an information management activity, or any act incompatible with the provisions laid down in the basic act, shall be entitled to receive compensation from the participating authority responsible for the damage suffered or the authority of the jurisdiction in which the claimant is resident or, in the case of a legal person, has its registered offices.

(2) In the event that the participating authority against which an action is brought is not the participating authority responsible for the information management activity having caused the damage, the latter shall be required to reimburse, on request, the sums paid as compensation, unless the use of the data by the participating authority requesting reimbursement infringes the basic act.

(3) If any failure by a participating authority to comply with its obligations under the basic act causes damage to another participating authority, the former authority shall be held liable for such damage, unless and in so far as the other participating authority failed to take reasonable steps to prevent the damage from occurring, or to minimise its impact.

(4) The damages will be calculated and compensated in accordance with the general principles common to the laws of the Member States.

VI-41 Penalties for unlawful data processing

Participating authorities shall ensure that any data processing as part of an information management activity within the scope of this book contrary to the basic act is subject to effective, proportionate and dissuasive penalties.

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