Editorial

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Editorial

'The rule of law stands alongside democracy and fundamental rights as founding values of the Union. It is common to all Member States and a bedrock of the Union's identity'. These are the opening words of the 2023 Rule of Law report by the European Commission that was published on 5 July 2023.[1] As is the case with the rule of law, administrative law in the EU Member States and in the EU is often subject to challenges. In that respect, the Dutch report interestingly reflects on the aftermath of the so-called childcare allowances affair that has proven to be a real challenge to balancing state powers and the proper functioning of general administrative law in the Netherlands.[2] This affair brought to light – amongst other structural issues – the inability of Dutch administrative courts to intervene in situations where administrative action – correctly based on a legislative act adopted by Dutch Parliament without any discretion for the public authority – has an unduly harsh impact on individuals. In this particular case, Dutch legislation seemed to require that all allowances received for the costs of using a childcare facility in a particular year had to be revoked and repaid in full if parents were unable to prove that the childcare facility had indeed been paid by them for all relevant hours of childcare that year. Application of that legislation sometimes had extremely harsh consequences that were approved for years by the highest Dutch administrative court, until the court intervened in October 2019.[3]

In the Dutch system, without a Constitutional Court and with limited possibilities for administrative courts to set aside an Act of Parliament, the government has been continuously working on a number of measures in response to this affair.[4] First, it seeks to improve the quality of legislation, including by identifying where legislation has an unduly harsh impact. Second, it identified options for a system of judicial constitutional review without introducing a Constitutional Court as such. Third, it established a State Commission on the functioning of the rule of law in order to think of ways to regain public trust in the system of public law. And, last but not least, the government published a draft amendment to the General Administrative Law Act (GALA) in the beginning of 2023 to strengthen the rights of individuals in relation to the state and public authorities. Most far stretching till now is the amendment to the provision that codifies the proportionality principle in Dutch administrative law (Art. 3:4 GALA). The amendment will allow public authorities and courts to deviate from Acts of Parliament when the outcome of the application of binding legislation

1 Commission, '2023 Rule of Law Report: The rule of law situation in the European Union' COM (2023) 800 final, 1.

2 Commission, '2023 Rule of Law Report: Country Chapter on the rule of law situation in the Netherlands' SWD (2023) 819 final, 20.

3 *Administrative Jurisdiction Division of the Council of State 23 October 2019*, NL:RVS:2019:3535.

4 Also as a response to: The Venice Commission, 'Netherlands-Opinion on the Legal Protection of Citizens, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)' CDL-AD (2021) 031, paras 134-137 in particular.

is deemed to be in violation of the proportionality principle, even when the public authority was granted no discretion whatsoever.

This is but one example of how current challenges may lead to a rebalancing of state powers or a process of re-thinking of the role of administrative law.

This issue of the Review of European Administrative Law (REALaw) contains several articles that address challenges in European administrative law. One of them is the use that public authorities make of algorithmic systems to support (or replace) decision-making. The article 'Safeguarding the Right to an Effective Remedy in Algorithmic Multi-Governance Systems: An Inquiry in Artificial Intelligence-Powered Informational Cooperation in the EU Administrative Space' by Jan Benjamin in this respect discusses the right to an effective remedy in light of future decision-making processes within in the EU administrative space. Public authorities using algorithmic systems, machine learning and AI to support decision-making has a high potential to make public services more efficient to the benefit of society. Administrative law must be adapted to these developments, as must the right to an effective remedy. Benjamin's focus is on systems that support decision-making by giving recommendations to public servants. The author uses the definition of recommender systems provided by Karen Yeung and then stipulates that recommender systems are basically intended to direct or guide a public servant when trying to take the most optimal decision based on the information available and the applicable legal framework. It allows the public servants to remain in the loop and retain formal discretion with final decisions made by them. The article explains that informational cooperation within the EU administrative space has evolved from responding to informational requests to shared databases and IT systems, and it furthermore assumes that the use of recommender systems will be the next evolution in that cooperation. It discusses the additional challenges this will bring to judicial review and what legal protection should be provided to individuals in light of the right to an effective remedy as codified in Article 47 of the Charter of Fundamental Rights.[5] One such challenge is the reluctance of the ECJ to allow review of EU acts without legal effects and transnational review because of the principle of mutual trust. The case law of the Court is not very helpful in cases where, for instance, a recommendation by an algorithmic system for a final decision in a Member State was based on unlawful inputs or wrong information that was registered at the EU level or in another Member State. With Hofmann, Benjamin argues that the Courts' reasoning in *Berlioz* (*C-682/15*) should be extended – preferably at the legislative level – to allow for judicial review by the courts of one Member State of the administrative actions of the public authorities in another Member State against an EU standard. That standard would constitute a necessary innovation for ensuring effective remedies. The author argues

5 Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art 47.

convincingly that safeguards should be put in place in the context of AI-powered informational cooperation within the EU administrative space to ensure that gaps in judicial review in composite procedures are not exacerbated and are in fact reduced.

One of the more common challenges for administrative law is the relevance and the influence of soft law in decision-making by public authorities and the consequential judicial review of those decisions by an administrative court. In his article 'Taking Soft Law Into Account... of Course! But What Does That Concretely Mean?', Francesco Liguori provides a thorough assessment of the consequences of the *Grimaldi* case that was decided over 30 years ago.[6] The article provides an in-depth overview and analysis of the duty of national courts to take European soft law into account. What are the sources of this obligation? Is deciding on the validity of EU soft law a prerogative of the CJEU and may a national court, therefore, never declare the invalidity of EU soft law? Is there a duty of consistent interpretation, or rather a 'soft duty to apply' EU soft law? In procedures before national courts a relevant question concerning EU soft law is whether national courts have an obligation to make a reference for a preliminary ruling by the CJEU when the case concerns EU soft law that requires interpretation. Even if the current view seems to prevail that there is no duty of referral on interpretative issues concerning EU soft law, it cannot be ruled out that there are circumstances under which national courts would be so obliged. Be that as it may, ignoring EU soft law all together as a national court might not be a good idea.

A topical but recurring challenge to European administrative law is the recovery of EU funds that are spent incorrectly. Often there is an obligation to recover the funds from those responsible for the infringements and sanctions may also be required. Only in exceptional cases may irregular expenditures of EU funds not be recovered and sanctioned, eg, when a certain time period has elapsed, and the offender is exempt from the obligation to repay the funds and cannot be sanctioned. In her article 'Limitation Period for Irregular Payments from the EU Budget and *NextGenerationEU* Funds in the Post-Covid Era', Justyna Łacny analyses EU legislation governing the statute of limitations for irregular expenditures paid from the EU budget and *NextGenerationEU*. It aims to determine whether the applicable provisions provided effective protection for these funds during the Covid pandemic, as well as whether they do so in the post-Covid era. Although the author reflects positively upon the actions of the EU combating the Covid epidemic itself, she concludes that the EU has not done everything possible to protect its own financial interests. The EU has not undertaken legislative work to extend the limitation periods laid down for so-called PIF offences in the PIF Directive and for irregularities in the PIF Regu-

6 Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, EU:C:1989:646.

lation which would allow additional time for conducting proceedings and taking actions against irregular spending of EU funds. Another conclusion of the author is that legal certainty is not the strongest aspect of the PIF Regulation. It is general, concise, laconic, and complex. Revision of the PIF Regulation after 25 years might be required in light of legal certainty. And it is not the first time that an article in our Review of European Administrative Law came to that conclusion: in 2013, Geleijnse and Den Ouden also concluded in their case law analysis that the time had come for a revision of the regulation.[7]

In her case law analysis 'C-61/21 Ministre de la Transition écologique: putting the individual-centered CJEU case law on air quality on hold' Justine Richelle discusses the noteworthy judgment where the court decided in a French case that arts 13(1) and 23(1) of the Air Quality Directive[8] do not confer rights on individuals and, therefore, cannot be invoked to request compensation for health damages suffered because of an infringement of that Directive by a Member State. Although the opinion of AG Kokott in this case had concluded otherwise, and although the court had ruled in *Janecek* that an earlier version of this Directive did confer rights to individuals (a person directly affected by an exceedance of limit values must be able to require the competent authority to draw up an action plan through action in court),[9] the question raised in *Case C-61/21* goes beyond what had been decided in *Janecek*. Richelle concludes that the court – much to the surprise of those involved in the fight against air pollution – declined to take a next step in its individual-centred case law on air quality. However, as the author rightly points out, the proposals for revision of the Air Quality Directive and for the Industrial Emissions Directive[10] both introduce instruments for individuals and NGOs to claim compensation for damages to human health.

Last, but certainly not least, this issue of REALaw provides a thorough review by Moritz Schramm of the book by Michał Krajewski ('Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman'). Schramm finds that the book by Krajewski concerns the 'dark matter of EU law': although we know of the existence of extra-judicial review mechanisms, we do not fully understand their functionality. The book provides an impressive

7 A Geleijnse and W den Ouden, 'Claims for Interest in the Fight against Fraud to the Union's Financial Interests: a Practical Solution. CJEU Judgment 29 March 2012, Pfeifer & Langen KG, Case C-546/10' [2013] 6[1] *REALaw*, 135.

8 Directive 2008/50/EC of the European Parliament and the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/01.

9 Case C-237/07, *Dieter Janecek v Freistaat Bayern*, EU:C:2008:447.

10 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions [2010] OJ L 334/17.

and inspiring take on these phenomena from a legal perspective. The review is insightful and leaves the reader wanting to read the entire book. One can only hope that this editorial will do the same for this issue of REALaw.

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