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From the Editors: The Story of a Comparative Interdisciplinary Research Project

Alternative Dispute Resolution in Administrative Law

Alternative dispute resolution (ADR) is a topic that most think they know about, but in reality, it has multiple facets that cannot be gauged so easily. The concept of ADR applied to public law increases the complexity of the debate.

The book attempts for the first time to do a comparative assessment of the state of the art of the ADR in administrative law of several European jurisdictions and at the level of European Union law. It then tries to analyze both empirically and comparatively, also for the first time, the effectiveness of selected ADR tools employed by the different administrative justice systems—namely, administrative appeals, ombudsman, and mediation.

Administrative appeals have always been considered an affordable tool for ADR in administrative matters, and a way of keeping litigations out of the courts. Nevertheless, the two systems of administrative appeals have fuelled debates concerning their efficiency, effectiveness, access to justice, promotion of good governance principles and accountability, in relation to mediation procedures.

The Council of Europe's Committee of Ministers has stressed repeatedly, in its recommendations, the idea that alternative means of solving administrative disputes are commendable because of their role in reducing the caseload of the courts while still securing a fair access to justice. It was also pointed out that the courts' procedures in practice may not always be the most appropriate to resolve administrative disputes, and that the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public.

However, in the comparative literature, it seems that there is no empirical research measuring the effectiveness of administrative appeals and other ADR tools. The few writings that tangentially touch upon the issue of administrative appeals are mostly descriptive, some even out of date, and they do not address its influence on the judicial review and its effectiveness as an ADR tool. The lack of empirical data favors on the other hand public policies directed towards reducing

the role of administrative appeals in the administrative justice system, based on the argument that they are "useless," and that only courts can effectively protect citizens from administration's abuse.

Mediation is an ADR tool that is considered to be specific for other fields of law, and not to administrative law. That is a reason enough for the lack of literature on this issue. Going beyond the merely descriptive approaches employed until now, this research tackles the empirical side of the matter, looking for signs of effectiveness of mediation in administrative proceedings, where the case.

Current researches at both the national and international level are mostly descriptive and focus on the responsibilities of the Ombudsman. The proposed research will address for the first time the topic from an interdisciplinary perspective and in the context of other alternative means for conflict resolution. The proposed research includes a comparative dimension and aims at developing a normative model regarding the way in which the Ombudsman institution contributes to the development of the rule of law and practices of good governance.

The Background of the Research Project

The team of authors contributing to this book is based in most part on the network of researchers established under the umbrella of the Permanent Study Group X "Law and Public Administration" of the European Group of Public Administration.[1] The study group joins together at every annual EGPA conference in September to discuss and share research ideas related to the field of public law but with a broader multidisciplinary perspective. Thus, the group is a permanent meeting place for scholars and practitioners from different fields: social scientists, jurists and economists working in academia and public institutions, as well as civil servants working in national and supranational institutions. It tries to combine external and internal perspectives on law in a public administration context. Internal perspectives on law relate to juridical analysis and efforts to improve legal (sub) systems from the perspectives of rules and legal history, jurisprudence and comments. The external perspectives can be of different kinds, as they confront (administrative) law with motives that are often external to law, like efficiency and timeliness of administration, the accountability of public agencies, transparency of government and citizen's participation in decision-making.

The theme *ADR in administrative proceedings* was first discussed at the EGPA conference in Toulouse (September 2010) and gathered an initial enthusiastic support and commitment from the members of the group. Many papers on the topic were presented during the annual EGPA conferences since then—in Bucharest (2011), Bergen (2012) and Edinburgh (2013). The book was completed with the participation of other well-established scholars in the field of administrative

[1] http://www.iias-iisa.org/egpa/e/study_groups/law/Pages/contact.aspx.

law, most of them members of the RENEUAL network (Research Network of European Administrative Law).[2]

Draft chapters have been discussed during the International Workshop organized in Cluj Napoca on 11th and 12th of October 2012[3] and further coordination was set up among authors coming from different jurisdictions.[4]

Scope of the Research

The research underpinning this book aims at examining the role, the general framework and the empirical effectiveness of the main alternative dispute resolution tools (administrative appeals, mediation, and ombudsman) in administrative matters, within the broader context of the administrative justice system. The research combines approaches from law, public administration, public policy and political science.

The main tool for dispute resolution in administrative law is the administrative appeal. Before going to court for annulment/modification of an administrative decision, the citizen as interested party has the possibility (or the duty) to challenge the decision before the administration itself. The (internal) administrative appeal is addressed to the issuing public authority or to the higher public authority and in most cases is a compulsory requirement before a suit can be filed.

The research was approached using a combination of methods—first hand legal research—the inventory of legal rules and descriptions of their functionality in national literature, research of reports on this matter, and of evaluation studies; secondary data analysis of statistics emanating from public sector authorities on administrative proceedings. This helped us map what data are available and what kind of research is necessary to develop next to a comparative juridical, a comparative empirical perspective on administrative proceedings. The research instruments also included interviews with administrative law judges/public officials with experience in conducting administrative appeal procedures, advocates and ordinary citizens.

For the purpose of this study, *effectiveness* of administrative appeals and of other forms of ADR was measured in terms of limiting the number of administrative disputes that reach the courts. In this context, an administrative appeal not followed by a court action was considered as a successful one, even if this includes the instance when the applicant who was not granted a positive solution dropped the court action anyway. We are aware of the limitations of such a simple definition of effectiveness. Due to the constraints of the research project and of the natural

[2] http://www.reneual.eu/.

[3] Financed by the Romanian Agency for Research, Grant Exploratory workshop, contract no. WE-2012-4-089.

[4] See http://www.apubb.ro/goodgovernancestudies/events/.

resistance of legal scholars to employ empirical tools, it is the best we could do. However, we tried to mitigate the shortcomings of the research methodology by advising authors to conduct interviews and to discuss case studies in order to supplement the findings or to explain them better.

From a normative perspective, the book assesses the nature and the role of selected ADR tools as institutions of administrative law and in relation to the judicial review. In addition, the normative part of the project focuses on the enforcement of citizens' right to good administration by administrative appeals, mediation and Ombudsmen.

On the empirical side, the research looks at the effectiveness of administrative appeals in avoiding court proceedings while providing protection of rights and interests of aggrieved parties. The two fundamental models of administrative appeals—mandatory and optional—are being assessed in this respect, as well as their effectiveness in specific fields which are more susceptible to administrative litigation, especially with a focus on two party litigation and litigation involving third party interests. Thus, the contributions focus on administrative appeals against *building permits*, *refusals to provide public information*, *fiscal decisions*, *social security decisions, public procurement* or other selected matters that appear to be relevant in one system or another. Both normative and empirical aspects of the research dwell side by side, in order to develop the interdisciplinary nature of the study. The basic line of questions and answers for this study was the issue how, without effectively denying citizens' rights to appeal, and effective balance can be found between the interests of the citizens and the interests of the administration in designing procedures of administrative litigation.

The research questions targeted the three selected ADR tools—administrative appeal, Ombudsman and mediation.

As to the administrative appeals, the questionnaire addressed by the authors of national chapters tried to find the answer to the following questions: Which is the historical background of these legal institutions in the national law? Are they a borrowed model or can they be considered the result of an evolutionary process? Do the origins of the legal institution affect its performances? How can the model of administrative appeals be characterized: mainly mandatory or mainly optional? If it is mainly mandatory, are there any *exceptions* from the mandatory character? If it is mainly optional, are there any instances where by law it is mandatory? Instances when public institutions and respectively private persons exercise the administrative appeal: Does the administrative appeal have *de jure* a *suspensive effect*? Is it a decision of the public authority, or of the court? Is this issue regulated in a specific manner in your jurisdiction? Do the administrative appeals have a *devolutive effect?* Is the principle of *non reformation in pejus* applicable in your administrative procedure? Discuss the possibility public authorities have to grant compensations as a result of administrative appeal. Are public entities reluctant to do this, so that the only option remains a court procedure? Which are the deadlines for exercising and answering to administrative appeals? Is their length appropriate for insuring effectiveness? Discuss if there are any incompatibilities between short deadlines for mandatory administrative appeals (if the case) and the right to access the courts, in

light of the Art. 6 par. 1 of the ECHR; What is the relation between judicial review (court proceedings) and the administrative appeal? Is the administrative appeal a prerequisite for judicial action? If not, does it have any influence on court proceedings (prorogation of deadlines, etc.)? Are there any exceptions to these rules? Which aspects have to be verified by the judge when receiving an action? Is the lack of administrative appeal a cause for inadmissibility? Which is the significance of the answer to an administrative appeal received after court proceedings have been initiated? Can it be considered as an administrative decision, or should it be regarded as an attempt to amiably resolve the judicial process? Is that a dimension of the activism of the courts towards a final dispute settlement? What other tools for final dispute settlement by courts can be identified in the national jurisdiction? Can the claimant change the scope of the review when reaching the court or should it follow the scope of the administrative appeal? The deadlines for mandatory administrative appeals and their relation with the deadlines for judicial review raise also question about access to justice, so the relevance of Art. 6 of the ECHR has been analyzed; finally, what powers are given to courts to go beyond striking down decisions and influence/bind the new decision or even replace them? Are they being exercised, or the courts are rather refraining from using these tools for final dispute settlement?

Relating to the Ombudsman: What background for the institution in national law? Is it a borrowed model or can it be considered the result of an evolution? Do the origins of the institution affect its performances? Can ombudsman institutions be understood as auxiliary to the checks and balances of the rule of law/rechtsstaat? In what ways? How effective are these (separate) auxiliary ombudsman functions? (relation ombudsman—parliament, relation ombudsman—courts; relation between different ombudsman at the local, national, EU and international levels). How can this (positive or negative) effectiveness be explained? How do ombudsman institutions relate to the role of citizens in the public domain of politics and adjudication? Do ombudsman institutions add to citizens' trust in government? Are there cases where it enjoys more legitimacy than other political and legal institutions? If so, why? To what extent has the office of the Ombudsman contributed to creating a culture of good governance and respect of the rule of law where it has otherwise been lacking? Do Ombudsman institutions develop ethical norms for government-citizens relations? How? What is the nature of the norms of *Ombudsprudence* and how are they perceived? What is the actual relationship between OMB norms and legal norms? In how far does the ombudsman operate legal norms and in how far does then ombudsman operate principles of proper administration? To what extent do OMB norms entail, overlap or form the basis of fundamental rights protection in administrations? To what extent are Ombudsmen seen to use jurisprudence referring to principles of proper administration as a source of inspiration for the development of a concept of good administration for dealing with complaints, or is it the other way around? Is there a measure of "cross-fertilization" between ombudsman and Courts? Are Ombudsman norms more effective in achieving the goals of citizen protection compared to legal norms?

In relation to the mediation, we tried to answer the following questions: Which is the relation between administrative appeals and mediation in administrative matters? Is mediation an alternative to the administrative appeals? According to the public law rules, are public entities allowed to resort to mediation? What is the juridical effect of mediation in public law? Can a mediation agreement replace an administrative decision (act)?

More general issues concerned the level of absorption of European principles of good governance in the practice of national public administration, and whether there are instances where administrative appeals are solved using these principles.

On the empirical side, the authors of the national chapters addressed principally the issue whether the ADR tools are *effective* in avoiding court proceedings. For this to happen, an agreed threshold was established at 50 %—at least half of the administrative appeals/Ombudsman interventions/mediation settlements should have prevented parties to further lodge a court action. The differences among levels of governance, independent or autonomous public bodies/subordinated bodies, bodies with political/professional (carrier based) management were addressed as well. The perception of the ADR tools was analyzed in some chapters: What is the perception of citizens on the administrative appeals/other ADR tools? Are they seen as a useful tool for solving disputes or as a nuisance? If so, why? Can this be explained by the level of trust in the justice system when compared with the level of trust in the public administration system?

Summary of Findings

The national chapters are following more or less the outline given in the questionnaire, while paying attention to the specifics of the jurisdiction analyzed. They are followed by three comparative chapters, which summarize the main findings from the national chapters as regards the administrative appeal, Ombudsman and mediation.

The panorama of ADR tools in national administrative law is as diverse as the systems of administrative law themselves. However, some common features appear: Administrative appeals are the most used remedy for administrative actions, followed by the Ombudsman, while mediation and other ADR tools are still working their way up into the ranks. Public policy initiatives promote the use of ADR means—traditional or non-traditional—for solving administrative disputes, although reluctance still persists as to the use of agreements instead of decisions taken with public power in administrative law.

The legal systems of Western Europe are divided along the line of mandatory-optional administrative appeals—Germany, Netherlands, Belgium, Spain and Denmark opting for mandatory appeals and France and Italy for optional appeals. However, exceptions to the rule blur the differences. Austria is undergoing a major change of paradigm—a stated switch from administrative appeals to judicial review—which is contradicted by the actual maintenance of administrative appeals

in a different setting. In Central and Eastern Europe, the mandatory system of appeals was appropriated unanimously. The United Kingdom stands alone, as usually, with a different approach to ADR in a common law setting.

In most of the jurisdictions analyzed in this book, the institution of the Ombudsman can act as an alternative dispute resolution mechanism to the judiciary. However, its role is still limited. Countries where the Ombudsmen are visibly playing a more prominent role in relation to the government and/or the judiciary are Netherlands, UK and Denmark.

Mediation is still underdeveloped in public law. Resorting to mediation in administrative proceedings seems generally to be infringing on the core principles of administrative law such as legality, exercise of public power, accountability. All legal systems theoretically allow mediation (or conciliation, arbitration) in administrative law. However, in practice, mediation is considered to be an institution that does not fit within the confines of administrative proceedings. Few jurisdictions employ mediation as a mean to solve administrative disputes regularly—it finds effective endorsement from the Government in Netherlands and in the United Kingdom.

Finally, as the chapter on EU law confirms, administrative appeals, Ombudsman and mediation have proven to be important tools of dispute resolution at the level of the EU institutions and agencies.

The overall conclusion is that ADR tools are playing an important role in the administrative justice system of all jurisdictions analyzed here, with different degrees of effectiveness. However, further coordinated and comparative research is necessary, to grasp the real impact of such legal instruments in the administrative practice. The book offers a first glimpse into this topic, hopefully of interest for both scholars and practitioners.

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- Quality Management in Courts and in the Judicial Organisations in 8 Council Of Europe Member States, A qualitative inventory to hypothesise factors for success or failure, Strasbourg, Council of Europe Publishing CEPEJ (2011),
- Administering Courts and Judges, *Rethinking the tension between accountability and independence of the judiciary, 30 October 2009, inaugural lecture, pp. 1–32*. http://igitur-archive.library.uu.nl/law/2009-1111-200124/UUindex.html,

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Part I
National Perspectives

Chapter 1
Administrative Appeals in Germany

Ulrich Stelkens

List of German Abbreviations

AGVwGO	Gesetz zur Ausführung der Verwaltungsgerichtsordnung (law on the execution of the VwGO)
Amtsbl.	Amtsblatt (gazette of the Saarland)
AO	Abgabenordnung (Fiscal Code)
BauR	Baurecht (journal)
BayVBl.	Bayerische Verwaltungsblätter (journal)
BGBl.	Bundesgesetzblatt (Federal Gazette)
BSG	Bundessozialgericht (Federal Social Court)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (collection of decisions of the BVerfG)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (collection of decisions of the BVerwG)
DÖV	Die Öffentliche Verwaltung (journal)
DStR	Deutsches Steuerrecht (journal)
DVBl.	Deutsches Verwaltungsblatt (journal)
FGO	Finanzgerichtsordnung (Code of Procedure for Fiscal Courts)
GG	Grundgesetz (Basic Law, the German constitution)
GV. NRW.	Official abbreviation of the gazette of Nordrhein-Westfalen
GVBl.	Official abbreviation of the gazette of Bayern, Rheinland-Pfalz and Thüringen
GVOBl.	Official abbreviation of the gazette of Niedersachsen and Mecklenburg-Vorpommern

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GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition)
JuS	Juristische Schulung (journal)
KStZ	Kommunale Steuer-Zeitschrift (journal)
LKRZ	Zeitschrift für Landes- und Kommunalrecht Hessen, Rheinland-Pfalz, Saarland (journal)
LKV	Landes- und Kommunalverwaltung (journal)
MediationsG	Mediationsgesetz (Law on Mediation)
NdsVBl.	Niedersächsische Verwaltungsblätter (journal)
NJW	Neue Juristische Wochenschrift (journal)
NordÖR	Zeitschrift für öffentliches Recht in Norddeutschland (journal)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (journal)
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungs-Report (journal)
NWVBl.	Nordrhein-Westfälische Verwaltungsblätter (journal)
NZBau	Neue Zeitschrift für Bau- und Vergaberecht (journal)
NZS	Neue Zeitschrift für Sozialrecht (journal)
OLG	Oberlandesgericht (Higher Appeal Court of the ordinary courts)
OVG	Oberverwaltungsgericht (Higher Administrative Court)
SGb	Die Sozialgerichtsbarkeit (journal)
SGB X	Sozialgesetzbuch – 10. Buch (10th Book of the Social Code)
SGG	Sozialgerichtsgesetz (Social Courts Act)
ThürVBl.	Thüringer Verwaltungsblätter (journal)
UPR	Umwelt- und Planungsrecht (journal)
VerwArch.	Verwaltungsarchiv (journal)
VG	Verwaltungsgericht (Administrative Court)
VwGO	Verwaltungsgerichtsordnung (Code of Administrative Court Procedure)
VwVfG	Verwaltungsverfahrensgesetz (Administrative Procedure Act)
ZfBR	Zeitschrift für deutsches und internationales Baurecht (journal)
ZUR	Zeitschrift für Umweltrecht (journal)

1.1 Introduction[1]

Writing an article about alternative dispute settlement for administrative matters in Germany is a complicated matter. You cannot simply refer to the Code of

[1] The "art" of citing articles in a statute is quite elaborated in Germany: An "Art." or a "§" indicates a section of a statute, a Roman numeral indicates the subsection of a section and an Arabic numeral a phrase in a subsection. Therefore, § 80 I 1 VwGO means: Section 80 Subsection 1 phrase 1 of the VwGO.

Administrative Court Procedure (*Verwaltungsgerichtsordnung—VwGO*)[2] or to the Administrative Procedure Act (*Verwaltungsverfahrensgesetz—VwVfG*),[3] because a whole bundle of Codes and legal acts are applicable in this context, all of which use the same concepts but provide for different solutions in their details. This is because of the quite unique fact that five hierarchies of courts, each with its own specific jurisdictions and codes of procedure, have been established in Germany.[4] Three of them are specialized in administrative law matters and two in private law matters: The finance courts (*Finanzgerichte*) have jurisdiction over (federal) tax matters, the social courts (*Sozialgerichte*) have jurisdiction over social law matters and the administrative courts (*Verwaltungsgerichte*) have jurisdiction over all other administrative matters.[5] The labor courts (*Arbeitsgerichte*) have jurisdiction over (private) labor law disputes and are also competent for all disputes between those employees of the administration whose employment is based on a regular contract governed by normal (private) labor law.[6] Finally, the ordinary courts (*ordentliche Gerichte*) are competent in civil and criminal law matters. As they are competent in civil law matters, the ordinary courts are also competent for all disputes involving the administration if private law is applicable to its actions—which is quite often the case.[7] In addition, for historical reasons only the ordinary courts have jurisdiction over (nearly all) disputes on non-contractual state liability.[8]

Finally, because of a not quite convincing decision of the federal lawmakers, the ordinary courts are also competent for (nearly all) disputes concerning public procurement.[9] Due to the peculiarities of this topic, we will address alternative

[2] VwGO in the version of the promulgation of 19 March 1991 (BGBl. I, p. 686), most recently amended by Art. 5 of the Act of 10 October 2013 (BGBl. I, p. 3786)—a translation by *Neil Musset* can be found at http://www.gesetze-im-internet.de/englisch_vwgo/index.html.

[3] VwVfG in the version of the promulgation of 23 January 2003 (BGBl. I, p. 102), most recently amended by Art. 3 of the Act of 25 July 2013 (BGBl. I, p. 2749). This law only applies to federal authorities. Nevertheless, the *Länder* have adopted (nearly) identical acts applicable to the *Länder* and municipal authorities, see Maurer (2011), § 5, no. 1.

[4] For an overview of the German court system, see Foster and Sule (2010), pp. 80ff.; Robbers (2012), no. 44ff.

[5] See § 40 I VwGO: "Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. Public-law disputes in the field of Land law may also be assigned to another court by a Land statute."

[6] See Stelkens (2011b), pp. 15f.

[7] See Stelkens (2011b), pp. 3ff. (with further references).

[8] See § 40 II 1 VwGO: "Recourse shall be available to the ordinary courts for property claims from sacrifice for the public good and from public-law deposit, as well as for compensation claims from the violation of public-law obligations which are not based on a public-law contract; this shall not apply to disputes regarding the existence and amount of a compensation claim in the context of Article 14 I 2 GG."

[9] For more details, see Burgi (2011), pp. 105ff.; Schoch (2013), § 50, no. 92ff.; Schröder and Stelkens (2011), pp. 16ff.; Stelkens and Schröder, (2010), pp. 307ff.

dispute resolution in matters of public procurement in a separate section of this chapter (*see* Sect. 1.3). In general, this article will focus on administrative appeal in the form of the "objection"[10] foreseen in §§ 68 ff. of the VwGO, §§ 348 ff. of the Fiscal Code (*Abgabenordnung—AO*)[11] in connection with §§ 44 ff. of the Code of Procedure for Fiscal Courts (*Finanzgerichtsordnung—FGO*)[12] and §§ 78 ff. of the Social Courts Act (*Sozialgerichtsgesetz—SGG*)[13] (see Sect. 1.2). In contrast to these formal procedures, informal administrative remedies have not really been able to develop in Germany, and the institution of an ombudsman is nearly unknown (see Sect. 1.2.5). The unique traits of the formal procedures may also be the reason why instruments of alternative dispute resolution could not really develop as an instrument of administrative appeal (see Sect. 1.4). Lastly, due to the quite comprehensive codification of principles of good administration since the 1970s, no real "traces of Europeanization" can be detected in the decision-making practices of the administrative authorities involved in these procedures (*see* Sect. 1.5).

1.2 The Objection Procedures in the Sense of §§ 68ff. VwGO, §§ 347ff. AO and §§ 78ff. SGG

Focusing an article about German alternative dispute resolution in administrative proceedings on the objection procedure in the sense of §§ 68 ff. VwGO, §§ 347 ff. AO and §§ 78 ff. SGG is a bit hazardous. No German scholar would treat these objection procedures as "alternative" dispute resolutions in administrative proceedings. Rather, their use is often understood as a simple (and—depending on the political position of the author—useful or dispensable) prerequisite of judicial review, one which has to be passed through prior to certain (but not all) types of court action in administrative proceedings unless otherwise stipulated by statute of the Federation or the Federal State (*Land*). Therefore, the objection procedures are (in general) either obligatory or inadmissible.[14]

A final preliminary remark: Even if the objection procedures have some predecessors in pre-war German administrative procedural law (above all in Prussian

[10] This seems to be a common translation for "Widerspruch" in the sense of §§ 68ff. VwGO, §§ 78ff. SGG and the "Einspruch" in the sense of §§ 348ff. AO. See for example Robbers (2012), no. 421; Singh (2001), p. 219.

[11] AO in the version of the promulgation of 1 October 2002 (BGBl. I, p. 3866), most recently amended by Art. 13 of the Act of 18 December 2013 (BGBl. I, p. 4318). A translation provided by the Language Service of the Federal Ministry of Finance can be found at http://www.gesetze-im-internet.de/englisch_ao/index.html.

[12] FGO in the version of the promulgation of 28 March 2001 (BGBl. I, p. 442), most recently amended by Art. 6 of the Act of 10 October 2013 (BGBl. I, p. 3786).

[13] SGG in the version of the promulgation of 23 September 1975 (BGBl. I, p. 2535), most recently amended by Art. 7 of the Act of 19 October 2013 (BGBl. I, p. 3836).

[14] See, however, *supra* note 28.

Law),[15] this tradition does not play any role in actual discussions on the effectiveness and the shaping of these procedures—aside from some more or less rhetorical arguments not really meant to convince the opponent but to dismiss him or her.[16] The irrelevance of the historic sources of these procedures in the actual discussion may be due to the fact that in Germany comprehensive legal protection in administrative matters is a post-war phenomenon[17]; the SGG entered into force in 1954, the VwGO in 1960, and the FGO in 1965. The entry into force of the German constitution, the so-called "Basic Law" (*Grundgesetz—GG*), is to be considered a clear break in the history of German law on administrative court procedure. This is due to Art. 19 IV GG, which for the first time provided a guarantee of a (effective) recourse to the courts when individual rights are infringed by public authority. Therefore, in our context, it does not seem very helpful to go into deep historical detail.

1.2.1 The Relationship Between the Objection Procedure and the Notion of the *Verwaltungsakt*

The objection procedure as foreseen in §§ 68 ff. VwGO, §§ 347 ff. AO and §§ 78 ff. SGG is closely connected to the concept of the *Verwaltungsakt* (administrative act), a core form of administrative action concerning single-case decisions and a core concept of German administrative law in general.[18]

1.2.1.1 The Notion of the *Verwaltungsakt* in German Administrative Law

The *Verwaltungsakt* is identically defined by § 35 phrase 1 of the VwVfG, § 118 phrase 1 AO and § 31 phrase 1 of the 10th Book of the Social Code (*Zehntes Buch Sozialgesetzbuch—SGB X*)[19] as follows[20]:

[15] For details, see Cancik (2010), pp. 471ff.; Sydow and Neidhardt (2007), pp. 23ff.

[16] In the political debate, the argument was put forward that the objection procedure has to be abolished because it is a relic of the German "*Obrigkeitsstaat*"—i.e. a relic of Wilhelmine constitutional monarchy—which has no place in a modern democracy (Kamp 2008, [p. 44]; Schönenbroicher 2009, p. 1144). This sort of argument can hardly be taken seriously (see Cancik 2010, pp. 468 and 474, see also Biermann 2007, p. 139).

[17] For the development of administrative jurisdiction in Germany, see Hufen (2011), § 2, no. 1ff.; Schmidt-Aßmann and Schenk (2012), Einleitung no. 70ff.

[18] For the historical development of this concept, see Bumke (2012), § 35, no. 6ff. For a brief overview, see also Singh (2001), pp. 63.

[19] SGB X in the version of the promulgation of 18 January 2001 (BGBl. I, p. 130), most recently amended by Art. 6 of the Act of 25 July 2013 (BGBl. I, p. 2749).

[20] Concerning the reason for the existence of three codes of administrative procedure (VwVfG, AO and SGB X), see Maurer (2011), § 5, no. 5. See also note 3 on the different versions of the VwVfG on the federal and the *Land* level.

> A *Verwaltungsakt* shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect.

Every characteristic of § 35 phrase 1 VwVfG and its corresponding regulations has to be fulfilled in order for an administrative decision to qualify as a *Verwaltungsakt*. Therefore, not every administrative (single-case) decision can be qualified as a *Verwaltungsakt*.[21] Above all, (nearly all) decisions concerning the conclusion and execution of public contracts are *not* considered as *Verwaltungsakte* in Germany.[22] Also *not* considered as *Verwaltungsakte* are (nearly all) decisions concerning compensation in state liability matters. This is because of the fact that—as already mentioned—only the ordinary courts have jurisdiction over (nearly all) disputes on non-contractual state liability.

Apart from these particular cases, the qualification of administrative measures as *Verwaltungsakte* is the object of an abundant case law, reflected in the commentaries[23] on § 35 VwVfG.[24] As *Foster* and *Sule* correctly stress,[25] the legal definitions provided by § 35 VwVfG, § 118 AO and § 31 SGB X cover all sorts of (but not all) administrative measures in everyday life: The granting of licenses, building permissions, permits of residence, tax orders, demolition orders, expulsion of foreigners, granting of state benefits, the withdrawal of licenses, etc.

In addition, it is important to highlight that not only private persons may be addressed by a *Verwaltungsakt* but also public entities, even if the exercise of public authority is concerned.[26] Therefore, municipal supervisory authorities can address a *Verwaltungsakt* vis-à-vis a local government, ordering it—to give an example—to change an illegal local regulation or to withdraw an illegal individual decision. Importantly, even when a *Verwaltungsakt* is addressed to administrative authorities, the same rules are (in general) applicable as with *Verwaltungsakte* addressed to private persons.[27]

1.2.1.2 Special Procedural Remedies Concerning *Verwaltungsakte*

The correct classification of whether an administrative decision is a *Verwaltungsakt* or not is of vital importance for the individual in order that he or she uses the right procedural remedies against either a *Verwaltungsakt* imposing an obligation or the

[21] From a comparative perspective, see Singh (2001), pp. 69f.

[22] Burgi (2011), pp. 106f.; Schröder and Stelkens (2011), p. 17.

[23] For the function of commentaries in the German legal tradition, see Zimmermann (2005), p. 46.

[24] See for example Stelkens (2014), § 35, no. 50ff. For a brief overview, see also Singh (2001), pp. 63ff.

[25] Foster and Sule (2010), pp. 295f.

[26] Stelkens (2014), § 35, no. 177ff., 185ff.

[27] For exceptions concerning these kinds of *Verwaltungsakte*, see Jungkind (2008), pp. 209ff.

rejection of a beneficial *Verwaltungsakt*. There are special time-limited court actions foreseen by § 42 VwGO, § 40 FGO, § 54 SGG with which judicial quashing of a *Verwaltungsakt* (rescissory action—*Anfechtungsklage*), as well as the judicial order to issue a rejected or omitted *Verwaltungsakt* (enforcement action—*Verpflichtungsklage*), can be requested by the plaintiff if he/she claims that his/her rights have been violated by the *Verwaltungsakt* or its refusal or omission. § 42 VwGO reads as follows (§ 40 FGO, § 54 SGG are formulated in a similar way):

(1) The rescission of a *Verwaltungsakt* (rescissory action), as well as sentencing to issue a rejected or omitted *Verwaltungsakt* (enforcement action) can be requested by means of an action.
(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the *Verwaltungsakt* or its refusal or omission.

In general, the exhaustion of the objection procedure foreseen in §§ 68 ff. VwGO, §§ 348 ff. AO and §§ 78 ff. SGG is a prerequisite only for such rescissory and enforcement actions. As stipulated in §§ 68 ff. VwGO, §§ 44 FGO and §§ 78 ff. SGG, prior to lodging a rescissory action or an enforcement action, the lawfulness and expedience of the *Verwaltungsakt* or its rejection shall be reviewed in preliminary proceedings. If such a review did not take place, the rescissory or enforcement action is inadmissible.[28]

These preliminary proceedings begin with the objection, which shall be lodged in writing within (in general) 1 month after the *Verwaltungsakt* or its rejection has been announced to the aggrieved party (§ 70 VwGO, § 355 AO, § 84 SGG). As *Singh* correctly points out,[29] because a *Verwaltungsakt* is required to mention the remedy against it and the time within which it can be sought, the objection is facilitated to this extent. If the *Verwaltungsakt* fails to mention the remedy and the time limit, an objection can be filed within 1 year (see § 58 VwGO, § 356 AO, § 66 SGG). After the expiry of that deadline, the *Verwaltungsakt* or its rejection becomes (in general) definitive, which means, it can – despite its possible unlawfulness – no longer be challenged in the courts (see Sect. 1.2.1.3).

The deciding authorities (see Sect. 1.2.2) will uphold the objection if the corresponding act is considered to be illegal or unsuitable (see Sect. 1.2.3). If the deciding authorities find the act neither illegal nor unsuitable, they may dismiss the

[28] However, there are specific case law exceptions from the requirement for an objection procedure. These exceptions do not exclude the admissibility of the objection (Pietzner and Ronellenfitsch 2010, § 31, no. 31) but are meant to make a rescissory action or an enforcement action admissible without having exhausted the objection procedure. This may be the case if the objectives of the objection procedure (see *supra* Sect. 1.2.4) have been fulfilled through other means. These exceptions are highly controversial in doctrine but cannot be discussed here in any further detail. On such exceptions, see (with further references) Geis (2010), § 68, no. 158ff.; Schoch (2011), pp. 1207ff.

[29] Singh (2001), p. 220.

objection by a formal decision (*Widerspruchsbescheid*), which shall be reasoned, supplemented with a notice on appeals and served. In this case, the applicant has (in general) once more to decide within 1 month if he wants to lodge a rescissory or enforcement action (§ 74 VwGO, § 47 FGO, § 87 SGG). If he does not, the *Verwaltungsakt* or its rejection again becomes definitive.

The specific case of non-decision within a reasonably period is referred to in § 75 VwGO (§ 46 FGO and § 88 SGG provide for similar provisions):

> If with regard to an objection or an application to carry out an *Verwaltungsakt* it has not been decided on the merits within a suitable period without sufficient reason, the action shall be admissible in derogation from § 68. The action may not be lodged prior to the expiry of three months after the lodging of the objection or since the filing of the application to carry out the *Verwaltungsakt*, unless a shorter period is required because of special circumstances of the case. If an adequate reason applies why the objection has not yet been ruled on or the requested *Verwaltungsakt* has not yet been carried out, the court shall suspend the proceedings until expiry of a deadline set by it, which can be extended. If the objection is admitted within the deadline set by the court or the *Verwaltungsakt* carried out within this deadline, the main case shall be declared to have been settled.

This means that the administrative authority may not delay judicial protection by either non-deciding on an application to carry out a *Verwaltungsakt* or by non-ruling on an objection. If there is an inexplicable delay, the applicant may go directly to court without having to exhaust the objection procedure. However, the applicant is not required to do so: He or she may also wait and pursue the administrative proceedings further. In other words, there are no time limits set for the direct action rendered possible by § 75 VwGO, § 46 FGO and § 88 SGG. Furthermore, even if in the end the administrative authority belatedly decides against the applicant, the already filed action in court does not become inadmissible but may be pursued by the applicant without the necessity to exhaust (again) the objection procedure.[30]

Three points have to be clarified concerning the scope of the objection procedure foreseen in §§ 68 ff. VwGO, §§ 348 ff. AO and §§ 78 ff. SGG: First, they are (in general) not admissible in contractual disputes and disputes concerning state liability. This is because of the fact that they are only a prerequisite for rescissory or enforcement actions, which for their part require that the administrative authority has issued or rejected a *Verwaltungsakt*. Furthermore, as already mentioned, administrative decisions concerning contractual disputes, public procurement and state liability matters are generally not considered as *Verwaltungsakte* (see Sect. 1.2.1.1). In such cases, direct court actions for a declaratory judgement (*Feststellungsklage*) or order for relief (*allgemeine Leistungsklage*) are admissible

[30] BVerwG, 13 January 1983—5C 114/81—BVerwGE 66, pp. 342–346 (p. 344); Hufen (2011), § 15, no. 28.

and—depending on the nature of the contract[31] or the foundation of the state liability claim—the administrative courts or the ordinary courts are competent. A formal administrative appeal comparable to the objection procedure is not foreseen in these cases (except in public procurement matters as will be described Sect. 1.3).

Secondly, even if the issue at stake is a *Verwaltungsakt*, the objection procedures cannot be used if the *Verwaltungsakt* in question has been settled—by repeal or otherwise—before the authorities competent to decide on the objection could decide. Yet in this situation, the applicant may still have an interest in having it declared that this act was illegal and infringed his/her rights (e.g. in case of a danger of re-offending under similar circumstances). Nevertheless, according to jurisprudence, in these cases only a court action for a declaratory order is admissible and therefore the objection procedure, being a prerequisite only of rescissory or enforcement actions, is not admissible.[32] This consequence is disputed by some scholars who argue that these procedures could fulfil their functions (see Sect. 1.2.4) also in these cases.[33]

Thirdly, it has to be stressed that if a *Verwaltungsakt* addresses a public authority—like many acts of municipal supervisory authorities—the addressed public authority has to go through the same procedure to challenge this supervisory act. This means that also in these cases, the rescissory action is applicable, that public authorities have to exhaust the objection procedure (if not stipulated otherwise by law) and that a supervisory measure may become definitive (even if potentially illegal) if the time limits are not respected. Therefore, in general, neither the courts nor the administrative authorities involved in the objection procedure would treat public entities filing an objection or a court action against a *Verwaltungsakt* differently from private persons in similar situations. For this reason, in the following we will not go into further details concerning these kinds of *Verwaltungsakte*.

1.2.1.3 Material Consequences of the Procedural Time Limit: The Notion of *Bestandskraft* of *Verwaltungsakte*

The fact that there are time limits for the initiation of the objection procedure and for the subsequent rescissory or enforcement actions has repercussions for the material conception of the *Verwaltungsakt*. This is the point of origin of the notion of *Bestandskraft* (non-appealability and definitiveness after the expiry of these time limits) of *Verwaltungsakte*.[34] As foreseen in § 43 VwVfG, § 124 AO, § 39 SGB X,

[31] On the qualification of the nature of a public contract in German law, see Stelkens (2011b), pp. 12ff.

[32] See decision of the BVerwG, 9 February 1967—I C 49.64—BVerwGE 26, pp. 161–168 (pp. 165ff.); Hufen (2011), § 18, no. 55.

[33] See for example Pietzner and Ronellenfitsch (2010), § 31, no. 29f.; Schenke (2012), no. 666.

[34] For the following, see Singh (2001), pp. 80ff.

a *Verwaltungsakt* comes into effect as soon as it is brought to the attention of the person concerned and continues to remain in effect until it is repealed, annulled, otherwise cancelled or expires for reason of time or for any other reason. As soon as a *Verwaltungsakt* comes into effect, it becomes binding not only on the affected parties but also on the administrative authority. It can only be repealed by the administrative authority for the reasons foreseen by the law.[35] Therefore, after the expiration of the time limits, the *Verwaltungsakt* becomes final and conclusive: It is beyond challenge through the regular remedies of objection or through an action in court. However, the administrative authority can still repeal the *Verwaltungsakt* (i.e. "withdraw" an illegal act [*Rücknahme*] or revoke a legal act [*Widerruf*])[36] or reopen administrative proceedings under the conditions foreseen by the law. Nevertheless, the person addressed by the *Verwaltungsakt* can only request the administrative authority to consider the possibility of a withdrawal of the *Verwaltungsakt* or to reopen the proceedings. In rare cases, the person may have an enforceable right to such a decision by the administrative authority (which may be pursued by an enforcement action).[37] Still, in general the decision to repeal an illegal *Verwaltungsakt* or to reopen the proceedings is a discretionary decision of the administrative authority. Furthermore, even if the administrative authority is aware of the illegality of the *Verwaltungsakt* or its rejection, it is generally not considered a misuse of these discretionary powers to reject such a demand, referring to the *Bestandskraft* of the *Verwaltungsakt* in question[38]—the *Bestandskraft* of a *Verwaltungsakt* being considered as a significant element to assure legal certainty and the effectiveness of administration. This fact has even been affirmed by the Federal Constitutional Court.[39]

The concept of *Bestandskraft* may also be the reason why informal remedies, the right to petition and the right to appeal to the ombudsman (in those *Länder* where an ombudsman exists) are not really considered by lawyers as useful instruments of alternative dispute resolution in cases where a *Verwaltungsakt* is at stake (see Sects. 1.2.5.1 and 1.2.5.2). On the one hand, the *Bestandskraft* is a "perfect excuse" for the administration not to reopen administrative proceedings.[40] On the other hand, the imminent expiration of the short time-limits for the objection procedure or the rescissory or enforcement actions forces the parties to initiate these formal remedies if they do not want to risk that the *Verwaltungsakt* in question becomes definitive (see Sects. 1.2.1.2 and 1.2.5.3).

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[35] See for example OVG Münster, 27 May 2013—1A 2782/11—NVwZ-RR 2013, pp. 745–747 (pp. 745f.).

[36] For the differences between "repealing," "withdrawing" and "revoking" of *Verwaltungsakte*, see Foster and Sule (2010), pp. 299f.; Nierhaus (2005), pp. 87–120ff. (pp. 99f.); Singh (2001), pp. 87ff.

[37] For more details, see Singh (2001), pp. 91f.

[38] So, most recently, BSG, 8 February 2012—B 5 R 38/11 R—NJW 2012, pp. 2139–2141 (point 17 of the judgment).

[39] BVerfG, 20 April 1982—2 BvL 26/81—BVerfGE 60, pp. 253–305 (p. 270).

[40] Wolke (1984), pp. 419–426 (pp. 424f.).

1.2.1.4 The Suspensive Effect of Objection and Rescissory Action[41]

Following § 80 I VwGO

> An objection and a rescissory action shall have suspensive effect. This shall also apply to constitutive and declaratory *Verwaltungsakte*, as well as to *Verwaltungsakte* with a double effect (§ 80a).

A similar rule is provided for in § 86a I SGG. Therefore, during the objection procedure and the court proceedings, a *Verwaltungsakt* may not be put into practice. The execution of a disadvantageous act has to be stopped as soon as an objection or—where no objection is required—a rescissory action is filed against this act. This suspensive effect is triggered in principle *ipso jure*. No specific demand by the plaintiff is necessary. Following § 80b I VwGO

> The suspensive effect of the objection and of the rescissory action shall end on non-contestability or, if the rescissory action has been rejected at first instance, three months after expiry of the statutory deadline for reasoning of the appeal available against the negative decision.

A similar provision is missing in the SGG; therefore, within the scope of the SGG, the suspensive effect ends only with the non-contestability of the *Verwaltungsakt*.[42] Yet even if § 80 VwGO and § 86a SGG establish the suspensive effect as a rule, this rule applies only when not otherwise specified by law, and § 80 II and III VwGO foresee some (very important) exceptions:

> (2) The suspensive effect shall only fail to apply
>
> 1. if public charges and costs are called for,
> 2. with non-postponable orders and measures by police enforcement officers,
> 3. in other cases prescribed by a federal statute or for *Land* law by *Land* statute, in particular for objections and actions on the part of third parties against *Verwaltungsakte* relating to investments or job creation,
> 4. in cases in which immediate execution is separately ordered by the authority which has issued the *Verwaltungsakt* or has to decide on the objection in the public interest or in the overriding interest of a party concerned.
>
> The *Länder* may also determine that appeals do not have a suspensive effect insofar as they address measures taken in administrative execution by the *Länder* in accordance with federal law.
>
> (3) In cases falling under Subsection 2 No. 4, the special interest in immediate execution of the *Verwaltungsakt* shall be reasoned in writing. No special reasoning shall be required if the authority takes an emergency measure designated as such in the public interest where a delay is likely to jeopardise the success, in particular with impending disadvantages for life, health or property as a precautionary measure.

Similar exceptions are foreseen in § 86a II to IV SGG. Yet the lists of exceptions in § 80 VwGO and § 86a SGG are not exhaustive: A bundle of other exceptions is provided in the special administrative law of the Federation and the *Länder*.

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[41] See, for the following also, Singh (2001), pp. 237ff.

[42] Keller (2012), § 86b, no. 11.

In general, these exceptions can be categorized in three groups: The first group consists of those exceptions that enable public authorities to ensure public safety, which would be put at risk if the simple filing of an objection created a suspensive effect (see § 80 II No. 2 and 3 VwGO). The second group of exceptions embraces, above all, *Verwaltungsakte* relating to investments that shall not be hindered by objections or rescissory actions of third parties (see § 80 II No. 3 VwGO and Sect. 1.2.1.5).

The third group of exceptions excludes the suspensive effect for those *Verwaltungsakte* establishing taxes or other public charges and costs. The reason why those *Verwaltungsakte* are exempted from the rule of § 80 I VwGO and § 86a I SGG is twofold: Firstly, all public authorities are dependent on a regular revenue collection which should not be endangered by the systematic use of objections and rescissory actions entailing a suspensive effect. Secondly, the simple filing of an objection or a rescissory action should not entail a factual deferment of payment (and the interest advantages related to this), which would be to the benefit of the plaintiff.[43] These reasons explain why the FGO does not provide for a suspensive effect in case of an objection or rescissory action concerning tax matters (see § 361 I AO and § 69 I FGO).[44]

Nevertheless, the exceptions to the rule of suspensive effect are not absolute. Either the authorities involved in the objection procedure or the competent court may—on request—order a suspension of the execution of the *Verwaltungsakt* in question if there is no ground for its immediate enforcement. This is provided for by § 80 IV and V VwGO (and equivalent rules in § 361 AO, § 69 FGO and § 86a III, § 86b SGG). § 80 IV and V VwGO read as follows:

> (4) The authority which has issued the *Verwaltungsakt* or which has to decide on the objection may suspend execution in cases falling under Subsection 2 unless otherwise provided by federal law. Where public charges and costs are called for, it may also suspend execution for a security. Suspension should take place with public charges and costs if serious doubts exist with regard to the lawfulness of the impugned *Verwaltungsakt* or if implementation would lead to unreasonable hardship for the party obliged to pay the charges or costs not required by overriding public interests.
>
> (5) On request, the court dealing with the main case may completely or partly order the suspensive effect in cases falling under Subsection 2 Nos. 1 to 3, and may restitute it completely or partly in cases falling under Subsection 2 No. 4. The request shall already be admissible prior to filing of the rescissory action. If the *Verwaltungsakt* has already been implemented at the time of the decision, the court may order the rescission of implementation. The restitution of the suspensive effect may be made dependent on the provision of a security or on other instructions. It may also be time limited.

Finally, it has to be stressed that the suspensive effect does not "work" when the plaintiff seeks a legal remedy against a rejection of a (favorable) *Verwaltungsakt*. As already mentioned, in these cases the enforcement action (and not the rescissory action) is suitable because the plaintiff wants a *Verwaltungsakt* to be issued: A

[43] Hufen (2011), § 32, no. 10.

[44] Seer (2012), § 22, note 25, 213ff.

simple suspension of its rejection by the administrative authority would not bring him/her nearer towards this objective. In these cases, (only) the court may make an interim order (see § 123 VwGO, § 114 FGO, § 86b II SGG). This is possible if the danger exists that the enforcement of a right of the plaintiff could be prevented or considerably impeded by means of an alteration of the existing state of affairs. An interim order may also be made to settle an interim condition if this appears necessary in order to avert major disadvantages or to prevent the immanent use of force or for other reasons.

1.2.1.5 Particularities of *Verwaltungsakte* Affecting Third Parties

The foregoing explanations (mostly) only took into consideration *Verwaltungsakte* concerning one person, the one to whom a given act is addressed. However, a *Verwaltungsakt* beneficial for the person to whom it is addressed could still affect third parties disadvantageously. Such *Verwaltungsakte* with double-effect occur mostly within the scope of the application of the VwVfG and the VwGO. Thus, in the following only these laws will be taken into consideration. The classic example of such *Verwaltungsakte* with double-effect are building permits or grants of permission to a person to construct a plant or other projects that affect the legal interests of the neighboring residents. Nevertheless, the following applies also to all other *Verwaltungsakte* with double-effect.

Being beneficial to him/her, on the one hand, the person addressed by the *Verwaltungsakt* (beneficiary) has no interest in challenging this act. On the other hand, he/she is interested that this act becomes definitive as soon as possible. Therefore, a withdrawal of the act by the administration because of its illegality is as disadvantageous for the beneficent as would be the act's quashing by a court as a result of a court action (of a third-party). In addition, the ability of the administration to withdraw a beneficial *Verwaltungsakt* is limited and the legitimate expectations of the beneficiary have to be taken into account: The beneficiary had good reasons to believe that the *Verwaltungsakt* in question is definitive and relies on it being so (e.g. when the beneficiary has made financial arrangements that he/she can cancel only at an unreasonable disadvantage). Therefore, § 48 VwVfG limits the ability of the administrative authority to withdraw beneficial *Verwaltungsakte* for reasons of their illegality (in general—not only of those beneficial *Verwaltungsakte* having third party effect).[45]

On the other hand, being disadvantageous for an affected (but not addressed) person, this person may—as a third-party—have an interest in challenging the *Verwaltungsakt* in court if he or she believes it to be illegal. In fact, a rescissory action is considered to be admissible in these cases. Therefore, the affected person may obtain the judicial quashing of the *Verwaltungsakt* in question if this act is

[45] For more details, see Foster and Sule (2010), pp. 299f.; Nierhaus (2005), pp. 99f.; Singh (2001), pp. 88f.

illegal and violates his/her rights. This means also that before going to court, the affected person has to exhaust the objection procedure. Here, the administrative authorities involved in this procedure may uphold the objection and, therefore, repeal the *Verwaltungsakt* in question. In addition, the time limits for the objection or the rescissory action also apply for the judicial remedy of the affected person. He or she has to act within 1 month after the *Verwaltungsakt* in question, or the ruling on the objection, has been given *to him/her* by the administration. Only after the expiration of these time limits the *Verwaltungsakt* becomes definitive for him/her. Furthermore, in this case it becomes also more or less definitive for the administration—a withdrawal of the act for reasons of illegality is no longer possible because of the aforementioned necessity to respect the legitimate expectations of the beneficiary.

The foregoing description hinted that the initiation of an objection procedure or a rescissory action by an affected third-person directly affects the interests of the beneficiary. Therefore, the beneficiary has the right to participate in the objection procedure and court proceedings—not as a defendant but as a person whose rights are directly affected by the decision of the court or the competent administrative authorities. Therefore, § 71 VwGO foresees a hearing for the beneficiary:

> If the rescission or amendment of a *Verwaltungsakt* is linked in the objection proceedings with a grievance for the first time, the person concerned should be heard prior to issuing the remedial notice or the ruling on an objection.

In addition, the beneficiary has the right to challenge the decision of the court or the decision of the authorities involved in the objection procedure if they decide in favor of the affected person and quash or withdraw the *Verwaltungsakt*. However, neither the court nor the authorities involved in the objection procedure have to—or are allowed to—take into consideration the legitimate expectations of the beneficiary: If the *Verwaltungsakt* is illegal and violates the rights of the affected person, the act has to be quashed or withdrawn even if the beneficiary had no reason to doubt its legality. Therefore, the law does not protect the legitimate expectations of the beneficiary before the time limits for formal legal remedies against the *Verwaltungsakt* have expired for *every* third-party affected by it. Of course, this legal uncertainty may delay investments and is, therefore, often considered to make it unattractive to invest in Germany.

Finally, it has to be stressed—as is clarified by § 80 I 2 VwGO—that the filing of an objection or a rescissory action against a *Verwaltungsakt* with double-effect by an affected person also entails the suspensive effect. Therefore, the beneficiary of this act may not take advantage of the act while the objection procedure and the court action are pending. § 80a VwGO tries to reconcile the conflicting interests by ruling the following:

> (1) If a third party submits an appeal against the *Verwaltungsakt* addressing another and favouring the latter, the authority may
>
> 1. on request by the beneficiary, order immediate implementation in accordance with § 80, Subsection 2, No. 4,

2. on request by the third party, in accordance with § 80, Subsection 4, suspend implementation and take interim measures to secure the rights of the third party.

(2) If a party concerned submits an appeal against a *Verwaltungsakt* which poses a burden on it in favor of a third party, the authority may order immediate execution on request by the third party in accordance with § 80, Subsection 2, No. 4.
(3) The court may, on request, alter or rescind measures in accordance with Subsections 1 and 2 or take such measures. § 80, Subsections 5 to 8, shall apply *mutatis mutandis*.

In addition, the suspensive effect of objections and rescissory actions concerning building permits and other (planning) decisions regarding infrastructure projects is often excluded by statute. The most important of these exceptions is § 212a I of the Federal Building Code (*Baugesetzbuch—BauGB*), which establishes that objections and rescissory actions concerning building permits have no suspensive effect. Nonetheless, the neighbor—as an affected person—may request an order to suspend the execution of the building permit on the basis of § 80 IV and V of the VwGO.

1.2.2 Administrative Authorities Involved in Objection Procedures

§ 73 VwGO, § 83 SGG and § 367 AO provide different models concerning the competence to rule on an objection. Nevertheless, it is possible to discern a basic model of objection procedures, which takes the form of a two-stage procedure. This is foreseen as a rule (which is subject to various exceptions) in § 73 VwGO and § 83 SGG. Furthermore, there is a one-stage procedure foreseen in § 367 AO and in many cases within the scope of the VwGO and the SGG. Finally, there are special arrangements for the organization of the objection authority that are applicable in only two of the *Länder* (*Rheinland-Pfalz* and *Saarland*).

1.2.2.1 The Basic Model: A Two-Stage Procedure

The basic model of the objection procedure is the two-stage procedure as foreseen in § 73 VwGO and § 83 SGG. In the first stage, the authority that has issued or rejected the *Verwaltungsakt* in question (issuing authority—*Ausgangsbehörde*) has to decide whether they will remedy it or not (§ 72 VwGO, § 85 I SGG). If they remedy the objection, the procedure is finished. If they decide not to remedy the objection, § 73 I No. 1 VwGO provides for the following:

If the authority [*which has issued or rejected the Verwaltungsakt*] does not remedy the objection, a ruling on the objection shall be handed down. This shall be issued by

1. the next higher authority unless another higher authority is determined by law.

[. . .].

A similar provision is foreseen in § 85 II No. 1 SGG. Therefore, in general, the issuing authority is not competent to reject an objection. If it chooses not to remedy the objection, the competence to decide on the objection is shifted to the "higher authority," i.e. the authority that has supervisory competences over the issuing authority. Therefore, on one hand, the objection procedure may also be understood as an instrument of administrative supervision. On the other hand, § 73 I No. 1 VwGO (and the similar § 85 II No. 1 SGG) provide for a certain shift of competences. In German administrative law in general, supervisory competences do not embrace the power to act instead of the supervised authorities vis-à-vis the citizen (if not otherwise explicitly foreseen by law). Therefore, the supervisory competences are generally limited to the guidance and control of the supervised authority and do not include the competence to act in place of them. However, this is different in the case of § 73 I No. 1 VwGO: If the higher authority rules on an objection, then all competences of the issuing authority vis-à-vis the citizen concerning this case are shifted to the higher authority, meaning the objection has a *devolutionary effect* (see also Sect. 1.2.3.1).

1.2.2.2 Variant 1: Identity of the Issuing Authority and the Objection Authority

§ 367 AO states quite simply:

> The revenue authority which has issued the *Verwaltungsakt* shall take a decision on the objection by means of an objection ruling.

In addition, § 73 I VwGO and § 85 SGG foresee that in specific situations, the issuing authority is also competent for the decision on the objection. § 73 I VwGO provides, for example:

> If the authority [*which has issued or rejected the Verwaltungsakt*] does not remedy the objection, a ruling on the objection shall be handed down. This shall be issued by
>
> 1. [. . .],
> 2. the authority which has issued the *Verwaltungsakt*, if the next higher authority is a federal or supreme *Land* authority,
> 3. in self-administration matters the self-administration authority unless otherwise determined by law.
>
> Derogating from the second sentence, No. 1, it can be determined by law that the authority which has issued the *Verwaltungsakt* is also competent for the decision on the objection.

In these cases, the objection procedure is generally reduced to one step: The issuing authority has to directly rule on the objection itself.[46] The issuing authority itself ruling on the objection is specifically and most importantly foreseen in

[46] Pietzner and Ronellenfitsch (2010), § 26, no. 10.

self-administration matters, especially those of the municipalities (§ 73 I No. 3 VwGO). This is meant to protect the autonomy of the local government.[47]

If the issuing authority and the objection authority are identical, it is completely legal to entrust the same civil servant who issued the original *Verwaltungsakt* to rule on the objection. In these cases, there is of course reason to fear that the objection does not lead to a real reconsideration of the legality and suitability of the *Verwaltungsakt*. The civil servant may be inclined to simply reject the objection by referring to the "accuracy of the statement of reasons given in the original notice" and some additional stereotyped idioms.[48] This can be avoided through internal organizational counter-measures, namely by creating a specialized department within the issuing authority (legal redress offices). Such legal redress offices are created within the revenue authorities, which assures a quite unbiased evaluation of the objection.[49] However, in general the municipalities do not create such internal departments because of lack of staff—often they do not even have (any longer) a real legal department for their own affairs.

1.2.2.3 Variant 2: Objection Authority with Quasi-Judicial Organization

The second variant is based on § 73 II VwGO, which provides that

> Provisions in accordance with which commissions or advisory boards replace an authority in the preliminary proceedings of Subsection 1 shall remain unaffected. In derogation from Subsection 1 No. 1, the commissions or advisory boards may also be formed in the authority which has issued the *Verwaltungsakt*.

A similar regulation can be found in § 85 II 3 SGG. These regulations are seen as authorizing the *Länder* to assign the task of the objection authorities to administrative bodies of a quasi-judicial nature—at least for *Verwaltungsakte* that were issued by authorities of the Land or the municipalities or other administrative authorities of the *Land*. If such quasi-judicial administrative bodies are created, the proceeding following the filing of an objection is again two-staged: First, the issuing authority has to decide if they will remedy the objection. If they do not want to remedy it, they cannot rule on the objection but have to hand it to the quasi-judicial organized administrative body.

Only two *Länder* make use of the option provided for by § 73 II VwGO in a broad manner: *Rheinland-Pfalz* and the *Saarland*. In their laws on the execution of the VwGO,[50] the creation of "legal commissions" (*Rechtsausschüsse*) on the level

[47] Hufen (2011), § 6, no. 44.

[48] Kallerhoff (2008), p. 36.

[49] Seer (2012), § 22, no. 11.

[50] *Rheinland-Pfalz*: §§ 6ff. of the law on the execution of the VwGO (Landesgesetz zur Ausführung der Verwaltungsgerichtsordnung—AGVwGO) in the version of the promulgation of 5 December 1977 (GVBl., p. 451), most recently amended by Art. 1 of the Act of 21 July 2003

of the municipalities and "counties" (*Landkreise*[51]) is foreseen.[52] These commissions are chaired by either the mayor/"county commissioner" (*Landrat*) or by a civil servant who has to be either a fully qualified lawyer or qualified for a senior administrative position. The other members of the commission are honorary members elected by the municipal or "county" council. These commissions rule on objections on the basis of an oral hearing, which are typically open to the public. In addition, supervisory instructions to these commissions are prohibited. If the ministry or the higher authority believes that the ruling of the commission on the objection is illegal, they have to act against this decision in court.[53] This clearly reflects that these commissions are organized following a judicial model.

The *Rechtsausschüsse* seem to have a quite good reputation. Their independence, the mandatory oral hearing and the participation of the lay commission members clearly help the appellant to accept its final decision as being unbiased. The procedure guarantees that the arguments of the appellant are seriously considered by the *Rechtsausschuss*.[54] Nonetheless, an objection procedure involving a *Rechtsausschuss* is quite complex and, therefore, there is a real danger that these procedures can become unduly lengthy. Additionally, it is sometimes claimed that they lack specialization in the issues at hand. The debate between scholars and practitioners on the advantages and disadvantages of *Rechtsausschüsse* is quite old.[55] In 2001, some reports on practical experiences with the *Rechtsausschüsse* in *Rheinland-Pfalz* were collected. These reports show a mixed picture of the strengths and weaknesses of the system.[56] Nevertheless, the governments of *Rheinland-Pfalz* and the *Saarland* seem to be convinced of the value of the *Rechtsausschüsse*: Whereas there is a political trend in most of the *Länder* to abolish the objection procedure totally or at least in parts (see Sect. 1.2.4.2), the abolition of the *Rechtsausschüsse* is not a political issue in *Rheinland-Pfalz* or the *Saarland*.[57]

Lastly, it has to be stressed that the *Rechtsausschüsse*—in spite of their quasi-judicial organization—are in no way considered as courts and they could never be qualified as courts because the members of the commission do not fulfil the criteria

(GVBl., S. 212); *Saarland*: §§ 7ff. of Act No. 719 on the execution of the VwGO (Gesetz Nr. 719—Saarländisches Ausführungsgesetz zur Verwaltungsgerichtsordnung—AGVwGO) of 5 July 1960 (Amtsbl. p. 558), most recently amended by Art. 2 of the Act of 19 September 2012 (Amtsbl. I, p. 418).

[51] On the *Landkreise*, see Singh (2001), p. 36.

[52] For more details, see Guckelberger and Heimpel (2009), pp. 246ff.; Hinterseh (2002), pp. 18ff.

[53] For more details, see Guckelberger and Heimpel (2012), pp. 6 ff.; Kintz (2009), pp. 5ff.

[54] Hinterseh (2002), pp. 7ff.

[55] See Hinterseh (2002), pp. 58ff., also with further references.

[56] See Ziekow (2001).

[57] See Fröhlich (2010), p. 446; Guckelberger and Heimpel (2009), p. 249.

to be "judges," as foreseen by Art. 97 GG.[58] Therefore, the commissions are part of the administration.

1.2.3 Decision Making Powers in the Objection Procedures

In general, the objection procedure is characterized as a formal administrative appeal foreseen to control for the legality (*Rechtmäßigkeit*) or suitability[59] (*Zweckmäßigkeit*) of a *Verwaltungsakt* or its rejection (see § 68 I 1 VwGO, § 78 I 1 SGG).[60] A *Verwaltungsakt* is considered to be illegal if it does not comply with every formal, procedural and substantive requirement foreseen by law for this specific *Verwaltungsakt*.[61] Therefore, this applies to every *Verwaltungsakt* and is a standard of review in every objection procedure. In contrast, the suitability of the *Verwaltungsakt* is only relevant in the objection procedure if the law grants a certain degree of discretion to the administrative authority.[62] Therefore, it does not apply in case of strictly bound administration. In this case, the issuing or non-issuing of a *Verwaltungsakt* may only be legal or illegal but never "suitable" or "unsuitable."

However, the foregoing description of the "standards of review" in the objection procedure may give rise to a misunderstanding: The decision making powers of the administrative authorities involved in the objection procedure are *not* limited only to quashing or maintaining the *Verwaltungsakt* in question. In truth, they are manifold and limited at the same time. On the one hand, they are strictly focused on the *Verwaltungsakt* that is the subject matter of the procedure. On the other hand, the deciding authorities in the objection procedure have extensive authority to decide on this subject matter.

1.2.3.1 The Objection Procedure as a Continuation of the Original Proceedings

As already said, the decision making powers of the authorities involved in the objection procedure are not limited just to control the legality and suitability of a given *Verwaltungsakt* or its rejection. The filing of an objection leads to a reopening

[58] See Foster and Sule (2010), pp. 213f.

[59] Sometimes in English legal literature on German administrative law the term "suitability" is used to describe the principle of proportionality (Singh 2001, pp. 163ff.). This is not meant here; "*Zweckmäßigkeit*" in the sense of § 68 I 1 VwGO, § 78 I 1 SGG means something like "advisability," "usefulness," "expediency." Therefore, an unsuitable *Verwaltungsakt* is not illegal (which would be the case if the principle of proportionality was not respected) but just not adequate.

[60] See, for example, Schenke (2012), no. 642.

[61] See Foster and Sule (2010), p. 297.

[62] For the German concept of discretion, see Foster and Sule (2010), pp. 291ff.; Singh (2001), pp. 88f.

of the procedure. Thus, the objection procedure has to be considered as a continuation of the original proceedings, one which may lead to a totally "reformed" decision. This means that the ruling on the objection may also be based on new facts, new legal considerations and new considerations on the suitability of the act.[63] This is clearly shown by § 79 I No. 1 VwGO, § 44 II FGO, § 96 I SGG, which provide that (in general) the subject matter of the rescissory action shall be the original *Verwaltungsakt in the shape it has assumed through the ruling on an objection*. This effect of an objection is even more evident when the objection is filed against the rejection of a *Verwaltungsakt*. Here, the authorities involved in the objection procedure are not allowed to just determine if the rejection of the requested *Verwaltungsakt* was legal at the time when the act was rejected: They also have to decide if the claim of the applicant is founded *today*. If they believe the claim to be founded, they should not just simply quash the rejection but issue the requested act themselves.[64]

The forgoing also—and especially—applies to the decision making powers of an objection authority which is not identical with the issuing authority. This is the reason why the filing of an objection is considered to have a *devolutionary effect* (see Sect. 1.2.2.1). Yet it must be stressed that the devolutionary effect is limited to the subject matter of the original proceeding. Therefore, the objection authority may only quash the challenged act or issue an illegally rejected act. It cannot grant any compensation for the illegal decision taken by the issuing authority. This is because in the context of German administrative law, the granting of compensations and all questions concerning state liability are in general—for historical reasons—not really considered as an object of administrative proceedings but as a subject of (private) tort law.[65]

1.2.3.2 Special Characteristics of the Decision Making Powers of *Rechtsausschüsse*

The foregoing discussion regarding the decision making powers of an objection authority also applies to the *Rechtsausschüsse* in *Rheinland-Pfalz* and the *Saarland* (see Sect. 1.2.2.3). They also have to decide on the legality and suitability of the *Verwaltungsakt* like other objection authorities. In principle, this means that the devolutionary effect of the objection applies to *Rechtsausschüsse* too. Nevertheless, in self-administration matters of the municipalities, the *Rechtsausschüsse* decide only on the legality of the *Verwaltungsakt*; the suitability of the act is solely controlled by the issuing authority. This is meant to protect the local authorities'

[63] See BVerwG, 6 September 1989—8C 88/88—BVerwGE 82, pp. 336–342 (p. 338); BVerwG, 1 December 1989—BVerwGE 84, pp. 178–183 (p. 181); Pietzner and Ronellenfitsch (2010), § 39, no. 1.

[64] Hufen (2011), § 9, no. 10.

[65] See *Stelkens* (2005), pp. 778f.

right to self-government.[66] Therefore, if a *Rechtsausschuss* dismisses an objection, it will include the considerations of the issuing authority on the suitability of the act in the statement of reasons on the decision ruling on the objection.[67]

Moreover, due to their non-specialization and their specific organization, the *Rechtsausschüsse* sometimes feel unable to exercise their power to grant final decisions in place of the issuing authority, even if self-administration matters are not at stake. So a *Rechtsausschuss* may—for example—not be willing to grant a building permit that had been illegally refused by the issuing authority because the procedure before the *Rechtsausschuss* is too cumbersome to establish the additional facts to be able to grant the permit. In these cases, the *Rechtsausschüsse* often just quash the rejection and oblige the issuing authority to effect the requested *Verwaltungsakt* while taking the legal view of the *Rechtsauschuss* into consideration. Following jurisprudence, this self-limitation of the decision making power is legal.[68] If the issuing authority still refuses to issue the requested *Verwaltungsakt*, then the plaintiff may go directly to court by filing an enforcement action—a new objection procedure is not necessary.[69]

1.2.3.3 The Possibility to Make Good Deficiencies of Procedure (§ 45 VwVfG, § 126 AO, § 41 SGB X)

As a continuation of the original proceedings, the objection procedure may also serve as an instrument to make good any formal deficiencies in the original proceedings. This is possible due to § 45 VwVfG and similar provisions in § 126 AO and § 41 SGB X. § 45 VwVfG—entitled "Making good defects in procedure or form"—reads as follows:

(1) An infringement of the regulations governing procedure or form [. . .] shall be ignored when:

1. the application necessary for the issuing of the *Verwaltungsakt* is subsequently made;
2. the necessary statement of grounds is subsequently provided;
3. the necessary hearing of a participant is subsequently held;
4. the decision of a committee whose collaboration is required in the issuing of the *Verwaltungsakt* is subsequently taken;
5. the necessary collaboration of another authority is subsequently obtained.

(2) Actions referred to in paragraph 1 may be made good up to the final court of administrative proceedings.

[66] Hufen (2011), § 7, no. 9.

[67] See Stelkens (2014), § 39, no. 128.

[68] BVerwG, 13 December 2007—4C 9.07—BVerwGE 130, 113–122 (point 10 of the judgement); for more details, see Pietzner and Ronellenfitsch (2010), § 42, no. 22ff.

[69] For more details, see Jutzi (2008), pp. 212ff.; Oster (2009), pp. 211 ff.

(3) [. . .].

Therefore, § 45 VwVfG, § 126 AO, § 41 SGB X may have a strange effect. A formal illegality of a *Verwaltungsakt* may have given rise to an objection that seems to be well founded; yet instead of upholding the objection, the issuing authority or the objection authority can "repair" the formal illegality of the *Verwaltungsakt* by making up for the procedural steps that had been illegally omitted by the issuing authority. In doing this, the objection becomes obsolete and has to be dismissed if the applicant does not withdraw the objection (a consequence of which may be the *Bestandskraft* [see Sect. 1.2.1.3] of the *Verwaltungsakt* in question). This is not necessarily to the full financial disadvantage of the applicant because following § 80 I 2 VwVfG, § 63 I 2 SGB X, the costs involved in the legal prosecution or defense proceedings shall be refunded to the appellant not only when the objection is well-founded but also when the objection is unsuccessful only because the infringement of a prescription as to form or procedure is insignificant under section § 45 VwVfG, § 41 SGB X.[70]

Taking this into consideration, there seems to be basically nothing to criticize about the possibility of making good formal deficiencies of the original proceedings through the objection procedure. If the act of procedure which was omitted in the first procedure and which is made up for in the objection procedure does not give rise to new facts or legal considerations, then there is no reason why the *Verwaltungsakt* in question should be quashed for formal reasons—only to be re-issued afterwards in a new proceeding by the same authority that issued the illegal *Verwaltungsakt* before.[71]

However, the real problem seems to be the danger that administrative authorities may tend to neglect procedural rights in administrative proceedings, knowing that this cannot be "sanctioned" by judicial review. Either the person affected by the *Verwaltungsakt* will not complain (so that the act will become final because of its *Bestandskraft*) or there will be an objection which will then give the authority the opportunity to "repair" the formal deficiencies. In the end, a systematic neglect of procedural rights by the issuing authority may, therefore, not be sanctioned by judicial review. Even if one doubts that judicial review of *Verwaltungsakte* is meant to "sanction" the administration,[72] such a systematic neglect of procedural rights—which seems to be quite frequent—is a real danger for the rule of law and should therefore be taken into consideration when evaluating the effectiveness of the objection procedure (see Sect. 1.2.4.2).

[70] A similar rule concerning the costs of the objection procedure is lacking in the AO, see Kallerhoff (2014), § 80, no. 11ff.

[71] Stelkens (2010), pp. 1082 f.

[72] Stelkens (2010), p. 1083.

1.2.3.4 Reformatio in Peius?

Whether the authorities involved in the objection procedure are allowed to amend the *Verwaltungsakt* to the detriment of the applicant is a well-known and often-discussed problem in German administrative law. A clear solution is only provided for by § 367 II 2 AO, allowing a *reformatio in peius*:

> The revenue authority ruling on the objection shall re-examine the matter in its entirety. The *Verwaltungsakt* may also be amended to the detriment of the appellant where he has been instructed of the possibility of a detrimental ruling stating the reasons and he has been given the opportunity to comment on this. An objection ruling shall only be required to the extent that the revenue authority does not remedy the objection.

Similar provisions allowing or forbidding a *reformatio in peius* are missing in the VwGO and the SGG. Following the jurisprudence, this means that the question of the permissibility of a *reformatio in peius* is left open by these acts and it is up to the special law of the Federation and the *Länder* to decide on this question.[73] In a landmark decision on 28 April 2003, the Higher Administrative Court (*Oberverwaltungsgericht*) of *Rheinland-Pfalz* ruled that the *Rechtsausschüsse* (see Sect. 1.2.2.3) may not rule to the detriment of the applicant given that their primary role is as an instrument of administrative review.[74] In contrast, in cases when the objection authority is the next higher authority (see Sect. 1.2.2.1) or identical with the issuing authority (see Sect. 1.2.2.2), the devolutionary effect of the objection is often considered to allow a *reformatio in peius*.[75] Following this jurisprudence, § 71 VwGO is applicable in these cases, which means that the applicant has to be heard before a detriment ruling. This gives him/her the opportunity to abandon the objection.[76] However, an explorative study came to the conclusion that the authorities involved in the objection procedure rarely make use of this competence.[77]

1.2.3.5 The Strict Binding of Administrative Authorities to (Even Illegal) Legislation and Norms and Its Effects on the Objection Procedure

A *Verwaltungsakt* may also be illegal because it implements a legislation or norm incompatible with higher ranking law. Thus, an act of parliament (of the Federation

[73] BVerwG, 12 November 1976—IV C 34/75—BVerwGE 51, pp. 310–315 (pp. 313ff.); BVerwG, 18 May 1982—7C 42/80—BVerwGE 65, pp. 313–322 (p. 319).

[74] OVG Koblenz, 28 April 2003—8 A 10366/04—NVwZ-RR 2004, p. 723.; For a critique, see Jutzi (2008), pp. 213f.; Schröder (2005), p. 1029f.

[75] For more details, see Hufen (2011), § 15, no. 15ff. Pietzner and Ronellenfitsch (2010), § 40, no. 1ff. For a recent case (stressing the limits of reformatio in peius), see OVG Münster, 27 May 2013—1 A 2782/11—NVwZ-RR 2013, pp. 745–747 (p. 746).

[76] Pietzner and Ronellenfitsch (2010), § 40, no. 30.

[77] Oppermann (1997), pp. 232ff.

or a *Land*) may be considered as unconstitutional, a statute of a *Land* may be considered as incompatible with federal law, and delegated legislation (*Rechtsverordnung*) or by-laws (*Satzung*) may be considered as incompatible with an act of parliament or the constitution. In all these cases arises the question of whether the authorities involved in the objection procedure may uphold the objection because the legal basis of the *Verwaltungsakt* or its rejection is incompatible with higher ranking norms. This question is of great practical significance because—above all in tax law and the law of fees and charges but also in building law, urban planning law and social law—the plea that a *Verwaltungsakt* is illegal because the legal basis for a *Verwaltungsakt* is illegal itself is quite frequent and often successful. The aforementioned fields of law are so complicated in Germany that errors in laws made by lawmakers are quite frequent, especially in municipal by-laws.

What is certain is that the *administrative courts* may quash a *Verwaltungsakt* due to the incompatibility of its legal basis with higher ranking norms.[78] Therefore, the invalidity of a piece of legislation or norm serving as a basis for a disadvantageous *Verwaltungsakt* may be the reason why a rescissory action succeeds. Equally, an enforcement action may succeed when the court rules that the legislation or norm obliging or permitting the administrative authority to reject a beneficial *Verwaltungsakt* is invalid. This is also true concerning acts of parliament—even though in these cases a preliminary ruling of the Constitutional Court (of the Federation or a *Land*) has to be requested by the deciding court (Art. 100 I GG).[79]

In contrast, administrative authorities are neither competent to initiate a procedure in the sense of Art. 100 I GG nor are they considered to be competent to decide on the conformity of delegated legislation or by-laws with higher ranking norms. Therefore, on the one hand, an objection may not be upheld because a statute, delegated legislation or a by-law on whose validity the legality of a *Verwaltungsakt* or its rejection depends is considered to be not in conformity with higher ranking norms. The authorities involved in the objection procedure are not competent to review the compatibility of statutes, delegated legislation and by-laws with higher-ranking norms.[80] On the other hand, the exhaustion of the objection procedure is still a prerequisite for the rescissory action or the enforcement action in these cases. This means that the applicant has to file an objection within the set time limits (see Sect. 1.2.1.2) just to avoid the *Verwaltungsakt* or its rejection becoming definitive

[78] Maurer (2011), § 4, no. 61f.

[79] Art. 100 I GG provides: "If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law." On this procedure, see Foster and Sule (2010), pp. 275f.

[80] On this question, see (with further references) Gril (2000), pp. 1080ff.; Maurer (2011), § 4, no. 63ff.

(*bestandskräftig*—see Sect. 1.2.1.3), even if it is clear that the administrative authorities involved in the objection procedure cannot uphold the objection because they cannot decide on the validity of the legislation or norm in question. Especially in tax and fee matters, this can lead to the filing of numerous objections that the objection authority can only dismiss—thus opening the way for the court to decide on the validity of the legislation or norm in question. § 367 IIb AO and § 85 IV SGG foresee a specific solution for this phenomenon. § 367 IIb AO provides

> (2b) Pending objections which affect a crucial legal issue ruled on by the Court of Justice of the European Communities, the Federal Constitutional Court, or the Federal Fiscal Court and which cannot be remedied before these courts following the outcome of the proceedings may only be withdrawn by way of general order. The highest revenue authority shall have subject-matter jurisdiction over the issue of the general order. The general order shall be published in the Federal Tax Gazette and on the website of the Federal Ministry of Finance. [. . .]. The general order shall be deemed as having been disclosed on the day following publication of the Federal Tax Gazette in which it is published. Notwithstanding § 47, Subsection 1, of the Code of Procedure for Fiscal Courts, the deadline for court action shall end after the expiry of one year following the day of publication. § 63, Subsection 1, No. 1 of the Code of Procedure for Fiscal Courts shall also apply insofar as an objection is rejected by a general order pursuant to the first sentence above.

Therefore, § 367 IIb AO and the similar § 85 IV SGG does not exclude the objection procedure in these cases but only facilitates the task of the objection authority.[81] It is designed to alleviate the symptoms instead of dealing with the underlying issue. In addition, a similar provision is missing in the VwGO. Finally, the same problems should also arise when the question is about the conformity of national law with European Union law. However, following the ECJ, all administrative authorities (including the authorities involved in the objection procedure) are required to disregard any national law that is not compatible with EU law.[82] Therefore, an objection may be upheld because the implementation of national law would be an infringement of EU law.

1.2.4 Objectives of the Objection Procedure and Exceptions from Its Scope of Application

All the foregoing should have made clear why the formal objection procedure is not considered as a form of *alternative* dispute resolution but as a preliminary stage of specific time limited court actions. It is a formal remedy against *Verwaltungsakte*, one which is generally considered to serve *three objectives*[83]:

[81] On this rule, see Bergan and Martin (2007), pp. 1384ff.; Tabbara (2008), pp. 211ff.

[82] See OVG Saarlouis, 22 January 2007—3 W 14/06—NVwZ-RR 2008, pp. 95–107; Burger (2011), pp. 985ff.; Demleitner (2009), pp. 1525ff.; Dettling (2009), pp. 613ff.

[83] Concerning the objection procedure foreseen in §§ 68ff. VwGO, see for example Hufen (2011), § 5, no. 2; a good summary of the development of the discussion in this context is given by

– to give the issuing authority the opportunity to internally review the legality (and the suitability) of the *Verwaltungsakt* (or its rejection);
– to give the citizen concerned an efficient (and non-expensive) non-judicial remedy;
– to relieve administrative courts of claims that may be satisfied by the authority itself.

Whether there is a real need for this kind of preliminary proceeding is above all a political decision that has to be taken by the legislator. Naturally, the exhaustion of the objection procedure is not a prerequisite even for rescissory or enforcement actions if a federal statute determines otherwise (see Sect. 1.2.4.1). In this case, the appellant has to go directly to court within the (short) time limit of 1 month (§ 74 VwGO, § 47 FGO, § 87 SGG). If he/she does not observe this time limit, the *Verwaltungsakt* in question will become definitive.[84] On the level of the *Länder*, a decision to abolish or modify the objection procedure—with the aforementioned consequences—can only be taken if federal law gives the *Länder* the authority to do so (see Sect. 1.2.4.2).

1.2.4.1 Exemptions from the Objection Procedure Foreseen in Federal Law

Exemptions from the objection procedure are foreseen either in federal *lex specialis* or—of a more general character—in § 68 VwGO, § 348 AO and § 78 SGG. One could also name § 75 VwGO, § 46 FGO and § 88 SGG, which deal with the case of non-decision (see Sect. 1.2.1.2). To elaborate, § 68 I 2 VwGO reads as follows

> Such a review shall not be required if a statute so determines, or if
>
> 1. the *Verwaltungsakt* has been handed down by a supreme federal authority or by a supreme Land authority, unless a statute prescribes the review, or
> 2. the remedial notice or the ruling on an objection contains a grievance for the first time.

The exception named in § 68 I 2 No. 2 VwGO is justified on the assumption that these supreme authorities are especially qualified and objective, so that a further administrative control is seen to be superfluous.[85] The exception named in § 68 I 2 No. 2 VwGO makes sense seeing that the remedial decision or the ruling on the objection by the administrative authorities involved in the objection procedure are themselves also *Verwaltungsakte*. Therefore, § 68 I 2 No. 2 VwGO is intended to prevent the duplication of the objection procedure. It applies in cases of a *reformatio in peius* ruling on the objection (see Sect. 1.2.3.4) or when a

Oppermann (1997), pp. 40ff. The same is said regarding the objection procedure foreseen in §§ 348ff. AO (Seer 2012, § 22, no. 9) and the objection procedure foreseen in §§ 78ff. SGG (Leitherer 2012, Vorbem. §§ 77ff., no. 1a). For a comparative perspective, see Singh (2001), p. 221.

[84] For judge-specific exceptions, see note 28.

[85] Geis (2010), § 68, no. 136; Pietzner and Ronellenfitsch (2010), § 31, no. 18.

Verwaltungsakt having third-party effect is repealed by the objection authority as a consequence of an objection by a third-party (see Sect. 1.2.1.5).

§ 45 FGO—which has no equivalence in the VwGO and SGG—provides for another exception. With the approval of the issuing authority, the plaintiff may go directly to court without having to exhaust the objection procedure. No reason can be found as to why this is only foreseen in the FGO.[86] This procedure—called "leap action" (*Sprungklage*)—seems to be useful primarily when the applicant claims the legal basis of a *Verwaltungsakt* is invalid (see Sect. 1.2.3.5).

Regarding exceptions foreseen in federal *lex specialis*, one of the most important is § 70 VwVfG (in connection with § 74 I 2 VwVfG), which excludes the objection procedure for *Verwaltungsakte* issued in so-called formal administrative proceedings (*förmliche Verwaltungsverfahren*) or planning approvals (*Planfeststellungsbeschluss*—such as decisions concerning the planning of streets, railways and other infrastructural measures[87]). The reasoning is that the enhanced formality of these procedures should not be duplicated by an objection procedure.[88] Other *lex specialis* are simply motivated by the desire to speed up procedures, exemplified by § 11 of the Asylum Procedure Act (Asylverfahrensgesetz—AsylVfG).[89]

1.2.4.2 Exemptions from the Objection Procedure Foreseen in the Law of the *Länder*

Only within the scope of the VwGO (but not within the scope of the SGG and the FGO),[90] the *Länder* are (generally) authorized to stipulate that the exhaustion of an objection procedure should not be required as a prerequisite for the admissibility of a rescissory or enforcement action. If a *Land* foresees exceptions, this only applies to *Verwaltungsakte* issued by the administration of the *Land* or the municipalities of the *Land*, not to *Verwaltungsakte* issued by federal authorities. However, most laws—including most federal laws—are executed by *Land* authorities.[91] Therefore, an exclusion of the objection procedure by a Land may have a quite broad effect. This "licence to kill" the objection procedure was given to the *Länder* by the federal legislature in 1997 by amending § 68 I 2 VwGO. This reform was one aspect of a quite big reform package meant to promote "*Wirtschaftsstandort Deutschland*"

[86] Steinbeiß-Winkelmann and Ott (2012), pp. 914–919 (p. 917).

[87] These planning approvals are of course also *Verwaltungsakte* affecting third-parties, meaning that the principles described at Sect. 1.2.1.5 apply to them.

[88] Hufen (2011), § 6, no. 17.

[89] AsylVfG in the version promulgated on 2 September 2008 (BGBl. I, p. 1798), last amended by Art. 1 of the Act of 28 August 2013 (BGBl. I, p. 3474)—a translation by *Neil Musset* can be found at http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html.

[90] See Steinbeiß-Winkelmann and Ott (2012), pp. 918f.

[91] Foster and Sule (2010), p. 213; Hailbronner and Kau (2005), pp. 73ff.; Robbers (2012), no. 165ff.

(business location Germany) by speeding up and simplifying administrative procedures.[92]

The "opening clause" foreseen in § 68 I 2 VwGO allows the *Länder* to experiment: They can abolish the objection procedure totally, only partly, or they may adhere to it. The choice is in principle dependent only on the political will of the *Land* legislature. This in turn depends on the political evaluation of the effectiveness of the objection procedure—above all on the evaluation of

1. whether the objection procedure fulfils its main objectives and
2. whether the (financial) costs of maintaining the objection procedure are estimated to be higher or lower than the costs likely to follow from a possible increase of court actions.

These questions are answered differently across the *Länder*, so that a quite diverse picture has emerged, with different solutions in different *Länder*.[93] However, most of the *Länder* adhere to the objection procedure. As already said, this is true above all for *Rheinland-Pfalz* and the *Saarland*, which seem to be quite satisfied with their system of "*Rechtsausschüsse*" (see Sect. 1.2.2.3). Other *Länder* abolished the objection procedure for specific areas or in cases when the issuing authority and objection authority would have otherwise been identical, following § 73 I 2 No. 2 and 3 VwGO (see Sect. 1.2.2.2). A more radical solution can be seen in *Niedersachsen*[94] since 2004 and since 2007 in *Nordrhein-Westfalen*,[95] both of which abolished the objection procedure as extensively as possible.[96] The same occurred in *Bayern*,[97] but with an interesting variation: Since 2007, the objection procedure is in some cases a facultative administrative remedy. Within the time limits foreseen by § 70, § 74 VwGO, the applicant may either file an objection or go directly to court. If he/she goes directly to court, the exhaustion of the objection procedure is no longer considered as a prerequisite for the rescissory or enforcement action.[98] *Bayern* followed a model that was first—but in a less significant

[92] Rüssel (2006), pp. 523–528 (p. 525).

[93] For an overview of the different concepts, see Beaucamp and Ringermuth (2008), pp. 426–432 (p. 426); Hufen (2011), § 5 note 4. For a more detailed discussion, see Müller-Rommel et al. (2010), pp. 38ff.

[94] § 8a of the law on the execution of the VwGO (Niedersächsisches Ausführungsgesetz zur Verwaltungsgerichtsordnung—Nds. AGVwGO) in the version of the promulgation of 1 July 1993 (GVOBl., p. 175), most recently amended by Art. 1 of the Act of 25 November 2009 (GVOBl., p. 437).

[95] § 110 of the act on the court organization in Nordrhein-Westfalen (Gesetz über die Justiz im Land Nordrhein-Westfalen—JustG NRW) of 26 January 2010 (GV. NRW p. 30), most recently amended by Art. 9 of the Act of 4 February 2014 (GV. NRW p. 104)

[96] See on these reforms Kallerhoff (2008), pp. 334ff.; Kamp (2008), pp. 41ff.; Meyer (2009), pp. 7 ff-; van Nieuwland (2007), pp. 38ff.; Schönenbroicher (2009), pp. 1144ff.

[97] Art. 15 of the law on the execution of the VwGO (Gesetz zur Ausführung der Verwaltungsgerichtsordnung—AGVwGO) in the version of the promulgation of 20 June 1992 (GVBl., p. 163), most recently amended by §1 of the Act of 20 December 2011 (GVBl., p. 689).

[98] See Härtel (2007), pp. 67 ff.; Heiß and Schreiner (2007), pp. 616 ff.; Unterreitmeier (2007), pp. 614 ff.

way—developed in *Mecklenburg-Vorpommern*, where the optional objection procedure was established for some areas in 2005.[99]

Despite this diversity, the political arguments in favor of the total or partial abolishment of the objection procedure have been more or less the same in every *Land*[100]:

- Judicial protection could be speeded up and be more simple without a mandatory objection procedure (which is hardly convincing in view of § 75 VwGO, see Sect. 1.2.1.2).
- In reality there is no real self-review in the objection procedure; the same arguments are repeated which have already been exchanged in the original proceedings.
- The function to relieve administrative courts of claims is not fulfilled because the success rate of objections is too low as is the willingness of the applicants to accept a negative ruling on his/her objection, resulting in an excessively high willingness to seek protection of their rights in court.
- The objection procedure is mostly misused by the administrative authorities, who seek only to "repair" formal deficiencies of the *Verwaltungsakt* (see Sect. 1.2.3.3); this possibility invites the issuing authority to neglect the rights of the parties in the original procedure. The abolition of the objection procedure will therefore "strengthen" the original procedure. The issuing authority will fear having to justify its decision before a court without the help of the objection authority and will therefore work less carelessly during the original proceedings.[101]
- And even: There is a legitimate interest in making access to justice in administrative matters more difficult in order to avoid a misuse of legal protection to the detriment of investments.[102]

In view of this "official" identity of the political argumentation in favor of the abolishment of the objection procedure in every *Land* concerned, it is surprising how disunited the legislation of these *Länder* is concerning the areas where the objection procedure should be (exceptionally) maintained. In some *Länder* that are generally in favor of abolishing the objection procedure, it is, nevertheless, considered to be indispensable concerning municipal taxes and fees but could still be abolished concerning building permits. In contrast, in other *Länder* that are also generally in favor of abolishing the objection procedure, it is considered indispensable concerning building permits but can be abolished when it comes to municipal

[99] § 13a of the law on the execution of the law on court organization (Gesetz zur Ausführung des Gerichtsstrukturgesetzes) of 10 June 1992 (GVOBl., p. 314), most recently amended by the Art. 2 of the Act of 11 November 2013 (GVOBl., p. 609, 611). See on this reform Biermann (2007), pp. 144 ff.

[100] Beaucamp and Ringermuth (2008), p. 427.

[101] Kamp (2008), pp. 44f.; Schönenbroicher (2009), pp. 1146; see also Sydow and Neidhardt (2007), pp. 14ff.

[102] See the report of Müller-Grune and Grune (2007), p. 70, note 52.

taxes and fees. Other examples of this disunity could be easily cited.[103] Therefore, the question arises: Are we facing one political concept in different variants—or are we facing different political concepts based on a uniform official justification?

Finally, it is important to note that—quite intensive—empirical studies and model projects were launched by *Bayern* and *Niedersachsen* to evaluate and justify the legislative decision to abolish the objection procedure.[104] In this context, the results of an explorative study from 1997 are also often cited. This study was the outcome of a – very interestingly – doctoral thesis that explored the results of the objection procedure by analyzing the files of one important building control authority and the related files of the supervisory authority. This study came to quite ambiguous conclusions on the effectiveness of the objection procedure (founded on the practice of these authorities).[105] Nevertheless, it seems that everybody interprets the results of these studies differently and draws different conclusions from them. This seems to be due to different understandings of under which conditions the objection procedure—or its abolishment—could be judged as effective and whose perspective in this regard is taken. This issue will be further discussed below (see Sect. 1.2.6).

1.2.5 Informal Remedies and Verwaltungsakte

The extensive abolishment of the objection procedure by certain *Länder* (see Sect. 1.2.4.2) has raised the question of whether and how informal remedies can be used to avoid unnecessary court actions, especially in cases where the administration itself would prefer to have an opportunity to reconsider its decision in light of the arguments of the affected person and reopen the proceedings rather than be directly sued. However, also from the perspective of the person affected by a *Verwaltungsakt* or its rejection, it may be easier (and less expensive) to find informal—alternative—solutions to solve the problem rather than to go directly to court.

[103] Steinbeiß-Winkelmann (2009), p. 690.

[104] On the methods of these evaluations, see Cancik (2010), pp. 478ff.; especially on the results of the Bavarian model project in *Mittelfranken*, see Eibner (2011), pp. 48ff.; Müller-Grune and Grune (2007), pp. 65ff. On the results of the evaluation in *Niedersachsen*, see Heins (2010), pp. 148ff.; Müller-Rommel et al. (2010), pp. 60ff. and the "executive summary" by Meyer (2009), pp. 7ff.

[105] Oppermann (1997).

1.2.5.1 The Right to Petition as the Basis of Informal Remedies and Its Limits

However, informal remedies against *Verwaltungsakte* are—quite cynically—often characterized by German lawyers as "formless and fruitless."[106] The reason for this opinion may be the legal basis of such remedies.[107] They are founded on the right to petition as provided for by Art. 17 GG (and similar provisions in the constitutions of the *Länder*):

> Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.

Firstly, this means that every person has the right to object to a concrete decision or an administrative practice of an administrative authority by filing a motion for reconsideration (*Gegenvorstellung*) with the administrative authority responsible—irrespective of whether the complainant is him or herself affected by the subject matter of his or her objection. Such a motion for reconsideration invites the administrative authority to reconsider its decision or practice.

Secondly, Art. 17 GG provides the possibility for everybody to complain to supervisory authorities (*Aufsichtsbeschwerde*) about decisions taken by administrative authorities over which the supervisory authority has supervisory powers. Again, it is irrelevant whether the complainant is affected by the subject matter of the complaint or not. Such a complaint invites the supervisory authority to make use of its supervisory powers.

Finally, Art. 45c GG and similar provisions in the constitutions of the *Länder* provide for the existence of parliamentary petition committees.[108] Art. 45c GG reads as follows

> (1) The Bundestag shall appoint a Petitions Committee to deal with requests and complaints addressed to the Bundestag pursuant to Article 17.
> (2) The powers of the Committee to consider complaints shall be regulated by a federal law.

The statute foreseen in Art. 45c II GG[109] only provides for investigative powers and not for decision making powers (in contrast to what the wording of Art. 45c II GG may imply). Therefore, the powers of the petition committee are limited to either dismissing the petition—if it is considered not to be well founded—or forwarding the petition to the government with a recommendation to reconsider

[106] The German saying is that informal remedies are "*Fristlos*, *formlos*, *fruchtlos*."

[107] For the following, see Hufen (2011), § 1, no. 45; Pietzner and Ronellenfitsch (2010), § 24, no. 11ff.; Schiedermair (2012), § 48, no. 29.

[108] For the following, see Dietlein (2011), pp. 311 ff.; Langenfeld (2005), § 39, no. 54ff.; Uerpmann-Wittzack (2012), Art. 17, no. 1ff.

[109] Law on the competences of the Petitions Committee of the German Bundestag (Gesetz über die Befugnisse des Petitionsausschusses des deutschen Bundestages—Gesetz nach Art. 45c des Grundgesetzes) of 19 July 1975 (BGBl. I, p. 1921), most recently amended by Art. 4 II of the Act of 5 May 2004 (BGBl. I, p. 718).

the request of the petitioner or to take a concrete decision to accommodate the request. However, these recommendations are not binding on the government and if they are not followed it can have only political and not legal consequences.[110]

This shows the general weakness of the right to petition from the point of view of the petitioner—independent of to whom the petition (issuing authority, supervisory authority or petition committee) is addressed. Following the jurisprudence, the right of petition generally gives a right that the petition is considered and even a right to be informed about how the petition was treated.[111] Yet there is no enforceable right that the request be accommodated—even if it is well-founded. The notification about how the petition was treated does not even have to be reasoned,[112] which may be why the petition committees do not really develop their own review standards for good administration[113] (see Sect. 1.5). An analysis of the reports of the petition committees reveals another weakness of the system. The petition is generally not considered as an alternative to but rather as subsidiary of judicial protection; if the petitioner did not exhaust the formal remedies foreseen for his request, the petitions committee will in general see no reason to uphold the petition.[114] If a *Verwaltungsakt* or its rejection became *bestandskräftig* then the petitions committee will in most cases not find it objectionable that the administration adheres to this *Verwaltungsakt*, even if it infringes the rights of the petitioner.[115]

This is also true concerning petitions and complaints that are addressed to supervisory authorities requesting that it uses its supervisory powers to make the supervised authority change its decisions. Even if the decision of the supervised authority is obviously illegal, and even if the petitioner is directly affected by this decision through its infringement of his/her rights, he/she has no right to an intervention by the supervisory authority. Administrative supervision is not considered as an instrument for legal protection but as an instrument which solely serves the general interest.[116] Therefore, a complaint to supervisory authorities is considered only as simple "suggestion" that they use their supervisory powers in a specific way.[117]

1.2.5.2 Ombudsmen in Germany: A Rarity

Many municipalities and other administrative authorities (of the Federation and the *Länder*) have voluntarily established a sort of "complaints department," the head of

[110] Langenfeld (2005), § 39, no. 70ff.

[111] BVerfG, 22 April 1953—1 BvR 162/51—BVerfGE 2, pp. 225–232 (p. 229ff.).

[112] BVerfG, 15 May 1992—1 BvR 1553/90—NJW 1992, p. 3033; Langenfeld (2005), § 39, no. 35.

[113] Uerpmann-Wittzack (2012), Art 17, no. 28.

[114] See Hornig (2001), pp. 64ff.

[115] See also Wolke (1984), pp. 424f.

[116] Wolke (1984), pp. 423f.

[117] Schiedermair (2012), § 48, no. 29.

which is often called "*Bürgerbeauftragter*" (the German translation for "ombudsman") and who is the contact person for every complaint concerning the given administrative body.[118] Yet these "ombudsmen"—even if they take their tasks seriously and may be very helpful for the citizens—are just the consequence of an organizational decision of the authority in question and have no legal basis. Therefore, the civil servants fulfilling this task are not independent, meaning that his/her powers to ensure good administration in their respective administration are quite limited.

In contrast, the creation of an independent institution empowered to receive complaints concerning instances of every kind of maladministration, i.e. the installation of "real" ombudsmen, is quite unfamiliar in German constitutional and administrative law. Neither the federation nor most of the *Länder* have installed such an institution. In view of the comprehensive legal protection guaranteed the administrative courts, as well as the work of the parliamentary petition committees, the establishment of such an institution has not been a political priority for any majority grouping, having last been discussed to a more significant extent in the 1970s.[119] What is more familiar to German law is the creation of independent commissaries (*Beauftragte*) created to safeguard specific rights or public interests vis-à-vis the administration and competent to investigate complaints in this context. *Beauftragte* in this sense are, for example, the Commissioner for the Armed Forces (Art. 45b GG), data protection supervisors, freedom-of-information supervisors, women's representatives etc.[120]

"Real" Ombudsmen, with a focus on administrative matters in general, exist only in *Mecklenburg-Vorpommern*, *Rheinland-Pfalz*, *Thüringen* and—with limited competences—in *Schleswig-Holstein*.[121] In *Rheinland-Pfalz*, a *Bürgerbeauftragter* exists (since 1974) on a statutory basis[122] as an auxiliary of the parliamentary petition committee.[123] Following the same model, the first ombudsman of *Thüringen* was established in 2000.[124] In *Mecklenburg-Vorpommern*, an ombudsman is foreseen (since 1993) in Art. 36 of its constitution,[125] with operationalization provided for in a statute foreseeing tight cooperation with the parliamentary petition

[118] Schiedermair (2012), § 48, no. 55.

[119] On this discussion and the constitutional arguments in this context, see Guckelberger (2013), pp. 618ff.; Haas (2012), pp. 156ff.; Franke (1999), pp. 21ff.

[120] On these *Beauftragte*, see Kruse (2007), pp. 185ff.

[121] On these ombudsmen on the *Land* level, see Kruse (2007), pp. 257ff.

[122] Landesgesetz über den Bürgerbeauftragten des Landes Rheinland-Pfalz of 3 May 1974 (GVBl., p. 187) most recently amended by Art. 10 of the Act of 5 November 1974 (GVBl., p. 469).

[123] Concerning the genesis and the tasks of the Ombudsman in *Rheinland-Pfalz*, see Haas (2012), pp. 163ff.; Kempf (1986), pp. 13ff.; Kempf (1999), pp. 357ff.

[124] Thüringer Gesetz über den Bürgerbeauftragten (Thüringer Bürgerbeauftragtengesetz—ThürBüBG) of 15 May 2007 (GVBl., p. 54); concerning the genesis and the tasks of the Ombudsman in *Thüringen*, see Debus (2009), pp. 77–83 (pp. 79ff.); Haas (2012), pp. 177ff.

[125] Verfassung des Landes Mecklenburg-Vorpommern of 23 May 1993 (GVOBl., p. 372), most recently amended by the Act of 30 June 2011 (GVOBl., p. 375).

committee.[126] In *Schleswig-Holstein*, an ombudsman with a similar statute as in *Rheinland-Pfalz* has existed since the 1980s. However, its competences are limited to social matters.[127]

Being more or less an auxiliary of the parliamentary petition committee, the investigative powers of these ombudsmen in general do not go beyond the powers of these committees. Additionally, their decisions are not binding. In reading their annual reports—which can be found on their respective websites[128]—it is surprising that the scope of the reviews of these ombudsmen seem in general that it did not go beyond a review on legality. Furthermore, it again seems that a complaint to the ombudsman is not considered as an alternative but as subsidiary to judicial protection. If a *Verwaltungsakt* has become *bestandskräftig*, then the role of the ombudsman seems to be mostly restricted to explaining to the complainant that the issuing authority has the right not to reopen the proceedings. In addition, the ombudsmen seem not to have contributed to standards of good administration. However, this is because of the fact that these standards are largely codified in the VwVfG, AO and SGB X, as will be discussed later on (see Sect. 1.5).

1.2.5.3 The Decision on Informal Remedies in *Verwaltungsakt* Matters: "Self-review" (Only) to Avoid Court Actions?

It follows from the above that the filing of a petition, a complaint or another informal remedy may give reason for the issuing authority to reconsider the legality and suitability of a *Verwaltungsakt* before and even after a *Verwaltungsakt* becomes *bestandskräftig*, at the very least when the *Verwaltungsakt* at stake is not beneficial for the person to whom it is addressed (see Sects. 1.2.1.3. and 1.2.1.5). Therefore, the extensive abolishment of the objection procedure by certain *Länder* (see Sect. 1.2.4.2) has raised the question of whether and how informal remedies may be used by the *issuing authority itself* in order to avoid unnecessary court actions. The question arises especially in cases where the authority would like to have an opportunity to reconsider its decision in light of the arguments of the affected person and to reopen the proceedings rather than be directly sued. This

[126] Gesetz zur Behandlung von Vorschlägen, Bitten und Beschwerden der Bürger sowie über den Bürgerbeauftragten des Landes Mecklenburg-Vorpommern (Petitions- und Bürgerbeauftragtengesetz—PetBüG M-V) of 5 April 1995 (GVOBl., p. 190); concerning the genesis and the tasks of the Ombudsman in *Mecklenburg-Vorpommern*, see Haas (2012), pp. 176f.

[127] Gesetz über die Bürgerbeauftragte oder den Bürgerbeauftragten für soziale Angelegenheiten des Landes Schleswig-Holstein (Bürgerbeauftragten-Gesetz—BüG) of 15 January 1992 (GVOBl., p. 42), most recently amended by the Act of 16 May 2003 (GVOBl., p. 280). Concerning the genesis and the tasks of the Ombudsman in *Schleswig-Holstein*, see Debus (2009), p. 79; Elsner (1999), pp. 230ff.

[128] *Mecklenburg-Vorpommern*: http://www.buergerbeauftragter-mv.de/; *Rheinland-Pfalz*: http://www.derbuergerbeauftragte.rlp.de; *Schleswig-Holstein*: http://www.landtag.ltsh.de/beauftragte/bb/; *Thüringen*: http://www.thueringen.de/de/bueb/.

assumes that the issuing authority is informed about the concerns of the affected person before he or she files a rescissory action or an enforcement action. It leads to the astonishing fact that the administration invites—or even begs—an affected person to make use of his/her right to petition to open an *informal communication* before or instead of going to court.

Yet even in cases when the issuing authority could not uphold an objection itself because it is bound by a legislation or norm whose validity is contested by the applicant (see Sect. 1.2.3.5), it may be preferable for the administration to find ways to carry out (only) one representative court proceeding, rather than being sued by the masses of persons who are addressed by the given *Verwaltungsakte*. If the objection procedure is admissible, the simplest way to do so is to suspend the procedure in all cases until a representative proceeding is decided by a court. The aforementioned § 367 IIb AO and § 85 IV SGG presuppose such a possibility (see Sect. 1.2.3.5). However, this is not possible in cases where the objection procedure has been abolished. This created serious problems for some municipalities in *Niedersachsen* and *Nordrhein-Westfalen* when they were confronted with the allegation that their by-laws concerning municipal fees were invalid, raising fears that they would be sued by every fee debtor.

However, it follows from the above that a well-advised person affected by a *Verwaltungsakt* will not just count on the willingness of the administrative authority to reconsider an administrative act following an informal complaint. Therefore, he/she will directly file an objection or a rescissory or enforcement action in cases where the objection procedure has been abolished—just to hinder the entry into force of the *Bestandskraft*. Therefore, in case of the abolishment of the objection procedure, the administration has to find ways to guarantee that persons affected by a *Verwaltungsakt* will not suffer any prejudice if they do not go to court within the short time limits.

This has led to the creation of veritable complaint management systems within the concerned administrative authorities. The aforementioned evaluation report concerning the abolishment of the objection procedure in *Niedersachsen* compiles an account of the different "tactics" the administrations adopted to solve this problem.[129] Often in the notice itself the administrative authority invites the affected persons to get in contact with the administration before going to court "because in many cases possible inconsistencies can be clarified by this." One interesting solution found was to accompany a *Verwaltungsakt* (in the same notice) with a legally binding promise to enact a new *Verwaltungsakt* on the same subject if no informal ways to solve any given problem was found. This second *Verwaltungsakt* could then be challenged before court as if the first *Verwaltungsakt* had never been issued and had never been become *bestandskräftig*.[130] In doing this, the administrative authority ended up creating an optional informal objection

[129] Müller-Rommel et al. (2010), pp. 158ff.

[130] See Rhein and Zitzen (2008), pp. 64ff.

procedure in an area where the mandatory formal objection procedure had been abolished by the legislature.

These solutions may be "creative"; they may be helpful from the administration's point of view and even qualify as "customer-friendly." Nevertheless, there is one main difference between this sort of informal complaint management system and the formal objection procedure foreseen in §§ 68 ff. VwGO[131]: Abolishing the mandatory objection procedure leaves the decision about whether "customer-friendly" informal legal remedies are established to the discretion of the administrative authority. Thus, the person affected by a *Verwaltungsakt* loses his/her right to pre-trial proceedings. He or she only has the hope that the issuing authority itself will believe that pre-trial communication has advantages over an attitude best expressed by saying: "If you are not satisfied, go to court" (and hoping that most of the persons concerned will not do so). This raises also the risk of inconsistency: A municipality may find a specific "customer-friendly" solution useful in one area of administration while in other cases a more strict literal observance of the rules on *Bestandskraft* may be considered to be more in the interest of the administration.

1.2.6 The Effectiveness of the Objection Procedure: A Never Ending Discussion

Whether the objection procedure is a useful pre-trial tool for solving disputes or an annoying "transit station" one has to pass through before being allowed to go to court has been discussed in Germany for years and even decades. Naturally, this discussion has intensified since 2000, following the total or partial abolishment of the objection procedure in many *Länder* (see Sect. 1.2.4.2). What seems to be undisputed is that there is really no need for an objection procedure in the cases where it is excluded by federal law (see Sect. 1.2.4.1). This is true especially for the highly formalized procedures for public participation prior to the authorization of large scale infrastructure projects that may have a significant impact on the environment. In these cases, duplication of administrative procedures before court actions makes no sense.

Apart from these cases, it is impossible to evaluate the effectiveness of the objection procedure "as such" on the basis of representative empirical data. Some quite old statistics (dating from the 1950s, 1970s and 1980s) exist that support the conclusion that only in about less than 10–20 % of all cases is the objection procedure followed by a court action. However, the quality of these data and their relevance for evaluating the effectiveness of the objection procedure today is questionable.[132] The aforementioned explorative study of 1997, which analyzed the files of an important building control authority and its supervision authority,

[131] For the following, see Cancik (2010), pp. 492ff.

[132] On these data see, Oppermann (1997), pp. 66ff.

came to the conclusion that in 1979 and 1988 about 29 % of the objections analyzed were followed by a court action.[133] Furthermore, it is undisputed that after the abolishment of the objection procedure in *Niedersachsen*, court actions in their corresponding areas tripled.[134] A similar experience was seen in *Bayern* in the 1970s after a partial abolishment of the objection procedure in building law matters, which led to the quite quick revocation of this reform.[135]

These data may give the impression that the objection procedure is at least not totally ineffective in limiting the number of administrative disputes that reach the courts. However, the ambiguousness and non-representativeness of these data has to be stressed. As already shown, there are thousands of authorities on multiple different levels (federal level, *Land* level, district level, municipal level, tax authorities, social security institutions and other specialized administrative authorities) which may be involved in an objection procedure. They all have different internal administrative cultures and they are embedded in the different modernizing politics of the different *Länder* and the Federation. These different authorities decide on objection procedures in different fields of law (police law, building law, environmental law, tax and fee law, social law, economic administrative law, etc.) with different proclivities for legal disputes and different rates of acceptation of decisions taken by the administration. Therefore, neither the federation nor the *Länder* have compiled representative statistics on how many objection proceedings are carried out per year in their area (including municipalities, districts, specialized administrations, etc.). Not knowing how many objection proceedings are carried out per year means also that no one can say how many objection procedures are followed by a court action even if there are statistics on the incoming court actions (of the different *Länder*).

In addition, it is important to stress that the effectiveness of the objection procedure cannot be judged only by its capacity to reduce court proceedings but also in its ability to ensure effective legal protection. This cannot be measured by just counting the success rate of objections. Even if we say that "only" 15 % of objections are upheld, it is not clear whether and why this should be seen as a low (or high?) success rate.[136] However, the function of the objection procedure has also to be seen in the light of the short time limits (1 month) for rescissory and enforcement actions in those cases were no objection procedure is foreseen (see Sect. 1.2.4). If an every-day-life *Verwaltungsakt* affecting the man or woman on the street is at stake, it seems realistic to assume that these individuals may be able to file an objection within 1 month (the formal requirements are very limited and the

[133] Oppermann (1997), pp. 323ff.

[134] Müller-Rommel et al. (2010), pp. 81ff.; van Nieuwland (2007), pp. 39f. However, even the significance of these data is limited because in the same period when the information was gathered, some important reforms of substantive law took place, which could also be the reason for an increasing willingness to go to court; see Cancik (2010), pp. 482f.

[135] See Vetter (2004), pp. 90ff.

[136] Cancik (2010), pp. 476ff. Would it be acceptable if (only?) 15 % of the *Verwaltungsakte* issued by a specific administrative authority were illegal?

costs are quite low). On the other hand, to be obliged to make the decision to go to court (where the costs are higher and many more formalities have to be respected) and to prepare a court action within 1 month is much more burdensome. It has not yet been proven whether in modern society everyone is able to overcome the threshold required to sue the public administration to protect his or her rights.[137] On the contrary, it has been shown that between 2006 and 2008 in *Mecklenburg-Vorpommern*, about 80 % of the complainants opted for the objection instead of going directly to court when the *Land* legislature allowed an optional objection procedure in their given case (see Sect. 1.2.4.2).[138]

Therefore, the filing of the objection can also be considered as an instrument to buy time—at least when this objection has a suspensive effect (see Sect. 1.2.1.4). As already shown, this gain of time may be also of importance for the administration to clear up any inconsistencies in the *Verwaltungsakt* (see Sect. 1.2.5.3). Therefore, the mandatory objection procedure may also be considered as a pre-trial opportunity for reflection, which allows the person affected by the *Verwaltungsakt* and the issuing authority to reconsider their positions before going to court.[139] However, as already stressed, this would be superfluous concerning *Verwaltungsakte* which were issued after a very formal proceeding. Yet in proceedings concerning every-day-life questions, obligatory pre-trial proceedings seem to be necessary when the time limits for court actions—with the harsh consequences of *Bestandskraft* in case of their non-respect—are as short as they are in Germany.

1.3 Administrative Appeal and Public Procurement

To understand the German system of legal protection —and the role of administrative appeal—in public procurement matters, it is important to note that the protection of the unsuccessful tenderer is more or less kept to a strict minimum. The EU directives on public procurement have been transposed to the letter in order not to go beyond the standards of legal protection required by them.[140] Therefore, a real system of legal protection for the unsuccessful tenderers is foreseen only for those public contracts addressed by the directives. This was done by inserting a "Part IV" (§§ 97 ff.) entitled "Award of Public Contracts" into the Federal Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*—

[137] See the argument of Kamp (2008), p. 45.

[138] Cancik (2010), pp. 481.

[139] See Müller-Grune and Grune (2007), p. 71.

[140] For more details including the historical reasons for this solution, see Burgi (2011), pp. 105ff.; Schröder and Stelkens (2011), pp. 17ff.

GWB).[141] §§ 102 ff. GWB have created the *Vergabekammern* (Public Procurement Tribunals) as an instrument of legal protection for the tenderers (see Sect. 1.3.1). In contrast, no federal legislation foresees specific instruments of legal protection for the unsuccessful tenderers concerning public contracts outside the scope of the EU directives and (therefore) the §§ 97ff. GWB. Rules on public procurement outside the scope of §§ 97 ff. GWB can only be found in the budgetary regulations of the Federation and the *Länder*. Nevertheless, there are some administrative authorities competent to ensure that these budgetary rules on public procurement are respected and to whom unsuccessful tenderers may complain (see Sect. 1.3.2). To understand all this, it is important to again stress that the objection procedures foreseen in the VwGO, SGG and FGO generally do not apply to public procurement matters because the decision to award a public contract to a specific tenderer is not considered to be a *Verwaltungsakt* (see Sects. 1.2.1.1 and 1.2.1.2). Therefore, these decisions are also not considered to be a *Verwaltungsakt* with double-effect, which could be challenged by the unsuccessful tenderers through a rescissory action (see Sect. 1.2.1.5).

1.3.1 *The* Vergabekammern *in the Sense of §§ 102 ff. GWB*[142]

The *Vergabekammern* (Public Procurement Tribunals) form the first instance of legal protection of tenderers provided for in §§ 102 ff. GWB. They are charged to ensure that the provisions concerning public procurement are respected *during the award procedure*. However, they are not considered as courts but as administrative bodies[143] even if they may be considered as "courts" in the sense of Art. 267 TFEU.[144] Therefore, the final decision of the *Vergabekammer* is explicitly qualified as a (enforceable) *Verwaltungsakt* (§ 114 III GWB). The federal *Vergabekammern* are established at the *Bundeskartellamt* (Federal Cartel Office) while the *Vergabekammern* of the *Länder* are established within different *Land* administrative authorities. All *Vergabekammern* are administrative bodies which make their decisions independently and are bound only by the law (§ 105 IV GWB). Concerning their members, § 105 II GWB provides:

[141] Gesetz gegen Wettbewerbsbeschränkungen in the version published on 15 July 2005 (BGBl. I, p. 2114), as last amended by Art. 2 of the Act of 7 August 2013 (BGBl. I, p. 3154). A translation of the GWB provided by the *Bundeskartellamt* can be found at www.gesetze-im-internet.de/englisch_gwb/index.html. Part IV was inserted by the *Vergaberechtsänderungsgesetz* of 26 August 1998 (BGBl. I, p. 2512) and the promulgation of the new version of the GWB of 26 August 1998 (BGBl. I, p. 2546).

[142] For the following, see Burgi (2011), pp. 111ff.; Schröder and Stelkens (2011), pp. 21ff.

[143] Germelmann (2013), pp. 54 f.; Siegel (2010), pp. 9 f.

[144] See Pfau (2011), pp. 55f.; Siegel (2013), p. 155.

> (2) The *Vergabekammern* shall take their decisions through a chairman and two associate members of which one shall serve in an honorary capacity. The chairman and the full-time associate member shall be civil servants appointed for life with the qualification to serve in the higher administrative service, or comparably expert employees. Either the chairman or the full-time associate member shall be qualified to serve as a judge; generally this should be the chairman. The associate members should have in-depth knowledge of the practice of awarding public contracts, and honorary associate members should also have several years of practical experience in the field of the awarding of public contracts.

The *Vergabekammern* initiate review proceedings only upon formal request. In principle every person who has an interest in the contract and claims that his or her rights were violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application (§ 107 I and II GWB). However, the admissibility of the application is dependent on quite strict conditions. This is clearly shown by § 107 III 1 GWB, which stipulates:

> (3) The application is inadmissible if
>
> 1. the applicant became aware of the violation of provisions governing the awarding of public contracts during the award procedure and did not object to the contracting entity without undue delay.
> 2. violations of provisions governing the awarding of public contracts which become apparent from the tender notice are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application.
> 3. violations of provisions governing the awarding of public contracts which only become apparent from the award documents are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application.
> 4. more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the complaint.

The provisions on the proceedings of the *Vergabekammern* are similar to those provisions concerning the administrative court procedure. The *Vergabekammern* shall, acting on their own initiative, investigate the facts (§ 110 GWB) and the parties may inspect the files at the *Vergabekammer* (§ 111 GWB).[145] The objective of the procedure is described in § 114 I GWB[146]:

> The *Vergabekammer* shall decide whether the applicant's rights were violated, and shall take suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. It shall not be bound by the applications and may also independently bring an influence to bear on the lawfulness of the award procedure.

In addition, the filing of an application has a suspensive effect (§ 115 GWB), which means that the contracting entity must not make the award prior to the decision of the *Vergabekammer*.[147]

Even if the decision of the *Vergabekammer* qualifies as a *Verwaltungsakt*, these decisions cannot be challenged before the administrative courts. Instead, a specific system of legal protection is foreseen in §§ 116 ff. GWB: The decisions of the

[145] Germelmann (2013), p. 55.

[146] For more details, see Burgi (2011), pp. 127ff.

[147] For more details, see Burgi (2011), pp. 122ff.

Vergabekammern are subject to a court action called "immediate complaint" (*sofortige Beschwerde*), which is open to the parties to the proceedings of the *Vergabekammer* (§ 116 I GWB). The immediate complaint is decided exclusively by the Courts of Appeal (*Oberlandesgericht—OLG*)—which are ordinary courts[148]—that has jurisdiction at the seat of the *Vergabekammer*.[149]

Therefore, the *Vergabekammern* are only organized as an instrument of legal protection for the unsuccessful tenderers. Moreover, review proceedings are only admissible *before* the conclusion of a valid contract. The *Vergabekammern* are not allowed to annul a valid contract, as is made clear by § 114 II 1 GWB:

> Once an award has been made, it cannot be cancelled.

Thus, the conclusion of a *valid* contract ends the proceeding[150]—while in general, the non-respect of provisions concerning public procurement has no effect on the validity of a public contract (with the exception of the cases foreseen in Art. 2d of the Directive No. 89/665/EEC in its version of the Directive No. 2007/66/EC).[151]

However, the *Vergabekammern* do not have much time to make their decisions. § 113 I GWB provides:

> The *Vergabekammer* shall take its decision and give reasons in writing within a period of five weeks of receipt of the application. In the case of particular difficulties regarding the facts or the law, the chairman may in exceptional cases by statement to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairman shall give reasons in writing for this order.

Respect for the time limit is assured by § 116 II GWB, stipulating:

> An immediate complaint shall be admissible also if the *Vergabekammer* does not decide upon an application for review within the period set out in § 113 I; in this case the application shall be deemed to have been rejected.

This short time limit adheres to the general "acceleration principle" that governs the system of legal protection in public procurement matters as foreseen in §§ 102 ff. GWB.[152]

Finally, here are some statistics provided by the Federal Ministry of Economy[153] on the basis of § 129a GWB: 1,275 applications to the *Vergabekammern* were followed by 199 immediate complaints to the Courts of Appeal in 2009; 1,065 applications to the *Vergabekammern* were followed by 226 immediate complaints

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[148] See note 9.

[149] For more details Germelmann (2013), pp. 56ff.

[150] On the role of the principle "pacta sunt servanda" in this context, see Schröder and Stelkens (2011), p. 19.

[151] See § 101b GWB. For details, see Burgi (2011), pp. 133ff.; Stelkens (2012), p. 612; Schröder and Stelkens (2011), pp. 19f.

[152] Braun (2003), pp. 134 ff.

[153] http://www.bmwi.de/DE/Themen/Wirtschaft/Wirtschaftspolitik/oeffentliche-auftraege,did=190910.html.

to the Courts of Appeal in 2010; 989 applications to the *Vergabekammern* were followed by 241 immediate complaints to the Courts of Appeal in 2011. This means that in 2009, about 15 % of the applications to the *Vergabekammern* were followed by a court action; in 2010 about 21 % and in 2011 about 24 %. However, it has to be stressed that many applications to the *Vergabekammern* were inadmissible, were withdrawn by the applicant or were settled for other reasons during the proceedings. Therefore, these percentages may give a misleading picture.

1.3.2 The Administrative Review Bodies Outside the Scope of the §§ 102 ff. GWB

As already mentioned, no federal legislation provides for legal protection of the unsuccessful tenderers as far as public contracts outside the scope of the EU directives on public procurement are concerned. The public procurement rules outside the scope of the directives are only budgetary rules, which do not create enforceable, subjective rights for the unsuccessful tenderers.[154] The fact that the ordinary (!) courts have found ways to "create" legal protection in these cases by applying the injunction procedure foreseen in §§ 935 of the Code of Civil Procedure (*Zivilprozessordnung—ZPO*)[155] was not foreseen by the federal lawmakers.[156]

However, this new jurisprudence of the ordinary courts and the silence of the federal legislature do not prevent the unsuccessful tenderers from complaining to higher administrative authorities with supervisory powers over the contracting entity about an infringement of the (budgetary) public procurement rules. Yet these informal remedies just serve to inform the supervisory authorities; the complainant has no right to an intervention by the supervisory authority—as already shown in another context (see Sect. 1.2.5.1). Nevertheless, this sort of complaint may be successful. Quite often, the supervisory authorities ask the contracting entity not to award the contract before the supervisory authority has established the facts and made a decision—and in most cases, the contracting entities comply with these requests. In case of an infringement of the applicable public procurement rules, the supervisory authority may resort to its ordinary supervisory powers to resolve the infringement.[157] By this means the unsuccessful tenderer may obtain legal protection through a supervisory procedure originally intended solely to serve the general interest. Yet it again has to be stressed that after the conclusion of the

[154] Burgi (2011), p. 109.

[155] ZPO in the version of the promulgation of 5 December 2005 (BGBl. I, p. 3202), last amended by Art. 1 of the Act of 10 October 2013 (BGBl. I, p. 3786). A translation provided by *Carmen von Schöning* is available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

[156] For the details and the foundations of this jurisprudence, see Schröder and Stelkens (2011), p. 23.

[157] Glahs (2010), § 21 VOB/A no. 2.

contract, even the supervisory authority has no power to cancel the contract (or to force the contracting entity to do so), even if public procurement rules were not respected.[158]

Nevertheless, there are also provisions *inviting* the unsuccessful tenderers to complain to the supervisory authorities, though a general rule is only provided for in *Sachsen*, *Sachsen-Anhalt* and *Thüringen*. Their laws on public procurement[159] provide for a structured complaint proceeding that resembles a "light" version of the procedure foreseen by §§ 102 ff. GWB—the main difference being that the decision of the supervisory authority cannot be challenged in the courts.[160] Moreover, these provisions do not take into account the aforementioned jurisprudence of the ordinary courts regarding the protection of unsuccessful tenderers by judicial injunction. Therefore, it remains to be seen if the model of *Sachsen*, *Sachsen-Anhalt* and *Thüringen* will be copied by other *Länder* or the Federation. Nonetheless, at the very least, these provisions have led to the creation of administrative authorities specialized in public procurement rules in these three *Länder*.

1.4 Alternative Dispute Resolution and Administrative Appeal

German administrative law has always been quite open to alternative dispute resolution. Transactions and compromise contracts are well-known instruments even in public law matters, just as arbitration and mediation are possible. Whereas a transaction is a possible result of any administrative appeal proceeding in *Germany* (see Sect. 1.4.1), mediation is used in public law almost solely in the context of the planning of large-scale projects (see Sect. 1.4.2). Arbitration solutions seem to be even rarer.[161] Generally, the administration seems only to resort to arbitration to settle disputes concerning the execution of (very) complex public contracts, above all PPP contracts. However, these situations are quite specific. Therefore we will not go into further details on arbitration here.[162]

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[158] See note 145.

[159] § 8 II Gesetz über die Vergabe öffentlicher Aufträge im Freistaat Sachsen (Sächsisches Vergabegesetz—SächsVergabeG) of 14 February 2013 (GVBl. 2013, 109); § 19 II Gesetz über die Vergabe öffentlicher Aufträge in Sachsen-Anhalt (Landesvergabegesetz — LVG LSA) of 19 November 2012 (GVBl. LSA 2012, 536), most recently amended by the Act of 30 July 2013; § 19 II Thüringer Gesetz über die Vergabe öffentlicher Aufträge (Thüringer Vergabegesetz — ThürVgG) of 18 April 2011 (GVBl. 2011, p. 69), most recently amended by Art. 7 of the Act of 23 July 2013 (GVBl., p. 194, 202).

[160] On this procedure, see André (2011), pp. 330–339 (pp. 337f.); André and Sailer (2011), pp. 394–400 (pp. 397ff) ; von Bechtolsheim (2003), pp. 458–460 (p. 460); Huerkamp and Kühling (2011), pp. 1409–1414 (pp. 1413f.); Kins and Hering (2013), pp. 152–157 (pp. 155ff.); Pfau (2011), pp. 178ff.

[161] See Stumpf (2006), pp. 1ff.

[162] For further information and references, see Stelkens and Schröder (2010), pp. 334ff.

1.4.1 Administrative Appeal and Transactions

In Germany, public contracts on matters governed by administrative law are possible to a large extent[163] (but not within the scope of the AO and FGO, i.e. in tax and fee matters[164]). This is shown by § 54 VwVfG, entitled "Admissibility of a public law contract," which provides[165]:

> A legal relationship under public law may be constituted, amended or annulled by contract (public law contract) in so far as this is not contrary to legal provision. In particular, the authority may, instead of issuing an administrative act, conclude a public law contract with the person to whom it would otherwise direct the administrative act.

§ 55 VwVfG entitled "Compromise contract" stipulates:

> The authority may conclude public law contract within the meaning of § 54 phrase 2, which eliminates an uncertainty existing even after due consideration of the facts of the case or of the legal situation by mutual yielding (compromise) if the authority considers the conclusion of such a compromise contract advisable in order to eliminate the uncertainty.

Similar provisions are provided for in § 53 and § 54 SGB X. In general, the compatibility of the rules on administrative compromise contracts with the principle of legality is not disputed if the limits of § 55 VwVfG, § 54 SGB X are respected.[166] Compromise contracts or other contractual settlements may also be a result of an objection in the sense of §§ 68 ff. VwGO, §§ 78 ff. SGG.[167] The contract partner of the applicant in these cases is generally the issuing authority (which may be pushed to do so by the objection authority). However, there are no data on how often and how successful an objection is settled by a compromise contract. It seems more likely that in cases where there is a pre-existing willingness to compromise, the applicant and the issuing authority will agree informally that a *Verwaltungsakt* satisfying both parties will be adopted and that the applicant will withdraw the objection after the issuance of the *Verwaltungsakt*. The conclusion of formal compromise contracts seems to be more likely if the subject matter of an objection procedure is a *Verwaltungsakt* with third-party effect (see Sect. 1.2.1.5). In such cases, it may be important to conclude a formal contract in order to legally bind the beneficiary and the affected party to the agreed-upon compromise.

Compromise contracts seem to be quite frequent also in public procurement matters within the scope of the §§ 97 ff. GWB. These are often concluded between the applicant and the contracting entity in order to avoid resorting to a decision of

[163] See the description of the different types of public contracts in Germany by Bauer (2012), § 36, no. 59ff.; Stelkens and Schröder (2010), pp. 307ff.

[164] However, even in this area, administrative practice and the jurisprudence developed transaction-like instruments that cannot be discussed in depth here; see Seer (2012), § 21, no. 20ff.

[165] On these contracts, see Singh (2001), pp. 94ff.

[166] See Kaltenborn (2007), pp. 151ff.

[167] Hufen (2011), § 8, no. 23.

the *Vergabekammer* or to settle the review procedure. The challenge here is to ensure that these compromise contracts are not to the detriment of other tenderers who are not party to the review proceedings.[168]

1.4.2 Administrative Appeal and Mediation

The Law on Mediation (*Mediationsgesetz — MediationsG*) of 21 July 2012[169] was enacted to transpose EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. However, the law goes far beyond the requirements of this directive. Its scope is neither limited to cross-border disputes nor to disputes on civil and commercial matters.[170] Therefore, the MediationsG is also applicable concerning mediation procedures in public law matters.[171] However, the MediationsG is restricted to follow certain general principles of mediation (§ 2), rules concerning possible bias of the mediator (§ 3), confidentiality obligations (§ 4) and the training of mediators (§ 5). Therefore, the MediationsG does not contain rules stipulating in which cases the administration may resort to mediation.[172] Albeit in principle, all administrative authorities are allowed to resort to mediation,[173] provided that they have discretion as to which decision to take on the contested matter. In cases of strictly bound administration or when only legal questions are at stake that there is no room for mediation. Nonetheless, in general, an administrative authority can conclude a contract to make the outcome of the mediation legally binding, at least in all cases where the administration can resort to public contracts and transactions without prior mediation (see Sect. 1.4.1).[174] Therefore, also within administrative appeal proceedings, the administrative authorities involved could resort to mediation.[175]

However, in practice, there is no real connection between mediation and administrative appeal.

In public procurement matters, there seems to be simply no place for mediation given the strict formalization of these procedures and the overall "acceleration principle" governing the review procedures (see Sect. 1.3.1).

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[168] See Rittwage (2007), pp. 484ff.

[169] Mediationsgesetz promulgated as Art. 1 of the Act of 21 July 2012 (BGBl. I, p. 1577).

[170] For an overview of the MediationsG, see Ahrens (2012), pp. 2465ff.

[171] von Bargen (2012), pp. 468ff.; Eisenbarth and Spiecker genannt Döhmann (2012), pp. 993ff.; Friedrich (2012), pp.705ff.

[172] Guckelberger (2011), pp. 390–396 (pp. 392f.).

[173] On the discussion on mediation in public law matters, including further references, see Appel (2012), § 32, no. 102ff.

[174] See VG Gießen, 10 May 2012—8 L 504/12.GI—LKRZ 2012, pp. 365–366; for limits in planning procedures concerning large scale infrastructure projects, see Mehler (2012), pp. 1288 ff.; Wagner and Hehn (2013), p. 5.

[175] See von Bargen (2012), pp. 473f.

Moreover, within the scope of the objection procedure in the sense of §§ 68 ff. VwGO, §§ 78 ff. SGG, administrative authorities do not resort to mediation in standard procedures pertaining to everyday life.[176] Mediation is simply too time-consuming and expensive in these cases.[177] Therefore, mediation is primarily considered to be the method of choice in complex proceedings concerning large-scale projects with a possibly significant impact on the environment,[178] albeit it is also used in the implementation of administrative reform projects within the administration.[179] However, in these cases, mediation is an element of the original administrative proceedings that leads to an administrative decision implementing the outcome of the mediation. These decisions are either not *Verwaltungsakte* or they are *Verwaltungsakte* for which federal law excludes the objection procedure (see Sect. 1.2.4.1). In both cases, formal administrative appeal is not admissible—only direct court actions.

Furthermore, mediation as an instrument of dispute resolution can be used within the scope of the objection procedure in cases that have some similarity to classic civil law disputes between neighbors or competitors. An example would be a dispute about a building permit affecting the neighbors. Yet in these cases, it is generally neither the issuing nor the objection authority that proposes mediation. On the contrary, mediation as an alternative to *judicial* resolution of conflicts is in general only suggested by the court after the exhaustion of the objection procedure. This may be explained by the fact that the court from its neutral position may be better placed than the administrative authorities involved in the objection procedure to see the possibility to find a more comprehensive solution to the real underlying problems of the case by mediation. This experience has led to the establishment of "court in-house mediation," but this form of *judicial mediation* is only accessible if a court action is already filed and when the competent judge sees that it may be suitable for the case at hand.[180]

Of course the administrative authorities involved in objection procedures and similar administrative appeals could develop similar (administrative) proceedings with "mediative elements." There are serious scholarly proposals along these lines.[181] However, an implementation of these proposals is highly unlikely, at least to medium term. It is the abolishment of the objection procedure that is on the political agenda of most *Länder*—not its re-invigoration.

[176] See Appel (2012), § 32, no. 108ff.

[177] Härtel (2007), pp. 71f.

[178] See Wagner and Hehn (2013), pp. 1ff.

[179] Fuchs et al. (2011), pp. 85f.

[180] On this "court in-house mediation" and its relationship to the MediationsG, see Drüschke (2013), pp. 41 ff.; Eisenbarth and Spiecker genannt Döhmann (2012), pp. 996ff.

[181] Vetter (2004), pp. 131ff.

1.5 The Contribution of Administrative Appeal to Europeanization and the Furthering of a Culture of Good Administration: Negative Report

To tell the truth, the contribution of all administrative authorities involved in formal or informal administrative appeals as well as of the parliamentary petition committees (see Sect. 1.2.5.1) and the four ombudsmen of *Mecklenburg-Vorpommern*, *Rheinland-Pfalz*, *Schleswig-Holstein* and *Thüringen* (see Sect. 1.2.5.2) to the development and Europeanization of principles of good administration is zero. This is, first of all, because of the fact that the traditional themes of (unwritten) standards of good administration—as for example described in the "European Code of Good Administrative Behaviour" of the European Ombudsman or the Recommendation CM/Rec(2007)7of the Committee of Ministers of the Council of Europe on good administration—have since 1976 been the object of quite detailed legislation, namely the VwVfG, the AO and the SGB X. These codes provide for rules on citizen's rights in administrative proceedings (inquisitorial principle, right to be heard, access to files, duty to give advice, obligation to inform about the reasons on which an administrative decisions are based, exclusion of bias, etc.).[182] These codes also provide comprehensive rules on the effects of *Verwaltungsakte* and the possibilities to repeal them within the legitimate expectations of the beneficent.[183] Furthermore, the fundamental rights laid out in the German Constitution are considered to be a directly applicable source of administrative law, which means that principles like equality and proportionality are directly derived from the constitution. This has led to a quite comprehensive jurisprudence on the question of how the respect of fundamental rights has to be ensured in administrative proceedings. So—of course—from time to time the question arises as to whether a new general principle of good administration should be recognized, one which is not foreseen in the administrative procedure codes.[184] However, it seems that these new principles were always either "found" by the jurisprudence or have been directly introduced by legislators (as it was the case with the German freedom of information acts). One exception may be the "jurisprudence" of the *Vergabekammern*, at least in the first years after the entry into force of §§ 97 ff. GWB (see Sect. 1.3.1).[185] Yet this may be due to the non-applicability of the VwVfG in public procurement matters and the resulting novelty of the rules on public procurement. This seems to have enhanced the "creativity" of the

[182] See Singh (2001), pp. 74ff.

[183] See note 36.

[184] See Stelkens (2011a), pp. 290 ff.

[185] The most famous case of these decisions is the decision of the *Bundesvergabekammer*, 29 April 1999—1-7/99—NJW 2000, pp. 151–154: The *Vergabekammer* "invented" a duty of the contracting party to inform all tenderers about its decision to whom it awards the contract and a duty to respect a stand-still period of 14 days before concluding the contract. On the consequences and the context of this decision, see Erdl (1999), pp. 1341 ff.

Vergabekammern (and led to their publication in specialized law journals on public procurement). However, by now also these new findings of the *Vergabekammern*, which were in general confirmed by the courts, are codified by new provisions of the GWB.[186]

Owing to the comprehensive codification of administrative procedure law, also the question of Europeanization of national administrative law—in the light of the principles of equivalence, effectiveness and adequacy developed by the European court of justice[187]—has generally not led to the development of new principles or administrative practices. More often, these European requirements only aroused the question of whether European law obliges the administrative authority to use in a specific way the discretionary powers granted to them by the administrative procedure codes. For example, the jurisprudence "Kühne and Heitz" of the ECJ[188] has, of course, led to decisions of German courts regarding under which circumstances EU law demands the repeal of a *Verwaltungsakt* that infringes EU law but which is already *bestandskräftig*. However, all the courts decided that these problems can be solved simply by applying the national provisions concerning the repeal of *Verwaltungsakte* in a specific European-friendly way.[189]

Finally, the reluctance of the petition committees and the ombudsmen to review *Verwaltungsakte* that have become *bestandskräftig* and their willingness to accept the invocation of the *Bestandskraft* by the issuing authority as a "excuse" not to repeal the *Verwaltungsakt* (see Sects. 1.2.5.1 and 1.2.5.2) also hinders the development of an "Ombudsprudence" or "Committeeprudence" in matters of good administration and Europeanization (see Sect. 1.2.1.3).

Therefore, it seems that the codification of administrative procedure law, the effective legal protection by courts, and the high esteem in which legal security is held—which is reflected in the rules on *Bestandskraft*—hinder any noticeable contribution of administrative authorities involved in administrative appeals to the development of standards of good administration and Europeanization in German administrative law.

[186] The aforementioned "inventions" of the *Bundesvergabekammer* (note 185) are codified today in § 101a, § 101b GWB.

[187] On this jurisprudence, see Galetta (2010), pp. 33ff.

[188] ECJ, 13 January 2003—case C.453/00—, European Court reports 2004, pp. I-837–I-871. On this judgement and the following jurisprudence of the ECJ, see Ward (2008), pp. 739ff.

[189] BVerwG, 17 January 2007—C 32/06—NVwZ 2007, pp. 709–712; BVerwG, 22 October 2009—1C 15/08—BVerwGE 135, pp. 121–137; BVerwG, 22 October 2009—1C 26/08 — BVerwGE 135, pp. 137–150.

1.6 Final Considerations

In German law, there seems to be no great difference between the courts and the administration itself when it comes to the legal *ability* to solve administrative law disputes. The rules on administrative procedure and administrative court procedures provide adequate means both to ensure effective legal protection and to definitively settle conflicts. However, for (good) constitutional reasons (Art. 19 IV GG), it is not allowed for administrative authorities to decide—as a "non-court" of last resort—on administrative matters concerning individual rights. Therefore, administrative appeal procedures may never be opened as a substitute for the recourse to courts. Administrative appeal may only complement judicial legal protection by establishing an opportunity of self-review to be optionally or mandatorily passed through before a court action. This self-review is of course only effective if it is taken seriously by the administrative authorities themselves. Nonetheless, even if this is not the case—as was the main accusation put forward regarding the objection procedure to justify its abolishment in some *Länder* (see Sect. 1.2.4.2)—there is no reason to abolish administrative appeal. Just improve it.[190]

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[190] Steinbeiß-Winkelmann and Ott (2012), p. 919.

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Chapter 2
Alternative Dispute Resolution in French Administrative Proceedings

Rhita Bousta and Arun Sagar

2.1 French Administrative Law System: An Overview

2.1.1 French Administrative Law Culture at a Glance

2.1.1.1 The *Conseil d'État* and the Public/Private Divide

In France, it is commonly accepted that administrative law was born in 1799 with the creation of what is still the Supreme Administrative Court, the *Conseil d'État*. This fact is deeply rooted in French administrative law culture so that ADR was seen for a long time as almost "unnatural," a small and weird shadow lining behind the "real justice."

A distinguishing feature of French administrative law is that, since its creation during the Napoleon period, the *Conseil d'État* has been, simultaneously, a judge and the central government's advisory body on legal matters. Since an important statute of 1872, these two functions have been separated. But still, this advisory role, which could appear contrary to the ECHR case law (art. 6 EconvHR; Procola jurisprudence), reinforces the position of the *Conseil d'État*. At the end of the nineteenth century and at the beginning of the twentieth century, the *Conseil d'État* develops a set of judicial review techniques that are part of what is still called the *recours pour excès de pouvoir*, the main recourse. The *recours pour excès de pouvoir* belongs to a wider category of recourses called the *contentieux de la lé galité*, in which the judge is in charge of deciding on a matter of legality and quashes or declares illegal an administrative decision. Apart from that, the

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contentieux de pleine jurisdiction deals with individuals' rights, and here the judge may declare the decision illegal and also allocate compensation (such as in public contract or public tortious liability).[1]

Indeed, one of the prominent features of French administrative law is the wide scope of legal issues it covers. This is due to the fact that, in France, administrative action and entities in charge of a *service public* are mainly ruled by specific provisions different from private law and ordinary courts. The legal means through which the administration operates is a result of public power prerogatives (*théorie de la puissance publique*), which, with the *théorie du service public*, are the cornerstones of French administrative law. This dates back to the famous decision of 1873 (*Blanco* case: TC, 8/02/1873, *Blanco*, rec. 1) issued by the *Tribunal des conflits* (a body instituted in 1872 with the function of deciding in case of uncertainty whether ordinary courts or the *Conseil d'État* have jurisdiction) about a young girl knocked down by a wagon owned by the Tobacco Administration (a public body). In this decision, the *Tribunal des conflits* held that public liability was not subject to private law rules but rather to special rules adapted to the *service public*.

This particularly wide notion, at the heart of French administrative law, explains why so many areas are now entirely or mainly under the administrative courts' jurisdiction. For instance, contrary to many other legal systems, in France, public liability and public contracts are not matters for private law and ordinary law, or at least not only. Added to that, there is a tendency to enlarge the spectrum of the *intérêt pour agir*, the notion determining which has standing.

As part of the Romanist legal systems, the French system conceives the public–private law divide corresponding to the idea that administrative activities need special rules. Moreover, there are actually a diversity of special administrative law rules relating to each and every kind of administrative action and entity. For instance, there is an administrative law for public contracts (*Droit des contrats administratifs*), for public works (*Droit des travaux publics*), for public properties (*Droit du domaine public*), for civil servants (*droit de la fonction publique*), etc. All in all, the scope of administrative law is wide, but there is no law on administrative procedure: the different rules do not form a single code and have not been systematized by the legislator. Coherence comes rather from judicially developed principles.

One may also underline the role of the French doctrinal writings in reinforcing French administrative culture.[2] For a long time, doctrinal writers focused on analysis of the *Conseil d'État* case law in order to formulate general principles, and the first writers on administrative law were members of the *Conseil d'État*. Even if, with the Europeanization of administrative laws, the private/public divide

[1] In some specific issues as tax litigation, the judge may also replace the decision of the administration.

[2] On French administrative law culture in general, see Bell (2001), pp. 153 et seq.

is debated, it is still one of the prominent features of French administrative law (*dualité de juridiction*).

2.1.1.2 ADR: Still Not Part of French Administrative Law Culture?

In most French law scholars' mind, ADR is first associated with (international) private law and especially private contracts. And yet, as we have seen before, in France, it is commonly believed that administrative law needs its special tools to resolve its special disputes related to special areas of public life. So adopting ADR that mainly comes from private law is not always warmly welcomed.

Not surprisingly, there is very little in-depth analysis on ADR in French administrative law,[3] whereas numerous substantial researches on ADR in French private law can be easily found.[4] The famous *Société de Législation Comparée* also edited a book on mediation where approximately 62 pages are dedicated to mediation in private law and only 26 to mediation in public law.[5] A very well-known French author on mediation, Michèle Guillaume-Hofnung, nearly doesn't deal with ADR in administrative law even in the recent version of her book, focusing on labor law, family law, and business law.[6] Another striking example is the Research Center on ADR of the University *Paris 2 Panthéon-Assas* (*Centre d'études des modes alternatifs de règlement des conflits*[7]), which only deals with private law, and especially private contract, family law, business law, and labor law. Last but not least, the *Conseil d'État* published only one study on ADR 20 years ago,[8] and since then only two studies had related to ADR: one in 2008 on mandatory internal recourses[9] and one in 2010 on the implementation of the 2008 EU Directive on mediation in civil and commercial matters.[10]

The strong emphasis on administrative courts (with the *Conseil d'État* at the bottom) derived not only from the Code of Administrative Justice (art. L 311-1) but also from the Civil Code. Quite symptomatically, article 2060-1 of the Civil Code and administrative case law[11] forbid arbitration in administrative law unless a specific statute provides otherwise. Derogations of article L 311-6 CJA are strictly

[3] These are mostly focused on mediation: Pauliat (2010), pp. 39–53; Boumakani (2003), pp. 863–888; for a theoretical and comparative approach: Boyron (2007), pp. 283–307.

[4] For instance: Cadiet (2005) and Moneger (2002).

[5] Société de Législation comparée (2008), 107 p.

[6] Guillaume-Hofnung (2012): the pages dedicated to administrative law go from 35 to 36 and then from 55 to 58, so approximately six pages.

[7] http://www.u-paris2.fr/CEMARC/0/fiche___laboratoire/ (informations provided only in French).

[8] Conseil d'Etat- Etude (1993), 163 p (not available online).

[9] Conseil d'Etat-Etude (2008) (not available online).

[10] Conseil d'Etat-Etude (2010).

[11] CE, 19/05/1893, *Ville d'Aix-les-Bains*; C.E., 3/03/1989, *Sté Area*, rec. 69. See also C.E., avis, 6/03/1986, *EuroDisneyland*.

interpreted by administrative courts,[12] and so ADR by arbitration, while not impossible,[13] is still rare in French administrative law. In this case, it is still the *Conseil d'État* that checks whether the arbitrary sentence is legal (CE, ass., 4/01/1957, *Lamborot*, rec. 12).

Indeed, the concept of legality is at the heart of French administrative law culture. Together with the strong emphasis on *service public*, *prerogative de puissance public*, and *Conseil d'État*, legality as generally conceived in France could also explain that the ADR tools are implemented with some resistance in public law.[14] At first glance, ADR doesn't fit within the traditional Kelsenian pyramid and the hierarchical legality bloc (*bloc de légalité*) that comprises all the rules with which the administration must conform, namely the Constitution[15] then international rules (mainly European and the European Convention of Human Rights)[16] then parliamentary statutes (*lois*) and then the general principles of law detected by the *Conseil d'État* itself without being permitted to do so by any statute (such as the principle of equality, the principle of nonretroactivity, or, more recently, the principle of legal certainty). At the bottom of this hierarchy lie the regulatory rules (*règlements administratifs*): those issued by national authorities prevail over regulations issued by local authorities; within each of this type of regulations, regulation made by a particular organ must conform to regulations issued by another administrative organ placed in a hierarchically superior position, etc.

In this context, the idea of flexible and informal ADR is difficult to implement, or rather to admit. Nowadays, administrative lawyers use more and more ADR, and it may be part of the French administrative law culture in the coming decades. The first and obvious reason for this new tendency is the length of administrative court proceedings (1–2 years and up to 5–6 years).[17] Thus, ADR represents the concrete need for alternatives to administrative courts *v.* the theoretical belief that French administrative bodies and actions don't need anything but the hierarchical *bloc de légalité* and the *Conseil d'État*.

This said, the traditional mechanisms of judicial review are more and more improved, which leads to an implicit competition with ADR. For instance, since 2000, various reforms had extended the powers possessed by administrative judges, especially in terms of injunctions and the possibility of issuing urgent judgments in order to prevent illegal behavior by the administration. So does France really need

[12] CAA de Lyon, 4ème ch., 27/12/2007, *SA Lagarde et Meregnani*.

[13] Patrikios (1997), pp. 131 et seq.

[14] Séminaire de Créteil (2000).

[15] The Constitution comprises the Constitution of the 4th of October 1958, the Déclaration des droits de l'homme et du citoyen of 1789, the Preamble to the 1946 Constitution, and the *principes fondamentaux reconnus par les lois de la République* (identified by case law, mainly that of the Conseil constitutionnel).

[16] Under article 55 of the French Constitution, treaties are superior to parliamentary statutes.

[17] Rapp and Terneyre (2002), p. 1629.

ADR? The answer is probably positive, but the influence of administrative courts will not disappear that easily. A discrete but yet striking illustration of the remaining French law culture, as we will examine later, is that the great majority of time limits governing ADR is 2 months, which is exactly the same as the one governing administrative courts.

2.1.2 Organization of French Administrative Justice

Most of the legal rules governing French contentious administrative law, such as the organization of administrative justice, are to be found in the previously mentioned *Code de Justice Administrative* adopted in 2000[18] and regularly modified since then. France belongs to (and maybe even is at the origin of) the dualist tradition (*dualité de jurisdiction*), which separates ordinary courts (*juridictions judiciaries*)—either criminal, civil, or commercial—from administrative courts (*juridictions administratives*), with the *Tribunal des conflits* deciding which kind of court has jurisdiction for a specific litigation in case of doubt or debate. Knowing exactly how to dispatch cases between the two orders is not an easy task. Sometimes, a statutory provision vests either ordinary courts or administrative courts with the power of adjudicating. For instance, decisions taken by the *Conseil de la Concurrence*—the body dealing with competition regulation—have to be challenged before the ordinary courts under a statute of 1987, and that even if the *Conseil de la Concurrence* is an administrative body. Sometimes the rule comes from case law; for example, when a public body deeply infringed the fundamental rights of citizens, especially their right to property, with a decision or through its behavior that is strongly unlawful (*voie de fait*), ordinary courts have jurisdiction. All in all, the dualist tradition is still valuable, but the distinction between ordinary courts' and administrative courts' jurisdiction is sometimes blurry.

2.1.2.1 General Administrative Courts v. Specialized Administrative Courts

The core of the system consists of nonspecialized courts divided into three layers. At the bottom, there are 38 administrative courts (*tribunaux administratifs*); in the middle, there are eight administrative courts of appeal (*cours administratives d'appel*) created in 1987; and eventually, as mentioned above, is the *Conseil d'État*, at the top of the system. Contrary to the *Conseil d'État*, which is the only central court (in Paris), the *Tribunaux administratifs* and the *Cours administratives d'appel* are embedded in their regions, so they may collaborate even if they are strictly independent. The *Conseil d'État* retains further control: an Assistant

[18] Ordinance (type of regulatory rule) of 4 May, 2000.

Secretary-General is responsible for the budget and functioning of the lower administrative courts; promotions and movements of judges are also managed through the *Conseil*, which also has a role of inspection (the Vice President of the *Conseil* also visits various courts during the year).

Decisions issued by administrative courts can be challenged before administrative courts of appeal, which are entitled to readjudicate entirely the case submitted to them. By contrast, judgments issued by administrative courts of appeal can be brought before the *Conseil d'État* through a special proceeding (*pourvoi en cassation*) that only entitles the *Conseil d'État* to examine if the administrative court of appeal respected the procedural rules and correctly interpreted the law. There are some cases that have to be directly submitted to the *Conseil d'État*, such as actions against some prominent regulatory decisions and some important decisions taken by the government.[19] Otherwise, the standard procedure is to seize first the administrative court, then possibly the administrative court of appeal, and eventually and still possibly the *Conseil d'État*.

Added to that, there are specialized administrative courts for litigations arising in areas like social welfare, discipline of judges, and public accounts monitoring. Judgments issued by these courts can be challenged only and directly before the *Conseil d'État*. For instance, the *Cour des comptes* judges public accounts and holds accounting officers responsible for spending. It also produces an annual report to the President of the Republic and various special reports that have a significant impact as criticism of government and public bodies.

2.1.2.2 General Rules of Procedure: Two Key Points

Whether general or specialized courts, legal persons with legal personality can act as well as individuals, public persons as well as private individuals, foreign individuals as well as foreign legal persons.[20] Then the administrative court appreciates whether or not there is an *intérêt à agir* mentioned above.

Last but not least, judicial review (*recours pour excès de pouvoir*) is normally subject to a 2-month time limit,[21] which begins to run upon publication (for regulatory decisions) or notification (for individual decisions), unless statutory provisions provide otherwise. The fact that this time limit has run out doesn't preclude an action on tortious liability based on the illegality of the decision to obtain compensation.

[19] Article 2 of the Décret-loi of 30 September, 1953.

[20] CE, 27/05/1991, *Ville de Genève*, rec. 205: action taken by Geneva local authorities against a decision concerning a nuclear plant located in the frontier with France.

[21] Decree of 11 January, 1965.

2.2 Administrative Appeals

2.2.1 Nature and Types of Administrative Appeals

One method of resolving administrative disputes is for the aggrieved citizen to bring an "administrative appeal" (*recours administratif*) either to the body that took the contested decision (*recours gracieux*) or to a hierarchically superior authority (*recours hiérarchique*) or to an organ with monitoring powers (*recours de tutelle*). These administrative appeals are sometimes provided for by statute, but this is not a necessary requirement; it is well established that they may be formed even in the absence of any textual foundation (but not in the case of the *recours de tutelle*; see below). Their theoretical basis is not clear: one sometimes considers their existence as following from a "general principle of law," while they are otherwise explained as being merely an aspect of procedure. It has been observed that the notion of *recours administratif* is rather vague and imprecise and is used to describe many different kinds of appeals or demands for review.[22]

The most common argument in favor of administrative appeals is that they help reduce the caseload of the administrative courts by providing not just a mechanism for the aggrieved citizen to seek redress but also the option for the administration to rectify its errors. Both parties may thus avoid the complications and expense of a long judicial process. In general, these appeals may help improve relations between citizens and the administration by providing a method for dispute resolution that favors a form of dialogue over actual litigation. Further, some suggest that administrators themselves are best equipped to handle disputes, as judges may not always have a fully nuanced understanding of how the administration functions and of how administrative authorities must balance individual interests in the overall working of the system, especially in light of the increase in administrative activity in many fields.[23]

Administrative appeals in the French system are unique in that they blur the line between administrative and judicial functions: while the appeals are addressed to administrative organs, there is clearly a certain judicial aspect to the task of deciding a dispute and determining the validity and appropriateness of an administrative act. Further, unlike many administrative functions, these appeals depend for their existence on a specific challenge brought by a citizen.[24] The otherwise rigid distinction between the two functions in French law may not always seem fully appropriate. At the same time, the differences between these appeals and judicial hearings are very evident.

The most obvious and most important difference is of course that there is no guarantee of impartiality in an administrative appeal, especially in the case of a

[22] Auby (1997), pp. 10–15 and 10–11.

[23] Prevedourou (1996), pp. 167–180.

[24] Brisson (1996a), pp. 7–15.

recours gracieux addressed to the same authority that made the original decision. Even in the case of a *recours hiérarchique* addressed to a superior authority, there is no assurance that this authority will not be inclined to favor the decision already made. This underlying issue is reflected in—and reinforced by—the fact that there are no strict procedural requirements in the case of common law appeals[25] (i.e., appeals not provided for by statute), neither with respect to the appeal itself nor with respect to how the administration should handle it.[26]

2.2.2 Procedure and Effects of Administrative Appeals

2.2.2.1 Procedure

In the absence of a text providing for an administrative appeal and specifying the manner in which it is to be exercised, there are no clearly established procedural guidelines. For instance, the *Conseil d'État* has held that even a verbally presented appeal may be admissible (CE, 07/11/1956, *Delzant*, rec. 421). The aggrieved citizen may raise any issues in the appeal, whether of fact or of law or based on equitable considerations,[27] and there is no time limitation for the appeal. It has even been held that the appeal need not state any grounds at all (CE, 20/02/1963, *Rubin*), although at least some minimum conclusions are required (CE, 30/07/1962 *Triboulet*, rec. 821). Issues of standing and capacity of the person forming the appeal are also not relevant (CE Sect., 23/11/1962, *Association des anciens élèves de l'Institut commercial de Nancy*, rec. 625). The *recours hiérarchiques* do seem to have one condition of admissibility: they must be addressed to an organ that is actually a hierarchical superior to the organ that took the contested decision; however, there doesn't seem to be any requirement for the former to be the immediate superior.[28] Further, in some cases the administration may be under an obligation to transmit the appeal to the correct authority.

Until relatively recently, the administrative authority had no obligation to formally acknowledge receipt of the appeal (CE, 29/07/1994, *Société Carpentier et Preux*, no. 136665). This changed with the law of 12th April 2000 on citizens' rights in their relations with the administration, under which the latter is obliged to send an attestation of receipt (*accusé de réception*) for all administrative demands, including administrative appeals. The *Conseil d'État* has held that an administrative authority has a duty to inform the person benefitting from the original decision when an appeal is brought by a third party (CE, 03/09/2009, *Ministre de l'emploi, de la cohésion sociale et du logement* no. 301095).

[25] The expression *recours de droit commmun* is often used.

[26] For a detailed analysis, see Michel (1996), pp. 47–98.

[27] Brisson (1996b), pp. 793–842 and 799.

[28] Auby (1955), pp. 117–124 and 118–119.

However, there is no certainty that the appeal will be properly considered: it is not clear whether there is a duty to answer the appeal (and hence no clear sanction for not doing so). Under a well-established case law principle[29] now confirmed by the same statute of 2000, if the administration does not answer the appeal within 2 months, this silence amounts to a rejection that can then be challenged before an administrative court. In the case of a hierarchical appeal, the superior authority has the same powers as the authority that took the decision: it can quash or uphold the decision or change its legal basis (CE, 23/04/1965, *Dame veuve Ducroux*).

The *recours de tutelle*—addressed to an authority with monitoring powers—is different from the *recours gracieux* and the *recours hiérarchique* in that it does not exist as a matter of right but needs a textual basis; there is no common law *recours de tutelle*, and it must be provided for by a specific legal provision. The monitoring body is not a direct hierarchical superior, and hence there is no unwritten right of appeal. Some authors dispute the classification of this form of appeal as an "administrative appeal" of the same kind as the *recours gracieux* and the *recours hiérarchique*.[30] The monitoring body may have the power to uphold, quash, or replace the administrative decision taken by the original authority; these powers need to be specifically provided for by statute.

2.2.2.2 Effects

Common law administrative appeals have no suspensive effect on the contested decision; it remains in force and may be applied.[31] Only a specific statutory provision may derogate from this general principle. The most significant practical consequence of an administrative appeal is the extension or renewal of the time limitation for challenging the original decision before the administrative courts.[32] It is well established that when an appeal—whether it be a *recours gracieux* or a *recours hiérarchique*—is made within the original 2-month time limit for a judicial challenge,[33] the limitation period ends and a new period begins from the moment the new decision (i.e., the decision on the appeal) is taken.[34] In a recent case, the *Conseil d'État* held that the expiry of a limitation period for the revocation of a certain decision by the administrative authority did not exclude a *recours gracieux*

[29] See, for example, CE, 30/06/1950, *Queralt*.

[30] See, for example, Auby (1997), *op. cit.*, p. 11.

[31] Michel (1996), *op. cit.*, p. 57. For a critical analysis, see Hourson (2012).

[32] See, generally, Chapus (2008), pp. 652–658; Michel (1996), *op. cit.*, pp. 228–238.

[33] As mentioned above, there is no limitation period for the administratif appeal itself.

[34] This basic principle has been regularly upheld since it was first established in some old decisions of the Conseil d'Etat: CE, 13/04/1881, *Bonsais*, rec. 431; CE, 14/01/1887, *L'Union des gaz*, rec. 43. (At this time, the limitation was 3 months and not 2.) See also CE, 10/07/1964, *Centre medico-pédagogique de Beaulieu*, rec. 399.

that could renew the limitation for judicial review (CE, 05/05/2011, *Ministre de l'Ecologie*, no. 336893).

There are, however, several conditions for this renewal to take place. The first and most basic condition is the one already mentioned, i.e. that the administrative appeal must be brought before the end of the limitation period for judicial review; a *recours gracieux* or a *recours hiérarchique* filed after this period has expired cannot give rise to a new limitation period for the admissibility of claims before the administrative courts (CE Sect., 05/06/1953, *Dame veuve Meignen*, rec. 271; CE Sect., 20/04/1956, *Ecole professionnelle de dessin industriel*, rec. 163).

Second, it should be a "true" administrative appeal that clearly asks for the modification or annulment of a specific administrative act or decision. A simple request for a hearing or a letter drawing attention to the consequences of a decision does not qualify (CE, 03/12/1975, *Commune de Saint-Paul*, no. 90394; CE Sect., 21/10/1960, *Berthiot*, rec. 580 bis).

Third, the appeal must be addressed to the correct authority for it to suspend the limitation period. However, this condition is interpreted more liberally now and does not seem to apply when the administration has a duty to transmit the appeal to the correct authority.[35]

Last, the limitation period may be suspended and renewed only once. The citizen may bring successive appeals concerning the same decision—a *recours gracieux* followed by a *recours hiérarchique* or vice versa, two *recours hiérarchiques*, or even two *recours gracieux*—but only the first one has any effect on the limitation period for judicial review (CE Sect., 27/01/1950, *Dlle Ducrot*, rec. 65; CE, 16/05/1980, *Clinique Sainte-Croix*, rec. 231).

2.2.3 *Statutory Provisions Concerning Administrative Appeals*

The principles described above are derived from case law and are applicable to common law administrative appeals. But these appeals can also be provided for by statute, and in such cases any of the rules may be changed; a statutory provision may specify different procedures or different legal consequences for appeals. For instance, the legislator may declare that in certain cases a *recours gracieux* or a *recours hiérarchique* does indeed have the effect of suspending the operation of the contested administrative decision; for example, Article L. 262-46 of the Code relating to social action and families (*Code de l'action sociale et des familles*) declares that both administrative and judicial appeals against a decision of recovery of certain unwarranted social benefit payments have a suspensive effect.

Any number of other special provisions are possible: a statute may specify a time limitation for the appeal to be filed or be replied to, it may specify the grounds on

[35] Chapus (2008), *op. cit.*, p. 654.

which the appeal must be based, it may specify the powers of the authority to whom the appeal is addressed, and so on. A statute may even specifically exclude some or all administrative appeals. For example, article L 5322-2 of the Public Health Code prohibits any hierarchical appeal against the decisions of the President of the French Health Products Safety Agency (*Agence française de sécurité sanitaire des produits de santé*).

2.2.4 Mandatory vs. Facultative Appeals

The most debated question concerning administrative appeals is that of whether or not they are—or should be—mandatory in terms of the admissibility of future judicial processes, i.e. whether or not the contested decision may be directly challenged before the administrative courts. When the prior administrative appeal is mandatory, no action may be brought before the courts without first attempting the administrative procedure.[36] Common law appeals are always facultative. Mandatory appeals are always statutory; they have to be provided for by a legal provision. They may be either *gracieux* or *hiérarchique*.[37] For instance, the 2001 decree on military public servants[38] obliges them to first form a *recours gracieux* in case of a dispute concerning their personal situation. Since the 1930s, there have been many mandatory appeals in tax law, perhaps because this area of activity concerns both private and public laws. In recent times, there has been a proliferation of mandatory administrative appeals in many fields, such as those of social security, labor law, banking, and education.[39] In 2012, a system of mandatory appeals was introduced with respect to a wide range of acts relating to the employment status of state agents.[40]

If the appeal is mandatory but has not been made, it is impossible to bring an action before the administrative courts (CE, 22/11/2006, *assoc. Squach rouennaise*). This may be the case even when the statute provides not just for a simple *recours gracieux* or *recours hiérarchique* but a complex system of mandatory appeals and conciliation procedures (CE, 26/07/2011, *Ligue Corse de Football*). The administration must respect the adversarial principle before giving its final answer and more generally must comply with the same procedural and substantive rules governing administrative decisions (CE, Sect., 18/11/2005,

[36] The term used for such an appeal is *recours administratif préalable obligatoire*.

[37] As mentioned above, the *recours de tutelle*, whether mandatory or facultative, are always statutory.

[38] Decree no. 2001-407 of 7th May, 2001.

[39] For lists of mandatory appeals existing by the mid-1990s, see Michel (1996), *op. cit.*, pp. 32–40; Prevedourou (1996), pp. 114–150.

[40] Decree no. 2012-765 of 10th May, 2012. See Erstein (2012).

Houlbreque). In some cases, if the irregularities of the prior decision are irremediable, the administration may have to revoke it (CE, 24/11/2006, *Guinot*).

When the statutory provision explicitly states that an appeal is mandatory, the legal situation is clear. However, in the absence of such a clear statement, judges must interpret the provision to determine whether the appeal is mandatory or facultative, since while all mandatory appeals are statutory, all statutory appeals are not necessarily mandatory. Various techniques of statutory interpretation are applied to determine legislative intent in this respect, such as looking at the precise wording of the provision, the procedures established, etc.[41]

Mandatory administrative appeals are often seen as efficient because they provide some guarantees to the citizen and avoid the cost and delays of judicial procedures.[42] Some authors suggest that they should be established across the board,[43] especially in matters such as the invalidation of driving licenses and public services and in laws relating to foreigners and to prisons. The counterargument is that mandatory appeals in fact add to the procedures and delays that citizens must deal with and that they cannot be a substitute for impartial judicial review. Some authors suggest therefore that rather than making more appeals mandatory, the solution lies in better managing the existing system, for example by establishing clear procedural guidelines for common law appeals.[44]

2.3 Transaction[45]

The mechanism of administrative transaction dates back to an old decision of the *Conseil d'État* (CE, 22 juin 1883, *Ministre de la Marine c. Corbet*, rec. 589) and has been reinforced through a Prime Minister's circular of February 6, 1995.[46] As states the *Conseil d'État* in its 2010 report, this ADR is mostly used in tax law but not so much in matters like public works (*travaux publics*) and public contracts (*marchés publics*), although it would supposedly be useful.

Under article 2044 of the French Civil Code, transaction consists of avoiding a litigation by contracting a written settlement between the parties (including here the public administration) that aims at ending or preventing a dispute.

[41] Brisson (1996a), *op. cit.*, pp. 438–446; Michel (1996), *op. cit.*, pp. 30–31; Prevedourou (1996), pp. 108–111.

[42] The law of 31st December 1987 on reforming administrative litigation stated that the Conseil d'Etat would determine by decree the conditions under which administrative litigation or arbitration must necessarily be preceded by prior administrative appeals or conciliation. However, there was no follow-up to this provision.

[43] Schrameck (2008); Belda (2008), pp. 1483–1511.

[44] Brisson (1996b), *op. cit.*, pp. 823–841.

[45] For a general approach, see Auby (1956), p. I.1; Chavrier (2000), p. 548.

[46] OJ of the 15 February, 1995, p. 2518.

The administrative court can thus dismiss an application that was priorly subject to transaction (CE, 8/02/1956, *Dame Germain*, rec. 69).

Transaction is a contract that is mostly subject to private law. But as it is sometimes a public contract, it can also be quashed by administrative courts (CE, 5/05/1971, *Ville de Carpentras*, AJDA 1971, p. 403—on public works) even if, in that case, the judicial review will be mostly inspired by private law (CE, 28/09/1983, *Soc. D'Etablissements Prévost*).

The transaction is valid as soon as each party signs it (CE, 30/10/1974, *Commune de Saint-Pierre-les-Bois*), but the administration needs very often the intervention of a Public Prosecutor in order to enforce it (*contrat judiciaire*).[47] The judiciary (mostly ordinary courts and in some cases administrative courts[48]) must give legal effect to administrative transactions (*homologation*).[49] Then the magistrate who homologated the transaction can't participate to the court proceeding if there is later a dispute about it (CE, 22/02/2008, *Tête*).

2.4 Mediation and Conciliation

Administrative contracts or standard specifications (*cahiers des charges type*) may include a conciliatory clause. It can, for instance, entitle a joint Committee to solve disputes relating to the variation in rates and fares in a concession contract (CE, 9/12/1991, *Snoy*, rec. 423). Apart from that, there are numerous mechanisms of conciliation and mediation in France.

2.4.1 Conciliation by the Administrative Courts

In France, administrative courts also have a conciliatory mission under art. L. 211-4 of the Code of Administrative Justice and art. L. 3-2 of the Code of Administrative Tribunals and Administrative Courts of Appeal (*Code des tribunaux administratifs et des Cours administratives d'Appel*) both issued by a Statute of 1986 (no. 86-14, 6/01/1986). The court's discretionary decision not to conciliate can't be challenged (CE, ass., 23/06/1989, *Veriter*). Added to that, the courts can't exercise their conciliatory power outside the scope of their jurisdiction (CE, 22/03/1995, *Dadillon*). Thus, despite its theoretical attractiveness, this procedure is not often used in practice and has not been very successful.[50]

[47] Then the judge verifies that the transaction is legal: CE, sect., 5/01/1966, *Hawezack*, rec. 6.

[48] TC, 18/06/2007, *Soc. Briancon Bus* (when the matter obviously belongs to administrative law).

[49] C.E., avis, ass., 6/11/2002, *Syndicat intercommunal des étudiants du second degré du district de l'Haÿ les Roses*; T.C., 18/06/2007, *Société Brancion bus et Brunet*.

[50] le Gars (2008), p. 1468.

Since 2005, and as a result of a reversal of precedent,[51] the *Conseil d'État* may also refer to an expert in conciliation (*Expert auprès du Conseil d'État*).

2.4.2 Mediation Officers Within the Administration

Internal mediation is also spreading in France.[52] It can be found in various public services such as the following:

- Public transports in *Î}\^{I}{le-de-France* (*RATP*)[53]: the protocol of 6th March 1990 was signed between the *RATP* and the Associations for consumers and users of public transports.
- French national railways (*SNCF*)[54]: created in 1994 on the basis of the protocol, June 27, 1990, this Ombudsman, like the one of the *RATP*, used to be sizeable only through consumers' associations. Since 2009, it can be directly seized and since 2011, it can be seized through the Internet. He is appointed by the Chairman of the *SNCF*. There were 4,339 complaints in 2011, which represents an increase of 16 % in comparison to 2010 (2008: 746; 2009: 2,485; 2010: 3,731; 2011: 4,339).[55] Ninety-five percent of the complaints come from individuals. In 2011, the Mediation officer gave an answer to 71 % of the complaints (66 % in 2010) in an average time limit of 58 days, with 56 % of the clients receiving an answer within 2 months. He rejected 49.8 % of the complaints, gave partial satisfaction in 18.6 % of the cases, and gave entire satisfaction in 31.6 % of the cases.
- Postal services (*La Poste*)[56] in 1995: regulation (*décret*) no. 2001-1335 of 28th December 2001 created the Mediation Officer for Universal Postal Service (*Médiateur du service universel postal*), which implemented article 19 of the 1997 EU directive (97/67/EC) with regard to the full accomplishment of the internal market of Community Postal services. Since 2007, this function has belonged to the *Médiateur de la Poste*, who can only be seized if the consumers' services don't manage to solve the problem within 2 months (decree of January 5, 2007). In 2011, the Ombudsman examined 10,420 complaints (17 % more than in 2010)

[51] C.E., sect., 11/02/2005, *Organisme de gestion du cours du Sacré-cœur* (reversing: CE, 12/10/1979, *Secrétaire d'Etat aux postes et télécommunications c/Mme Devillers*, rec. 375).

[52] Pauliat (2010), pp. 39–53.

[53] http://www.ratp.fr/en/ratp/r_6177/regulation-of-public-services/.

[54] http://www.sncf.com/en/contacts/ombudsman. There is very few information in English on this website.

[55] http://www.evenement.sncf.com/sncf.com/mediateur/pdf/mediateur.pdf (2011 annual report only in French).

[56] http://www.laposte.fr/mediateurdugroupe/fichePratique.php (only in French).

and gave 4,612 recommendations within an average time limit of 45 days. It solves the dispute in 95 % of the cases.[57]

- Department of Education (*Médiateur de l'Education nationale et les médiateurs académiques*)[58]: created by regulation (*Décret*) no. 98-1682 of 11th December 1998, these Ombudsmen deal with disputes between individuals and public agents (69 % of the complaints in 2011) and also with disputes between public agents and their administration, the Department of Education (31 % of the complaints in 2011, mainly transfers, etc.). In 2011, there were 9,239 complaints in total (14 % more than in 2010) that lead in 70 % of the cases to an answer; 83 % of the people were answered within 3 months, and 17 % had to wait more than 3 months. The 2011 report also indicates that the mediation was successful in 86 % of the cases; the remaining 14 % may have led to an action before a court (the report doesn't give any specific details on that point).[59]
- Department of Economy and Finances (MINEFI): this was created by a decree of April 26, 2002, in order to prevent court actions.
- Energy (*Médiateur national de l'énergie*)[60] implemented by a decree of October 19, 2007 (Statute of December 7, 2006): here the citizen is rather treated as a consumer; if he didn't manage to find a deal with the electricity or gas supplier within 2 months (starting from the consumer's complaint), he can seize the *Médiateur* in another 2 months' time limit. The opening up of the energy sector to competition participates to the growing number of complaints, the mediation protecting consumers from the negative sides of competition. As states the *Médiateur* itself,[61] the complaints are solved by mixing statutory instruments, reasonableness, and equity and with the aim of protecting the consumers (91 % of the complainants) against the providers. In practice, the 2 months' time limit to issue the recommendation is a little longer due to the growing number of complaints: the average amount was 100 complaints per month in 2008 and 300 complaints per month in 2010. The recommendations (which are published on the website) have to be implemented by the administration within 2 months, and they are most of the time.
- The Ombudsman of Paris (*Médiateur de la ville de Paris*)[62]: created by a municipal order of October 12, 1977 (*arrêté municipal*), this Ombudsman is in charge of disputes involving all kinds of municipal public services but housing. Since 2008, he cannot be an elected municipal officer anymore. In 2011, there were 998 complaints: 43.55 % were solved, and 35.53 % received a negative

[57] http://www.laposte.fr/mediateurdugroupe/documents/rapports/rapport-mediateur-2011.pdf (2011 report—only in French).

[58] http://www.education.gouv.fr/cid3998/faire-appel-mediateur.html.

[59] http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/124000319/0000.pdf (2011 report—only in French).

[60] www.energie-mediateur.fr.

[61] Merville (2010), *op. cit.*, pp. 83–87.

[62] http://www.paris.fr/mediatrice (only in French).

answer (the Ombudsman confirmed the decision of the municipality, but here again the 2011 report doesn't say if it leads to an action before a court). Approximately, 80 % of the complaints received an answer within 4 months with an average time limit of 87 days.

These internal Mediation Officers are difficult to list because their creation is not always official and their fields are quite diverse. Some are institutionalized; others are improvised. The listing made by the *Conseil d'État* in its 2010 study,[63] while interesting, is far from being exhaustive and underlines the lack of available methodological guidelines.

There is a real need for a network. In April 2002 was created the Public Service Mediation officer's Club (*Club des Médiateurs de services au public*),[64] which brings together 21 Mediation Officers who also drafted a Public Service Mediation Officer's Charter in 2004 (*Charte des médiateurs du service public*). Nevertheless, there is still a huge diversity among mediation services, and so this Charter only brings together common general values (holding an amicable settlement, engaging in a dialogue, listening to the users and consumers, etc.).

2.4.3 External Mediation/Conciliation Introduced by Statutory Law

Some external conciliatory bodies are also entitled by law to solve disputes involving public bodies. For instance, a statute of 1959 on relationships between the State and private schools obliges them to go first see a conciliatory body available in each county (*département*) in case of a dispute relating to the execution of the contract.

Such ADR is also useful in public health matters. The important Statutory Law of March 4, 2002, (art. L. 1142-5 and 6 of the French Public Health Code) creates a Regional Committee on Conciliation and Compensation in case of medical mishaps, iatrogenic disorders, and nosocomial infections (*Commission régionale de conciliation et d'indemnisation des accidents médicaux, des affections iatrogènes et des infections nosocomiales*[65]). This committee is headed either by a magistrate of an ordinary court or by a magistrate of an administrative court. In both cases, it is composed by representatives of users, public health professionals, head of health care establishments and insurance companies.

This provision was completed by regulation (*décret*) no. 2005-213 of March 2nd, 2005, which establishes a Committee on relationships with users (*Commission*

[63] *Op. cit.*, on the EU directive on Mediation and its implementation in French administrative Law (Annex no. 5.83).

[64] www.clubdesmediateurs.fr.

[65] http://www.oniam.fr/crci/crci//presentation/ (only in French).

des relations avec les usagers) within each public or private health establishment and composed by two Mediation officers (R. 1112-81 of the French Public Health Code). The Mediation officers must meet the complainant within 8 days (art. R. 1112-93 of the FPHC). Under article R1112-80al2 of this Code, the Committee examines only the complaints that couldn't be subject to internal recourse (*recours gracieux*) or action before a court. Otherwise, the Committee informs the user on his right to administrative appeals and/or remedies before a court. The Committee also makes recommendations for improvements and informs the Regional Committee on Public Health (*Agence régionale de santé*) of dysfunctions through an annual report.

Conciliatory bodies also exist in matters such as intercommunal cooperation, State Officials' disciplinary regulation, planning law (for instance, during the elaboration of urban development documents), and public contracts. Article 127 of the Public Contract Code (*Code des marchés publics*) introduced by regulation no. 91-204 of February 25, 1991, creates an advisory committee for amicable settlement in case of disputes between administrations and contractors (*Comité consultatif de règlement amiable—CCRA*). This ADR has a suspensive effect,[66] so the contractors can still bring an action before the administrative court in case the pretrial remedy is not successful. Since a 2010 regulation,[67] this kind of Committee can also be found in every ministry.

Another interesting example is the Mediation Committee on right to housing that was implemented by a 2007 Statute. Here, the goal was clearly to lower the high number of court litigations on that matter. But the means doesn't seem efficient. First, the Committee is only entitled to examine if the request for housing is urgent or not. The *Conseil d'État* itself was quite suspicious in its 2009 report, considering that this Committee serves more the interest of the public administrators than that of the individuals.[68] The unfavorable answer of the Committee can be challenged before the administrative court (TA of Paris, ord. Réf., 20/05/2008, *Fofana*, JCP A, juin 2008, no. 2138).

2.5 Tribunals (*Autorités Administratives Indépendantes*)

Outside the administrative courts, a number of independent bodies have been charged with supervising the administration and offering redress in case of dispute before individuals need to consider court action. These are called *Autorités administratives indépendantes* (AAIs) or *Autorités de regulation* and have both regulatory and disciplinary powers. Their decision can be easily challenged before the administrative court even if no statutory law provides so (CE, 20/05/1985, *Labbé et*

[66] CE, 6/11/1998, *Société Quillery et autres*, Req. No. 169884.

[67] Decree of 8 December, 2010.

[68] Conseil d'Etat, rapport (2009), pp. 279 et seq.

Gaudin, RFDA, 1985, p. 554). In this case, the judge examines the case with scrutiny (CE, 14/06/1991, *Association Radio-Solidarité*, RFDA 1992, p. 1016).

Today, there are roughly 40 AAIs in France in various sectors like securities and markets (*Autorité des marches financiers*—Act no. 2003-706; 1/08/2003), competition (*Autorité de la concurrence*—Act no. 2008-776; 4/08/2008), public health and ethics (*Comité consultatif national d'éthique*—Act no. 2004-800; 16/08/2004), electricity regulation (*Commission de regulation de l'énergie*—Act no. 200-108; 8/02/2000), prevention and fight against doping (*Agence française de lute contre le dopage*—Act no. 2006-405; 5/04/2006), or data protection and individual liberties (*Commission Nationale Informatique et Libertés*—Act no. 78-17; 6/01/1978).

Not every AAI is ADR tools, or at least not mainly. Some are more known for their regulatory powers; others are more directly in charge of ADR and solve disputes involving regulations that were not necessarily enacted by them. For the purpose of this study, it is worth focusing on the Commission on Access to Administrative Documents (*Commission d'accès aux documents administratifs*—CADA) because it deals with disputes involving citizen, companies, or associations (and their rights to access) against mostly public bodies contrary, for instance, to the Higher Council for Audiovisual Sector (*Conseil supérieur de l'audiovisuel*), which is a supervisory agency over the providers of a public service that are mainly private companies. Besides, the CADA, created by statute no. 78-753 of July 17, 1978, is also at the heart of the administrative procedure and especially the principle of transparency reinforced by ordinance no. 2005-650 of June 6, 2005, on freedom of access to administrative documents.

At the latest, 2 months after the administration rejects an individual request for access to administrative documents, he can seize the CADA for free, without the mandatory assistance of a lawyer and by a simple letter or through the Internet. The CADA gives its opinion based on administrative case law and statutes (mainly the 1978 statute mentioned above) within 1 month (art. 19 of the 2005 decree). Nevertheless, if it doesn't comply with this time limit, there is no consequence on the decision of the administration not to communicate the documents (CE, 9/03/1983, *Association SOS Défense*). If the CADA is in favor of the citizen, the administration must inform the CADA within 1 month of its decision to open or not access to administrative documents.

This proceeding is useful and quite quick compared to court action. Added to that, the CADA is relatively well known and far from being isolated from the administrative courts and lawyers. Indeed, the CADA seats in closed plenary session two times a month at the *Conseil d'État*, it is headed by a member of the *Conseil d'État* (*conseiller d'État*), two members out of ten are magistrates (from the *Cour de cassation*, the supreme ordinary court, and from the *Cour des comptes*), and its opinions are most of the time followed by the administration. More importantly, this appeal is mandatory: it has to be done before any court action.

In 2011, there were 4,827 requests for opinion (17 % in matters related to planning, 14 % involving public servants, 13 % on social affairs, and only 5 %

concerning local communities); 6.2 % of the requests were formed by individuals and 32.5 % by legal persons governed by private law.[69] A total of 46.5 % of the CADA's opinions were in favor of the requests, while only 8.4 % were against (33.2 % of the requests were inadmissible: uncompleted files, renunciations, etc.).

In 54.3 % of the cases, the opinions have been followed by the administration (in other words, the court action has been avoided), and only in 11.4 % the dispute was not solved. A total of 33.3 % of the CADA's opinions remained unanswered by the administration. This figures show that this ADR is quite efficient, providing quick redress in matters that, while tremendously important for administrative democracy and transparency, do not necessarily need the intervention of an administrative court.

2.6 The French National Ombudsman (*Le Défenseur Des Droits*)

2.6.1 The Former Médiateur De La République: A "Perfect Stranger"?

Originally from Sweden,[70] the Ombudsman reaches French waters more than one century after with the *Médiateur de la République* in 1973.[71] When Pierre Messmer introduced his bill on October 2, 1972, the MRF was far from parliamentarians' initial proposals for the creation of High Commissioner for Human Rights.[72] With little interest shown by members of parliament,[73] the MRF was only given responsibility for administrative dysfunction, without competing with the judiciary (Senior Member of the *Conseil d'État* Jacques Larché was one of the main drafters of the bill—and probably aimed at protecting the scope of activity of the prestigious *Conseil*). The Ombudsman would be seen by its critics as a "bizarre and useless creature": the *Conseil d'État* would still be the best Ombudsman.[74] For the majority of French people, the *Médiateur de la République* was (and still is) unknown.[75]

[69] http://www.cada.fr/IMG/pdf/rapport2011-2.pdf (2011 report only in French).

[70] Bousta (2008), pp. 36–61.

[71] Act no. 73–96 of 3 January, 1973 (latest amendment: Act No. 2000-321 of April 12, 2000). Amended in 1976 to introduce the power to propose reforms to Parliament (Act 76-1211 of December 24, 1976, OG, December 28, 1976 at 7493; com. B. Sentolini, RA, 1977 at 117).

[72] Michel Poniatowski (Secretary-General of the Independent Republicans) and André Chandernagor. During parliamentary debates (December 14–20, 1972), the motion was defeated. The bill was defended by René Pleven (Minister of Justice), among others.

[73] André Legrand sharply criticized the lack of interest shown in the institution and particularly the lack of curiosity on the part of parliamentarians and the French government about experience in other countries. See Legrand (1973), p. 4.

[74] Preface to the Thesis of Legrand (1970).

[75] le Clainche (1992), p. 561.

Following the English model, the MRF would also be appointed by the government (s. 2) and could receive referrals only from a member of parliament (but not directly from a member of the public—s. 6). It should be pointed out, however, that the important Act of April 12, 2000, regarding the rights of citizens in their dealings with administrations (consolidated reform of November 15, 2006) provides for exceptions to the parliamentary filter for reasons of urgency or when the MRF receives a referral from the European Ombudsman or a foreign counterpart. It also provides for the establishment of delegates throughout the country. The bill introduced in 2006 (October 24, 2006), by Minister of Justice Pascal Clément to the Council of Ministers, also provides for the MRF to be referred to directly in the event of a dysfunction in the administration of justice or objectionable conduct by a magistrate.

Unlike Parliamentary Ombudsmen, the MRF could not be dismissed by parliament (he could only be removed in the event of his inability to act in the conditions enumerated by a decree of the Council of State—s. 2). This particularly strong link to the government (which was behind the bill) cast some doubt on the MRF's independence from the administration, which he was responsible for monitoring. Some critics described the MRF as a betrayal of the parliamentary model of the Ombudsman, in other words, an *Ombudsmanqué* (a failed Ombudsman).[76]

In order to shut down these critics, the *Comité Balladur* initiated a constitutional amendment creating the *Defenseur des droits*, which replaces the *Médiateur de la République*. This amendment was (a small) part of the broader 2008 constitutional reform focusing on public liberties, constitutional justice, and powers of Parliament. Despite some changes, the French Ombudsman, who took office on 23rd June, 2011, is still relatively unknown and remains in the background of administrative appeals.

2.6.2 The New Defenseur Des Droits: Still in the Background?

In his important 2008 constitutional reform, former French President Nicolas Sarkozy didn't think of changing the institution of the *Médiateur de la Ré publique*[77]: the idea emerged from the *Comité Balladur* after a quick (and one may say quite superficial) scan of the Spanish *Defensor del Pueblo*. Not surprisingly, this new institution didn't attract the attention of the population.

[76] Legrand, *art. cit.*, note 28, p. 1.

[77] Decree no. 2007-1108 of July 18, 2007.

2.6.2.1 The Resistance of the French Model of Executive Ombudsman

Under new article 71-1 (Title XI-bis) of the French Constitution (proposition no. 76 of the *Comité Balladur*)[78]:

> The Defender of Rights shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission or by those that the Institutional Act decides fall within his remit.
>
> Referral may be made to the Defender of Rights, in the manner determined by an Institutional Act, by every person who considers his rights to have been infringed by the operation of a public service or of a body mentioned in the first paragraph. He may act without referral.
>
> The Institutional Act shall set down the mechanisms for action and the powers of the Defender of Rights. It shall determine the manner in which he may be assisted by third parties in the exercise of certain of his powers.
>
> The Defender of Rights shall be appointed by the President of the Republic for a six-year, non-renewable term, after the application of the procedure provided for in the last paragraph of article 13. This position is incompatible with membership of the Government or membership of Parliament. Other incompatibilities shall be determined by the Institutional Act.
>
> The Defender of Rights is accountable for his actions to the President of the Republic and to Parliament.

The new *Défenseur des droits* still is, as the former *Médiateur de la République*, appointed by the French President. Parliament can now strike down this decision by a three-fifths majority of votes in both Chambers (art. 13 of the FC), but this is very unlikely to happen. Contrary to the *Defensor del Pueblo*,[79] the French Parliament can't dismiss the Ombudsman. Moreover, the French Ombudsman's accountability to the President is now constitutionalized. Article 71-1al 5 of the French Constitution provides the accountability to the "president" first and then to "parliament." All in all, the new *Défenseur des droits* doesn't change the real nature of the French Ombudsman, which is remarkably "linked" to the executive (Executive Ombudsman[80]) while still impartial and independent.

It is definitely not a Parliamentary Ombudsman such as the Spanish *Defensor del Pueblo*, the English Parliamentary and Health Commissioner, or the majority of Ombudsmen in Central and Eastern Europe.[81] During the parliamentary debates, it was even called a "bureaucratic monster,"[82] a "gadget"[83]; doctrinal writings also

[78] Art. 46-1 of the constitutional law of July 23, 2008; Organic Law no. 2011-333 of March 29, 2011; Decision of the Constitutional Council no. 2011-626 DC of March 29, 2011; Ordinary Statute no. 2011-334 of March 29, 2011.

[79] Art. 54 of the Spanish Constitution of 1978.

[80] Reif (2004), pp. 3 and 8.

[81] Giner de Grado (1986), p. 47.

[82] Badinter (2008).

[83] Goulard (2008).

pointed out the lack of real changing[84] and the superficial use of comparative law (the drafters pretended to transplant the Spanish model).[85]

Yet, for the first time in France, the Ombudsman is part of the Constitution and is not an independent administrative authority (AAI) anymore. This new status of "independent *constitutional* authority" (art. 2 of the Organic Law) is far from being clear.[86] Is it a fourth constitutional power complementing the legislative, the executive, and the judiciary? The Constitutional Court (*Conseil constitutionnel*) rejected this vision and ruled that the expression "independent constitutional authority" only meant to reinforce the independence of the French Ombudsman.[87]

The scope of activity of the new *Défenseur des droits* is broader than the one of the *Médiateur de la République,* even if disputes between administrations and its officers remain excluded (art. 10al2 of the Organic Law). It actually merges three AAIs that used to be independent: the Children's Ombudsman (*Défenseur des enfants*), the Equal Opportunities and Anti-Discrimination Commission (*Haute autorité de lute contre les disciminations et pour l'égalité*—HALDE), and the body supervising the conduct of police and other security agencies (*Commission nationale de déontologie de la sécurité*), together with the former *Médiateur de la République*.[88] In 2012, among the cases concerning public services, 19 % dealt with public health and 29 % with social affairs.[89]

These previously independent institutions are now colleges of the *Défenseur des droits* all headed by the *Défenseur* himself and for which vice presidents are appointed by the French Prime Minister after the proposal of the *Défenseur*.[90] Parliament only appoints some members of the colleges. *Amnesty International* France[91] and the Children's Defender himself,[92] together with doctrinal writings,[93] criticize this merging and the danger it represents for independence and democracy.

Another striking illustration of this strong relationship with the executive power is article 32 of the 2011 Organic Law. Under this article, the French Prime Minister can ask the *Défenseur* for his opinion on bills or matters relating to his jurisdiction (which he did ten times in 2012[94]). The *Défenseur* also contributes to the French position during international negotiations for matters lying under its scope of

[84] Lavroff (2008), pp. 66 et seq.; Dumat (2009), pp. 4–7.

[85] Bousta (2011) (Article available online).

[86] Giddings (2000), p. 463.

[87] Conseil constitutionnel, décision no. 2011-626 DC, préc., cons. No. 5.

[88] On the independence of the *Médiateur*: C.E., ass, 10 juillet 1981, *Retail*, rec. 303.

[89] Defenseur des Droits (2012), p. 28.

[90] Art. 11 of the Organic Law.

[91] Recommendations available at http://www.amnesty.fr/var/amnesty/storage/fckeditor/File/sf10f25_01juin2010.pdf.

[92] Press release of September 15, 2009: http://www.infomie.net/IMG/pdf/Defenseuredesenfants15.09.09-3.pdf.

[93] Wachsmann (2009), pp. 260–268.

[94] Defenseur des Droits (2012), pp. 10 and 28.

activity. In other words, not only does the *Défenseur* supervise the executive and its administration; he also works hand in hand with it to define and implement some policies. Conversely, in order to investigate, the *Défenseur* may have to first ask permission from the Ministers (article 18.5 of the Organic Law).

Nevertheless, the reform changes an important feature of the former *Médiateur de la République*: the new *Défenseur des droits* can be directly seized (art. 5 of the Organic Law) by "every person" (art. 71-1al2 of the French Constitution). Direct access to the Ombudsman, though not constitutionalized, ended the so-called MP filter that was seen by the majority of writers as one of the biggest distortion of the original institution of the Ombudsman.[95] Even if the citizen (ex-administered) must complain first to the administration to be able to seize the *Défenseur* (art. 6.2 of the Organic Law),[96] direct access may reinforce the popularity of the French Ombudsman in the future.

2.6.2.2 Relationships Between the Défenseur Des Droits and the Courts

The reform also reinforces the relationship with the judiciary. Under article 21 of the Organic Law, the *Défenseur des droits* may seize the *juge des référés* (judge sitting in chambers to deal with urgent matters) in case his order addressed to the administration to give information remains without effect. This provision underlines the need for ADR to have the support of the judiciary in order to be effective. Article 12 of the Statute also provides a 15,000 euro fine and 1 year of imprisonment.

Transactions in civil or criminal matters are also new prerogatives of the French Ombudsman in case of discriminations that didn't lead to a court action. The amount of the fine goes up to 3,000 euros for an individual and 15,000 euros for a legal entity. In any case, the transaction has to be homologated by the Public Prosecutor. Indeed, in case the transaction is rejected or not implemented, the *Défenseur des droits* can seize directly the criminal court (art. 28-IV-al2 of the Organic Law). Here again, the activity of the French Ombudsman is far from being isolated from the judiciary.

But this ADR has no suspensive effect on court time limit (art. 6al3 of the Organic Law), except in case of transaction. This rule doesn't contribute to the success of the Ombudsman: sometimes, a choice has to be made between him and the judiciary, and the French administrative law culture is still attached to the latter. Added to that, the court doesn't help enforce the recommendation of the Ombudsman. For instance, under article 25al4 and 5 of the Organic Law, in case recommendations remained without effects, the *Défenseur* may address an injunc-

[95] Abdel Hadi (1977), p. 334.

[96] Also, if he wishes so, MP filter is still available (art. 7.1 of the organic law).

tion to the administration (as he did two times in 2012[97]), but if the injunction itself remained without effect, all he can do is write a "special report."

The cross-fertilization is encouraged through the new possibility for the *Défenseur des droits* to formulate observations to the court, which he used 90 times in 2012[98] and 62 times in 2011.[99] In other words, the complaint to the *Défenseur* leads to a court litigation initiated by the Ombudsman himself. Then, in 68 % of the cases, the judges confirm the observations or advice of the Ombudsman, which means that they share the same interpretation of Law. This said, the majority of observations concerns private employment (52 % in 2012), and only 24 % concerns public employees (and only 5 % relates to public services).[100]

Given the specificities of the French Ombudsman, and its broad scope focused on fundamental rights, its "Ombudsprudence" is not that different from the legal norms. For instance, the *Défenseur* works tightly with the International Labour Organization and published a guide on equal remunerations between men and women (in France, there is still an average wage difference of 27 %).

Contrary to the European Ombudsman or the British Public and Health Ombudsman, the French *Médiateur* and now the *Défenseur des droits* didn't draft a code of good administration or good behavior. And with the new focus on fundamental rights, it is unlikely to happen.

As for the efficiency of the institution, in 2012, the *Défenseur* received around 80,000 complaints (this high number is due to the merging of the four institutions mentioned above), 82 % being resolved[101] (the figures were approximately the same in 2011 with 89,000 complaints received[102]). Mediation is often used, and it is most of the time successful, especially in tax law and urban planning. The institution of the *Défenseur des droits* is too young (only 2 years) to be rationally evaluated of its efficiency.

2.7 Traces of Europeanization?

The adjustment of some of the most French traditional concepts such as the *service public*[103] with the evolution of EC law was—and sometimes still is—difficult. Nevertheless, the case laws of the ECJ and the ECHR have become strongly

[97] Defenseur des Droits (2012), pp. 9 and 28.

[98] Défenseur des Droits (2012), p. 8.

[99] Défenseur des Droits (2011), p. 8.

[100] Défenseur des Droits (2012), p. 30.

[101] Défenseur des Droits (2012), p. 24.

[102] Défenseur des Droits (2012), p. 15. It is hard to find out how many complaints have been resolved because the 2011 report is a transition report that accounts of the activity performed before the merging of the four institutions (so when they still worked independently) up to after the appointment of the *Défenseur* in June 2011.

[103] As I already mentioned, the French concept is wider than the EC concept of economic services in the general interest even if the scope of these concepts was reduced by EC case law.

influential, such as the concept of fair trial.[104] For nearly 10 years, there has been a spreading in doctrinal writings on Europeanization of French administrative law.

In this context, ADR is often presented as an original tool coming from abroad and for which transplantation is encouraged by the European Union. The main instrument on that matter is EU directive no. 2008/52/CE of May 21, 2008, on mediation in civil and commercial matters, which was implemented in France through the ordinance of November 16, 2011.

Administrative matters don't fall within the scope of the EU directive (arts. 1–2 of the EU directive), but there are some exceptions. To be more precise, ECJ case law retains a very restrictive approach to "administrative matters" that equal to sovereign right (*droit régalien*) where public bodies use special public power prerogatives (*prérogative de puissance publique*).[105] French administrative courts have a similar approach.[106] Thus, matters that are part of French administrative law could be qualified as "civil and commercial matters" in the sense of the EU directive and then be subject to ADR.

This is exactly what is recommended by the *Conseil d'État* in its 2010 study on the implementation of the 2008 EU directive (pp. 28 et seq.). In the light of this directive, the *Conseil d'État* recommends to introduce ADR and, especially, mediation in various codes such as the Local and Regional Collectivity Code (*Code general des collectivités territoriales*), the Public Health Code, or the Environmental Code[107] (study, p. 31). Added to that, the study proposes to reinforce conciliatory powers of administrative courts by extending it to the *Conseil d'État*, as mentioned above. In the light of art. 8 of the EU directive, the study also insists on the necessity for mediation in administrative matters to have suspensive effect so that it doesn't preclude a posterior court action (p. 41); see also art. 3 of the EU Parliament resolution of September 13, 2011, on the implementation of the directive on mediation in the Member States, its impact on mediation, and its take up by the courts [2011/2026 (INI)].

These recommendations have to be taken seriously, given the fact that only 10 % of the current mediations in French administrative law listed by the *Conseil d'État* fall within the scope of the EU directive (p. 46). Indeed, in its 2011 resolution, the EU Parliament doesn't refer to French law as an example of good implementation of Mediation, contrary to Romania, Bulgaria, and Italy.

European law also influences specific sectors such as postal service. For instance, regulation (*décret*) no. 2001-1335 of December 28, 2001, created the Mediation Officer for Universal Postal Service (*Médiateur du service universel postal*), implementing article 19 of the 1997 EU directive (97/67/EC) with regard to the full accomplishment of the internal market of Community Postal services.

[104] CE, ass., 14/02/1996, *Maubleu*, RFDA 1996, p. 1186 (rights to a hearing).

[105] In the light of ECJ, 21/04/1993, aff. C-172/91, *Volker Sonntag c/Hans Waidmann*; ECJ, 19/01/1994, aff. C-364.72, *Eurocontrol*.

[106] CE, avis no. 366-313, 2003 report, p. 185; CE, 4/02/2004, *Leseine et Mme Warnimont*, rec. 23.

[107] On Mediation in environmental matters: Makowiak (2010), op. cit., pp. 55–65.

Even if nowadays the name of the Mediation officer has changed (as previously mentioned), French mediation in this sector is clearly under European Union influence. In the same spirit, the European Charter of Human Rights in urban areas (*Charte européenne des droits de l'homme dans la ville*), signed in Saint-Denis (a suburb of Paris) on May 18, 2000, insists on mediation.[108]

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[108] Chabrot (2007), p. 355.

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Chapter 3
Administrative Appeals in the Italian Law: On the Brink of Extinction or Might They Be Saved (and Are They Worth Saving)?

Mario Comba and Roberto Caranta

3.1 The Administrative Law System: An Overview

The Italian system of review of administrative action has its peculiarities. Leaving aside for now the internal administrative appeals, the judicial review of administrative action is unevenly divided between the general or "ordinary" (civil and criminal) courts and the administrative courts, the latter being a separate and specialized set of courts having their own self-governing body. More specifically, the term administrative courts means *Tribunali amministrative regionali* (one for each of the 20 Regions; however, in some Regions there are decentralized panels) at first instance and the *Consiglio di Stato* (*Consiglio di giustizia amministrativa* in Sicily) as an appeal court; judgments by the *Consiglio di Stato* may be challenged before the *Corte di cassazione* (which also acts as the highest court on civil and criminal matters) only in so far it is claimed that the *Consiglio* has overstepped the boundaries of its jurisdiction.[1]

The general courts have jurisdiction for the protection of *diritti soggettivi* (subjective rights), while administrative courts have jurisdiction in cases involving

Mario Comba drafted Sect. 3.4 and codrafted the conclusions; the rest of the chapter was written by Roberto Caranta.

[1] E.g., Cass. civ., Sez. un., 23-12-2008, n. 30254, in *Resp. civ. prev.*, 2009, 1310, note P. Patrito, *Pregiudiziale amministrativa: il primo passo verso un concordato giurisprudenziale*?, and in *Giornale dir. amm.*, 2009, 385, note L. Torchia, *La pregiudizialità amministrativa dopo la sentenza 500/99: effettività della tutela e natura della giurisdizione*.

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interessi legittimi (which could be roughly translated into interests to the legality of administrative decisions or, more shortly, legitimate interests).[2]

Individuals and undertakings are normally held not to have *diritti soggettivi* but only *interessi legittimi* when they are asking for permission or a license or a grant or other utility or benefit, including employment with the State or other public law entity and the award of procurement or concession contracts. On the other hand, property and other economic rights are not necessarily faced with *diritti soggettivi*. They are instead treated as *interessi legittimi*. when the State or other public law entities are given the power to limit or take away those rights; general courts are competent only with reference to the compensation to be paid, not with the legality of the expropriation decision. The general doctrine is that no individual or undertaking can claim a right when public law entities are given discretionary powers (unless it is a fundamental right).

Moreover, Article 103 of the Constitution empowers the Parliament to give administrative courts *giurisdizione esclusiva* (i.e., jurisdiction on cases involving both *diritti soggettivi*, including fundamental rights, and *interessi legittimi*) in relation to specific subject matters.[3]

While standing before the general courts depends on the claimant being granted a right, standing before administrative courts is linked to the theory of *interesse legittimo* and is generally wider. In practice, the rules on standing before the administrative courts have been the result of jurisprudential developments. The starting point is that *actio popularis* may be allowed on the basis of specific legislation only (i.e., concerning general and local elections). Only those who can claim that their situation is different (*differenziata*) from that of the majority of the people can claim to have a legitimate interest, provided that additionally their situation can be said to be somewhat foreseen by the law.[4]

Among the different situations where an *interesse legittimo* is granted, we can recall here that landowners are given standing to challenge building permissions granted to their neighbours, and candidates applying for a public service position or the award of a public contract may challenge both their exclusion for the procedure and the preference given to other candidates.

Litigation is widespread, and the economic crisis may have intensified it concerning, for instance, the award of benefits or public contracts.[5]

[2] All judgments by administrative courts are reported in www.giustizia-amministrativa.it; the site does not always work, and the research engine is antiquated, to say the least; the same materials were therefore accessed at www.utetgiuridica.it, for a fee website.

[3] See Protto and Bellavista (2011), pp. 168ff.

[4] Caputo (2011), pp. 250f.

[5] The latest released statistical data refer to 2009: see them at http://www.istat.it/it/archivio/65822; in that year, the *Consiglio di Stato* handed down more than ten thousand judgments.

3.2 Administrative Remedies/Administrative Dispute Resolution Tools and Their Effectiveness

3.2.1 Categorization of Available Remedies

Overall, in Italy, remedies against administrative measures or inaction are judicial remedies; besides the Ombudsman, which will be considered in a separate section, nonjudicial remedies such as administrative appeals have so far played a marginal role. The 1948 Constitution, drafted after the fall of the fascist dictatorship, is focused on judicial protection and does not even address the issue of administrative appeals. Under Article 24 of the Italian Constitution, everyone has right of access to courts for vindicating his or her rights or legitimate interests. A *certiorari* mechanism as the one present in the US for appeals to the Supreme Court or in the UK for appeals to the English Court of Appeal or to the (now) Supreme Court would run against the Constitution. Judicial remedies play a central role in Italy, while as we will see, other forms of redress, including ombudsmen, are much less relevant.[6]

Moreover, and again as a reaction to abuses perpetrated during the tyranny, Article 102 of the Constitution forbids the institution of special courts in addition to the administrative courts that are listed in Article 103, along with the Court of Auditors.[7]

This, coupled with the case law mentioned below, which has held unconstitutional all provisions making administrative appeals mandatory, has stymied the development of any institution resembling the Tribunals present in the UK. Administrative appeals in Italy are and cannot be but internal.[8]

Finally, due to the accelerated decentralization process of the past decade, administrative litigation more and more opposes different territorial levels of government. The dissolution of the hierarchical relations between the State and the local authority (*tutelle administrative* is no more part of the Italian institutional picture) has meant that litigation takes place before administrative courts (with the highest levels—i.e. the State and the Regions—litigating before the Constitutional court).[9]

Unlike in France, no institution is given the power to challenge decisions taken by other institutions before the administrative courts in the general interest of the law. The litigation is about one institution claiming that the other one has either infringed its competencies or adopted an illegal decision detrimental to some

[6] Even those pleading the case of the need of efficient administrative appeals accept the primacy of judicial remedies: see Calabrò (2012), p. 4.

[7] See Poggi (2006), p. 1968.

[8] Tribunals were studied in Italy by Balboni (1986).

[9] For instance, in 2010, this kind of litigation made up about 40 % of the caseload of the Constitutional Court: see table III at http://www.cortecostituzionale.it/documenti/relazioni_annuali/Prospetti_statistici_2010.pdf.

general interest whose protection falls under its mandate. This can be the case, for instance, when a decision taken by one administration may affect detrimentally the environment in a given municipality or the interests of the citizens of a local authority.[10]

3.2.2 Internal Administrative Appeals

Appeals, as we understand them today, are the result of a long evolution that was common to all of Europe. In feudal times, well before jurisdiction became a specialized function, appeals could always be lodged to the overlord and ultimately to the King or Emperor. This is so much so that until today, judicial review proceedings brought in England are registered as R. *ex parte* so and so, where R. stands for Regina. In Italy, for instance in the Kingdom of Sardinia (which at the time besides Sardinia included Piedmont and Savoy in today's France), the rules concerning these appeals were, for instance, recast in 1770.[11]

When courts finally became a separate avenue for redress, the Kings kept the prerogative power of mercy. This was the case in Italy too according to Article 8 of the *Statuto albertino*, the 1848 Constitution of the Kingdom of Sardinia (Kingdom that, in a matter of two decades, was to incorporate most of the rest of the peninsula to become the Kingdom of Italy, making the *Statuto* the first Constitution of the new state).

Moreover, being usually the head of the executive power (and this was the case under Article 5 of the *Statuto*), the King could reform the decisions taken by State officials.[12]

The same could be deduced from the fact that under the provision last referred to, he was the commander in chief of both the army and the navy; the hierarchy, as was the case in the feudal system, was the template on which appeals were designed. Needless to recall that, following the model that was perfected in France after the French Revolution but was already quite developed in eighteenth century absolutist—and therefore centralized—States, hierarchy was the way both ministries and the relations between State and local officials were organized.

Italy was very part of this general pattern. Article 3 of l. 20 marzo 1865, n. 2248, all. E (which was part of a handful of statutes simultaneously passed in order to make possible the administrative unification of Italy) provided, as general procedures for the review of administrative decisions, both a request for revision

[10] E.g., Cons. Stato, Sez. IV, 9-10-2010, nos. 8683, 8685, and 8686, all cases concerning actions brought by a provincial government against the State agency responsible for setting motorway tolls.

[11] *Leggi e costituzioni di S.M.*, Torino, Stamperia Reale, 1770, t. I, pp. 50–52; t. II, pp. 473–475.

[12] Moreover, under Article 65 of the *Statuto*, the King had the power to name and to dismiss the ministers.

addressed to the same authority that had taken the decision and appeal to a hierarchically higher authority.

The decision by the hierarchically higher authority could in turn be appealed to a higher authority, and so on up to the King, who decided having heard the advice of the *Consiglio di Stato*, the Italian counterpart of the French *Conseil d'Etat*. When in 1889, in a development similar to the evolution from the *justice rétenue* to the *justice délégué* that had already taken part in France, the *Consiglio di Stato* was given jurisdiction for the review of administrative decisions (l. 31 marzo 1889, n. 5992), it was provided that the exhaustion of administrative appeal was a condition precedent to an action for judicial review. In this way, the French model of the *récours préalable* was followed in Italy as well. The rule of the *récours préalable* was reaffirmed by R.D 26 giugno 1924, n. 1054, *Approvazione del testo unico delle leggi sul Consiglio di Stato*, which consolidated all the previous rules about the *Consiglio di Stato*. Under Article 26 of R.D 26 giugno 1924, n. 1054, action for judicial review could be only brought against *atti definitivi*, i.e. administrative decisions affirmed following appeal(s) to higher authorities or against decisions taken by State organs not having any superior (i.e., decisions taken by the Government, usually being formally Royal decrees). Meanwhile, the *Consiglio di Stato* kept the power to give advice to the King on appeals brought to him against *atti definitivi* [Article 16(4) R.D 26 giugno 1924, n. 1054].

Basically, and leaving aside special appeal procedures, at this stage administrative decisions in Italy had to be appealed to the hierarchically higher authority; then they could either be appealed to the King (so-called *riscorso straordinario al Capo dello Stato*) or be challenged in judicial review proceedings.

Appeals to the hierarchically higher authority were frankly ineffective, not only because of the tendency on the part of the superior official to affirm the decision taken by his (and more rarely and lately her) inferior but because appeals were often left unanswered, in order to try to stall any possibility of judicial review,[13] so much so that the *Consiglio di Stato* in the end allowed those having lodged an appeal and having waited 60 days to ask for a formal decision on the appeal within 30 further days. If no decision was taken even after this, the prolonged inaction was treated as a silence equivalent to a rejection of the appeal (*silenzio rigetto*) so to give to those concerned the possibility to directly challenge the first decision.[14]

Inefficiency finally led to reform. D.P.R. 24 novembre 1971, n. 1199, *Semplificazione dei procedimenti in materia di ricorsi amministrativi* (in Italy we started trying making things simple already in 1971) (a) abolished the *récours préalable* rule, meaning that appeal was still possible, but represented no more a condition/precedent for judicial review; (b) hierarchical appeals were confined to just one step, the appeal being lodged with the official who was the immediate

[13] Unhappiness with the administrative appeal systems was voiced decades before the reform mentioned below: Zanobini (1958), p. 83; see now Calabrò (2012), pp. 70ff.

[14] E.g., Cons. St., Ad. Plen., 3-5-1960, n. 8; for analysis and further references, see Parisio (1996).

superior of the official having taken the decision; and (c) this kind of appeal was kept as a condition precedent to the *riscorso straordinario al Capo dello Stato*.

Article 7 D.P.R. 24 novembre 1971, n. 1199, reaffirms in a very general way all preexisting rules providing for petitions for reconsideration addressed to the same decision maker to be treated as administrative appeals. The rules enacted with reference to hierarchical appeals do apply to these appeals as well, unless they are inconsistent with the specific regulations applicable to appeals for reconsideration.[15]

At the same time, l. 6 dicembre 1971, n. 1034, *Istituzione dei tribunali amministrativi regionali*, which set up first instance administrative courts in each region, confirmed that appeals were no longer a condition precedent for judicial review.

A number of special provisions making administrative appeal a condition precedent to judicial review still survived the 1971 reforms. Most of them have however been declared unconstitutional and void in the meantime. According to a well-established case law, making administrative appeal a condition precedent to judicial review is inconsistent with the principle of effective *judicial* protection enshrined in the Constitution.[16]

However, there are some instances where administrative appeals are mandatory mainly in the field of social security payments[17] and taxation (but limited to litigation whose value does not exceed the sum of 20,000.00 €).[18]

Finally, it must be said that in the past 40 years the Italian public sectors, including the State services and line ministries, have been deeply reorganized, one of the leading principles for reform being the reduction, if not elimination, of the hierarchical relations between different organs and officials (so much so that a Minister is no more a hierarchical superior of the directors of the ministry he/she is heading). Similarly, the relations between the State and local authorities are no

[15] See Calabrò (2012), pp. 80ff, also providing a few instances of legislative provisions providing for this appeal.

[16] E.g., Corte cost., 23-4-1998, n. 132, relating to taxation.

[17] Art. 443 of the Civil Procedure Code states that in the field of social security, the judge can be addressed only after an administrative appeal has been presented or, in any case, after 180 days following the presentation of the administrative appeal. The Court of Cassazione, S.S. U.U., 6 April 2012, n. 5572, referring to the decision of the Corte costituzionale 132/98, holds that the right of the petitioner cannot expire during the period of the administrative appeal.

[18] Art. 17bis, D. Lgs, 546/92, introduced by D.L. 98/11 and effective from 1st April 2012, states that in case of fiscal litigation under 20,000.00 €, the taxpayer cannot address immediately the Tax Court but must file a prior administrative appeal with the Tax Administration. If the administrative appeal is not notified in time, the taxpayer loses the right to file his recourse to the Tax Court. This recent innovation has created a debate in legal literature between the position according to which it is unconstitutional (Marini 2012, p. 855; Bianchi 2012, p. 204) and the position that it is not (Turchi 2012, p. 898). The latter position is mainly grounded on the decision of the Corte costituzionale 13 luglio 2000, n. 276, which held the constitutionality of a law that introduced a mandatory mediation (not an administrative appeal) before filing recourse to the Tax Court.

more construed in terms of hierarchy. This has undercut in a relevant manner what room for hierarchical appeals could have survived the 1971 reforms.

Beyond special sector provisions, which will be discussed below, the only appeal that is still used widely enough across the range of administrative law is the *riscorso straordinario al Capo dello Stato*.[19]

This is mainly due to two factors. Firstly, the *ricorso straordinario* used to be not just much cheaper than judicial review procedures but was almost for free. As it is generally the case with appeals, specialized legal assistance is not mandatory, so that the claimant can save lawyers' fee (another question is whether this is advisable); on top of that, there were almost no costs involved in the procedure of *ricorso straordinario*. This has been changed by Article 37(6) l. 2011/111 (the 2012 budget), which has introduced a 600 € fee both to discourage the appeal and to make some money to contribute to the State budget. Secondly, the deadline for lodging this *ricorso* is 120 days, while judicial review must be brought in 60 days (and in some cases in 30 days), meaning that the *ricorso* is often used by those claimants who would be too late to bring an action in judicial review because they, and more rarely their lawyers, have left the shorter deadline pass without acting. Thirdly, in some milieu, like the armed forces, the *ricorso straordinario*, which is lodged in front of the authority that is also the commander in chief, is considered to be less of a challenge to hierarchical authority than judicial review and might be preferred for this reason.

Finally, Article 120 of the Code of Administrative Judicial Procedure has ruled out the possibility to appeal by way of *riscorso straordinario al Capo dello Stato* the decisions taken in the procedures for the award of public procurement contracts. The reason usually given for this special rule refers to the highly technical nature of public procurement litigation, always involving more parties than just the contracting authority and the economic operator challenging the award (actually, if the award is challenged, it means that another economic operator would resist the challenge).[20]

Those aggrieved by an administrative decision may always ask the decision maker for reconsideration.[21] Within limits, including those linked to the principle of protecting legitimate expectations, public authorities in Italy may always reconsider their decisions. However, beyond the exceptional cases in which such a petition is treated as an administrative appeal under the specific rules applicable to it, a petition for reconsideration does not suspend the running of the time for lodging the judicial review.[22] The public authority is not even under a duty to reply to a petition consideration since it is considered to have already given its final say on the matter.[23] Additionally, if after the deadline is passed the administrative

[19] See, generally, Bertonazzi (2008).

[20] See Comba (2011), p. 240.

[21] See Calabrò (2012), pp. 24ff, with reference to earlier scholars.

[22] The distinction is well established in the case law: for references, Calabrò (2012), pp. 82ff.

[23] E.g., Cons. Stato, Sez. V, 03-10-2012, n. 5199.

authority simply affirms its previous decision without changing the reasons given, this later decision can no longer be challenged since it has not changed the legal situation to which the claimant is held to have acquiesced to by not timely bringing judicial review against the original decision.[24] This hardly encourages asking for reconsideration rather than bringing judicial review procedures, unless of course the first decision is thought to be legal and what is asked is a different exercise of discretion.[25]

As already remarked, *tutelle administrative* belongs to the past in Italy. Litigation has taken its place, and all territorial levels are involved in this game, which is played in the Constitutional Court when the State is opposed to the Regions, before the administrative courts otherwise.

Under Article 3 D.P.R. 24 novembre 1971, n. 1199, the hierarchically superior authority charged with deciding an appeal may, on its own motion or because the complainant so asks, suspend the execution of the measure challenged.

Hierarchical appeals may be brought for reasons pertaining to both the legality and the merits of the decision challenged. The authority charged with deciding an appeal is however bound by the grounds raised by the claimant, meaning that *reformation in pejus* is in principle ruled out.[26] In case of polycentric disputes and appeals and cross appeals, however, the claimant could find his/her situation worsened at the end of the day.[27]

The legality principle is taken very seriously. Reference to the "grounds" of appeal betrays a legalistic approach that hardly leaves room for dialogue between the administration and the concerned party(ies). The entire procedure is a written one. Article 4 D.P.R. 24 novembre 1971, n. 1199, provides that the appeal document is served to the other (if any) parties directly involved. These parties are given 20 days to produce documents or briefs. There is no provision of a hearing, and the administration is supposed to decide based on the elements in the file, the appeal, and the possible additional documents or briefs. This is quite in line with the tradition of detachment between the administration and the *administré*, which is still the rule under Article 10 of the l. 7 agosto 1990, n. 241, the general rules on private participation in administrative proceedings.[28] That provision as well only foresees written participation. Only in 1992, the official in charge of the proceeding was given the power of hearing the interested parties if he/she thought it useful.[29] This power is seldom used in general, and this is even more so in case of appeals.

[24] On decisions merely affirming previous decisions, Cons. Stato, Sez. IV, 30-7-2012, n. 4311, and Cons. Stato, Sez. V, 21-10-2011, n. 5653.

[25] See Calabrò (2012), p. 75, noting that this is the only reason why these administrative appeals might deserve not to be cancelled from the law books.

[26] See, to this effect, Cons. Stato, Sez. VI, 16-7-2012, n. 4150.

[27] Cons. Stato, Sez. V, 14-11-2006, n. 6687.

[28] The statute is analyzed in the different contribution collected by della Cananea and Sandulli (2010).

[29] For some basic information, you may refer to Caranta (2007a), p. 253.

True, Article 11 of the l. 7 agosto 1990, n. 241, provides for the possibility of agreements between the public authorities and private parties. However, those agreements must conform to all legal provisions applicable, and while the public authority can modulate the outcome of its discretionary choices in search of an agreement, it must still pursue the general interest. The room for compromise is therefore limited, and once a decision has already been taken it seems difficult for the public authority to significantly alter the appreciation of the public interest on appeal.

Transactions are concluded with reference to civil obligations only. They happen often enough, even if fear of personal liability actions brought by the public prosecutors with the Court of Auditors might discourage civil servant from actively seeking transactions.

Finally, annulment or reform of the decision taken is the only favorable decision that can be taken if the administrative appeal is upheld. Damages must be pursued through judicial actions.[30]

Under Article 2(1) D.P.R. 24 novembre 1971, n. 1199, the deadline for a hierarchical appeal is 30 days; as already recalled, the deadline for *riscorso straordinario al Capo dello Stato* is 120 days.

Under Article 6 D.P.R. 24 novembre 1971, n. 1199, a hierarchical appeal is presumed to be rejected if no decision is taken in 90 days, meaning that the original decision has to be challenged in a judicial review in 60 (more rarely 30) additional days.

The decision of the *riscorso straordinario al Capo dello Stato* can easily take 2–3 years, which is still way shorter than normal judicial review proceedings (first instance and appeal combined).

Concerning public contracts, whatever their type is, Italian law distinguishes between award and conclusion of the contract (Article 11 of d.lgs. 12 aprile 2006, n. 163, the Code for Public Contracts). Under the pressure of EU law, a minimum standstill period has to elapse between the two moments.[31] This is so in order that the aggrieved bidders may challenge the award and get interim relief before the contract is concluded. The principle according to which aggrieved parties may always ask for reconsideration may well apply to public contracts, and even more so since Article 9(11) of the Code for Public Contracts reaffirms the power of contracting authorities to undo illegal decisions.[32] However, aggrieved bidders will be rather advised to seek judicial review since the deadline is particularly short (30 days), and asking for reconsideration does not prevent the time from running.

[30] See Caranta (2007b), p. 629.

[31] See, generally, Caranta (2011), p. 53.

[32] E.g., Cons. Stato, Sez. V, 23-5-2011, n. 3078, Cons. Stato, Sez. V, 12-5-2011, n. 2818.

3.2.3 Conditionality Between Administrative Review/Appeal and Judicial Review

Generally, administrative appeals are not a precondition for judicial review, so no problems with reference to the ECHR arise under this respect, Article 24 of the Italian Constitution already enshrining the principle of effective judicial protection into the national legal order. Again, the filing of a hierarchical appeal will however result in the suspension of the deadline for lodging an action for judicial review for 90 days.

Any decision taken after the lodging of an action for judicial review will be considered an act to be challenged in the same judicial proceeding,[33] unless it is one annulling the administrative decision to the satisfaction of the claimant, in which case the court proceeding will be considered to be devoid of a matter to be decided and terminated (but the claimant could still ask to recover his/her legal costs).[34]

The main link between appeals and subsequent judicial review is that no new ground for review can be added at the latter stage. Otherwise said, the claimant in judicial review proceedings having before lodged an administrative appeal is then bound to the grounds then chosen.[35]

This is of course problematic since no legal advice is required for lodging an administrative appeal, while experts, once they are involved in the litigation, could well spot more grounds for review than a layman.

The decision on the *riscorso straordinario al Capo dello Stato*, on the other hand, has not a suspensive effect concerning judicial review procedures. The rule is the one of either or because the *Consiglio di Stato* is involved both in deciding the *ricorso* (in its advisory capacity) and (potentially) in judicial review proceeding (in its judiciary capacity as an appeal court). It would not make sense to involve twice the same body. If one of the parties to the litigation would rather have the issue decided judicially, the appeal procedure is discontinued and the case is brought before the administrative courts. The decision on a *riscorso straordinario*, on the other hand, cannot be challenged in a judicial review except for breaches of procedural rules, the substance being finally adjudicated upon in the administrative appeal.

The jurisdiction of Italian administrative courts is generally confined to the legality of the administrative decision and does not extend to the merits of any case.[36] However, under Article 21 *octies* (2) of l. 7 agosto 1990, n. 241,

[33] To the effect that the new decision has to be challenged in the pending procedure for judicial review, Cons. Stato, Sez. V, 13-12-2012, n. 6393, stressing that the new measure needs to be challenged to avoid the first action to become inadmissible, Cons. Stato, Sez. V, 3-10-2012, n. 5196, and Cons. Stato, Sez. V, 25-8-2011, n. 4807.

[34] E.g., Cons. Stato Sez. V, 5-03-2012, n. 1258.

[35] E.g., Cons. Stato, Sez. VI, 5-9-2002, n. 4473, in *Foro Amm. CDS*, 2002, 2125.

[36] For some recent judgment, see Cons. Stato, Sez. IV, 8-10-2012, n. 5209, and Cons. Stato, Sez. VI, 28-9-2012, n. 5149; for a discussion, Caranta and Marchetti (2009), p. 145.

administrative courts can affirm administrative decisions tainted by formal or procedural errors if they are satisfied that they are correct on their merits.[37] However, this mainly applies in cases of bound administration.[38]

Besides damages, the remedies afforded are annulment of the illegal administrative decision and orders to take a decision if the inaction of public authorities is challenged.[39] In the first case, the public authority may well take a decision purged of the defects that lead to the annulment (and possibly otherwise invalid); in the second case, it is expected to take a decision (and possibly an invalid one). Generally speaking, the remedy here is to bring a new judicial review procedure against the measure taken.[40]

In some specific cases only may administrative courts—usually through an administrative official specifically named to this end—take the decision instead of the public authority. This is when the new decision taken is reiterating the same mistakes or—and this is more often the case—it is only apparently giving effect to the judicial decision while actually abusing the discretionary powers left to the decision maker (so-called *elusione del giudicato*).[41] Moreover, an official is always named in judgments concerning the duty to act, along with a 30-day deadline for the public authority to act, beyond which the official is empowered to take for himself/herself the decision.[42]

3.3 Mediation and Arbitration

As already recalled, overall in Italy, remedies against administrative measures or inaction are judicial remedies. This is due first and foremost to the idea that the administration is traditionally quite authoritative. The relations between the State and the citizens adhere to quite a top-down pattern.[43] True, since 1990 the law allows for dialogue (rather than negotiations) possibly leading to agreements between the administration and the private sector.[44]

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[37] See, generally, Sorace (2007), p. 385a, and Luciani (2006), p. 377.

[38] E.g., Cons. Stato, Sez. VI, 12-12-2012, n. 6382; Cons. Stato, Sez. IV, 9-10-2012, n. 5257; and Cons. Stato, Sez. V, 6-12-2010, n. 8546.

[39] Even in case of inaction, the administrative courts can't take decisions in lieu of the public authority: Cons. Stato Sez. IV, 25-9-2012, n. 5088, and this is so even if there is no discretion and the power is totally bound: Cons. Stato, Sez. V, 14-4-2009, n. 2291; the situation is different only if the administration does not abide to the order to take a decision (see immediately below in the text); see, generally, Ramajoli (2011), p. 573.

[40] E.g., Cons. Giust. Amm. Sicilia, Sez. giurisdiz., 7-2-1990, n. 17.

[41] This concept is obviously quite flexible, and a lot is left to the appreciation of the facts of the case by the administrative courts: for a few recent cases, see Cons. Stato, Sez. IV, 21-11-2012, n. 5903; Cons. Stato, Sez. V, 20-4-2012, n. 2348; Cons. Stato Sez. IV, 4-4-2012, n. 2004.

[42] E.g., Cons. Stato, Sez. IV, 12-3-2010, n. 1459; see, for more references, Parisio et al. (2011).

[43] Please refer to Caranta (2009), p. 99.

[44] See Mirate and Rodriquez (2011), p. 237.

However, besides the fact that this approach is mainly confined to urban development and other projects impacting the environment, the point is that agreements are supposed to take the place of the administrative decision. Once this is taken, a short deadline for appeal or judicial review applies, so that there is not much scope for dialogue or negotiation. It must be noted that according to a well-established case law, a plea by a concerned party to reconsider a decision taken does not stay the time to seek judicial review, and a decision taken simply affirming a previous decision cannot be reviewed by courts when the concerned party failed to challenge in due time the original decision before the administrative courts.[45]

This is hardly any incentive to try and negotiate rather than immediately seek judicial review.

Of course it cannot be considered as instances of mediation those cases—such as with traffic fines—when the party concerned is to choose whether to pay immediately or to challenge the fine and pay more if he/she loses his/her case[46] or when the owner is entitled to a marginally higher price if he/she agrees to sell his/her property rather than to challenge an expropriation.[47]

Under Article 1966 of the Italian Civil Code, out-of-court settlements are possible only with reference to rights the parties may freely dispose of. This is generally not the case with public authorities since public powers are considered nonnegotiable.[48] Cases of out-of-court settlements are therefore mainly focusing on pecuniary obligations, such as with reference to damages claims.

Here again, the legal environment is not really favorable to out-of-court settlements since these contracts amount to an at least partial acknowledgement of wrongdoing resulting in damages being paid from the public purse. As such, it is from the moment an out-of-court agreement is signed that the public servant having caused the harm can be pursued before the Court of Auditors to recover the money.[49] The same Court of Auditors is quite attentive—and sometimes possibly too strict—in assessing whether an out-of-court settlement is really in the best interest of the administration, pursuing the public servants having signed them if the answer is in the negative.[50]

[45] E.g., Cons. Stato Sez. IV, 26-09-2013, n. 4818; Cons. Stato Sez. IV, 17-09-2013, n. 4602; Cons. Stato Sez. III, 25-03-2013, n. 1655.

[46] E.g., Article 16 of L. 24-11-1981 n. 689 (as amended in 2008).

[47] Article 45 D.P.R. 8-6-2001 n. 327.

[48] Cass., Sez. Un., 27-07-2004, n. 14090, *Foro Amm. CDS*, 2004, 2007; T.A.R. Calabria Catanzaro Sez. I, 25-03-2011, n. 401.

[49] E.g., C. Conti Veneto, Sez. giurisdiz., 13-02-2009, n. 121; C. Conti Sicilia, Sez. App., 20-11-2008, n. 363.

[50] See, e.g., C. Conti Trentino-Alto Adige, Sez. giurisdiz., 30-04-2008, n. 22; C. Conti Lazio Sez. giurisdiz., 13-12-2005, n. 2921, e C. Conti Sez. II App., 10-01-2005, n. 3.

Public servants are thus hardly encouraged to seek settlements, the best option usually being to wait for a final judgment against the administration, which in Italy can take decades to be handed down.[51]

Compulsory mediation was introduced in the Italian legal system, but only for civil litigation, by legislative decree 28/2010 but was struck down by the Constitutional Court with decision n. 272/2012 and again reintroduced by decree law n. 63/13, which witnesses the difficulty that accompanies the introduction of this ADR mechanism even in civil litigation. It is therefore easy to understand why it was never introduced in administrative law as a general rule. It is however possible to find some examples of mediation in specific fields of law close to administrative law, like taxation, where it is no question of *interessi legittimi* but only of *diritti soggettivi* (see Sect. 3.1). As we have already seen (Sect. 3.2.2), a compulsory administrative appeal was introduced in 2011 for tax litigation whose value does not exceed the sum of 20,000 € (effective from 1st April 2012). This appeal may be filed together with a proposal of mediation. If he/she does so, the taxpayer gets 40 % automatically decreased tax penalties and can begin a bargaining procedure with the tax administration in order to reach a settlement on the final sum to be paid. In case of tax litigation whose value exceeds 20,000 €, mediation is not compulsory but possible, according to art. 48 Legislative Decree 546/1992, which was many times challenged before the Constitutional Court but always upheld.[52]

Arbitration in administrative disputes was admitted by case law only when *diritti soggettivi* were at stake and not for *interessi legittimi*. Article 6 of law 205/2000 (now art. 12 of the Administrative Process Code—Legislative Decree 104/2010) acknowledged the rule and transformed it into law and refers to art. 806 of the Code of civil procedure, which regulates the arbitration.

Special rules are provided for arbitration when public procurements are involved. In 2007, arbitration in public procurements was totally forbidden because of the perceived high costs faced by contracting authorities, but then it was again introduced in 2010, even if with some restrictions. According to art. 241 of the Italian Public Procurement Code (Legislative Decree 163/2006), the contracting authority must declare in the public bid its intention to insert the arbitration clause in the contract. If the private contractor is against the arbitration clause, he must notify his position to the contracting authority within 20 days from the adjudication, in which case the arbitration clause is eliminated from the contract.

[51] For a pessimistic forecast about the future of out-of-court settlements with the public administration, see Greco (2005), pp. 223ff.

[52] See Constitutional Court, decisions n. 433/2000 and n. 110/2013.

3.4 The Ombudsman in Italy

3.4.1 The Origins and the Evolution: The Lack of a National Ombudsman

A national Ombudsman was never established in Italy, even if some proposals were advanced, including at the constitutional level. In 1984, the "Bozzi Commission" for the reform of the Constitution, named after the President, Aldo Bozzi, proposed the introduction of art. 89 *bis*, according to which a national Ombudsman could be established by law, at the service of citizens, with the with to report about failures and abuses of the public administration and to protect citizens' interests. The proposal did not pass, nor was the other proposed reform of the Constitution worked out by a new Commission in 1997, which proposed to introduce Article 111 establishing a national Ombudsman. In the following official proposals for the reform of the Constitution, the discourse about a national Ombudsman was abandoned (for example, in the proposal approved by Parliament in 2005 but then struck down by referendum in 2006, a national Ombudsman is not mentioned any more).

The legal literature tackled the issue as soon as 1974, with a seminal book written with comparative method and edited by Costantino Mortati,[53] which supported the introduction of an Ombudsman in Italy following the Scandinavian model. But less than 10 years later, in 1983, a study on constitutional reforms edited by Gianfranco Miglio[54] noted that the idea of a form of control on the public administration based upon an Ombudsman was not realistic because the Ombudsman is a powerless institution, whose efficiency depends only on the willingness of the Parliament or the local elective Assembly to follow his reports. And since Parliament was not likely to give any relevance even to the reports of the *Corte dei Conti* (the national Magistrates' Court, which issues a yearly report on the National Budget Act), then it was even more unlikely that it would have taken into account the report of a national Ombudsman.[55]

What can explain such a profound difference between the mildly optimistic proposals found in the book edited by Mortati (1974) and the strongly pessimistic views expressed in the study edited by Miglio (1983)? Apart from the personal positions and legal backgrounds of the authors, it has to be said that it was exactly in the first half of the decade 1970–1980 that the first experiment of local (regional) Ombudsman was performed in Italy. It was a not so exciting experience that perhaps disappointed the Authors of the study edited by Miglio.

[53] Mortati (1974).

[54] Miglio (1983).

[55] F. Pizzetti, in Miglio (1983), p. 712.

3.4.1.1 The Introduction of Regional Ombudsman and the Extension to Provinces and Municipalities

The Italian Constitution of 1948 introduced a regional level of government, which was unknown to the previous Italian constitutional organization, inspired by the French centralized model. Part II, Title V of the Constitution regulates Regions: there are 15 regular Regions and 5 special Regions, all of them provided with the legislative power and with the competence of approving their own "Statuti" (a frame of government for each Region). However, it was not until 1970 that the first Regional councils were elected and the first *Statuti* were approved. The Constitution does not say anything about Regional Ombudsman, but almost all Regions introduced it in their Statute (perhaps also under the influence of the book edited by Mortati) and then approved regional laws in order to regulate their activity.

Even if they were free to choose any possible model, Regional legislators followed a standard model of Ombudsman, mainly reproducing the Scandinavian one as described in legal literature: Regional Ombudsmen were appointed by regional Legislative Assemblies, they did not have any hard power (they cannot nullify administrative acts) but only a soft power, and, at least at the beginning, they had the double role to (1) control the executive on behalf of the legislative assembly and (2) help citizens in their relationship with the administration, carrying out a quasi-judicial function.[56] At the beginning of their experience, Regional Ombudsmen were required to perform both these activities, following the model of the Regions Liguria and Toscana, but from the beginning of the 1980s, the quasi-jurisdictional function prevailed, under the influence of the law enacted in Regione Piemonte (Regional Law 9 December 1991, n. 50, still in force), whose Article 2 declares that "The Ombudsman's (Difensore civico) task is to protect the citizen in achieving from the Regional Administration what is due to him by law." No mention of the task to control the Executive on behalf of the Legislative is made in the law of Regione Piemonte.

Regione Piemonte soon became the leading model for Regional Ombudsman,[57] which hence lost its original function as controller of the Executive on behalf of the Legislative, even if keeping the legal tools designed for this task: a yearly relation to the Regional Assembly and no power to nullify administrative acts. It is however incorrect to say that the Regional Ombudsman only acts in the interest of citizens because in their yearly relations, Regional Ombudsmen very often use the cases tackled during the year in order to suggest modification and improvements in the general administrative organization and activities.[58]

[56] The distinction between those two functions of the regional Ombudsman is well described in Luciani (1990). For a general description of the different regional Ombudsman, see Sica (1993); and Asprone and Salvati (2012), pp. 1–23.

[57] Calderoni (1987), pp. 35–36, but for a critical position against the Regione Piemonte statute, see Lombardi (1986), pp. 397–401.

[58] See, for example, the yearly relation of the Regione Piemonte Ombudsman for 2011.

In 1990, the Code for Local Government (art. 8 L. 142/90, then art. 11 D. Lgs. 267/00) authorized the Provinces and Municipalities to create their own Ombudsmen. Considering that in Italy there are about a hundred Provinces, and more than 8,000 Municipalities, one can imagine the huge amount of confusion that this innovation was potentially able to entail since the Code only provided very limited rules, leaving great discretion to local bylaws in defining the structure and the powers of Ombudsman.[59] However, this discretion was not widely used since Municipalities' and Provinces' bylaws about Ombudsman were very similar to one another: they provided that Ombudsmen were always appointed by the Municipal or Provincial Assembly (only the required majority varies among the different Municipalities and Provinces) and that they were roughly given the same powers (only soft power) and competences.[60]

As for the function of the Ombudsman, this is the only specific indication that can be found in the Code: Article 8 (then Article 11) states that the Ombudsman (difensore civico) must guarantee the impartiality and efficiency of the Administration, warning about the cases of maladministration of citizens, also on his own motion. This wording seems to reconcile the two traditional functions of the Ombudsman: it is not any more the controller of the Executive on behalf of the Legislature (as in the original Swedish model), but it must act in order to protect citizens against maladministration, and through this activity, it must help the Administration in improving its organization in order to guarantee impartiality and efficiency. The local Ombudsman's role is thus mainly in favor of citizens,[61] and its relationship with the Administration has become similar to that of a consultant of the Administration, recommending organizational improvements on the basis of the complaints received from citizens. The Constitutional Court defined the role of local Ombudsman, even if only in *obiter dicta*, as a controller of administrative legality and correctness.[62]

One of the most problematic issues in the activity of the Local Ombudsmen is the definition of their competence, particularly in relation to the Regional Ombudsman. Provinces and Municipalities can perform their own functions and also functions delegated by Regions, and formally the Regional Ombudsman is competent for regional functions that are performed by Provinces and Municipalities. However, one can imagine the confusion that could be created if citizens should be required to know what the proper functions are and what the delegated functions of Provinces and Municipalities are in order to address the correct Ombudsman. In their ordinary routine, Local and Regional Ombudsmen generally never dismiss a complaint on the basis of their lack of competence but sometimes direct the

[59] One of the first commentaries was very worried about this aspect: see Bonatti (1990), pp. 243–235. See also Sica (1993), pp. 61–63.

[60] For an overview of the (not so much) different organizational models followed by Municipalities, see Gambino and Storchi (1993).

[61] Luciani (1990), pp. 1 and ff.

[62] Italian Constitutional Court, decision nos. 167/2005, 173/2004, 112/2004.

petitioner to the correct Ombudsman and more often assist him or her in the case, even if it is not their strict competence. In the latter case, of course, Local and Regional Ombudsmen only act as legal advisors for the petitioner, suggesting to him what to do and asking the Administration to act properly but without exercising any power or right towards the Administration.

3.4.1.2 The Abolition of the Municipal Ombudsman

After almost 20 years of activity, Municipal Ombudsmen were abolished by Article 2, Section 192 of Law 191/09 (the Budget law for 2010). The reason given for the abolition, in the first sentence of the article, is to reduce public expenses, and in fact the same article 2, Section 192, abolishes other cases of "municipal waste," like the municipal director general for municipalities with less than 100,000 residents or submunicipal councils for municipalities with less than 250,000 residents.

The new law provides that the functions of the Municipal Ombudsman can be performed by the Provincial Ombudsman, on the grounds of an agreement that can be signed between the Municipality and the Province.

The abolition of the Municipal Ombudsman did not create a great reaction in the legal literature, nor was it missed by Municipal governments, since only a few of them signed the agreement with the Province for the transfer of Ombudsman's functions. To complete the picture, one has to consider that Article 17 of Decree law 95/12 (approved by Law 135/12) states that all Provinces have to be reorganized, which means that they have to be melted into a lower number of greater entities. The reform of Provinces is now far from being completed or even carried out, but if ever it will be, the destiny of Provincial Ombudsman will follow.

The present situation is now the following: there is no National Ombudsman nor a national framework legislation about Ombudsman but only Ombudsmen at regional and provincial levels: the Provincial Ombudsman can also act on behalf of the Municipalities existing in the territory of the Province, if they have so decided through a specific agreement between the Municipality and the Province.

Not all Regions have created their Ombudsman, but only 14 out of 20 have[63]; nor have all Provinces created their Ombudsman, but only 29 out of 110 have, and the larger Italian Municipalities (e.g., Milano, Roma, Torino, Firenze) have not signed any agreement with the Provinces for the transfer of Ombudsman functions.[64]

[63] The Regions presently having an Ombudsman are the following: Abruzzo, Basilicata, Campania, Emilia Romagna, Friuli Venezia Giulia, Lazio, Liguria, Lombardia, Marche, Piemonte, Sardegna, and Toscana.

[64] Relazione del Difensore Civico della Provincia di Torino per il 2011, p. 2, http://www.provincia.torino.gov.it/urp/organi_istituz/dif_civ/difensore.

In 2011, the Network of Regional Ombudsman elected the Ombudsman of Regione Piemonte as their President, strengthening the leading role fulfilled by Regione Piemonte since 1981, with the first regional law about Ombudsman.

3.4.2 The Present Situation

It is quite difficult to describe the present situation and the activity of the Italian Ombudsman since, as we have seen in the previous paragraphs, there is not a national Ombudsman but only some Regional and Provincial Ombudsmen and, above all, there is not a national law setting a common legal framework for Ombudsman's scope and activities.

The main sources that can be used for analyzing the activity of Regional Ombudsmen are the yearly reports they are bound to present to the Regional Assemblies. But since there is not a common format, not even common editing rules for the preparation of such reports, it is very difficult to compare the different Regional Ombudsmen' reports and even more to find common trends (and the problem is much the same if one considers Provincial Ombudsmen). It follows that the role and the extent of the activity performed by the Ombudsman can vary very much from Region to Region and can depend upon the personality and the ability of the person sitting as Ombudsman.

Another source is case law: litigation about the Ombudsman is not rare but still not enough to give a complete picture of all aspects of legal problems connected with the Ombudsman, since it mainly relates to the appointment of an Ombudsman and, only to a minor extent, to its powers and, more generally, to its role.

Having in mind these limitations, it is now possible to tackle the main issues related to the Italian Ombudsman.

3.4.3 The Role of Italian Ombudsman in the Checks and Balances of the Rule of Law: The Ombudsman as an Independent Administrative Agency?

The original role of the Swedish Ombudsman in the Constitution of 1809 was commonly perceived as part of the checks and balances system, since it was aimed at controlling the Government on behalf of the Parliament, being an organ of the Parliament. However, we have seen in the previous paragraphs that the Italian Regional Ombudsman (the first Ombudsman created in Italy) very soon lost this role—if it ever had it—becoming the defender of people against cases of maladministration and, at the same time, the counselor of the Administration in order to avoid cases of maladministration.

The evolution of the Ombudsman's role is accurately investigated in a decision of the Regional Administrative Tribunal (TAR) of Region Lazio of 2009,[65] where the origin of the institution is traced back not to the Swedish Constitution of 1809 but to the *Defensor civitatis* created in the IV century A.C. in Rome for defending people from abuses of imperial officers,[66] which shows that the "political" role of the Ombudsman coming from the Swedish tradition is not the only one with sound historical roots since there is an older one coming from the ancient Rome tradition.

But leaving apart the historical debate, what is affirmed by the decision of the TAR is that in Italy the Ombudsman is not an agency of the Assembly (regional of provincial), nor does it depend on the (regional of provincial) Administration, and thus it is an independent entity, which leads the TAR to state that the Italian Ombudsman can be considered as an Independent Administrative Authority (IAA), with a role of mediation between the people and the Administration (following the model of the French *Médiateur*). In carrying out its activity of mediation, the Ombudsman should also facilitate the participation of citizens to the administrative activity by strengthening their petitions to the Administration.[67]

If we accept to qualify the Ombudsman as an IAA, this however does not solve the problem of its position in the checks and balances mechanism. Even going beyond the traditional theory of the three classical powers and accepting the modern idea of a constellation of powers (perhaps more close to the original idea of Montesquieu[68]), the position of IAAs is still not easy to be assessed: they can be considered as one of the powers constituting the constellation or, on the contrary, as institutions out of the check and balances mechanism, since they are typically technical institutions, without a political orientation (*indirizzo politico*), which instead characterizes the players of the separation of powers game. This second position seems to be fit for the Ombudsman in Italy, whose position cannot be placed in the check and balances mechanism also because it is not a "power," having no legal powers and a very scarce soft power, as it will be seen in the following paragraph.

As far as the relations between the different Ombudsman at the local level is concerned, going through the yearly relations one can find an extreme flexibility and the absence of any problem of territorial competence. For example, the Relation of the Ombudsman of Piemonte for 2011 lists among the cases processed operations with all the local level of government and with national government's offices, as well as with private companies,[69] while in Lombardia, art. 9 of Regional

[65] TAR Lazio—Roma, sez. II, 14 gennaio 2009, n. 139, in www.giustizia-amministrativa.it. For a comment, see Lucchini (2009), pp. 1491–1498; Italia (2009), pp. 126–133.

[66] The reference to the Imperial Rome experience can be found also in Nasuti (2010), pp. 2412–2474.

[67] But some Authors do not share this view, arguing that mediation and participation are two incompatible roles. See Luciani (1990).

[68] Comba (2005), p. 225.

[69] In a high number of cases, the Ombudsman for Piemonte acted against private telephone companies on behalf of citizens complaining for unauthorized telephonic advertisement.

Law 18/10 states that the Regional Ombudsman can intervene with all local governments. On top of that, national law 127/97, art, 16, states that the Regional Ombudsman can intervene with all national offices located in the Region, except for Defence, Justice and Public Security.

The persisting lack of a National Ombudsman and of a national framework law about Ombudsman brought about the need of a coordination, which is fulfilled by the National Network of Ombudsman (*Coordinamento nazionale dei Difensori Civici delle Regioni e delle Provincie Autonome*[70]), presently chaired by the Ombudsman of the Regione Piemonte. Hence, the following is the idea of a new model of Ombudsman, typical of the Italian situation: a "reticular Ombudsman," which is a network of Regional Ombudsman, lacking coordination imposed by national law but working together on a voluntary basis, which is, by the way, more coherent with the core model of Ombudsman activity.[71]

3.4.4 The Legitimacy of Italian Ombudsman: Between Citizen's Trust and "Quasi-Hard" Powers

It is very difficult to tackle the problem of Ombudsman's legitimacy. A first answer—at a formalistic level—could be that Ombudsmen do not need a specific legitimacy other than national law (for Provincial Ombudsman) and regional laws (for Regional Ombudsman), since it is not using a public power. But if one wants do dig a little deeper in order to really understand the operation of Ombudsman, it is necessary to forsake the usual formalistic rules of public law (exercise of public power requires legitimacy by law) and explore the field with ampler analysis criteria.

The discourse about Ombudsman legitimacy quite always implies a research about the citizen's trust: if the Ombudsman enjoys an ample trust from citizens and, through that trust, contributes to creating a culture of good governance and respect of the rule of law, then it has fulfilled its task and is therefore fully legitimated. The more the Ombudsman is legitimated, the more it is entrusted by citizens and the more administrative entities tend to follow its suggestions, which increases its legitimacy and thus implements a virtuous circle.

The assessment of citizens' trust towards the Ombudsman is however a very difficult task for a lawyer because it implies recourse to questionnaires and surveys that are not presently available about Italian Ombudsman.[72] What is available are the yearly reports of the Regional Ombudsman to the Regional Councils, generally downloadable from the internet but not easily comparable because they are written

[70] http://www.parlamentiregionali.it/consiglieri_regionali/difesa_civica/presentazione.php.

[71] Sgueo (2010), pp. 557–571.

[72] The lack of accurate studies about the efficiency of the Italian Ombudsman is pointed out by Piazza (2007), pp. 405–411.

and edited in different ways and thus descriptions of data and data themselves do not correspond. The results of the Ombudsman's activity are generally positive, in the sense that they convince the administration to accept their instance in the majority of cases: looking at 2011, it goes from 87.1 % of positive result in Region Emilia Romagna to 79.7 % in Piemonte, 59.44 % in Lombardia, and (for the cumulated period 1991–2009), 55.1 % in Toscana.[73]

Looking at these data, one may conclude that citizens should be satisfied with the Ombudsman's activity and thus do trust it, but it is not clear if it is a correct conclusion since there may be other indicators to assess this result. For example, it has been noted the importance of the communication used by the Ombudsman towards citizens as a tool of interpersonal relations: the Ombudsman must give to citizens the feeling of belonging to a community, instead of using the communication typical of the administrative and judicial vertical communication.[74] In other words, the citizens must appreciate the difference between addressing the Ombudsman and addressing a court, not only because the Ombudsman is free of charge but also because the citizens can *understand* what is happening and have the feeling to direct the activity, which almost never happens to the layman in the course of a judicial process.

The "competition" between the Ombudsman and the courts is thus one of the most crucial issues in analyzing the Ombudsman, and it is even more challenging in the Italian system, which is provided with a special jurisdiction for administrative litigation. It was debated in Italian legal literature if the Ombudsman was compatible with the Italian system of dual jurisdiction or, on the contrary, if it could create conflict and overlap between them,[75] but this objection can be easily overcome, considering that the Italian administrative process is only finalized to the nullification of the administrative act, while the Ombudsman is required to intervene in all cases of maladministration, mainly caused by administrative officers' behavior.

A first way to analyze the relationship between the courts and the Ombudsman can consist in studying what courts say about the Ombudsman in their decisions.[76]

The procedure of appointment of the Ombudsman is one of the most litigated issues related to the Ombudsman. The main point is whether the appointment of the Ombudsman by the (regional, provincial, and, up to 2009, municipal) Assembly can be qualified as a political decision, as such not justiciable or is only a highly discretionary act. The first opinion is supported by some Sicilian tribunals,[77] according to which courts can only verify compliance with the procedure of

[73] For Emilia Romagna, Yearly report of the Ombudsman 2011, p. 131, for Piemonte, p. 25, for Lombardia, p. 13, for Toscana, p. 108 (for Toscana, the data relate to the period 1991–2009, and the percentage puts together the results "appropriate" and "Partially insufficient."

[74] Dolcher (2010), pp. 134–151.

[75] These opinions are critically reviewed in Di Giovine (1974), p. 176.

[76] For an accurate review of Italian case law about Ombudsman, see De Leonardis (2009), pp. 2971–2985.

[77] TAR Sicilia-Palermo, sez. I, 25 ottobre 2007, n. 2306; TAR Sicilia—Catania, sez. III, 17 marzo 2010, n. 697.

appointment but cannot require for a motivation or examine it. According to the opposite line of thought, the act of appointment must be motivated and, even if the Assembly has a large discretion and is not forced to accurately compare all the candidates, must however follow a logical reasoning in choosing the Ombudsman. Another point of interest is the definition by administrative case law of the legal nature of the Ombudsman, which was examined supra at Sect. 3.4.3.

A second field of interplay between the courts and the Ombudsman is the Ombudsman's exercise of specific powers bestowed on him by law, considered by legal literature as "atypical" powers of the Ombudsman, since they are not soft but "quasi-hard." This happens in two cases.

Under Article 25 of Law 241/90, everyone has the right of access to administrative documents that may be of his interest, and, if he receives a denial, he can either file recourse to the administrative judge or address the Ombudsman. In the latter case, the Ombudsman must examine the case and give an answer in 30 days; if he decides that the denial was illegal, he must notify its decision to the person concerned and to the Administration. Administrative judges[78] have qualified this procedure as an atypical administrative hierarchical appeal, in the sense that Ombudsman is considered to be an Administrative Authority to which D.P.R. 1199/1971 applies. According to the yearly reports of the Regional Ombudsman, the application of Article 25 of Law 241/90 often represents the highest percentage of the activities of Ombudsman.

Article 136 of D. Lgs. 267/00 (the Local Government Code) provides that in case a Municipality or a Province does not issue an act that is compulsory by law, the concerned person can address a petition to the Regional Ombudsman asking for the appointment of a commissioner *ad acta*, that is, a commissioner who, acting in place of the Municipality or the Province, issues the compulsory act.[79] This is quite a "hard" power of the Ombudsman since it can appoint a substitute for the Municipality or the Province, and in fact it was challenged before the Constitutional Court,[80] which however dismissed the case stating that national law can bestow on regional organs a substitutive power, without violating, in so doing, the constitutional guarantee of Municipalities and Provinces. However, according to the Constitutional Court, this is an exceptional power, so that regional laws cannot bestow on the Regional Ombudsman a general substituting power for any administrative act of Municipalities and Provinces. According to the yearly reports of the Regional Ombudsmen, the application of Article 136 of the Local Government Code is not required by citizens often.

Finally, the interplay between the courts and the Ombudsman can be analyzed in the light of a possible cross-fertilization between administrative case law and the Ombudsman's decisions (so-called *Ombudsprucence*). The first consideration is

[78] T.A.R. Abruzzo, L'Aquila. sez. 1, 2 novembre 2009. n. 452; T.A.R. Lazio, Roma, sez. I, 3 novembre 2009, n. 10747.

[79] Lombardi (1986), p. 397.

[80] Corte costituzionale, 29 aprile 2005, n. 167.

that *Ombudsprudence* is not easy to be found because the Ombudsman publishes only its yearly reports, where cases decided are reported only in aggregate numbers for statistical purposes without the legal motivations but only with general outlines. It is however possible to say, judging from these outlines of cases decided, that Ombudsman often refers to administrative case law, especially for the application of Article 25 of Law 241/90. The contrary is not true: there is no evidence at the author knowledge of administrative judges citing Ombudsman decisions as authorities or precedents.

3.5 Europeanization of Administrative Law: What Role for ADR Tools?

As already recalled, administrative appeals are not a precondition to judicial review and are anyway very seldom pursued since they are perceived as ineffective. They are hardly the place for developing principles of administrative law, and this is even so since the decisions on administrative appeals are not reported; it would be very difficult for them to act as something of a precedent even if they had high doctrinal quality. The situation is different with reference to the *riscorso straordinario al Capo dello Stato*. If not the actual decisions, the pieces of advice given by the *Consiglio di Stato* are on its website. Only, the research engine is normally not working, and one needs to know the date of a specific advice to find anything but a very long list.[81]

This, however, is not a problem, since while divergences may arise even between different judgments of the *Consiglio di Stato*, there is an institutional effort in maintaining or restoring consistency. What the *Consiglio di Stato* says in its advices is the same as to what it says in its judgments, and as will be shown below, EU principles are quite relevant and play a role in case law as well.

Hierarchical and other lesser appeals are the only uncharted—but marginal—waters, in so far as the decision maker may go beyond illegality and to the merits of the decision challenged; considerations pertaining to good governance might therefore, in principle, be relevant.[82] It is to be remembered that the principle of good governance is expressly referred to in Article 97 of the Italian Constitution.[83]

A number of other general principles however do apply to all administrative appeal procedures since they are general principles of Italian administrative law applicable to all and every proceedings. This is of course the case for the legality principle, already referred to. This is also the case of the duty to give reasons.

[81] http://www.giustizia-amministrativa.it/webcds/consultiva.asp.

[82] www.google.it was asked about "ricorso gerarchico buona amministrazione" on January 14, 2013, and provides about 200,000 entries; none in the first pages has to do with our question.

[83] On this principle, see Galletta (2010), p. 601; on the Constitutional provision, see generally Caranta (2006), p. 1889.

According to Article 3 of the Administrative Procedure Act 1990, every individual decision shall state the facts upon which it is based and give the legal reasons upholding it. A similar rule had already been inserted in Article 18 (2) of the Administrative Sanction Act 1981. Article 7 of l. 27 July 2000, n. 212, the Taxpayer's Charter, is somewhat more stringent,[84] in that it further provides that when reasons are given by referring to some previous act or decision, they must be joined with the final decision.[85]

The principle referring to the protection of legitimate expectations, while again a very general principle, is specifically relevant with reference to administrative proceedings whose possible outcome is the annulment or modification of a previous decision. This does not just mean administrative appeals but—and more often—procedures started on its own motion by the same public authority to change one of its previous decisions.[86]

The case law was somehow restated in 2005, when Legge n. 241, 7 agosto 1990, was amended. Under Article 21 *nonies*, the decision maker may quash any illegal decision taken provided three conditions are met: (1) the public interest must require annulment, (2) the authority must act in a reasonable time, and (3) the interests of the parties concerned (the beneficiary, but not only) must be taken into account. The protection of legitimate expectation is therefore one, and only one, of the relevant considerations, which must be spelt out in the reasons given for the decision.[87] Under Article 21 *quinquies*, the public authority may change its mind as to the expediency of a decision previously taken and withdraw it; this only applies to decisions with prospective effects, such as a license to operate a pub on given premises; in case this is detrimental to the beneficiary of the decision withdrawn, a compensation must be paid unless the beneficiary had acted in bad faith.[88]

[84] Breach of the duty to give reasons makes the final decision voidable: Commiss. Cass. civ., Sez. V, 15-3-2002, n. 3861, in *Mass. Giur. It.*, 2002; *Arch. Civ.*, 2003, 101; Trib. Prov. Cosenza, Sez. II, 26-5-2003, n. 123, in *Boll. Trib.*, 2004, p. 301.

[85] The difference between the two rules is stressed by Cass. civ., Sez. I, 11-6-2003, n. 9357, in *Mass. Giur. It.*, 2003; in *Arch. Civ.*, 2004, 506; Cass. civ., Sez. V, 16-4-2003, n. 6071, in *Guida al Diritto*, 2003, 24, 64.

[86] See, generally, Galletta (2006), p. 393; Cerulli Irelli (2006).

[87] E.g., Cons. Stato, Sez. VI, 18-12-2012, n. 6489; Cons. Stato, Sez. III, 13-11-2012, n. 5733; Cons. Stato, Sez. III, 13-11-2012, n. 5733.

[88] Cons. Stato, Sez. III, 16-10-2012, n. 5282; see also Cons. Stato, Sez. IV, 9-02-2012, n. 689, holding that the lack of compensation does not render void the withdrawal decision; only the person affected will have to ask the public authority for compensation.

3.6 Final Considerations

As far as Italy is concerned, administrative appeals, and especially hierarchical appeals, are very much an institution from the past. Being optional, they don't really hinder judicial review. Being ineffective, they don't contribute to limit the caseload of administrative courts. Rules have been introduced in the past few years trying to speed up judicial review procedures and to give definitive answers to instances of litigation between private parties and public authorities (or between public authorities). It is too soon to say whether these rules will be successful, and anyway it would be a different paper.[89]

The historical evolution of Ombudsman in Italy shows that, after a first period of enthusiasm, a kind of pessimistic realism prevailed, anticipated in the study edited by G. Miglio in 1983 and culminated in the budget law for 2010, which eliminated the Municipal Ombudsman simply because it was too expensive (and thus, implicitly, was considered useless). The most striking thing was perhaps not so much abolition itself but the lack of any strong form of protest or of lobbying in order to avoid abolition. What happened with the Municipal Ombudsman confirmed the witty definition of Ombudsman given in 1986 by one of the leading Italian comparative lawyers, who, referring to the Regional Ombudsman, said it was an "administrative luxury."

Now, after the slimming treatment in 2010, the overall system of the Italian Ombudsman would need a strong coordination, at least among the Regional Ombudsman, in order to organize a coherent reticular structure with national relevance. But the still profound differences even in the editing of yearly reports, which make impossible comparability, do not authorize to be optimistic.

The results of single Regional Ombudsman activity, summed up in their yearly reports, seem to suggest that they are quite successful, but the effective level of satisfaction and trust of citizens towards Ombudsman has not yet been accurately studied. It is however interesting to notice that one of the main activities of Regional Ombudsman—the application of Article 25 of Law 241/90 in the field of access to administrative documents—is qualified by administrative case law as a hierarchical administrative appeal. If it was necessary for administrative judges to bring back the Ombudsman's activity to the old formal model of hierarchical appeals, whose limits and flaws are described in the other paragraphs of this paper, that means that the novelty of the Ombudsman model has not been adequately communicated and perceived.

It is now up to Regional and Provincial Ombudsmen the hard job to make people understand their peculiarities and the potential benefits of their original model in order to make them perceive the Ombudsman as a real alternative to the formal model of hierarchical and judicial recourses and not only as their weaker version.

[89] Improvements, especially concerning the duration of proceedings, have been noted, but they might be insufficient: for a discussion, Calabrò (2012), pp. 19ff.

Going back to the more general issue, could administrative appeal procedures be improved so as to make them palatable? Maybe, but what would be needed is a different administrative culture, possibly less legalistic but where the integrity of public servants should be beyond questioning, so that any compromise or mediation would be considered still in line with the public interest, rather than requiring the attention of the public prosecutors with the Court of Auditors (not to speak of those with the criminal courts).

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Chapter 4
The Dutch System of Dispute Resolution in Administrative Law

Philip Langbroek, Milan Remac, and Paulien Willemsen

4.1 Introduction: Administrative Law in the Dutch Legal System

The Netherlands has a civil law system. The general rules for administrative decision making and legal protection are organized in the General Administrative Law Act (GALA). This Act has been in force since 1994 and has been gradually extended. It currently contains chapters on decision making, law enforcement, administrative debts, administrative grants, requests, general provisions, and rules for legal protection under administrative law.

The GALA uses three key definitions: administrative authority, interested party, and decision. Article 1:1 of the GALA contains a definition of an administrative authority; subsequently, the GALA provides for general rules governing acts performed by administrative authorities. Most rules in the GALA relate to specific acts, namely decisions (*besluiten*). Article 1:3 GALA includes a definition of a decision made by an administrative authority: a written decision of an administrative authority constituting a public law juridical act. This provision determines to a great extent the scope of the rules of the GALA. An appeal to the administrative court may be filed only against a decision (Art. 8:1 GALA). Appeals may be filed only by "interested parties," a concept defined in Article 1:2 GALA. Prior to the GALA, the right of appeal of interested parties was often restricted to individual decisions (*beschikkingen*). It was the legislator's intention that the GALA should broaden the scope of administrative law and that orders (including regulations and plans) should be the central concept of administrative law. The Act provided that after 5 years the exclusion of the right to appeal against rules would be abolished. After several years, however, the legislator feared a huge incentive for people to file

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appeals and maintained the exclusion in Article 8:2 GALA. For decisions that are not appealable to an administrative court, the civil courts have jurisdiction.

Because of this definition from article 1:3 of the GALA, a distinction must also be made between legal acts under public law, legal acts under civil law, and factual actions. Legal protection against use of private law by the administration and factual actions is organized in the Netherlands in the jurisdiction of the civil courts. This is a complicating factor. In the Netherlands, there is no system as, for example, in France that characterizes certain factual acts and agreements as factual acts and agreements governed by administrative law.

Under the Dutch procedural administrative law, access is limited to "interested parties." Article 1:2 of the General Administrative Law Act defines the term "interested party" as a person whose interests are directly affected by a decision. From the case law, it follows that an interested party must demonstrate the following:

- An interest of his/her own: unless expressly authorized to do so, a person cannot represent the interests of others.
- A personal interest, i.e., an interest that sets the person apart from others: disadvantage in itself is not enough if that same disadvantage is experienced by many others. For example, the mere fact that someone uses a road does not give him/her an interest in contesting a decision to close that road since an indefinite number of other people also use that road. However, if he/she can prove that as a consequence of the closing of the road he/she must detour for many kilometers a day, he/she is an interested party because this distinguishes him/her from other road users.
- An objectively determinable interest: an interest that is too subjective or uncertain is, in general, not sufficient.
- A direct interest: the causal link between the decision and the violated interest must be sufficiently direct. According to case law, this requirement under Article 1:2 is not fulfilled if there is a secondary interest. An interest is secondary if it is not directly but indirectly affected, for instance, through a contractual relationship or other private relationship. The case law used the criterion of secondary interest strictly in the past but has now found the nuances. Thus, unlike before, it no longer plays a role in situations where an appellant has a clear interest that is opposite to that of the person to whom a decision is addressed. A resident of an apartment, despite a contractual relationship, was therefore considered to have a direct interest by a license to extract this apartment from its designation as a "house" that was granted to the housing association.[1]

Apart from natural persons, legal persons can also be an interested party. As regards administrative organs, the interests entrusted to them are deemed to be their interests. With regard to legal persons, the general and collective interests,

[1] Damen et al. (2012), pp. 130–153.

defended in particular by virtue of their objectives and as evidenced by their actual activities, are also deemed to be their interests.[2]

Legal protection against the administration is arranged in the GALA via pretrial objection proceedings and via the administrative sectors of the first instance courts. The ordinary administrative jurisdiction applies if not a special administrative court has been indicated in special legislation. First instance decisions of administrative courts in social security cases can be appealed against at the Central Appeals Court in Utrecht; the other ordinary cases can be appealed against at the Administrative Jurisdiction Division of the Council of State in The Hague. In tax cases, after objection proceedings, an appeal can be lodged with the assigned first instance courts and appeal against their decision can be filed with the Appeal Courts. From there, appeal for cassation can be lodged with the Supreme Court (Hoge Raad). For competition law, the first instance court is Rotterdam District Court and the appeal court is the Industrial Appeals Tribunal in The Hague. The Administrative Jurisdiction Division of the Council of State is special first instance court in land-use planning and environmental cases, and a number of other statute acts. The Central Appeals Court is also first instance court for judges in their capacity as civil servants and in a number of other regulations in the field of social security. The Industrial Appeals Tribunal is first instance court for many regulations involving economic public law.

It should be noted that the map of first instance courts and appeal courts in the Netherlands has changed recently. To date, there are 10 first instance courts with 32 hearing locations and 4 appeal courts with 21 hearing locations.[3]

4.2 Available Remedies for Administrative Disputes

4.2.1 Categorization of Available Remedies

4.2.1.1 Conflicts Between the Administration and Citizens

The focus of legal protection of citizens and businesses is on the *decision*. This can be a license, a decision in the context of land-use planning, and also law enforcement decisions. The system of legal protection is quite straightforward, but there are some exceptions that make it more difficult to comprehend.

The general outline is this. If a person or organization with a directly involved interest wants to object to an administrative decision, such a person or organization has first to file an objection with the administrative authority that made the decision.

[2] See Article 1:2(3), GALA.

[3] Besluit van 27 November 2012, houdende aanwijzing van zittingsplaatsen van rechtbanken en gerechtshoven (Besluit zittingsplaatsen gerechten Staatsblad 2012, nr. 601—Decision containing the appointment of hearing locations of district courts and secondary appeal courts).

The GALA has a special procedure outlined in Chaps. 6 and 7. Most administrative authorities have an advisory committee to hear the objecting interested persons. Based on their assessment of law, applicable policies, and circumstance, they formulate an advice for the administrative authority. The office holders are also competent to do the hearing themselves. If there is a civil servant involved, precautions have to be taken against possible objections of bias. The objection proceedings can lead to a full review of the contested decision. The review not only is legal but also considers current policies concerning the matter at hand.

Having followed administrative objection proceedings is a precondition for filing a case with an administrative court. There are two exceptions to this rule. The first is that public preparatory proceedings have been followed (those may be mandatory in land-use planning). The second is that administrative appeals at a higher administrative authority must be followed. This latter type of administrative appeals has become quite scarce. It still can be found in law enforcement situations, especially where law enforcement competences have been attributed to civil servants. For example, inspectors for risk prevention at the workplace can shut down an installation, e.g. a building site, and the administrative appeal can be lodged with the minster for social security and employment. Another example is policemen that can fine traffic offenders. The offenders can lodge an administrative appeal against the decision with the public prosecutor.

The obligation to have followed either public preparatory proceedings or administrative appeal at a higher administrative authority or to have followed objection proceedings also applies when a specialized administrative court has jurisdiction, though the objection proceedings can be slightly different in taxation cases.

4.2.1.2 Conflicts Between Administrative Bodies

For conflicts between administrative bodies, a complex regime applies. Administrative bodies are legal persons, according to civil law. Their offices or organs can make them act (are their representatives). They are the administrative authorities. The state is the administrative body; ministers and the government are the administrative authorities. A municipality is an administrative body; the mayor, mayor and alderman and the municipal council are three different administrative authorities of the municipality. Because an administrative body is a legal person, it needs the administrative authorities and their office holders and civil servants to make them function.

On one hand, the GALA acknowledges administrative authorities as persons with a directly involved interest in administrative decision making regarding the interests that have been entrusted to them. This means that administrative authorities can lodge objections and appeal as far as the interests (of the administrative body and concerning their responsibilities) entrusted to them are at stake. They can also appeal to an administrative court. On the other hand, there are so called *pure administrative* or *horizontal* conflicts between administrative bodies—municipalities, provinces, and water boards.

Article 136 of the Dutch Constitution attributes the competence to decide those disputes to the government by *royal decree*. Civil rights do not apply to administrative organs. The advisory division of the Council of State can prepare an advice on the matter and organize hearings. The conflicts between administrative bodies that make it into this kind of proceedings are quite rare. Administrative bodies mostly find amiable ways to negotiate their differences.[4]

Next to such ordinary conflicts, there is also a system of supervision of decisions made by administrative authorities within the system of decentralization of the Netherlands. In the hierarchy of central offices over decentralized offices, they can also make decisions in cases where a lower authority is negligent to take adequate action. Such decisions can be based on legal and policy considerations (effectiveness and efficiency), based on, e.g., arts. 123 and 124 of the Municipality Act. Such decisions in the context of Dutch decentralization are to be made by royal decree. Usually, this requires an advice of the Council of State, and it is based on Article 132 of the Constitution. A general arrangement for prior consent, suspension, and cancellation of decisions of administrative authorities has been laid down in Title 10.2 of the GALA. Decisions to prior consent with, suspension of, or cancellation of administrative acts cannot be appealed against at a court, but the subjects of such decisions may appeal the decisions themselves. The government published a policy document on the way it will use those supervisory powers,[5] where they explain how two grounds for suspension and cancellation—"contrary to law" and "contrary to the general interest"—will be used. An example of the former is a situation where a municipal council in a regulation had taken on the competence to appoint the type of investigations a municipal audit office would do. This is contrary to the municipal act, which demands that a municipal audit office is independent.[6]

An example of "contrary to general interest" consists of several cases where municipal councils had decided not to levy taxes for housing and sewerage from persons with an income below a certain threshold. This was deemed to be an income policy, and that is the prerogative of the central government.[7]

If a decision of a provincial board or of a minister to make a municipal or a provincial decision because of neglect affects a citizen, the citizen then can follow the order of the GALA by filing objection proceedings with the authority that made the decision and subsequently get the case to the first instance court. In specific cases, the administrative organs can appeal against replacement decisions taken by the first instance court at the Administrative Law Division of the Council of State.

The number of ordinary administrative cases with conflicts between citizens and the administration is far larger than the conflicts between administrative bodies themselves. Based on statistics of the Council of State and the Council for the Judiciary, the number of ordinary administrative cases filed with the first instance

[4] Widdershoven et al. (1999) (Conflicts between administrative authorities).

[5] Beleidskader schorsing en vernietiging, Ministerie van Binnenlandse Zaken (2010).

[6] Beleidskader schorsing en vernietiging, Ministerie van Binnenlandse Zaken (2010), p. 5.

[7] Beleidskader schorsing en vernietiging, Ministerie van Binnenlandse Zaken (2010), p. 7.

courts is far larger than the number of conflicts between administrative bodies. Ten (10) of such conflicts per year are considered many. The number of administrative cases at the different administrative courts amounts to about 115,000 cases per year.

4.2.1.3 Complaints Proceedings

The GALA makes a distinction between *legal proceedings against decisions* made and *complaints* against the way office holders and civil servants have treated a person. This has been arranged for in Chap. 9 of the GALA. It prescribes a distinction between internal complaints proceedings and external complaints proceedings at an ombudsman. The subject of complaints proceedings can be diffuse. Also, if a decision is concerned with the complaint can be dealt with a focus on events before and after the decision was made. The outcome of complaints proceedings consists of an answer on the justification of the complaint and its reasons. The outcome of complaint proceedings (e.g., a declaration that the complaint is justified) is not a legal act or a decision whatsoever; it has no legal effect.

4.2.1.4 Mediation

In the field of administrative law, mediation is also quite a broad subject. Because of the specific structure of administrative decision making and the position of administrative organs as mediators between different interests, mediation in administrative proceedings as a separate tool is not very important, at least not in terms of number of cases. The difficulty is that administrative organs are bound by legal rules, meaning that possible outcomes of mediation in administrative law disputes must fit within legal competences of the administrative organs, often, but not always, accommodating third party interests. Of course, objection proceedings *de facto* can function as pretrial mediation, provided the advisory committee restricts itself not too much to a legal approach of the objection at hand.[8]

4.2.1.5 Conclusion

It is mainly individual decisions that are challenged on appeal before an administrative court, usually only after a preliminary procedure within the administrative system has been followed. In most cases, rulings of administrative courts are open to appeal to the Administrative Jurisdiction Division of the Council of State (the successor to the above-mentioned Judicial Division). The objection proceedings and other preliminary procedures (like public preparation proceedings or administrative appeal to a higher administrative authority) are mandatory. Also, the

[8] Pach (2001), pp. 99–143.

administrative authority and parties involved may agree to skip objection proceedings. Internal and external complaints proceedings are another way of seeking redress. While the latter focuses on behavior for which the administration is responsible, the former focuses on legal acts.

4.2.2 Internal Administrative Appeals

4.2.2.1 Concept and Legal Foundation

Article 107 (2) of the Dutch Constitution empowers the legislature to enact general rules of administrative law. Objection proceedings are governed by the GALA. There is no soft law applicable, but there is some jurisprudence on the applicable GALA provisions. In specific legislation, deviations from the GALA can be enacted. Although the GALA can be considered an organic act, it does not have a higher legal status than that of other statute acts. Therefore, some coordination of legislation is necessary. The coordination of legislation is in the hands of the Ministry of Security and Justice as all bills for statute acts have to pass the legislative department of this ministry before they are sent for advice to the Council of State and to Parliament later on.

For court proceedings, the courts have created some soft law on the application of procedural rules of the GALA (*de procesregeling bestuursrecht*). Furthermore, administrative organs have enacted rules on the organization of the work of advisory committees in objection proceedings. It should be noted that the association of municipalities in the Netherlands (*Vereniging van Nederlandse gemeenten-VNG*) provides standardized proposals for regulation for municipalities. Municipal councils can adapt them within their range of competence.

The rules of procedure that apply to objection proceedings also apply to appeals to another administrative authority. The instructions for drafting legal rules state in provision 155 that administrative appeals are the exception. It states: "Administrative appeal will only be permitted if: a. decisions are at stake which are not strictly bound by a clearly delineated competence; b. the general interest of central steering by a higher administrative authority cannot be served otherwise."[9] In practice, therefore, internal administrative appeals have become a rarity. Where 12 years ago the subject of internal administrative appeals were still part of a hand book with references to Jurisprudence of 30 and 25 years earlier.[10] Hence the title of an

[9] Regeling van de Minister-President, Minister van Algemene Zaken van 1 April 2011, nr. 3102255, houdende vaststelling van de Aanwijzingen voor de regelgeving (policy rules of the minister-president on the drafting of legislation), last changed on May 10, 2011 Staatscourant 6602.

[10] Ten Berge and Widdershoven (2001), pp. 41–43, 114.

"Expectation" in the Netherlands' journal for administrative law: Farewell to internal Administrative Appeals.[11]

4.2.2.2 Historical Background

Administrative law in the Netherlands emerged in the late nineteenth century. Through pension regulations and unemployment benefits, the development of the welfare state, and land-use planning and, in the 1970s, via the emergence of Environmental law, a body of administrative law appeared. In the 1970s and the 1980s, each ministry had its own specialized tribunal: the Council of State for space planning and environmental law, the Tribunal for students' grants and loans at the Ministry of Education; the Ministry for Economic Affairs had since the 1950s the Trade and Industry Affairs Appeal College; the Ministry for Social Affairs had the appeal councils and the Central Appeals Court for Pensions and Social Security Benefits; the Ministry of Finance had its taxation sections at the secondary appeal courts and the Court of Cassation. Each tribunal had its own rules of procedure, pretty much like the tribunal system in England and Wales, until recently.[12]

In the *Benthem* judgment of the ECHR of 1984,[13] the Council of State, handling land-use cases and environmental cases in its advisory capacity for decisions of the government (royal decrees) was declared not to be an independent and impartial tribunal as required by Article 6 of the European Human Rights Convention. In a case of 1986, the Industrial Appeals Tribunal followed the same route, because the Minister for Economic Affairs could legally reverse its judgments. Therefore, the Industrial Appeals Tribunal was deemed not to be an independent Tribunal within the meaning of article 6 ECHR.[14] The GALA is partly the result of the rationalization efforts of the Dutch government following those judgments. It entered into force in 1994 and has been gradually extended since then. The fact that currently there are four highest administrative courts in the Netherlands (the Administrative jurisdiction division of the Council of State, the Trade and Industry Affairs Appeal College, the Taxation section at the Court of Cassation, and the Central Appeals Court) all applying the GALA is a remnant of earlier times. Still so far, it has not been possible to reform the highest courts into one court, but recently an adaptation of the GALA (the new article 8:10a) has made it possible that if a highest administrative court finds it necessary in the interest of consistency of

[11] Verheij (2007), p. 40; also: H.Ph.J.A.M. Hennekens, De Awb in de revisie. Gemeentestem 2000-7118, 1 (The GALA in revision—The Municipal Voice), paragraph 2.3, who describes internal administrative appeals as a "superfluidity that has to be weeded."

[12] On the tribunal system in England: Langbroek (2012), pp. 11–40.

[13] Administratiefrechtelijke Beslissingen, 1986, 1 with annotation. E.M.H. Hirsch Ballin. For a description of the system of legal protection against the government in the Netherlands before the General Administrative Law Act was enacted, see Widdersjoven (1989) (Specialized Jurisdictions in Administrative law).

[14] EHRM 19-04-1994, NJCM 19-04-1994 Van de Hurk, Series A 288.

jurisprudence, a grand chamber can be formed consisting of five members of the highest courts.

Before this recent change of the GALA, there were informal ways to guarantee consistency of jurisprudence, as members of the highest administrative courts can be substitute judges in the other highest courts, and there are regular informal consultations on issues of interpreting GALA provisions. The chairs of the administrative law sections of the first instance courts also have a meeting several times a year where they discuss GALA interpretation issues. The procedure rules for administrative law (*procesregeling bestuursrecht*) also are product of this arrangement. They are rules of interpretation of the GALA, with a view to creating consistency in their application by the administrative sections of the first instance courts.

So, even though there is quite some specialization in the Dutch administrative adjudication, consistency of jurisprudence is not much of a problem. There is not a big difference in pretrial proceedings, although in taxation cases where objections may be filed in large numbers, oral hearings may be skipped.

4.2.2.3 Mandatory Character of the Appeal

Administrative appeals like objection proceedings or appeals to a higher administrative authority follow the same rules of procedure. They are mandatory—Article 7.1 from GALA states that everybody with a right to appeal at an administrative court must first file objection proceedings unless the administrative appeal has been prescribed or unless public preparatory proceedings have been followed. There is also a provision enabling the appellant to request the administrative authority to skip the objection proceedings and bring the case directly to court (art. 7.1a).

Objection proceedings are very successful in preventing cases from reaching the courts. It is our estimation that about 85 % of cases are filtered out. Conversely, in the court procedures, only about 30 % of the cases lead to success for the appellant. There are two problems with Dutch administrative law proceedings (thus including court proceedings). Firstly, the court proceedings take too much time, and, secondly, because the object of proceedings is a decision, the outcome of a successful appeal to an administrative court can mostly only be the annulment of a decision. As a consequence, the administrative authority needs to make a new decision on the objection. For that reason, courts have developed a special type of case management leading to a finalization of the conflict at hand. This can only be successful, however, if all parties involved are fully cooperative and all (if any) relevant third interests take part. Of course, administrative appeals have an element of instigating supervision of the contested decision by a higher administrative authority.

4.2.2.4 Suspensory Effect of the Appeal

Filing an objection or filing an appeal with a court does not have suspensive effect. That is the general rule. This means that decisions like a license have immediate legal effect. Third parties or the addressee of an administrative enforcement decision can apply for a suspension via summary proceedings at the competent administrative court in connection with an objection filed (Art. 8:81 GALA). The suspension is granted if immediate speed, with a view to the interests concerned, so requires. The result of such an appeal, when granted, is a suspension of the decision. In special legislation concerning the environment and concerning monumental buildings, exceptions to this rule have been enacted, suspending the legal effect of a decision taken until the terms of objection and appeal have passed or until the objection has been decided (Art. 6.1 of the Act General Provisions on Environmental Law). For example, an objection or appeal against a license to demolish a recognized monumental building does have a suspensive effect, under the Monuments Act.

4.2.2.5 The Devolutive Effect of the Appeal

Objection proceedings and administrative appeals at another administrative authority have a full devolutive effect. For both objection proceedings and administrative appeals, article 7:11 of the GALA states: (a) if the objection is admissible, the challenged decision shall be reconsidered on the basis of the objection; (b) if the reconsideration gives cause to do so, the administrative authority shall revoke the challenged decision and, if necessary, make a new decision replacing it.

The scope of the review of objection proceedings is wide; not only legal norms but also policy on the matter at hand should be taken into consideration. Furthermore, the phrasing of the paragraph from a) that "the challenged decision shall be reconsidered on the basis of the objection" means that the objection itself defines the dispute at hand. The administrative authority may not change that beyond the scope of the argument. If the objection focuses on a certain condition for a license or a grant, this means that the review of the original decision should be restricted to that aspect. The administrative authority may change the justification of the decision and, if faults were made, may also change the legal basis of the decision.

Another limitation is imposed by the principle of *non reformatio in peius*. This applies fully to the objection and administrative appeal proceedings, equally based on Art. 7:11 GALA and considered a specific elaboration of the legal certainty principle. This applies only to the appellant and not to third party interests. Also, if third parties are the appellants, it does not apply to the addressee of the original decision. A *reformatio in peius* is permissible, however, if the authority without the objection would be authorized to amend the contested decision to the detriment of the applicant. Article 7:11 of the General Administrative Law Act does not preclude such a change in the decision.

4.2.2.6 Going Beyond the Specific Provisions of the Law When Solving Administrative Appeals: The Development of Good Administration Practices

There is a general development that administrative authorities are asked to consider informal solutions of a conflict over the formal. This has been a development in the Netherlands during the past 15 years. It is rather peculiar because the number of cases in the Netherlands is not particularly high. For consumers, there is a long-standing tradition of complaint commissions for several branches of trade and industry.[15] Nonetheless, mediation has become quite a business in the Netherlands. There is a large infrastructure of law firms, mediation institutions, public and private ombudsmen, mediator training courses, and so on. The government actively pursues a policy to develop tools that can help individuals to solve their disputes outside of court. While doing so, a balance must be struck between maintaining the right to go to court and effective law enforcement, also for persons "only" pursuing their own interest, and the efforts to persuade persons to solve their problems with the administration otherwise. One of the problems with those policies is that at the lower administrative levels, where a lot of troubles between citizens and the administration are generated, the primary inclination is to defend a set of action that is being challenged by a citizen. From there, it is often considered easier to engage in juridical bickering rather than trying to solve the real problem. To answer the question, going beyond the law is not required from administrative authorities, but they are being persuaded with programs and courses for civil servants to pursue amiable solutions within the law.

The question is whether administrative authorities and their administrations have engaged in some kind of quality management, making analyses of objection and administrative appeal proceedings in order to find out how to improve decision-making processes. Juridical quality control is as widespread as mediation practices. The idea is quite simple—to check the juridical feasibility while preparing a contract or a decision. This has advantages for municipalities and their insurance companies as it saves their money.

But apart from juridical quality management, quality management within administrative bureaucracies, including customer orientation, complaint proceedings, organization development, and so on, is an accepted practice in the Netherlands. This also has become an industry with association, consultant firms, conferences, a journal, etc. This is not the place to evaluate those practices. They are not new, however, as they are related to the new public management and subsequent good governance movements. As good governance may be qualified as New Public Management with an ethical sauce, there has been a growing interest in government and civil servant ethics with a view to daily administrative practices.

It should be noted that the National Ombudsman has taken the lead in this discussion. The chair of the National Audit office wrote 6 years ago that civil

[15] Blankenburg and Bruinsma (1994), pp. 9–11.

servants should stop complaining about complaints but use them to improve the organization.[16]

Having said that, the origin of the norms the ombudsman uses to give feedback to public organizations based on complaints has been developed by the civil courts and the earlier administrative tribunals. They are called principles of proper administration.[17] The question if administrative appeal bodies have a role in developing good administrative practices is quite difficult to answer. It is not a legal assignment to make objections and appeals function that way, but many public bodies have some kind of quality management installed. This means that they try to learn from new developments and from mistakes.

4.2.2.7 The Use of ADR Tools (Mediation Techniques, Transaction) for Solving Administrative Appeals

Administrative objection proceedings and administrative appeals have as an essential function to solve the conflicts and to filter out the cases that do not need to go to court. Conflict resolution is part of the assignment for objection proceedings. It should be noted however that administrative authorities are bound by the law, and administrative law often had been designed as a set of instruments to protect certain interests. The outcome of the conflict resolution efforts therefore always is bound to such legal limits. Sometimes administrative authorities even develop a policy to prevent the objection proceedings from formally starting by calling the appellants on the phone and asking what has gone wrong for them. Such practices can be helpful to prevent formal proceedings. It should be understood that such early interventions no way hinder an organization or a party in persisting in continuing proceedings.

For objection proceedings, often advisory committees have been installed, based on article 7.13 from GALA. The members of those committees are often lawyers. So there has been a tendency that those committees act as if they are a court. Later, there has come more attention to problem solving. Civil parties taking part in objection proceedings show a great deal of discontent, according to the latest evaluation exercise.[18] Especially, businesses use the aid of legal representation of objection proceedings.[19] This is an indication that objection proceedings have quite a juridical setting, even though originally they were intended as pretrail conflict resolution mechanisms.

[16] Stuiveling (2007), pp. 33–48.

[17] Langbroek (1997), pp. 81–107.

[18] De Waard et al. (2011), pp. 95–103.

[19] De Waard et al. (2011) (supra, pp. 115–116).

4.2.2.8 Is It Possible to Grant Compensations in Administrative Appeal Procedures?

On July 1, 2013, the Act on Compensation of disadvantages and compensation for damages of illegal acts entered into force. This Act adds two new chapters (4.5—compensation of disadvantages and 8.4—damages) to the General Administrative Law Act. According to this new legislation, for which a lot of former jurisprudence has been used, in principle there are two situations.

First, there was a decision by the administration that caused a disadvantage, and, conditionally, the disadvantage has to be compensated. Here, ordinary pretrial proceedings apply, with the possibility of an appeal to an administrative court. The compensation here is based on the principle that damages should be compensated as far as they went beyond the "égalité devant les charges publiques." There may be disputes about the damages that can be addressed in objection proceedings. For example, the infrastructure department had decided that a movable bridge over a channel would be replaced by a fixed bridge. The minister gave the municipality of Utrecht a license to do so. This was causing trouble to a shipyard whose business would become extremely difficult behind a fixed bridge. In such a case, the shipyard is entitled to damages as far as it should not reasonably be within its domain of foreseeable risk. In objection proceedings, therefore, the amount of damages can be a subject of decision making. After objection proceedings—if necessary—an administrative court can be addressed.

Second, there was an administrative decision and it was decided that this decision was illegal, and it caused damage. The damage can be claimed at the administrative body to which the administrative authority taking the decision belongs. In such a case, if the claim is not (fully) recognized, appeal can be lodged directly with a competent court.

Thus, in principle, a granted administrative appeal or objection can lead to compensation. The point of departure is that only if an administrative court has decided that a decision was illegal can compensation be given. This also holds true for objection or administrative appeal proceedings as far as the original decision was assessed to be illegal and therefore was recalled:

a. The original decision was changed as a result of objection proceedings because it was not according to law. An interested person has started objection proceedings against the decision and has asked for damages alongside the objection. The damage produced in the short time between the original decision and the new decision can be compensated. This is quite rare, however, because if damages are at risk one can ask for a suspension of the decision by means of summary court proceedings.
b. The decision on objection proceedings was annulled by a court because it was not according to law. If this decision caused damages, they can be compensated by the administrative body to which the decision-making authority belongs. This can be achieved by filing a claim for damages with the administrative body.

Depending on the reaction of the administrative body, a competent court can be addressed without first starting administrative objection proceedings.

c. Damages were caused by other actions than a decision under administrative law. Also in such a case, a claim can be filed with the administrative body (the damages to houses in Amsterdam caused by the work on the extension of the Metro). Also in such a case, a claim can be filed with the responsible administrative body. Depending on the outcome, a claim can be filed with the competent court without following an objection procedure.

If the highest competent court for the decision causing damages is the Central Appeals Court or the Taxation Chamber of the Supreme Court, then the administrative divisions at the first instance courts are competent exclusively (article 8:89, GALA). If the damage does not exceed 25,000 € and the damages were not caused by a decision for which the Central Appeals Court or the Taxation Chamber of the Supreme Court is competent, one can choose between filing a claim with the civil court and filing a claim with the administrative court. For damages larger than 25,000 €, not caused by decisions for which the Central Appeals Court or the Taxation Chamber of the Supreme Court is competent, the claim should be filed with the civil law division of the first instance court.[20]

4.2.2.9 Deadlines for Exercising and Answering to Administrative Appeals

The deadline for appeal and objection is 6 weeks following publication of the decision or the receipt of the decision by an addressee. This time limit also applies to appeal to an administrative court, and failing to keep this limit leads to a declaration of inadmissibility of the objection or appeal. The administrative authority has 6 weeks or 12 weeks to make a decision on the objection or on the appeal, depending on the type of preparatory proceedings. The term can be postponed for a maximum of 6 weeks.

Statistics on specific objection proceedings at the central level of government shows that objection proceedings often do not make those deadlines. Timeliness in administrative pretrial proceedings is an issue in the Netherlands. Objections or appeals from citizens that do not make the deadline are declared inadmissible, but for administrative authorities, there are no sanctions where a legal arrangement has been made for administrative organs to forfeit a financial penalty for missing the deadline for a decision on an application for a decision, starting a fortnight after the passing of the deadline (8 weeks, usually), passing the deadline for a decision on an objection. The only consequence for not deciding on time is that the party filing the objection to appeal can file the case with an administrative court, in order to organize some pressure on the administrative authority.

[20] Scheltema (2011), pp. 29–40.

Recent studies show that timeliness is an issue for most individuals. They do not want to wait 12 or even 18 weeks for a decision on their objection. Eighty-one percent in a survey opined that it took too long.[21] Statistics show that 85–95 % of the decisions on objection taken by central government agencies take place within legal time limits. Especially when medical advice is required, for example, in unemployment benefit cases, this number drops down to 77 %.

4.2.2.10 Rules Applicable to Public Contracts

Contracts with the administration follow civil law, even although the Civil Code explicitly draws general norms of public law into civil law. There is not (yet) an arrangement for public contracts, apart from a special statute act for cooperation between administrative bodies within the decentralization context. For example, municipalities and a province can cooperate in the enforcement of environmental legislation; municipalities cooperate in housing, also tourism and recreation issues, and so on. For contracts with the administration, principles of proper administration apply. Contracts about the exercise of public competences, like in-land development or housing development, cannot be enforced *contra legem*; in such cases, the conditions for the exercise of administrative competences set in statute acts do prevail.[22] Civil law judges will deal with the contract, and possibly with damages for breach of contract by the administration, but they will respect the competences of the administrative courts to assess the legality of the decision at hand. It therefore sometimes is necessary to have both civil procedures for damages and administrative procedures against an administrative decision contrary to contract. It sometimes occurs, for example, that after elections, a shift in majority in the municipal council causes a shift in political views of mayor and aldermen. This may be the end of the cooperation with a project developer for certain buildings, etcetera, but this usually comes with the obligation to compensate the project developer financially.

4.2.3 Administrative Tribunals

4.2.3.1 Concept and Evolution

The Dutch system of legal protection against the administration is one moving from specialized Tribunals, comparable with the tribunal system in England until 2012, to an integration of the legal protection against the government in the Dutch judicial organization. The organization of courts and tribunals is a peculiar one, also in comparison with France. The Netherlands does have a Council of State with a

[21] De Waard et al. (2011) (note 20).

[22] Damen et al. (2012), p. 587.

leading position in the administrative law jurisdiction, but it does not have any administrative responsibility for other administrative courts. And the first instance administrative courts have been integrated into the first instance courts with ordinary jurisdictions (civil, criminal) since 1994. There is some specialization of jurisdictions in first, but especially in second, instance. In second instance, there are specialized courts for taxes (a section at the ordinary appeal courts), for social insurance and civil servants (the Central Appeals Court—*Centrale Raad van Beroep*), and for disputes related to economic public law (Industrial Appeals Tribunal). The administrative jurisdiction division of the Council of State is the second instance court for all other cases.

It should be understood that those instances are functioning as administrative courts, and all apply the rules of court proceedings of the GALA.

The origin of this hybridization is article 112 of the Dutch Constitution: "The judgement of disputes involving rights under civil law and debts shall be the responsibility of the judiciary. Responsibility for the judgement of disputes that do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament."

This means that traditionally the administrative courts were separated from the ordinary courts. To assign administrative jurisdictions either to the ordinary courts or to special courts is a discretionary competence of the legislator. The current situation, where the first instance administrative jurisdiction has been given to the first instance courts for some cases and for other cases to specialized courts—which also function as secondary appeal instances—is a result of this development. In the Judicial Organization Act, the ordinary courts are installed. The Administrative Courts are installed in separate acts, which declare the judicial organization act applicable to the organization of the Central Appeals Court and to the organization of the Industrial Appeals Tribunal. The Council of State is a constitutional office and the Act on the Council of State does not refer to the Judicial Organization Act whatsoever. From a systematic point of view, it therefore seems only inconsequential to have first instance courts and ordinary second instance appeal courts dealing with taxes, which are arranged for in the Judicial Organization Act. So, to answer the question with reference to the historical paragraph, there is a tendency to a lesser specialization from a jurisdiction perspective. However, the recent revision of the court map in the Netherlands (from 26 to 14 ordinary court organizations, 10 first instance, 4 secondary appeal, and from 64 to 32 hearing locations) was justified by the necessity to have court hearing locations in the major cities of the Netherlands and by the need to specialize and differentiate between judicial specializations on content (e.g., taxes, aliens, physical injuries, intellectual property, market regulation, business organization, family law, small claims, financial crimes, human trafficking, international legal cooperation in criminal matters, maritime cases, and so on).[23] This means that flexibility in the deployment of judges with

[23] TK 2010–2011, 32 891 nr. 1–3 (Bill and justifications for changes of the court map).

specialized skills and/or knowledge is organized within the main frame of organizing jurisdictions. As the judiciary is not allowed to assess the constitutionality of statute acts in the Netherlands, and considering the text of article 12 of the Constitution, the shifting framework for court jurisdictions is to be considered permissible. It follows from this organizational framework that the administrative courts are organized as if they are part of the judiciary, under the administrative supervision of the Council for the Judiciary. Only the judicial division of the Council of State is not part of the judiciary. It has a constitutional mandate like the Supreme Court, which is part of the judiciary but which is also not under the supervision of the Council for the Judiciary.

The administrative court divisions of the first instance courts and the specialized first instance courts and the administrative appeal courts are not part of the administration. The rules of independence of the judiciary do apply. Also, the judges of the judicial division of the Council of State are independent. All administrative courts follow the rules on court procedure set in Chap. 8 of the GALA, although the tax courts have procedural rules that deviate explicitly somewhat from GALA rules. This is related to the aims of effective tax collection without a too restricting legal protection. In conclusion, they are independent courts as ordinary courts are.

4.2.3.2 Differences Between the Procedure of Administrative Appeal and the Procedure at a Tribunal

The differences are mainly in the decision-making competences. The usual procedural guarantees do apply, parties have a right to be heard, time limits apply, and so on, but the administrative authority responsible for the assessment of the decision in administrative appeal can replace the decision appealed against in the hierarchical administrative pretrial proceedings by its own decision (Art. 7:25 GALA).[24]

There are some limitations to the competences of the administrative organ where the appeal has been filed, however, because there is a difference with the objection procedure: in administrative appeal, the administrative organ is at some distance of the original administrative organ, and therefore it cannot repair mistakes in the taking of the original decision; for example, if it cannot exercise a decision-making competence as in exam decisions, it has to annul the contested decision.[25] On the other hand, article 6.22 GALA allows for the acceptance of formal mistakes in the decision-making process—also in administrative appeals—if no harm has come from it. Furthermore, also administrative appeals allow for both a legal check and a policy check. Even so, a *reformatio in peius* is not allowed, provided a third party interest is not at stake. We repeat here that administrative appeals to a hierarchical higher administrative authority are few in numbers; administrative objection

[24] Arnhem District Court, 21 January 2008, AB 2008, 46, with annotation Michiels (2006).

[25] Judicial Division Council of State, 27 May 2009, AB 2009, 275, with note BWN de Waard.

proceedings are the standard, also according to the instructions for rule making of the prime minister.[26]

4.2.3.3 Conditionality with the Judicial Review Performed by Courts

There should be an administrative decision in writing of an administrative organ, under public law. The appeal should be lodged by a person or organization whose interest is directly affected by the decision. Furthermore, either objection procedures or, if so prescribed, administrative appeal procedures must have been followed in order to have access to the court, and the decision concerned should not be excluded according to articles 8.2–8.4 of the GALA.

Article 6 ECHR is applicable to internal administrative appeals only as far as the timeliness requirement is concerned. The entire procedure of legal protection, including administrative appeals and court proceedings, should take no longer than 3.5 years.[27]

4.3 Dispute Settlement by the Ombudsman

4.3.1 The Ombudsman Institution in the Netherlands

The institute of the National Ombudsman has a stable place in the legal system of the Netherlands as one of the external complaints mechanisms. It is a monocratic institution that was included in the Dutch legal system in 1982 by the National Ombudsman Act (WNo) of the Dutch Parliament. In the end of the 1990s, the office of the National Ombudsman has received also a constitutional status. According to Article 78a of the Dutch Constitution, the National Ombudsman can investigate, on request or on his own accord, actions taken by administrative authorities of the State and other administrative authorities designated by or pursuant to Act of Parliament (Art 78a, the Constitution of the Netherlands). The office of the National

[26] Regeling van de Minister-President, Minister van Algemene Zaken van 1 April 2011, nr. 3102255, houdende vaststelling van de Aanwijzingen voor de regelgeving (policy rules of the minister-president on the drafting of legislation), last changed on May 10, 2011 Staatscourant 6602.

[27] CRvB (MK)—Central Appeals Court, 26-01-2009, nr 05/1789 WAO, nr 08/4026 WAO-S; ABRvS—Judicial Division of the Council of State, 3 December 2008, LJN BG5910 en ABRvS 17 juni 2009. Also see Schouten and Meldrum versus The Netherlands, ECtHR 09-12-1994, Series A 304, where the court stated that the administrative pretrial proceedings do count for the reasonable time requirement under article 6 ECHR. Furthermore: Conclusion of Advocate General R.J.G.M. Widdershoven of 23 October 2013 201302106/2/A2 www.raadvanstate.nl, last visited 21 November 2013. He advises a reasonable time limit of about 3 years for objection procedures and one instance appeal and about 4 years from objection procedure, including secondary appeal.

Ombudsman has a general mandate for all central governmental authorities of the state, but he has also a mandate to deal with complaints against bodies of local authorities that have not, according to a particular statute, created their own ombudsman or "ombudscommission" (*ombudscommissie*) that should deal with these complaints [Art 1a (1), b) WNo]. Hence, next to the fact that the National Ombudsman deals with complaints against the central government as a "national" ombudsman, he also acts as a "general" local government ombudsman. The Dutch local authorities can decide that they will create their own ombudsman. They can do it according to different statutes, for example, statute on provinces (*de Provinciewet*), statute on municipalities (*de Gemeentewet*), or statute on water boards (*de Waterschapswet*). This was done, for example, in municipality of Amsterdam or Rotterdam. Despite everything, this is not a two-tier ombudsman system as the National Ombudsman or any other institution does not function as an appellate body to the local government ombudsmen. The WNo also creates the Children Ombudsman (*de Kinderombudsman*) and Veterans Ombudsman (*de Veteranenombudsman*), though the provisions of the latter are not yet in power. The investigative powers of the National Ombudsman and the local ombudsmen are included in the GALA. From the historical perspective, the Dutch ombudsmen can be traditionally included into the second ombudsman generation.[28] If we look at the scope of the control and criteria of the Dutch ombudsmen, we can include these ombudsmen in the group of ombudsmen assessing mainly compliance with a certain general concept, which in this particular case is proper administration or *behoorlijk bestuur*.[29] The creation of the ombudsman institution in the Netherlands was influenced by two main ombudsman models—the British Parliamentary Commissioner for Administration as an extension of parliamentary control and the Scandinavian model, which stands in the center of the protection of an individual against the government.[30] However, the institution of the Dutch National Ombudsman is an original copy of these institutions as he does not submit special reports to the States General, or it is possible to approach him directly without an involvement of a Member of Parliament.

In the center of attention of the National Ombudsman is the state administration. According to the WNo, the National Ombudsman can investigate complaints against the Dutch ministries, against local administrative institutions, including water boards that are not investigated by an ombudsman institution established by a statute; against administrative bodies that exercise roles connected with the police as far as these bodies exercise these roles; and against other administrative institutions (Art. 1a, WNo). His competence covers only the state administration, i.e., executive power. The National Ombudsman, in connection with the investigation of administrative actions, has a whole toolkit of traditional investigative powers that include onsite inspections, interviews with employees of administrative body, or

[28] Diamandouros (2007).

[29] Remac (2012).

[30] Timmer and Burger (1994).

right to request information and consult files (Arts 9:31–9:34, GALA). The National Ombudsman can also conduct investigations on his own initiative (Art 9:26, GALA). No legal statute enables the National Ombudsman to investigate the complaints against the Dutch courts or judges. The competence of the National Ombudsman is limited regarding complaints concerning a conduct that is connected with a case: in which an administrative court has rendered judgment, which is pending before another court or before an appellate court, in which another court has given judgment.

Also, complaints against a conduct that is supervised by the judiciary are *ex lege* excluded from assessment (Art 9:22, d–f), GALA). At the same time, the Dutch administrative courts do not assess the legality of reports of the National Ombudsman.

4.3.2 Proper Administration as Normative Concept of the Dutch Ombudsman

In accordance with Article 9:27 (1) of the GALA, the Dutch ombudsmen shall determine whether the administrative authority investigated by him in that matter behaved properly or not. Both, the National Ombudsman and the local ombudsmen, have to deal with concept of "behoorlijkheid," which in English can be loosely translated as propriety of administrative conduct or proper conduct. The general criterion of the assessment of the Dutch ombudsmen is thus proper conduct of administrative institutions or simply proper administration. No legal act defines or gives contents to this term, and as the courts are also reluctant to give a comprehensive definition of this term, it is the Dutch ombudsmen who have to give this term its contents. In 1987, the second Dutch Ombudsman, Mr. Oosting, without defining the term "behoorlijkheid," developed a list of criteria of proper administrative conduct that de facto created a normative system leading to proper administration. In the following years, the list was changed and improved. The first important change happened in 2002[31] and the last one in December 2011. The existence of the list facilitates the work of the National Ombudsman and of the administration within this competence, and it also leads to the unification of perception and the contents of "proper administration" as the latest version of this list was created in the cooperation of the National Ombudsman with the majority of the local ombudsmen. This list has as a character of a checklist, and breach of one of the requirements leads to an improper administrative conduct. Proper administration is de facto a Dutch set of ethical and legal norms that were developed much earlier than the current term "good administration."[32] With an indirect blessing of the Dutch legislators, the National Ombudsman has developed his own assessment

[31] Langbroek and Rijpkema (2004).

[32] Langbroek and Remac (2011).

Table 3.1 Ombudsman's opinion on propriety and lawfulness

Administrative behavior	Proper	Improper
Lawful	Lawful and proper	Lawful but improper
Unlawful	Unlawful but proper	Unlawful and improper

Source: Ombudsman 2006 annual report

criteria against which he assesses the conduct of administration. These criteria lead the National Ombudsman to a constant explanation of the relation between this concept and legality. He considers these two normative concepts as different. They are close, even partially overlapping, but they are not the same. Proper administration stands independently next to legality, i.e., there is a social dimension next to the legal one.[33] According to the Ombudsman himself, in the center of the attention of the administration should be the will to act lawfully and properly. The administration should not simply rely on statements like "rules are rules." When exercising its functions, it must take into account the aspects of proper administration as they play the role as well.[34] The Ombudsman expressed his view on propriety and lawfulness in the so-called *ombudsmankwadrants*. One of the clearest examples of this mutual relation was included in the Annual Report 2006 (Table 3.1).

The connection of the criteria used by the National Ombudsman with the law is visible through his Behoorlijkheidswijzer (the list of criteria of proper administration). Some requirements included in this guide in some aspects copy or at least clearly remind of the general principles of proper administration (algemene beginselen van behoorlijk bestuur) that were developed by the Dutch administrative courts and were, in 1994, partially codified as written legal principles in the GALA. Here, one can see the cross-fertilization of the normative standards. Despite this fact, the Ombudsman always underlines a different character of these norms. He states that, in general, it is possible to crystallize proper administration out of the general principles of proper administration, and requirements of the proper administration can be even transformed into legally binding rules. But even with this codification, it is not possible to escape the fact that proper administration is not a legal category. It is mainly an ethical category.[35]

4.3.3 The Effectiveness of the National Ombudsman: Dispute Settlement in Numbers

The National Ombudsman deals yearly with thousands of complaints. Each investigation, depending on the particular conditions of the case, can be solved in several

[33] Annual Report 2010.

[34] Annual Report 2011.

[35] Brenninkmeijer (2007b) (Fair administration, on lawfullness and propriety, Van Slingelandt lecture).

Table 3.2 Statistics: the National Ombudsman

	2011	2010	2009	2008	2007
Amount of complaints received by the National Ombudsman	13,740	13,979	12,222	13,073	13,242
Amount of issues dealt with by the National Ombudsman	13,519	14,311	12,257	13,102	13,096
Amount of cases within the competence of the Ombudsman	86 % 11,653	84 % 12,055	87 % 10,659	87 % 11,401	86 % 11,247
Amount of researched cases	3,476	3,757	4,029	4,614	3,877
Amount of cases that led to a report	11 % 379	10 % 382	8 % 303	7 % 324	9 % 339
Amount of cases solved by intervention	76 % 2,657	79 % 2,973	88 % 3,550	89 % 4,120	75 % 2,899
Amount of cases solved differently[a] (%)	13	11	4	4	16
Own motion investigation	No data	8	14	10	9

Source: Annual Reports of the National Ombudsman 2007–2011
[a]Mediation, conciliation, letter

ways. Generally, there are four ways in which the National Ombudsman concludes the investigation, including intervention (oplossing door interventie), mediation (bemiddeling), investigation ending with a report (onderzoek met rapport), or investigation ending with a letter (onderzoek met brief). A small number of investigations are closed for some other reasons (e.g., own initiative of the administration or death of complainant). The number of complaints received by the National Ombudsman per year is relatively low but stable (see Table 3.2).

A high number of complaints that reach the National Ombudsman are within his competence, on an average of 86 % of all received complaints. However, only 9 % of complaints lead to an individual report. As shown by the table, a high amount of complaints is solved in an informal way, through an informal intervention, on an average of 81 %. The National Ombudsman is authorized to start investigations on his own initiative (Art 9:26, GALA), and on average he uses this ability in ten cases per year. Investigations on his own initiative often lead to an adoption of a special general guidance document for the administration as, for instance, a guidance document, Handhavingswijzer (Guidance for Enforcement), included in the report "Helder handhaven" (Clear Enforcement).[36] In connection with the result of an investigation, the National Ombudsman can make recommendations to the administrative bodies (Art 9:27 (3), GALA). Compliance with the recommendations of the National Ombudsman is high, on an average of 93 % (Table 3.3).

If we compare these numbers with the number of cases dealt with by the Dutch first instance administrative courts (see Annual Reports of the Dutch Council for the Judiciary), then the amount of cases dealt with by the National Ombudsman yearly is, on average, only 11.5 % of the amount of cases annually dealt with by the administrative courts. If we compare the average of decisions of both bodies (court

[36] Report 2010/235 of 14 September 2010.

Table 3.3 Recommendations

	2011	2010	2009	2008	2007
Number of recommendations	157 in 379 reports	141 in 382 reports	133 in 303 reports	191 in 324 reports	206 in 339 reports
Compliance with recommendations (%)	90	94	90	93	97

Source: Annual Reports of the National Ombudsman 2007–2011

Table 3.4 Ombudsman Cases: average processing time in days (Annual Reports of the National Ombudsman 2007–2011)

	2011	2010	2009	2008	2007
Reports (months)	11	13	14	11	13
Interventions (days)	42	46	63	62	52
Mediations	157 days	182 days	No data	No data	No data

judgments and reports), the amount of reports of the National Ombudsman is only 1.5 % of the amount of decisions of the first instance administrative courts. However, more than 81 % of the Ombudsman cases are solved by means of informal methods. Another important feature of the National Ombudsman help is the speed of his investigation. The time between filing of the complaint and the outcome of the case varies, depending on the type of the method that is used by the National Ombudsman. The average time spent on the investigation concluded with a written report is 12 months. The average time lapse decreases to 169 days (on average) when using mediation and to 53 days (on average) when using intervention. The administrative courts, with possible appellate proceedings, need more time. The fact that the report of the National Ombudsman is final and is not possible to appeal against makes the investigation of the National Ombudsman a faster type of dispute resolution than the proceedings before the court.

The service of the National Ombudsman is free. The service of the administrative courts is connected with a moderate fee (ranging from 42 to 310 euros) (Table 3.4).

4.3.4 Auxiliary Character of Protection of Citizens Against the Administration by the Dutch Ombudsmen

Is the work of the Dutch ombudsmen an alternative to the work of courts? Does it bring something new into the checks and balances in the Netherlands? From a normative perspective, certainly. The Dutch ombudsman institutions are independent and impartial state institutions that can, on one hand, deal with complaints about administrative actions and, on the other, exercise their own investigations about the quality of the functioning of the administration. They have their own functions and their own roles. The ombudsman system is fully independent from the

courts, whether ordinary or special ones, despite the fact that the law bars them from assessing complaints in case of court proceedings. They can deal with problems of individuals that are directly connected with the conduct of the state administration. The law gives the Dutch ombudsmen a specific scope in which they can exercise their roles—propriety. They do not charge any fee, and their working methods are informal. Although their scope of control is not limited to lawfulness, the overlap of these scopes is visible. The Dutch ombudsmen protect a part of the administrative behavior that cannot be completely covered by the Dutch courts. So far, the Dutch ombudsmen are an alternative to the courts. In practice, the National Ombudsman is not always an effective mechanism in avoiding court proceedings despite the fact that it is low cost, fast, and informal. For certain, his competences and remit are different from those of the courts.[37] Because of that, he can help individuals that deal with issues that would not succeed or are not assessed before the court. These issues are closely connected with the special character of the ombudsman's protection. The Dutch ombudsmen do not deal with the contents of administrative decisions but with the actions of (persons working in) the administration that may be connected with decisions or with real acts. Thus, they cannot prevent an appeal to the administrative court. In connection with these types of disputes, the ombudsmen can indeed be a mechanism that will help to avoid the court proceedings and theoretically decrease the number of court cases. Furthermore, his impact on the quality of the administration in the Netherlands is an important point that cannot be overlooked, despite the legally unbinding character of his reports, his limitations preset by the law, and the relatively small number of complaints.

4.4 Other ADR Tools

4.4.1 Overview

Administrative rules of procedure do not allow explicitly for ADR. But everybody is convinced that informal approaches are much better from a conflict resolution perspective. The legal debate therefore has evolved as to what the rules of procedure stated in the GALA enable administrative organs and administrative courts to do in this respect. Actually, it appears that they can do quite a lot.

Pretrial proceedings originally have been designed to give the administration the possibility to correct itself. As such, they are considered to be a conflict resolution mechanism in itself. There are formal requirements, but proceedings are quite effective: recent empirical research on the filtering effects of objection proceedings and on user satisfaction on a national scale has not yet been published. In the past, evaluation research has been carried out and published, especially as part of

[37] Brenninkmeijer (2007a).

evaluations of the General Administrative Law Act. Sanders also conducted research into objection proceedings.[38] More recently, published studies, conducted at the initiative of the Ministry of Justice, are of a more exploratory nature. From those studies, it appears that the context in which a decision was taken affects the filtering effect of an objection. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1½ million and 30,000 per agency, annually). These organizations are called *decision factories*.[39] These decisions are very often made with the help of information and computer technology. This means that presumptions may be faulty, because of administrative mistakes. The objection procedure helps the administration to correct its errors or to explain the decision to the citizen in these cases. The effect is huge, as only about 10 % of the addressees of all original decisions commence court proceedings after decisions on objections in general; for decision factories, this may be even a smaller proportion.[40]

As far as mediation in administrative proceedings is concerned, the institution has been developed during the past 15 years. Mechanisms have been explored following the mediation wave from the USA that struck the Netherlands since the mid-1990s. It has been explored intensively by an administrative judge from Zwolle District court in the year 2000, with a positive outcome.[41] The positive outcome refers to the conditions for mediation next to adjudication by a court. The mediation effort precedes court proceeding. A case is tested for mediation fitting, and subsequently mediation has been tried. It requires a highly informal approach of the parties by a judge and by a subsequent mediator. It has become a standard practice that an administrative judge tries to refer a case to mediation; each first instance court has a mediation desk and a list of mediators. The Council for the Judiciary has also published a brochure in which parties are informed about the possibilities for mediation in administrative court proceedings.[42]

4.4.2 *The Relation Between Administrative Appeals and Mediation in Administrative Matters*

During the past 10 years, everybody has been convinced that court proceedings in administrative law should be a means of very last resort only: a serious point of attention is the deep dissatisfaction felt by most Dutch citizens with experience of objection proceedings. Some 61 % value the services rendered with a 4.7 on a 1–10

[38] Sanders (1999).

[39] Beerten et al. (1996) were among the first.

[40] van Erp and Klein Haarhuis (2006), pp. 38–39.

[41] Pach (2001), pp. 99–143.

[42] De Rechtspraak (2011).

scale.[43] Research by Roëll shows that trust by civil servants in citizens can be considered as a decisive factor for the success or failure of establishing trust between citizens and the administration.[44] A recent report by the scientific council for government policy (Wetenschappelijke Raad voor het Regeringsbeleid) also advocates a more active approach by civil servants involving citizens in decision making and investing in mutual trust. So far, the thoughts about citizen–administration relations are much more developed than practiced, and this means that there is still some way to go. However that may be, the government has taken the initiative to stimulate civil servants and citizens to take an active informal approach and to cooperate instead of hide behind formal rules, also by starting the project: www.prettigcontactmetdeoverheid.nl. Contacts between the administration and citizens should be the opposite of inducing conflicts. Civil servants have to "listen" to the citizens and help try to solve the problem at hand, instead of steering towards formal approaches.

Because of separation of powers and because administrative courts in the past only annulled a decision if the decision or its preparation was not in conformity with the law, a debate has started about *finality* in administrative law court proceedings. The basic issue is that the object of administrative court proceedings usually is the decision as a result of objection proceedings. The annulment of such a decision has as a consequence that the administrative office should take a new decision on the objection filed. Such a decision can be again appealed against.

This has resulted in a project: "The new case management" (nieuwe zaaksbehandeling), also aiming at administrative court proceedings leading to final solutions.[45] Here, within the context of the court proceedings, the courts try to steer the parties towards a negotiated solution of the conflict at hand.

4.4.3 *The Juridical Effect of Mediation in Administrative Law*

For mediation in administrative law, quite some restrictions apply. Of course, the administrative organ cannot negotiate the use of its competences beyond legal boundaries. This includes general principles of proper administration. In more complex cases with third party interests, also those third party interests should be taken into account.

When mediation is successful, parties have to sign a settlement agreement. This agreement will specify how the administrative office involved will use its competences under administrative law. When applying the settlement agreement, the administrative office needs to follow administrative rules for decision making.

[43] Kanne and Bijlstra (2010).

[44] Röell (2013).

[45] van Ettekoven and Verburg (2012), pp. 13–14.

Under Dutch civil law, such a settlement agreement is enforceable at an ordinary court. If it appears to be impossible for the administrative office to live up to settlement conditions, an action for damages may be successful. For that reason, it is very important that the administrative organ also, when negotiating a settlement, stays within the legal boundaries of its competences, including its accountability for third party interests.

Furthermore, as most conflicts in administrative law do arise because a decision was taken, a negotiated solution will involve a number of new decisions, like the decision to revoke the original decision and its replacement with another. This may involve the application of the GALA provision on replacing a decision with another one while proceedings are pending (art. 6.19 GALA). Usually, it is advised not to withdraw the pending appeal before the administrative organ has effectuated its part of the settlement agreement.[46]

As far as the new case management is involved, the outcome may be that the parties agree on what the outcome should be. If it is technically not too complicated, the court then can provide for the new decision (art. 8:72 GALA). However, often there are points yet to be decided, and what the court can do in such a case is to state conditions for the new decision to be taken by the administrative organ. Also, when technically complex decisions (licensing, for example) are at stake, the administrative courts leave that to the administrative organ.

This also means that a settlement agreement as a result of mediation cannot replace the decision. The administrative authority is bearer of the competence under public law. So it should do the decision-making as a follow-up of the settlement agreement.

4.5 The Relation Between Administrative Appeal and Judicial Review

4.5.1 Relation Administrative Appeal and Judicial Review

According to article 6:13 GALA (General Administrative Law Act), interested parties have the obligation to first exhaust all available remedies on the administrative level. If the interested party can reasonably be blamed for not raising an objection or giving his views during the preparation of the decision, then the District Court has to declare the appeal inadmissible.

The court also has to verify if the administrative organ has declared an objection admissible by mistake. This admissibility issue is a public policy issue. Public policy issues can be defined as issues whose significance for the legal system are so great that the validity of the provisions applicable to them must be ensured,

[46] De Graaf (2005), pp. 33–36.

irrespective of the will, knowledge, or interest of the parties. The court has to review public policy issues ex officio. *Ex officio* review occurs independently of and, if necessary, against the will of the parties. If need be, the court conducts *ex officio* review with a so-called *reformatio in peius* (including in two-party relationships) and, if necessary with respect to the entire decision, even if only a part thereof is challenged.

Upon receiving an action, the court has to verify its competence. As a general rule in administrative law, its competence is limited to examining administrative decisions. Further, it has to verify the admissibility of the action. The appeal has to be brought before the court in 6 weeks after the announcement of the contested decision. Only interested persons have access to the court. A court fee must be paid in order for the appeal to be admitted. With regard to the notice of appeal, some requirements have to be fulfilled. The most important one is that the notice of appeal shall contain the grounds for the appeal.

If this requirement has not been complied with, the appeal may be ruled inadmissible, provided the appellant has had the opportunity to remedy the omission within a time limit set for this purpose.

An important question is if article 6:13 GALA implies that objections or views that could but have not been brought forward in the objection procedure and the public preparation procedure will be declared inadmissible in the appeal procedure. In recent case law, such new objections and views are admissible if they concern a part of the decision that has been challenged before. An important question is therefore what is meant by "a part of the decision."[47]

Whether a decision consists of several parts depends on the nature of the decision. In areas where often the same kind of decision is contested, the courts have drawn clear and general lines. Thus, there is great clarity on the components of an environmental permit. Such a permit concerns the carrying out of a specific project that has environmental consequences (e.g., the building of a factory), and it can consist of several activities such as building, setting up an establishment in environmental law sense, cutting down trees, and making an exit to the public road. There is a fairly large number of activities that can be covered by an environmental permit, depending on the nature and scope of the project for which the authorization is demanded. When permission is requested for several of these activities at once, then those consents are normally issued simultaneously in one environmental permit. For the purposes of Article 6:13 GALA, each of these activity consents included in one environmental permit is considered a separate part of this permit.

This approach means that only those points can be raised in an appeal that concern an activity, or part, of the decision that was previously contested in the uniform public preparation procedure or in the objection procedure. In cases concerning land zoning plans, for example, each geographically distinct location

[47] Judicial Division Council of State, 21 January 2009, case nr. 200801408/1; Judicial Division Council of State 9 December 2009200901496/1/H1 www.raadvanstate.nl, last accessed November 21, 2013.

and the rules concerning this particular location are considered to be a separate part of the decision.

Other "common" decisions, according to the case law, do not consist of "parts" in the above sense.

4.5.2 *Final Dispute Settlement by Courts*

In most cases of judicial review, court decisions that quash the challenged administrative decision do not end the conflict. Usually, the administrative organ has to take a new decision, following through on the court's reasons for the quashing of its original decision. But this is not a guarantee that the conflict has ended. In many cases, the interested citizen will be able to appeal against the new decision. This is called the "yo-yo effect."[48] This phenomenon can also lead to a violation of the reasonable time limit of article 6 ECHR.

The administrative courts have stated in their case law that a right to damages exists if the administrative organs and the administrative courts violate this reasonable time requirement in article 6 ECHR. For instance, in the case law of the ABRS, as a general rule a procedure of, in total, 5 years (after lodging the objection at the administrative organ) is reasonable (1 year for the objection and 2 years for the first and final instance courts).[49] In the case law of the Central Appeals Court, this period is 4 years (one-half year for the objection, one-and-a-half year for the first court instance, and 2 years for the final court instance).[50] If this issue is raised by the claimant, he receives 500 euros for each half year that the reasonable time period is violated.[51]

The courts have started to explore their possibilities to come to final dispute settlement. The legislator has formalized this case law in the GALA.

The basic problem is connected with the question of the kind of possibilities administrative courts have to settle the case without jeopardizing the separation of administrative and judicial responsibilities based on the separation of powers doctrine (trias politica). In cases where the administration has only one option, e.g. it has to take one particular decision (legally bound administration, without any discretion left), it is much easier for the court to work from the perspective of effective dispute settlement. If the competent authority has discretionary power, it is more difficult. Although it should be remembered here that the administration in many, if not most, cases standardizes its choices, as the competent authority adopts more policy rules, it is easier for the court to come to a final dispute settlement.

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[48] Willemsen (2005). Also see supra, paragraph 4.2.

[49] ABRvS 20 May 2009, LJN BI 4558.

[50] CRvB 26 January 2009, LJN BH 1009.

[51] Seerden (2012), p. 148.

In recent law, the legislator has established an obligation for the courts to examine the possibility of settlement of the dispute. If the court concludes that the appeal is founded and the decision has to be annulled, or quashed, it first has to examine if all or part of the legal consequences of the annulled order or the annulled part thereof shall be allowed to stand. If this is not possible, the court has to examine if its judgment shall take the place of the annulled order or the annulled part thereof.

If it is not possible to leave the legal effects intact or replace the decision by a judgement of the court because the administration has room for discretion, the court has to examine whether the so-called administrative loop can be used. In that case, the administration gets the opportunity to repair an error or fault in the decision. The administrative body can come to the conclusion that the disputed decision is flawed and that this can be redressed by changing or withdrawing the disputed decision. In that case, the appeal against the new decision is unfounded and the appeal against the original decision is founded. When it is not possible to repair an error or fault in a new decision, the administrative authority can sometimes repair an error or a fault by producing a new document. After this, the court can use its power to leave the legal effects of the original decision intact. When the administration does not succeed in repairing the error or fault, the court has to examine again whether it can replace the decision of the administration by its own judgement. If that is not possible, the court can annul the decision and order the administration to take a new decision and give indications on the content of the new decision.

Apart from the administrative loop, "new" decisions are accepted during the court proceedings. It has become clear that administrative bodies need a possibility to change or withdraw the disputed decision while the appeal is still pending. In this way, a complete or a partial solution of the dispute can be achieved without having to wait for the outcome of pending court proceedings. The administrative body can come to the conclusion that the disputed decision is flawed and that this can be redressed by changing or withdrawing the disputed decision. Changing or withdrawing a decision can also lead to complications in the court proceedings, however. Because of this, Article 6:19 GALA states that if an administrative authority has taken a new decision, the appeal shall be deemed also to have been brought against the new decision, unless this new decision completely satisfies the objection or appeal. Also, repeal of the disputed order shall not be an obstacle to its annulment if this is in the interests of the claimant.

4.6 Europeanization of Administrative Remedies?

4.6.1 Introduction

At the European level, the Union institutions have created an extensive body of superior and direct applicable Union law by means of the Treaties, regulations, and directives. The EU law harmonizes and sometimes unifies the substantive law of the

member states in many areas of law (environmental law, customs and taxes, socioeconomic law, etc.).

However, the application, enforcement, and also the legal protection concerning all these Union laws are carried out on the national level, by the member states. In other words, the remedial context of all the rights created by EU law is still national. Apart from special fields like custom law, Union law does not prescribe the remedies and procedural rules that have to be applied in a particular case. So there is no alternative but to use the remedies and procedures prescribed by national law.

As long as specific aspects of remedial law are not harmonized by secondary EU law, the principle of national procedural autonomy applies. The Member States determine which courts are competent and lay down the rules for administrative and judicial procedures in which EU law is enforced. However, this autonomy is limited by three principles.[52]

4.6.2 Principles of Equivalence and Effectiveness

National rules applicable to EU claims cannot be less favorable than the rules relating to similar actions of a purely domestic nature. Or in other words, the rules that have to be applied in Community matters may not be less favorable than those governing similar rights or actions in internal matters.

The principle of equivalence requires a comparison between national procedural rules applicable to Community rights and the procedural rules applicable to an equivalent national claim. This leads to the obvious question, *what is the equivalent national claim*? Sometimes there are four or more possible comparators. In Dutch law, there has been, since 1994, one uniform time limit of 6 weeks for lodging an appeal. In other countries, this can be different. Thus, one has to decide what the equivalent national claim is.

In general, one may say that the Court leaves a *broad margin of appreciation* to the national court to choose the comparable national procedural rule. If there are more possibilities, the national courts are not obliged to apply the—for individuals—*most favorable national rule*. They can choose for an appeal in a purely domestic matter that is similar to the EU claim regarding the purpose, cause of action, and essential characteristics. So, in European tax matters, they can choose for an appeal concerning a national tax; in European subsidy matters, for an appeal in national subsidy matters; etc.

Moreover, in the beginning of the 1990s, the ECJ has stretched (or extended) the scope of the principle of equivalence to the rule that national competence/discretion is a Union obligation. This extension is based on the principle of sincere cooperation of article 4(3) TEU (formerly art. 10 EC). This rule implies always that when a

[52] Jans et al. (2007), pp. 40–56.

national procedural rule offers discretion to be applied in favor of a domestic claim or contrary to the claim, EU law requires the procedural rule to be applied in favor of a Union claim. In short, national discretion is a Union obligation.

National rules may not make it impossible or excessively difficult to exercise the rights conferred by Union law.

In 1995, in two cases, Peterbroeck[53] and the Dutch Van Schijndel,[54] the Court for the first time explained in general how we have to answer the question whether a national procedural rule meets this requirement of effectiveness. The Court stated that each case that raises the question whether a national procedural provision renders application of Union law impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress, and its special features, viewed as a whole before the various national instances. In the light of that analysis, the *basic principles* of the domestic judicial system, such as the *rights of the defense, the principle of legal certainty and the proper conduct of procedure*, must be taken into consideration.

4.6.3 Principle of Effective Judicial Protection

This principle is derived by the Court in the case of Johnston[55] from the *constitutional traditions* common to the Member States, and it is also laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It has been reestablished in article 47 of the Charter of Fundamental Rights of the EU.

From the case law of the ECJ, it has become clear that from the principle of effective judicial protection three subprinciples can be derived:

a. Effective access to a court: there must be a court by which an appeal based on Union rights is possible. In other words, an individual must have an *effective access* to the judge in order to claim his rights that are based on EU law.
b. Procedural guarantees: the procedures before the national court and also the ECJ itself should meet some guarantees. These guarantees are the same as the guarantees of article 6 ECHR and concern, for instance, the right to a fair trial, the requirement of impartiality, and the provision of adjudication within a reasonable time.
c. Effective remedies: the judge must have, at his disposal, effective remedies by which the Union law can be enforced and by which violations of EU law can be rectified or repaired. The procedure, therefore, needs to comply with some

[53] Case C-312/93.
[54] Case C-431/93.
[55] Case 222/84.

material requirements of quality. This is the substantive or material aspect of the principle of effective judicial protection.

4.6.4 Relevant Case Law

The aim of this paragraph is to illustrate the way these three principles work out in some famous Dutch cases to show the impact of the EU law on the Dutch system of administrative legal protection.[56] When reading this section, one could get the feeling that it is more a description of the EU law than the Dutch Administrative law and the impact of the EU law on the Dutch system of administrative legal protection, which is not true, as in these cases the Dutch system was tested against the core European demands; these cases became also benchmarks in the EU law.

First one to be discussed is the so-called *ex officio* application of EU law, the application of EU law by the court in case the parties themselves have not relied on EU law at all but, e.g., only on national grounds. In that case, the question can be posed whether the national court should apply EC law ex officio on its own motion.

From the viewpoint of EU law, it is quite convenient if national courts should be obliged to apply EU law ex officio because, in that case, EU law will always be applied (in theory) and, at least, this application does not depend on knowledge of Union law and EU cleverness of the parties. On the other hand, in most systems of administrative law—for instance in the system of the Netherlands—the obligation of the courts to apply the law ex officio is limited to certain very important rules, the so-called rules of public policy (order). In Dutch administrative law, this has been based on Art. 8:69 of GALA. It means that a court only has to apply ex officio rules with regard to competence and admissibility. Outside these rules of public policy, the courts are not obliged and in fact do not have the power to apply the law in general, ex officio, for several reasons like the rights of defense—to apply a certain rule ex officio is always in favor of one of the parties—or the requirement of reasonable time. After all, applying the law ex officio normally will take a lot of time.

The way the ECJ has solved this tension has become clear in the case of Van der Weerd.[57] This case dealt with the conformity of the Dutch system with EU law. From this Dutch case, we can learn that the ECJ answers the question whether national courts are obliged to apply EC law ex officio in the light of the principles of equivalence (which is sometimes extended by the rule "national discretion is Union obligation") and effectiveness. The case also gives a clear example of the application of the procedural rule of reason. The result of this test is that national courts generally are not obliged to apply the EC rules in question ex officio. The Dutch system in administrative law was considered not to be contrary to EU law.

[56] Jans et al. (2007), pp. 286–316.

[57] Case C-222/05.

4.6.5 Reopening Administrative Procedures Based on EU Law

Finally, the authors have some remarks on another remedy, the possible obligation for administrative authorities to review a final administrative decision that is contrary to Union law, the so-called the Kühne & Heitz situation, named after the Kuhne & Heitz case.[58,59]

Typical for Kühne & Heitz is that the administrative decision had become final because of a judgment of a court adjudicating in last instance that has misinterpreted EU law.

We will briefly give you the facts of Kühne & Heitz. For the export of pieces of chickens, an exporting company could get EU export refunds, which were different depending on the question whether the exported pieces were legs of the chicken (high refund) or other parts (low refund). The chicken pieces of Kühne & Heitz existed out of a combination of legs and other pieces. The administrative authority in question was of the opinion that the other pieces prevailed, so K&H was rewarded the low export refund.

The company appealed before the national court, but the appeal was rejected in last instance because the court agreed with the opinion of the administrative authority on the low refund. The court did not refer the question to the ECJ.

Some years later, in a completely different case but also concerning the export of chicken pieces, the question on the interpretation of the EU law in question was referred to the ECJ, which ruled that chicken pieces similar to those of Kühne & Heitz should have been rewarded with the high export refund. In effect, the decision in Kühne & Heitz and also the judgment of the national court in which this decision was upheld were contrary to EU law.

So, K&H requested the administrative authority to review its decision and to reward the higher refund after all. The authority refused, and in the appeal procedure against this refusal, the national court (Trade and Industry Appeals Tribunal) referred the question whether EU law requires, in the circumstances of the case, that the decision (which had become final after the first procedure) should be reviewed.

In the judgment, the ECJ first declares that EU law in general does not require administrative authorities to reopen (or review) decisions that have become final after the exhaustion of national legal remedies or after the expiry of reasonable time limits, even not when the decision is contrary to Union law. The reason for this opinion is that the finality of decisions contributes to legal certainty, an important general principle of EU law.

So, there is no need under Union law to create a remedy of reviewing final decisions that are contrary to EU law.

[58] Case C-453/00.

[59] Jans et al. (2007).

However, in the circumstances of the case, the ECJ comes to a different view concerning the refunds of K&H. Important for this view is that the national referring court (CBB) told the ECJ that according to national (Dutch) law, administrative authorities enjoy the competence (discretion) to review final national decisions in national cases. In K&H, this discretion in purely domestic cases is changed in a Union obligation at least if several other requirements are met. In K&H we see an application of the rule "national discretion is Community obligation," the extended version of the principle of equivalence [based on 4(3) TEU].

The other conditions that have to be met for creating an obligation to review a decision that is contrary to EU law are the following:

- The individual in question should have exhausted all national legal remedies. So the decision of the authority should have become final as a result of a judgment of a national court ruling at final instance.
- The judgment of this court is, in the light of judgment of the ECJ subsequent to it (so, a new EC judgment), contrary to EU law.
- Moreover, the person concerned should have complained to the administrative authority immediately after the judgment of the ECJ.

So only in exceptional circumstances is there an administrative obligation to review final administrative decisions.

In a more recent case, Kempter,[60] the ECJ has explained the meaning of two of the K&H criteria. First, what is immediately? This is something that is up to national law to establish, of course within the limits of equivalence and effectiveness. In Dutch, there is no legal provision concerning this question. From a recent decision of the CBB, we can learn that according to the CBB a period of 28 months is not immediately, but whether half a year, a year, etc., is still unclear. Three months should be no problem because this was the period K&H took before it asked the Dutch administrative authorities to reconsider the wrongful decision.

Second, Kempter made clear whether the issue concerning the conflict with EU law had to be a part of the procedure before the national court in the original proceedings. According to Kempter, it cannot be inferred from *Kühne & Heitz* that the parties must have raised before the national court the point of Community law in question. In order for that K&H condition to be satisfied, it is sufficient that either the point of Community law, the interpretation of which proved to be incorrect in light of a subsequent judgment of the Court, was considered by the national court ruling at final instance or it could have been raised by the latter on its own motion.

[60] Case C-2/06.

4.7 Final Considerations

One question that this paper tries to answer is whether and how effective administrative appeals are in avoiding court proceedings. From our research, it appears that the context in which a decision was taken affects the filtering effect of an objection. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1½ million and 30,000 per agency, annually). These organizations are called *decision factories*. These decisions are very often made with the help of information and computer technology. This means that presumptions may be faulty, because of administrative mistakes. The objection procedure helps the administration to correct its errors or to explain the decision to the citizen in these cases. The effect is huge, as only about 3 % of the addressees of all original decisions commence court proceedings after decisions on objections.

Other types of decisions are taken in much lower quantities and depend on much more complex decision-making processes. This is the case for, e.g., spatial planning decisions and also for licenses under environmental law. One can imagine how complex a license for oil drilling or for a windmill park on the North Sea can be. The organizations that deliver these decisions are called "decision workshops." Here the filtering effect of objection proceedings is much less.

It is also important to assess whether the system of administrative appeal/review is considered a "nuisance" for those seeking access to justice or by the public authorities. As a general rule, interested parties are required to follow a preliminary administrative procedure (usually an objection procedure) before they can take their case against a decision to court (Article 7:1 GALA). This procedure allows the individual to explain why he or she disagrees with the decision, after which the administrative authority considers its decision once again. Officially, this preliminary procedure has two objectives: extended decision making and legal protection. In practice, the emphasis often lies on the latter element, which gives the objection procedure a quasi-judicial nature. This is generally considered to be a negative development, and there are various initiatives designed to make the procedure more informal again. The government has taken the initiative to stimulate civil servants and citizens to take an active informal approach and to cooperate instead of hide behind formal rules, also by starting the project: www.prettigcontactmetdeoverheid.nl.

There is much more of a certain degree of intermingling between administrative proceedings and court proceedings in the Netherlands. If the administrative court rules that an order is unlawful, it will annul the order and instruct the administrative authority to issue a new order. Until recently, as a general rule, the procedure then came to an end, and interested parties could initiate procedures all over again, against the new decision. Over the last years, courts have adapted their line of case law and now, as a general rule, try to settle disputes definitively. To that end, the courts have recently been granted the power to render an interim decision, after ruling that an order is unlawful, requiring the administrative authority to issue a new

order or to provide better reasons for its old order (during the process). This is also known as the "administrative loop" (*bestuurlijke lus*). This new tool enables courts to manage the decision-making process in the administrative stage to an increasing extent.

Of course, one question the paper examines is which system of administrative appeal (mandatory or optional) could be considered as a better solution. One would think that for the answer to this question, a distinction must be made between routine mass decisions, where the objection phase has an important sieve effect and does in fact give time for an individual reconsideration, and customized decisions, which are often preceded by an extensive consultation phase already and for which the objection has less value.

For this reason, 10 years ago the possibility was introduced that appellant(s) and administrative organs can—on the condition that they agree on this point—skip administrative pretrial proceedings (article 7.1a GALA). This, however, was not a big success.[61] The purpose of the introduction of direct action was certain flexibility in administrative law in order to enable the parties to skip procedures they may find unnecessary in order to save time. However, the direct appeal does not operate in accordance with this objective.

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Chapter 5
Administrative Appeals and ADR in Danish Administrative Law

Inger Marie Conradsen and Michael Gøtze

5.1 Danish Administrative Law System: An Overview

The Danish administrative review system is diverse and highly multifaceted. The system as a whole has been described as one not being short of review possibilities and, in addition, being unduly confusing.[1] Time and space do not allow for a full account of administrative review in Denmark; therefore, what follows is an analysis of the various review possibilities, their interconnectedness, and their effectiveness compared to judicial review.

5.1.1 A Methodological Note

The field of study is characterized by a general absence of statistics that in itself bears witness to the diversity of the Danish review landscape. No overall statistics exist as regards either individual administrative acts or their appeal. A further complication for our present purpose is that whereas court statistics distinguish between civil and criminal cases, no distinction within the concept of civil cases is made between public or private parties.

As a consequence, the statistics employed in this chapter are generated at the institutional level. This has obvious limitations when it comes to the generalization of our conclusions. The institutions we have chosen for the present study are three

[1] Christensen (1994), p. 321.

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influential national boards of appeal, i.e., independent public authorities whose main or sole purpose is to review administrative appeals that cover very different areas: the National Social Appeals Board (*Ankestyrelsen*), the Environmental Board of Appeal (*Natur- og miljøklagenævnet*), and the National Tax Tribunal (Landsskatteretten)[2], which will be described in more detail below. Suffice it here to mention that all three boards review appeals of individual administrative acts concerning a variety of issues made primarily at local level, decentralized and deconcentrated, and all three boards review several thousand appeals per year; the National Social Appeals Board reviews more than 25,000 appeals. Our samples thus cover the review of a large number of individual administrative acts made across the administration and thus have a representative quality to it.

5.1.2 An Overview of the Administrative Structure

The Danish public sector is divided into three levels: the national level, the regional level, and the local level. Each level is governed by directly elected governments, and the seven regions and 98 municipalities have a high degree of autonomy.[3] The regions' primary task is to run the hospitals. The task of the municipalities is the remainder of citizen-oriented tasks such as daycare, schools and care for the elderly, as well as the issuance of decisions of local interest regarding, e.g., social benefits, building permits, etc. A consequence of the autonomy is that administrative review takes place in geographically closed circuits, unless otherwise provided by statute, which is quite often the case as we shall see shortly. The Danish General Administrative Procedures Act (*Forvaltningsloven*) applies to individual administrative acts across levels and sectors, as well as in first and appeal administrative instances.

5.1.3 An Overview of the Administrative Justice System

A useful key to understanding the general legal framework governing complaints against administrative acts in Denmark can be found in the Danish constitution (*grundloven*).[4] In accordance with democratic tradition section, three of the constitutions divide the power between the legislature, the executive, and the judiciary. This tripartite division is useful when outlining the framework governing complaints

[2] See http://www.ankestyrelsen.dk/, http://www.nmkn.dk/, and http://www.landsskatteretten.dk/, respectively. Despite its name, the National Tax Tribunal is a board of appeal.

[3] Until the local government reform in 2007, the number of regions was 13 and the number of municipalities was 271. Following the reform, a number of tasks were transferred from the regions and the state to the municipalities.

[4] The present constitution dates back to 1953, but a number of the provisions dates back to 1849.

against administrative acts as such complaints may be dealt with by all three branches of the state. Central to understanding the general framework is also Section 82 of the Constitution, which establishes autonomy for the municipalities.

5.1.3.1 Ordinary Court Review of Administrative Authorities

Section 63 of the Constitution grants the ordinary courts—that is, the 24 district courts, the two high courts, and the Supreme Court—the power to pass judgments on any matter relating to the powers of public authorities and, as such, creates a direct access for citizens to bring disputes regarding administrative matters, whether at the central or the local level, before the courts. Section 63 (2) provides for the setting up of administrative courts but presupposes that decisions made by administrative courts must be reviewable by the highest ordinary court, which is the Supreme Court. No administrative courts have been set up, and the reason for this is generally ascribed to this constitutional presupposition that decisions made by administrative courts must be reviewable by the highest ordinary court. Thus, as opposed to, e.g., Sweden and Finland, the court review of administrative authorities takes place within the ordinary court system and within the general procedural framework of judicial review—e.g., the Danish Administration of Justice Act (*Retsplejeloven*).[5]

The direct access to judicial review is not absolute in Danish law. It is generally considered that the legislature may specify the extent of this access, e.g., by setting up preclusive time limits for lodging complaints against administrative authorities, as well as other procedural limitations. Such procedural limitations are quite widely incorporated into specific regulation on access to courts.

One controversial example of limiting the access to judicial review is the so-called final clause, where a statute provides that an administrative legal act issued under it cannot be reviewed by the courts. Recent statutory changes concerning review of administrative decisions focus on limiting the access to administrative review rather than precluding judicial review. This applies to recent changes in the three boards of appeal that concern us here. The courts have accepted the preclusion of judicial review in the case of refugees.[6]

5.1.3.2 Ombudsman Review

Section 55 of the Constitution forms the foundation for Parliament to elect one or two persons to supervise the state's civil and military administration. The civil ombudsman institution—the Parliamentary Ombudsman—was created by statute in 1955, and in 1997 its powers were extended to cover not only state but also

[5] Gøtze and Rytter (2000), pp. 525–44.

[6] Cf. Danish Law Weekly 1997.1157H ("Ugeskrift for Retsvæsen").

municipal administrative acts. The Danish Parliamentary Ombudsman has arguably a more influential and pivotal role in Denmark than in other European countries due, inter alia, to the fact that no administrative courts have been set up and to the fact that the ombudsman institution has been given comprehensive economic and manpower resources that exceeds, e.g., the resources of the Danish Supreme Court. No military ombudsman institution has been set up. In contrast to the direct access for citizens to bring administrative matters before the courts, the Parliamentary Ombudsman may deal with administrative matters only when administrative appeal is exhausted. Thus, the Ombudsman is a fallback position.

5.1.3.3 Multilevel System of Administrative Review

Whereas the judicial and parliamentary control regarding administrative acts are provided for in the Constitution and, in addition, regulated by specific statutes, the Danish Administration of Justice Act (*Retsplejeloven*)[7] and the Ombudsman Act (*Ombudsmandsloven*),[8] respectively, a similar framework as regards administrative review is conspicuous by its absence. The nearest we can get to a general legislative stance on administrative review is Section 25 in the Danish General Administrative Procedures Act (*Forvaltningsloven*), which presupposes the existence, as well as the complexity, of administrative review, as it establishes an obligation for the administration *to give guidance on administrative review where the application of the party is not fully met*. This absence of a statutory framework should not be confused with an absence of rules. On the contrary, the regulatory framework is both vast and diverse as it consists of a combination of legal principles and a myriad of statutory rules governing specific sectors.

Another characteristic of administrative review in Denmark is the existence of sector-specific boards of appeals (*ankenævn*). Boards of appeal are characterized as being collegiate public authorities whose sole or main purpose is to review administrative acts following an appeal. Characteristic of these boards is that they fall outside the traditional categories of public authorities as they fall outside both the hierarchically organized machinery of central government and the council of local government, without being courts of law or sections of parliament.[9] In 2012, the number of national boards that solely or primarily are concerned with reviewing appeals is approximately 30,[10] but the number is not constant. The current legislative program includes the setting up of new boards, as well as the closing down of existing boards. A number of boards of appeals exist at the local level too, and the total number of boards of appeal is therefore higher. However, as the legal acts of these boards may be appealed to a national board, they are not dealt with in detail

[7] Act no. 1008 of 24 October 2012 as amended

[8] Act no. 473 of 12 June 1996 as amended.

[9] Christensen (1958).

[10] Royal Court and State Calendar 2012 (“Hof og Stat”).

here. This widespread existence of boards of appeal—combined with the free-of-charge access to these complaint bodies—has as a consequence that in a Danish context *administrative appeal is in practice the rule and judicial review the exception*. Or as Norwegian law professor Jan Fridthjof Bernt has put it: "For the vast majority of citizens the practical reality is that administrative justice begins and ends in the administration."[11]

5.2 Danish Administrative Dispute Resolution Tools and Their Effectiveness

5.2.1 Categorization of Available Remedies

In Danish administrative legal theory, the concept of administrative review covers four different situations: *remonstration*, *revocation*, *recourse, and oversee*. [12] The concepts differ in two respects: first, whether the initiative to review is vested in the administration, as in the case of revocation and oversee, or in the citizens, as in the case of remonstration and recourse, and, second, whether the review is carried out by the public authority that made the decision in first instance, as in the case of remonstration and revocation, or whether it is carried out by another public authority, as in recourse and oversee.

Focus here is limited to the types of administrative review initiated by citizens—remonstration and recourse—which differ as regards the public authority that is reviewing the decision. As we shall see below, the main difference in the review carried out in remonstration and recourse is the important one of legal certainty inherent in an entirely new review by a public authority that is independent from the public authority that made the decision in first instance. On the other hand, remonstration has the advantage of efficiency, in the sense of swift decision making, as the case is already known to the reviewing authority.

The possibility of administrative review dates back to the late eighteenth century where individual legal acts could ultimately be appealed to the king.[13] Today, ministers have replaced the king for all practical purposes, and mayors have replaced ministers as regards the majority of citizen-oriented decisions. To this decentralization should be added the specialization of administrative appeal that is reflected in the numerous sector-specific boards of appeal that began emerging in the first half of the twentieth century. As a consequence, the general rule of administrative appeal now appears three-dimensional: (1) administrative acts

[11] Bernt et al. (2002).

[12] Loiborg (2002), p. 913.

[13] Report no. 957 on the motivation of individual administrative acts and administrative appeal, 1972.

issued by central government may be appealed to the minister unless otherwise authorized by statue, (2) administrative acts issued by local government may be appealed to the minister only if authorized by statute[14], (3) decisions made by specific bodies outside the traditional hierarchies may, as a general rule, not be appealed.[15] The statutory exceptions are so many that it seems inaccurate to talk about general rules. However, the general rules form the background against which the statutory rules should be read and understood, and hence they are essential for understanding administrative review.

5.2.2 Internal Review

5.2.2.1 Remonstration Based in a Statute

Remonstration is defined as the quite common situation where a citizen requests that the public authority that has issued the administrative legal act reopens the case with a view to reaching a more favorable decision.[16]

Occasionally, remonstration is *mandatory*, i.e. a prerequisite for appeal, the purpose of this being to limit the number of cases reviewed in recourse. An example of this is complaints about grades in higher education, which must be reviewed by the examiners prior to an appeal.[17] A variation of mandatory remonstration, so-called *built-in remonstration*, exists where an appeal must be sent to the public authority that issued the administrative act in the first instance with a view to this authority reviewing it. If no grounds for reversing the administrative act, fully or in part, are found, the appeal, including the grounds for the original decision and the review, must be forwarded to the public authority designated to review the decision in appeal, and only then is the individual administrative act reviewed by another public authority. An example of great practical importance is social welfare law, where appeals must be forwarded to the authority that made the initial administrative act; cf. s. 66 in the Consolidation Act on Legal Protection and Administration in Social Matters Act (*Social retssikkerhedslov*). In 2012, built-in remonstration was introduced in appeals concerning the physical environment too.[18]

The Ombudsman has addressed the issue of mandatory remonstration in two fundamental opinions and concluded that the cutting off of recourse, and thus of the legal certainty inherent in a second legal opinion, can only be done by the legislator.

[14] Christensen (1994), p. 321.

[15] Revsbech (2009).

[16] Loiborg (2002), p. 915.

[17] Cf. s. 33 in Statutory Instrument no. 666 of 24 June 2012 regarding examination in higher education.

[18] Act no. 580 of 18 June 2012, which amended the 26 statutes that constitute the legal framework of the National Environmental Board of Appeal.

One opinion was concerned with the introduction of a so-called reverse mail system.[19] The Directorate of Unemployment Benefits, which deals with appeals regarding unemployment benefits in first instance, and the independent Labor Market Board of Appeal, which deals with appeals in second instance, had agreed that appeals to the board should be sent via the directorate, with a view to the directorate reopening the case if it found there were grounds for reviewing the decision, disregarding that the complainant had appealed the act to the board of appeal. The Ombudsman found that it was unquestionable that the complainant had a lawful right to a review of the decision by the board of appeal. As a consequence, the introduced "reverse mail system" could not, in his view, have the effect that the complainant was deprived of a review of the decision by the board of appeal. This built-in remonstration in the recourse now follows from Section 99 of the Unemployment Benefit Act (*Arbejdsløshedsforsikringslov*). The advantage of a built-in remonstration in the recourse is that the reviewing process is simplified in the sense that the administrative act is "double checked" by the issuing authority prior to the external review. Where a case is subsequently forwarded for external review, the issuing authority has already commented on the decision that allows the reviewing authority to begin the review without delay.

The second opinion was concerned with the administrative *en bloc* revocation of 30 delegations of power from the Ministry of Taxation to the Directorate of Taxation. Subsequent to the revocation, the directorate was administratively transformed into a directorate general, and the revoked powers were delegated to the directorate general. An important effect of this maneuver was that individual legal acts issued by the directorate general could now only be reviewed in remonstration and not in recourse. The case raised the issue whether a decision as far-reaching for the citizens as the cutting off of the legal certainty inherent in the access to recourse could be made without the participation of the legislator. The Ombudsman found that it could not and added that if the sole or yet, in practice, sole purpose of the transformation of the directorate into a directorate general was to cut off external administrative review without the participation of the legislature, the issue was one of *détournement de pouvoir*, that is, abuse of power.[20] The cutting off of appeal was subsequently introduced in statute. The Ombudsman has not addressed the issue of unlawful cutting off of recourse in his written opinions in recent years.

Taken together, the two opinions reflect a need in the administration to find new ways to handle a growing number of appeals. That the Ombudsman has not addressed the issue lately should not be seen as an indication that the problem of handling a growing number of appeals has disappeared but rather of a risen awareness of the problem in the legislator that now frequently introduces appeal-reducing measures in the legislation. The opinions also underline that the difference

[19] Cf. Parliamentary Ombudsman opinion FOB 1997. 74.

[20] Cf. unprinted Parliamentary Ombudsman Decision J.nr. 1989-1107-220, reported in Loiborg (2002), p. 958.

between internal and external administrative reviews is one of legal certainty. Finally, they reflect that the Ombudsman is concerned with the access to complain, not merely as a right in individual cases but as a general and important legal value.

5.2.2.2 Remonstration Based in Legal Principle

Outside the case of mandatory remonstration, a category of *remonstration based on legal principle* exists. The general rule is that the public authority is under an obligation to review the issued legal act only in the case of essential, factual or legal, *novelty*. A fact is essential if it is probable that the case would have had a different result had the facts been known to the public authority at the time the act was issued. As regards essential legal novelty, this is the case when a retrospect change in the law formed the basis of the legal act, e.g., if a court case or an opinion from the Ombudsman overrules the interpretation or the practice of the administration. Essential procedural errors may lead to a reopening of the case too.

The extent of the review in remonstration is unlimited. This means that the legality, as well as the discretion, may be reviewed. As regards the possible result in remonstration, the act may be changed to the advantage of the party. As regards change to the disadvantage of the party, the principle of *non reformatio in peius* (the principle of nonamendment of a decision to a worse one) prevails, except in the case that the original decision was illegal.

5.2.3 External Administrative Appeals

5.2.3.1 Recourse

Recourse is defined as situations where a citizen appeals to a public authority about a legal act issued by, or a procedure followed by, another public authority, and the public authority that receives the appeal is under an obligation to review the decision.[21]

The confusing regime of the administrative appeal is determined by the existence of general legal principles from which, to a large extent, statutes deviate. We stated above that the statutory exceptions to the general rules were so many that it made limited sense to talk about general rules. That focus of this chapter is nevertheless on the general rules and not their statutory exceptions is due to several reasons. In addition to the overwhelming size of the task (a call for a thorough study of administrative review was made already 20 years ago[22]), the statutory exceptions

[21] Loiborg (2002), p. 954.

[22] Christensen (1994), p. 321.

are not the result of a global logic but the result of specific solutions to specific problems.[23]

5.2.3.2 Who May Appeal?

As regards the question of *who* may lawfully appeal an administrative act, the general rule is that an administrative act may be appealed only by the party, or parties, to the procedure at first instance. This means that the individual administrative act may be appealed by the addressees of the act, as well as others who are directly, considerably, and individually affected by the act. A tendency to expand the concept of lawful complainants to associations that would not be recognized as a party in first instance may be detected, noticeably in cases concerning the environment.[24] This expansion is explained by the fact that certain cases, noticeably those concerned with the physical environment, would otherwise never be reviewed. This development reflects the importance ascribed to legal certainty inherent in review, as the purpose of legal certainty inherent in the review would otherwise be forfeited. As regards public authorities, the general rule is that a public authority may appeal acts of which it is the addressee, e.g. the refusal of a building permit, whereas it may not appeal an act on the ground that it overrules a previous act made by the public authority itself, unless this is specifically decided by statute. Such a statutory right to appeal exists as regards social benefits, and others where the municipalities may appeal decisions of the regional Social Board of Appeal to the National Social Appeals Board; cf. Section 63 in the Legal Protection and Administration in Social Matters Act (*Social retssikkerhedslov*). However, the right to appeal is not unlimited; it is for the National Social Appeals Board to decide if the case is sufficiently principled or general to be reviewed. A similar right has been vested in the Minister of Taxation, who may appeal administrative acts of the National Tax Council concerning questions of EU law to the National Tax Tribunal; cf. s. 40 of the Tax Procedural Act (*Skatteforvaltningsloven*), just as he/she may bring any act of the National Tax Tribunal before the courts; cf. s. 49 of the Tax Procedural Act. The main reason for this is fear of loss of yield and thus not primarily a matter of the legal certainty inherent in appeal.

A recent court case illustrates the general rule that a public authority cannot appeal administrative acts of which it is not the addressee.[25] The Ministry of Employment had sued the Labor Market Board of Appeal as the ministry disagreed with an individual administrative act issued by the board concerning the right of the early retired to a holiday allowance without deduction in the pension benefit. It was estimated that the decision would affect about 40,000 persons and would cost the

[23] See, for a critique of this casuistic approach, Norway, Statskonsult (2003).

[24] Bønsing (2013), p. 311; Revsbech (2009).

[25] Decision by Eastern High Court, 31 October 2007, Danish Law Weekly 2009.58 Ø ("Ugeskrift for Retsvæsen").

Ministry of Employment in the area of 55–80 million euros. The court dismissed the case on the ground that the ministry did not have sufficient legal interest in the decision made by the board to file a lawsuit. The case illustrates that the board of appeal was independent of the ministry to an extent that the only action available for the ministry was the extraordinary one to involve the courts. However, the independency does not extend to the guarantee of continued existence; subsequent to the failed lawsuit, the ministry decided to introduce legislation that closed down the board.

5.2.3.3 How and When May an Individual Administrative Act Be Appealed?

It is asserted that the general rule as regards the how and when of administrative appeal is that neither formal requirements nor a time limit exists. However, the exceptions to this general rule are numerous, especially as regards time limits. The time limit is *two weeks* as regards complaints about examinations and *four weeks* as regards complaints about social welfare services, whereas it is *three months* as regards taxation. As regards formal requirements, the use of specific, often electronic, forms have become commonplace, but it is generally not a mandatory requirement but rather an aid to the complainant in order to provide the administration with all the necessary information. Like this, it works as a tool of efficiency, but it does not relieve the administration of the obligation that follows from the official duty to collect all necessary information.

The general rule as regards a possible *suspensive effect* of an administrative appeal is that administrative appeal does not have a suspensive effect. This mimes the situation of judicial review of administrative acts where Section 63 of the Danish Constitution explicitly provides that asking for a judicial review of an administrative act does not have a suspensive effect. However, the situation is less absolute when it comes to administrative appeal as the administration may decide that an appeal has suspensive effect, and this decision may be made by the public authority that issued the act or by the reviewing authority.

5.2.3.4 The Extent of the Review

As regards the extent of the review, the reviewing authority may carry out a full review of all aspects of the case, factual as well as legal.[26] No restrictions apply as to the inclusion of nova; on the contrary, it follows from the official duty that new material must be included if it is relevant to the case. In addition to reviewing the legality of the individual legal act, the reviewing body may also review the appropriateness of the legal act and thus review the discretion carried out by the

[26] Revsbech (2009), p. 334.

first instance, something that the courts, as well as the Ombudsman, are normally reluctant to do. Here, as in external administrative review in general, the principal rule may be, and to a large extent actually is, deviated from in the legislation governing specific areas.

The possible *results* of an administrative review range from dismissing the request of review to upholding the individual administrative act or to disregarding it. As regards the latter, this may take the form of either pure annulment, in which case the act is returned to the public authority that made the decision in first instance, with a view to this authority reviewing it, or an annulment in combination with modifying the act fully or in part. The extent to which the reviewing authority returns the act or decides to modify it differs across the different areas of law and is, to certain extent, also determined by tradition.[27] As regards the extent of the modification, the situation is the following: where there is just one complainant, the general principle is one of *non reformatio in peius*, unless the original decision is void. In the case of more lawful complainants, a shift of balance from the legal certainty inherent in the access to complain as such to the administrative act having the accurate result may be detected. This shift is more pronounced as regards opposite private interests, whereas opposite public interests must be directly specified.

The diversity is particularly marked in this important dimension of administrative review. Confusing as this may be when trying to establish an overview of the functioning of the system, it reflects that the legal system is receptive to the particularities of specific areas in understanding that one legal solution does not necessarily fit all problems. The extent to which this diversity is inappropriate requires a deeper analysis across different areas of law.

5.2.4 Tribunals: Danish Boards of Appeal

Central to understanding administrative appeal in a Danish context are the numerous sector-specific boards of appeal that are highly specialized collegiate public authorities whose sole or main purpose is to review administrative acts following an appeal. They are independent of the traditional hierarchical structures. This means, on one hand, that the minister is cut off from giving general and specific instructions concerning the activities of the boards and, on the other hand, that the individual acts of the boards cannot be appealed to the minister.

As regards the working method of the boards, the procedure is written like in the administration, whereas the decision making is based on deliberation and voting as in the courts. The chairmen of the boards are often judges or have a different legal background, whereas the cases are prepared in (large) administrative secretariats attached to the boards.

[27] Bønsing (2013), p. 355.

A report from Norway concludes that 43 % of administrative appeals dealt with in Norway are dealt with by boards of appeal.[28] Similar data do not exist as to the situation in Denmark, but as the setup of administrative review in the two countries are very similar, the situation is likely to be on the same scale in Denmark. In addition to this quantitative significance, the boards are also qualitatively significant as the statutory exceptions to the general principles of administrative review for the vast majority are linked to boards of appeal. It is not the purpose here to list the numerous exceptions. Instead, it is the purpose to highlight some of the common features of the boards of appeal in order to understand the framework of the deviations.

The reasons for setting up a board of appeal are many: a cheaper and faster alternative to judicial review; the involvement of interested representatives, laypersons, and experts in the review process; a more thorough and judicialized process compared to the traditional bureaucratic procedure; an alternative to the minister and his/her department.[29] The listed reasons reflect that a board of appeal may be set up as an alternative to judicial review but that this is not the only purpose. The Norwegian report mentions a similar variety of reasons for setting up boards of appeal and draws the attention to the absence of any principled discussions as to why it is necessary to deviate from the general principle of hierarchical recourse by setting up boards of appeal.[30,31] In other words, the setting up of boards of appeal appears to have become such an integrated part of the setup of administrative review that no particular reason needs to be manifest in order to set off the measure.

5.2.5 *Effectiveness of Danish Administrative Review*

The prominent part that boards of appeals play in administrative review is apparent in the judicial review of individual administrative acts too. What follows is an analysis of the effectiveness, in the sense of correctness of the individual legal acts, of three large national boards of appeal, which all constitute the final administrative review level. As already mentioned, the three boards are the National Social Appeals Board, the Environmental Board of Appeal, and the National Taxation Tribunal.

The National Social Appeals Board was set up in 1973. It reviews about 27,000 cases annually concerning a variety of issues relating to social welfare law based on a dozen of different statutes—some as first instance, others as second instance. The

[28] Statskonsult (2003).

[29] Christensen (1958), chapter VI Revsbech (2009), p. 48.

[30] Statskonsult (2003), pp. 13–15.

[31] For the sake of completeness, it should be mentioned that in Norway the principle of hierarchical appeal is founded in statute.

secretariat of the board has 300 employees, primarily with a legal background. When the board makes decisions, it consists of a chairman, who is one of the heads of unit of the board and who must hold a law degree, and two of a number of lay members appointed by the minister for social affairs nominated by the social partners central organizations, the Danish Council of Organizations of Disabled People, as well as local authorities.

The Environmental Board of Appeal, in its present form, was set up in 2011 by merging the former Environmental Appeals Board set up in 1974, with the Protection and Conservation Appeals Board set up in 1992 as a replacement for the Conservation Board set up in 1917. It reviews about 2,400 cases annually in first, and final, instance concerning the physical environment based in 26 different statutes. The secretariat of the board consists of 90 employees, primarily with a legal background. The board is a so-called combination board, which means that its composition depends on the type of case it is reviewing. When it makes decisions, it consists of the chairman, who is one of the heads of unit of the board and who must hold a law degree, and either one or more expert members, who are appointed by the minister following nomination by a number of associations and NGOs, or seven lay members appointed by Parliament and two High Court judges. When composed of experts, the board makes decisions in writing but may make decisions in meeting, whereas the board in its lay composition makes decisions in a meeting.

The National Taxation Tribunal was set up in 1938 and reviews today about 4,000 decisions annually concerning taxation. The secretariat consists of 95 employees primarily with a legal background. The tribunal consists of four chairmen and 34 members, 23 of which are appointed by the Minister of Taxation and of which 11 must be judges and 11 members appointed by Parliament. When the board makes decisions, it is composed by the chairman and at least two members. The board may make decisions in writing or in a meeting.

The annual reports of the three boards contain extensive statistics regarding their activity, including statistics of the number and outcome of court cases. As the national court statistics do not distinguish between cases with public and private parties, this information is valuable for our study. The statistics used concern 2011, which are the most recent data vis-à-vis the three bodies.

Whereas judicial review is available as an alternative to the administrative review process throughout as regards social welfare law and the physical environment, it is a prerequisite that administrative review in taxation must be exhausted before a case can be filed with the courts. In addition, it must be filed within 3 months of the final administrative decisions; cf. s. 48 of the Tax Procedural Act (*Skatteforvaltningsloven*).

5.2.5.1 Effectiveness of Administrative Appeal

Internal Manifestations of Effectiveness

It is clear from the annual reports from the three boards that effectiveness, in the sense of making correct decisions, is central to the boards. Like this, the correctness of the decisions made forms part of the vision of all of the boards, and it forms part of the goals in the internal contract made between two of boards and the respective departments. However, effectiveness is not solely measured against the number of decisions that are upheld by the courts.

As the National Social Appeals Board is concerned, the outcome of court cases forms one of six goals from the internal contract with the Department of Social Affairs. This goal is supplemented with an annual internal quality assessment in the shape of random checks as regards the legal quality of decisions made. A final goal is the time spent on each decision, which must not exceed 12 months. The goals are quite high, 94, 84, and 98 %, respectively, but matches today's numbers.[32]

As regards the Environmental Board of Appeal, the orientation of the internal contract does not have the number of decisions that are upheld by the courts as a point of reference. Instead, the contract focuses on the number of cases that the board itself decides to reopen, the goal for 2013 being 5 % of the total number of cases closed. In comparison, the result in 2011 was 3 %. The acceptable margin of error thus equals that of the National Social Appeals Board, with the important difference that the point of reference is internal and not external. It could be argued that the use of an internal point of reference equals letting the fox into the henhouse, as the number of reopened cases may be adjusted to fit the goal. However, the internal point of reference may also be seen as a reflection of a self-confident board that sees the quality of internal decisions as meeting that of the courts. In a broader perspective, the internal point of reference illustrates that in Danish administrative law boards and courts are perceived as being on an equal footing when it comes to the legal quality of the decision.

The focus of the 2009–2012 internal contract between the National Taxation Tribunal and the Department of Taxation is on reducing the time spent on handling each case. The contract is, in other words, concerned with efficiency rather than effectiveness, but the contract refers to the reintroduction of overall complaints and court case statistics that have not been collected since 2002. The purpose of the statistics is, inter alia, to contribute to the monitoring of the development in the numbers, as well as topics, of the appeals, and in addition to this to ensure transparency as regards the course and result of administrative and judicial review of taxations cases.[33] Thus, the apparent absence of the effectiveness of the tribunal is modified by the reintroduction of statistics that in 2011 was 240 pages, including

[32] National Social Appeals Board (2012c), internal contract 2013–2016, http://www.ast.dk/publikationer/ankestyrelsens_virksomhed/.

[33] Ministry of Taxation (2011), p. 5.

explanatory text. A prominent effect of this impressive information is a recent proposal from the Minister of Taxation to limit administrative review in taxation matters to one, as opposed to the present two.[34] One explanation for this proposed restructuring is a decrease in the number of complaints to the taxation boards. This proposal, which is obviously more concerned with efficiency than effectiveness, was severely criticized by lawyers.

In addition to the effectiveness of the decisions, all three boards are preoccupied with the internal efficiency of the boards, noticeably the time spent per case. This is the overall goal of the 2009–2012 internal contract of the National Taxation Tribunal, it is the first goal of the National Social Appeals Board internal contract, and it permeates the internal contract of the National Environmental Board.

Court Cases

If we turn to the number and outcome of court cases, the percentage of cases where the courts uphold the decisions of the boards is quite high, viz., 95 % as regards social welfare, 93 % as regards the physical environment, and as regards taxation, 81 % as civil cases are concerned and 91 % as criminal cases are concerned.[35] These numbers when seen in isolation are fairly impressive; they become even more so when they are seen in the context of the number of cases that are brought before the courts: a modest 3 % of the decisions made by the National Social Appeals Board, 2 % of the decisions made by the Environmental Board of Appeal, and 8 % of the decisions made by the National Taxation Tribunal are brought before the courts.[36]

Ombudsman Reviews

Only one of the three boards (the National Taxation Tribunal) refers to the number of cases reviewed by the Ombudsman, in addition to referring to the number of court cases. In 2008–2010, the total number of cases lodged with the Ombudsman was about 40, or just below 1 % of the overall number of decisions made by the tribunal. About half of the lodged cases were rejected. Of the cases that the Ombudsman reviewed, he criticized the decision of the National Taxation Tribunal in an average of one case per year. As the Ombudsman's criticism may be concerned with the procedure, as well as the result, the concept of effectiveness

[34] Bill no. 212 amending the Tax Procedural Act and other Acts, introduced in Parliament 24 April 2013.

[35] National Social Appeals Board (2012b), Annual Report 2011, Environmental Board of Appeals (2012), Annual Report 2011, Ministry of Taxation (2011).

[36] See note 35.

has a broader meaning here than when court cases are concerned. This may explain why the two other boards do not use his opinions as a benchmark for effectiveness.

Summary and Assessment

The figures shed important light on the effectiveness of administrative *review*, and they do so in two respects: only a very limited number of cases are brought before the courts, approx. 2–3 %, and of these the courts uphold the decisions of the boards in 81 and 95 % of the cases, respectively. Against this background, it is fair to conclude that administrative review appears to be effective, even if a part of the explanation of the low number of cases that are brought before the courts is likely to be attributed to structural and practical barriers such as risk of litigation costs and lengthy court processing time.[37]

If focus is shifted from the courts to the public authorities that make the individual legal acts in *first instance*, statistics reveal that there is a significant effectiveness deficit. The National Social Appeals Board overrules the decisions made by lower instances in 55 %, which is in more than half, of its principled cases,[38] i.e., cases that the board decides to review as third instance as they are concerned with issues of a principled or general nature, i.e., that the issues have not been addressed yet or will apply to a large number of identical cases. This follows from Section 63 of the Act on Legal Protection and Administration in Social Matters (*Retsikkerhedsloven*)[39] This is quite remarkable. In the ordinary cases, the "reverse" rate is an average of 33 %, ranging from 12 to 83 %, depending on the type of case.[40] The Environmental Appeals Board overrules the decisions made by the first instances in 33 % of the cases.[41] As regards taxation, the National Taxation Tribunal overrules an average of 55 % of the cases it reviews, ranging from 12 to 77 %, depending on the type of case.[42] These figures should be seen against the background that all three boards have dissemination of information about their practice as part of their work description.

In sum, the relevant question to pose regarding effectiveness in administrative review in Denmark thus should not be centered on the correctness of the decisions made by the boards of appeal but instead on the correctness of the decisions that are appealed to the boards.

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[37] See, for a detailed discussion of this argument, Adler (2010).

[38] National Social Appeals Board (2012a), Key Figures 2011. The total number of principled cases in 2011 was 499.

[39] Cf. Section 63 of Act no. 930 of 17 September 2012 on Legal Protection and Administration in Social Matters (*Retsikkerhedsloven*) (consolidated).

[40] National Social Appeals Board, Key Figures 2011.

[41] Environmental Board of Appeal (2012), Annual Report (2011).

[42] National Tax Tribunal Annual Report, 2011.

On a supplementary note, we are aware that the approach taken here is silent as regards hierarchical appeal. If the figures from Norway are applicable in a Danish context, this means that about 50 % of appeals fall outside our analysis. However, we assume that the structural barriers surrounding judicial review of administrative acts, as well as the high trust in the administration,[43] are independent of the legal foundation of the administrative review. This implies that the number of cases brought before the courts is equally low in hierarchical appeal. In contrast, the reviewing authorities in hierarchical appeal are less specialized than the boards of appeal. This implies that the number of cases that the courts will overrule is likely to be higher. However, no statistics are currently available to support or defy these assumptions.

5.3 Dispute Settlement by the Danish Ombudsman

5.3.1 Scandinavian Ombudsman Models

The Danish Parliamentary Ombudsman (*Folketingets Ombudsmand*) belongs to the exclusive group of classic ombudsman institutions, and the Ombudsman occupies a well-established position as a watchdog over Danish public authorities. The Danish Ombudsman belongs to the tradition of Scandinavian ombudsman institutions. Although there are a number of similarities between the various institutions, they also show considerable individuality. The Swedish Ombudsman is the oldest in the world, dating back to 1809.[44] The general framework is that the holder of the office is appointed by the legislator and enjoys independence of both the executive and the judiciary. The task of the institution is to inquire into administrative decisions and to safeguard the interests of citizens by ensuring administration according to the law, discovering instances of maladministration, and eliminating defects in administration. Subsequent ombudsman institutions were created in Finland in 1920, in Denmark in 1955, and in Norway in 1962.[45]

Despite the Danish ombudsman institution's historical affinity to the other Scandinavian Ombudsmen, the institution today stands out as far as its conceptual and intellectual impact on general administrative law is concerned. Apart from his practice on general administrative law, the Danish Ombudsman produces extensive academic literature on administrative law matters. In addition, almost all literature in English on the Danish Ombudsman stems from the ombudsman institution itself.

[43] See Special Eurobarometer 374 on Corruption, 2012.

[44] Wieslander (1994).

[45] Kucsko-Stadlemayer (2008). See [online] on Sweden: www.jo.se (*Justitieombudsmannen*), Finland: www.ombudsman.fi (*Eduskunnan oikeusasiamies*), Denmark: www.ombudsmanden (*Folketingets Ombudsmand*), and Norway: www.sivilombudsmannen.no (*Stortingets sivilombudsman*).

Coupled with the fact that all Danish standard textbooks massively draw on the practice and theoretical concepts of the Danish Ombudsman, this paves the way for an influential national Ombudsman. The current Danish Ombudsman holds the position of the *primus inter pares* among Scandinavian ombudsman institutions.

5.3.2 Legal Framework

Historically, the Danish Parliamentary Ombudsman was incorporated into the amended Danish Constitution of 1953, reflecting a need for an improved protection of the individual citizen against public authorities.[46] The Danish courts did not suffice as a control body in this respect. The economic reconstruction of Danish society after World War II necessitated a powerful state and an administrative apparatus with extensive powers. The public administration grew immensely in size, and Parliament enacted an increasingly number of regulations providing administrative authorities and agencies with both numerous and discretionary powers. As a legal countermeasure to this development, the Danish ombudsman institution was established. The Act creating the office of the Parliamentary Ombudsman was passed in 1954[47] and the first Ombudsman—a distinguished professor of criminal law—took office in 1955. The Act was amended most recently in 2012, which is its sixth amendment. In practice, the most significant regulation of the Ombudsman's review and activities is found in the Ombudsman Act, whereas the constitutional basis of the Ombudsman plays a more symbolic role.

The Danish ombudsman institution is normatively omnipotent within public law, and the institution is empowered to examine and to deal with *all* aspects of public law. The Danish Ombudsman Act is open-ended and largely discretionary, containing only few normative and clear-cut limitations of the scope of the Ombudsman's review of public authorities.[48] If the ombudsman institution has the ambition to harbor an expansive normative role, the Ombudsman Act is rarely a hindrance. As to the fundamental formal boundaries of the Ombudsman's current competence, it follows from the Act that the Ombudsman cannot review the acts or the behavior of the Danish Parliament, the courts of law, and private institutions.

The statutory and functional powers of the Danish institution are wide and multilevel, and the Danish Ombudsman often enjoys a priori sympathy from the Danish Parliament and the media. In addition, there are no specialized administrative courts in Denmark, as mentioned above, and the ombudsman institution is thus traditionally unrivalled on the domestic legal scene as the primary specialist

[46] The Danish Ombudsman (2005).

[47] The Ombudsman Act no. 203 of 11 June 1954 with subsequent amendments (*Ombudsmandsloven*).

[48] See General Administrative Procedures Act no. 473 of 12 June 1996, with subsequent amendments.

protector of good administration. If a case is brought before a Danish ordinary court, however, the Danish Ombudsman is no longer an option in so far as the Ombudsman is incompetent vis-à-vis courts, as already mentioned.

5.3.3 *Flexible Access to Ombudsman Review*

Another basic characteristic of the Danish Ombudsman is his functional flexibility. Compared with courts of law, the Ombudsman operates in a much more informal framework and is given vast freedom in his selection of cases. Generally, the existence of only minimum legal barriers to the Ombudsman is an inherent element of the ombudsman model. The *actio popularis* principle gives anybody the right to lodge a complaint, and there is no requirement of material interest in the case. There are only a few formal requirements that must be adhered to, such as a requirement that attempts should have been made to resolve conflicts within the system of administrative recourse before the Ombudsman is involved in the case. The majority of the Danish Ombudsman's cases are complaint cases. Some 4/5 of an annual total of 5,000 cases (in 2012) are complaints from citizens. It is free of charge to lodge a complaint that in itself makes the Ombudsman more accessible to citizens than the court system. The open track system combined with the Ombudsman's functional flexibility give the Ombudsman a good prognosis for receiving cases concerning *all* aspects of citizens' rights.[49]

However, this open access does not mean that all complaints are dealt with. In practice, the Danish Ombudsman relies on a selection of complaints, and it is up to him whether a complaint affords adequate grounds for investigation. About 75 % of all complaints are rejected by the Ombudsman primarily due to the fact that the citizens have not exhausted administrative redress. With this reduction, this annual amount of complaints that are treated on their merits is less than 1,000 cases. The Ombudsman's selection policy revolves around complaints that deal with general principles in administrative law and with issues of general interest. The majority of the admitted complaints deal with administrative decisions (*l'actes administratifs* or *Verwaltungsakten*) that represent a distinct area of focus of the Danish Ombudsman. As for the substantive areas of public authorities, the complaints tend to fall within, *e.g.*, social law, employment law, education law, health law, environmental law, taxation law, local government law, and criminal law. A specific field of interest for the Ombudsman is the right to access to documents.

[49] See, on Ombudsman techniques in general, Buck et al. (2011), p. 91 et seq.

5.3.4 Outcome of the Ombudsman Review

The opinions of the Ombudsman are *per se* soft law opinions in the sense that the public authorities are not legally obliged to comply with them. This is a well-known characteristic of most ombudsman institutions. As to the statutory catalogue of Ombudsman actions, the Danish Ombudsman Act states that the Ombudsman "may express criticism, make recommendations and otherwise state his view of a case."[50] Although the Ombudsman is deprived of formal sanctions, he is given wide freedom in the wording of critical opinions. The opinion of the Ombudsman is phrased in the first person singular ("I state as follows . . ."), stressing the fact that the opinion is given by the Ombudsman personally. The Ombudsman expresses his opinion on behalf of the Parliament, and this has a ceremonious impact. The written opinion of the Ombudsman is often attached to thorough summaries of the facts of the case and with relatively thorough legal arguments in order to convince the recipient authority of the justification of the Ombudsman's opinion. If an authority refuses to comply with a recommendation by the Ombudsman, the Ombudsman may recommend that the complainant be granted free legal aid as to bringing the case before a court of law.[51] The percentage of cases that ends up with a critical Ombudsman opinion is typically some 20 %. The percentage is considerably higher with regard to Ombudsman cases concerning local authorities. The present Ombudsman, who took office in 2012, has explicitly proclaimed that the institution intends to modify its critical stance, and as a result of this the frequency of final criticism is to diminish in the years to come.

A significant embodiment of the Ombudsman's functional flexibility is his investigation powers. The Ombudsman can choose to act as a "nosy detective" by exercising his powers to instigate a specific or general investigation on his own initiative. These powers are not incumbent on the courts of law. Although the proactive cases of the Ombudsman constitute a smaller part of the total bulk of cases, they form a potent part of the normative work of the institution. The general experience is that even the prospect of being involved in an Ombudsman investigation means a loss of prestige for the public authority in question. In conjunction with the negative press coverage that an investigation may generate, an Ombudsman investigation on his own initiative often leads to improvements by the public authority even if the Ombudsman has not reached any conclusion. In addition, the Ombudsman can perform inquisitorial activities during an investigation, and authorities are obliged to furnish the Ombudsman with the relevant information. Also, the obligation to contribute to an ongoing Ombudsman investigation can in itself produce positive changes at a preliminary stage.

The wide powers of the Ombudsman have, in large measure, compensated for the Ombudsman's lack of formal sanctions. Most of the Ombudsman's critical or advisory opinions are adhered to by the responsible public authority.[52] The exact

[50] Cp. Article 22 of the Ombudsman Act.

[51] Cp. Article 23 of the Ombudsman Act.

[52] Passemiers et al. (2009).

percentage of adherence is not known, but it is traditionally stated—e.g., in the Ombudsman's academic writings—that the figure is supposedly constantly high.

5.4 ADR Techniques in Danish Administrative Proceedings

5.4.1 The Legal Framework

No general legal framework exists as regards alternative dispute resolution in administrative proceedings in Denmark. Specific regulation has been introduced in certain areas, noticeably in matters regarding family law.

This absence of a general framework does not preclude alternative dispute resolution techniques from being introduced in the administration. The existing legal framework is sufficiently broad to allow for variations in the organization of the work, e.g., to replace written communication with dialogue. When it comes to the actual execution of public authority, of which the issuing of individual administrative acts forms an important part, the room of maneuver is curtailed by the principle of legality, as well as the principle of equality. The administration cannot deviate from the law by reference to negotiations with private parties. This is even more so in administrative review: the question of legality of individual administrative acts is not very suitable for mediation.[53]

This limited room of maneuver when it comes to the execution of public authority is also found in ADR in court proceedings where mediation was introduced in civil cases in 2007 and in criminal cases in 2010. Whereas mediation is to take place prior to the judgment in civil cases, it is to take place subsequent to the sentence in criminal cases as punishment, the execution of public authority *par excellence*, is not negotiable.

5.4.2 ADR Techniques in Practice

In 2011, alternative dispute resolution techniques were introduced in selected administrative areas, one by legislation and the other on a trial basis. As part of restructuring the complaints system in the health care sector, a dialogue scheme was introduced in statute making it mandatory for the hospital authorities to offer a patient who has filed a complaint a dialogue but making it optional for the patient to participate in it.[54] The explicit purpose of introducing the dialogue scheme was to

[53] See, for a similar view, Bragdø-Elleness (2009), p. 8.

[54] Act no. 706 of 25 June 2010 amending Act on complaints and compensation in the health care sector, Act on the authorization of health persons, the Health Care Act, and other Acts ("Lov om

reduce the number of complaints. In the first year following its coming into force, a modest 17 % of the patients who had complained accepted to engage in a dialogue with the hospital authorities. However, of these, 44 % of the affected patients decided to withdraw their complaint subsequent to the dialogue.[55] Whereas the overall patient interest in engaging in a dialogue with the hospital authorities is limited, the tool appears highly effective when actually activated. One of us has elsewhere argued that the replacement of a legal assessment with a dialogue may be highly problematic from a legal certainty perspective.[56] We shall not repeat the arguments here but simply draw the attention to the fact that alternative dispute resolution tools need careful consideration before they are introduced.

Inspired by a Dutch project, a trial was carried out in 2011–2012 in a small number of units in two municipalities and in two hospitals.[57] The purpose of the trial was to examine whether the method that consisted of fast, personal, and outreach contact to the citizen would make time normally spent on handling complaints available for other purposes. It was furthermore the purpose to test whether the Dutch results, i.e. that 50 % of the complaints were withdrawn and that time spent on handling complaints was reduced to 30 %, could also be achieved in Denmark.

In the two municipalities, the number of complaints that were withdrawn was between 48 and 88 % in the participating units. In the hospitals, 10 of 11 complaints that fell under the statutory dialogue scheme outlined were withdrawn.[58] The time spent on complaints was reduced to 7–49 % in the municipalities, again with big variations across the participating units. In the two hospitals, no difference was measured at ward level, but the management reported considerably less time spent on handling complaints. Whereas focus in the trial is on efficiency, balanced by the softer and more ambiguous topics of citizen and employee satisfaction, legal certainty is conspicuous by its absence in the trial; it is not mentioned once in the report, and some of the quotes from participating employees reveal that fundamental legal principles, such as hearing, are unknown to them. This lack of knowledge should not be ascribed to the trial, but if this is the background against which alternative dispute resolution tools are introduced, then the need to address legal certainty is the higher.

ændring af lov om klage-og erstatningsadgang inden for sundhedsvæsenet, lov om autorization af sundhedspersoner og om sundhedsfaglig virksomhed, sundhedsloven og andre love").

[55] The national Agency for Patients' Rights and Patients Complaints, Annual Report 2011, http://www.patientombuddet.dk/da/Publikationer/Aarsberetninger/2011.aspx.

[56] Conradsen (2012), pp. 48–61.

[57] See www.styrketborgerkontakt.dk.

[58] For the sake of completeness, it should be added that an additional 57 everyday complaints were recorded.

5.5 Conditionality Between Administrative Review and Judicial Review

There are quite a number of procedural requirements that have to be met if a citizen wishes to bring an administrative case before a Danish court. As mentioned above, it is no general requirement to exhaust the administrative remedies system beforehand. If the citizen so desires, he/she can skip the administrative appeal altogether. However, in a number of specific instances, requirements to use the administrative review system have been made, such as within the tax law area, and the lack of exhaustion of administrative appeal is in these areas a cause for inadmissibility.[59] There is no general deadline for starting a court action, but such deadlines are found in specific statutes, and they are becoming more common. It is assumed that deadlines for starting court actions are enforced by the court ex officio. In practice, however, the courts will admit a suit after the expiration of the deadline if both parties agree to it. The court might also ignore the deadline if by the institution of the proceedings it appears probable that very serious legal problems are involved. The scope of the action can be changed by the claimant if he/she so desires.

5.6 Traces of Europeanization?

The overall impact of European law in Danish administrative law has till date been limited, the exception proving the rule being the implementation of the Data Protection Directive in 2000. Whereas this implementation was set off in a separate act that supplemented the general administrative act,[60] it is with a considerable delay and at a slow pace finding its way into the general laws and was partly incorporated into the General Administrative Act in 2009.[61]

However, the overall impact of European Union Law is so far limited in the sense that it is difficult to identify a clear focus on European Union Law within the various systems of administrative appeals. It can be noted that the specific appeal bodies that we have dealt with in this analysis have not been established as a result of the implementation of European law. One explanation of this relative unaffectedness by European law is of structural nature. The legal system has a strong hierarchical orientation, and change seeps from the higher instances to the lower. This may take considerable time because, as we have seen above, only very few cases reach the courts and the Ombudsman and only a limited amount of these cases

[59] See, e.g., Section 26, Subsection 2 of Act No. 1161 of 20 November 2011 on Procedures in expropriation (consolidated) ("Ekspropriationsprocesloven") and Section 48, Subsection 1 of Act No. 175 of 23 February 2011 on Procedures in taxation (consolidated) ("Skatterforvaltningsloven").

[60] Act no. 429 of 31 May 2000 on data protection as amended.

[61] Act no. 503 of 12 June 2009 amending the General Procedural Act and the Data Protection Act.

will have elements of European law. Another explanation of the unaffectedness relates to the legal players. It has been pointed out that the Danish Parliamentary Ombudsman is cautious to address issues founded in European law; this shows in his practice, as well as in the theory.[62] The same tendency can—although to a somewhat lesser extent—be found in the Danish court system.[63] One explanation of this is the position of European law in legal education. Where European law today plays a prominent part in the curriculum, this was not the case 20 years ago. As the younger generations of lawyers all are familiar with European law, a change of the role of European law in Danish administrative law is foreseeable in the not too far away future.

5.7 Final Considerations

It has been demonstrated above that phrasing the question of effectiveness in Danish administrative review on the premises that administrative review is secondary in nature to judicial review misses the primary point in a Danish context. This follows from the statistics, and it follows from the internal reference to reopened cases that is made by, e.g., the Environmental Appeals Board. The voice of the courts is, in other words, stifled by the voice of the administration and the Danish Ombudsman when it comes to assessing the correctness of administrative acts. This, in combination with the demonstrated "effectiveness deficit" as regards administrative acts made in first instance, implies that there is a lot to be gained if focus is shifted from top-down perspective of the courts to the bottom-up perspective of the first administrative instances.

This shift of focus to the first administrative instances already manifests itself in the ingenuity that the administration, as well as the legislature, has demonstrated in handling the growing number of appeals. A characteristic of this ingenuity is to build remonstration into the recourse, which means that the appeal begins, but not necessarily ends, at the public authority that made the decision in first instance. A different manifestation of this ingenuity is the introduction of (trial) dialogue schemes in administrative appeal with the explicit purpose that complaints are repealed. It should be borne in mind that the focus in these cases is shifted from effectiveness to efficiency, as the correctness of the complaints that are repealed is never tested and there is no guarantee that only unfounded complaints are repealed.

In the light of the growing number of appeals, alternative methods to resolve administrative disputes are called for and should be welcomed. It is, however, paramount to ensure that new methods do not create more (severe) problems than they solve. The current absence of legal certainty, the very purpose of administrative appeal, in the introduction of ADR in Denmark overlooks this important point.

[62] Gøtze (2010), pp. 33–50.

[63] Wind et al. (2009), p. 63.

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Chapter 6
The Complexity of Administrative Appeals in Belgium: Not Seeing the Woods for the Trees

Ludo M. Veny

6.1 The Belgian Administrative Law System: An Overview

Belgian law is partly modeled on the French legal system. Judicial review against government action and decisions is characterized by a dual system; both the administrative and the judicial courts exercise jurisdiction in this matter. The division is incorporated in constitutional (articles 144 and 145 Belgian Constitution, hereinafter referred to as BC) and legal provisions (Act on the Council of State—CoS-act—and Judicial Code).

In accordance with article 144 BC, disputes about civil rights belong *exclusively* to the competence of the courts; this category includes, inter alia, disputes relating to the declaration to acquire the Belgian nationality, disputes concerning expropriation of estate, compensation for damage in case of liability of the government, wage claims of appointed civil servants, etc.

Article 145 BC stipulates that disputes about *political rights* belong to the competence of the courts, *except* for the exceptions established by the law. Firstly, for some of these disputes, the Judicial Code assigns them to the courts of the Judiciary: in this respect can be listed, for instance, disputes relating to the noninclusion of a citizen as a voter in the voters list by the college of mayor and aldermen, claims on certain decisions given by Belgian consuls abroad, litigation concerning social security decisions,[1] etc. Secondly, distrust in the Executive made the Council of State be established only in 1946. Article 14 CoS-act now declares the Council of State, in general, competent for all unilateral administrative acts[2] of a

[1] The Court of Cassation considers the unemployment compensation as a political right.

[2] Under this concept, both regulations of the Executive—but not that of the Legislature and of the Judiciary—as individual decisions are understood.

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Belgian administrative authority. The aforementioned provision thus expressly excludes disputes arising from a contract, i.e., multilateral act. Except for the "actes detachables," the Council of State does not deal with either litigation regarding contractual public staff or disputes on a public contract or public procurement.

According to article 146 BC, a court or a body capable of rendering judgment can only be established by virtue of a law. In order to implement this provision, several administrative courts were established by the federal Legislative.[3] In addition, the Flemish Community and the Flemish Region have, while applying the doctrine of implied powers, created their own administrative courts.[4]

Depending on the nature of the conflict, the Council of State annuls unilateral administrative[5] acts or acts as a judge in appeal with full jurisdiction[6] or an administrative Court of Cassation.[7]

A second division of jurisdiction between the judicial and administrative courts concerns the distinction between subjective and objective litigation. In the event that claims refer to the recognition of a right that was violated by or denied in an administrative act, regardless of whether this involves a civil or a political right, a tribunal or a court of the judiciary is competent[8]; the judge can either recognize a right or reform the concerned decision of an administrative body.

In case of an objective litigation before the Council of State, the administrative judge upon determining an illegality will only annul the contested decision without recognizing any right for the requesting party.

Despite the competence of the judicial or administrative courts, in no case may the judge set himself in the place of the Government; the court seized has just a marginal judicial review.

Taking into account the aforementioned division of jurisdiction between judicial courts and administrative tribunals, the full jurisdiction of the Judiciary regarding all social security disputes and all disputes arising from a contract, the majority of the disputes concerning administrative acts belong to the jurisdiction of the courts and tribunals of the Judiciary.

[3] Recently, for example, the Aliens Litigation Council.

[4] For example, the Council of electoral disputes (at municipal and provincial levels), the Council of disputes concerning progress decisions in the Flemish higher education system. See also Veny et al. (2012).

[5] Article 14, §1, CoS-act.

[6] Appeal against the decisions of the Council of electoral disputes; see article 16 CoS-act.

[7] Article 14, §2, CoS-act.

[8] I.e., Court of Cassation March 1, 1993, *Journal des Tribunaux* 1993, 156 regarding compensation for accidents at work; also Fagnart, no. 45 en 48.

6.2 Administrative Remedies and Their Effectiveness

In the absence of a general administrative law act, in Belgium there is no general legislation concerning appeal against government decisions at any administrative level. As a consequence of the lack of coherence, the citizen himself must be well informed in order to follow the correct appeal procedure, to file an admissible administrative appeal, and to understand the consequences of lodging an administrative appeal. This happens also because the conditions to lodge an admissible appeal and the consequences of filing such an appeal can differ subject to the applicable law. Different forms of administrative appeal can therefore be distinguished and can also be found in various regulations.

6.2.1 Unorganized Administrative Appeal

Administrative appeal, in principle, can always be made even if no law provides for it. There is no obligation to appeal; in general, there are no formal conditions or specific formal requirements to lodge an admissible unorganized administrative appeal, and the requesting party does not have to prove an interest.

The unorganized administrative appeal has a facultative character, which means that the citizen for whom this appeal is available is not obliged to use this option. As a consequence, the application for annulment to the Council of State is possible from the moment the challenged decision is made, simultaneously with the possibility to lodge an unorganized administrative appeal. Although there is no time limit to be respected when an administrative appeal is lodged, it is important to bear in mind the period of 60 days within which appeals to the Council of State must be made. After all, lodging an unorganized administrative appeal does not have suspensive effect either on the initial decision or on the time limit under which the appeal must be brought before the Council of State or a judicial tribunal.

6.2.1.1 Internal Administrative Appeals

Firstly, citizens can always lodge an appeal in reconsideration with the administrative authority that made the decision, in the course of which the litigant requests this body to reconsider its decision or, when the administrative authority has not yet acted, to make a decision. A citizen who is lodging an appeal in reconsideration does not always experience this appeal as very efficient since the appellate body will not be inclined to reconsider its own decision and is not even required to address the administrative appeal.

Secondly, citizens can lodge a hierarchic appeal with the hierarchic superior of the authority concerned. This is only possible in the case of deconcentration of competences. The basic principle of this administrative appeal lies in the

hierarchical structure of the government, as the hierarchical body can give mandatory instructions to its subordinates. Obviously, the possibility of filing a hierarchical administrative appeal can exist without the possibility of being provided for in a normative act. The chance of success of the hierarchical administrative appeal regarding the citizen is, in general, restricted as the public servant acted upon the instruction of the higher authority. The higher and hierarchical authority will have more regard for the functioning of the public service than for the interests of the citizen.

In both cases, the body of appeal is not obliged to answer the administrative appeal or to respect a certain time limit for solving the appeal.[9]

The administrative authority can modify or adjust the initial decision, replace the decision with a new one, or, when the relevant conditions are fulfilled, revoke the decision. The appellate body supervises not only the legality of the act but also its opportunity.[10] It can condemn the authority concerned if its act was inopportune, even if no legal provision was violated. Thereby, it investigates the entire case as, principally, it is not possible to limit the dispute to certain aspects of the challenged decision. Only if a part of the decision can clearly be separated from the whole, it is sometimes admitted that the administrative appeal is limited to that part of the decision.[11]

Neither the appeal in reconsideration nor the hierarchic appeal is mandatory.

6.2.1.2 External Administrative Appeal

An appeal can be lodged to the supervisory authority. Citizens can turn to the supervisory authority to obtain the suspension or the annulment of an administrative decision due to a violation of law or a principle of good governance regarding that decision. In this case, there is no hierarchical relationship between the administrative authority that made the decision and the supervisory authority. Appeal to the authority exercising administrative supervision evidently only exists in the case of decentralization, for only then is administrative control exercised.

In case of an appeal to the authority exercising administrative supervision, the competences of the appellate body depend on its competence of supervision.[12] This body of appeal has a more restricted competence than in the case of an appeal in reconsideration or a hierarchic appeal. The reason for this lies in the relationship between administrative supervision and administrative decentralization. The self-government of the decentralized authority guards against an excessively extensive competence of the supervisory authority. Comprehensive regulatory power risks being an infringement on democratic values as decentralized authorities are often

[9] Council of State, March 19, 2007, no. 169,068, Bilterys.
[10] Mast (2009), p. 790; Cromheecke (1998), pp. 231–232.
[11] Lust (2007), p. 36.
[12] Idem, p. 37.

elected by the people. As administrative supervision is essentially a form of negative control, it does not provide the possibility for the higher authority to act instead of the decentralized authority, to amend its decisions, or to give orders to it. The central authority can only forbid the decentralized authority from acting in one way or another by suspending and annulling its acts, by not ratifying its decisions, or by authorizing it to make certain decisions.[13] Exceptionally, the supervisory authority will rather approve or should grant permission.

Unlike the two previous appeals, this appeal shall suspend or interrupt the appeal period to the Council of State or a court during either the time to take a decision in appeal or the expiration of the prescribed time for supervision. In addition, the supervisory authorities take a more neutral attitude to, and are more likely to annul an illegal decision or to refuse its approval. This form of appeal is therefore much more effective for the citizen than an appeal in reconsideration or a hierarchic appeal. In the absence of relevant elements in the annual reports of the Provinces, no statistic and empirical data are available.

However, as both previous forms of appeal also this appeal is not mandatory.

6.2.2 Organized Administrative Appeal

6.2.2.1 In General

If the law explicitly provides for an administrative appeal, this represents an organized administrative appeal; this appeal will be internal or external.[14] Before a complaint can be made before the Council of State, organized administrative appeals must be exhausted. Regarding an organized administrative appeal, it is determined that a legal act provides for such an appeal; the body that conducts the appeal is not relevant since that authority can also be consulted in unorganized administrative appeals.[15]

Because of the lack of a "general administrative law act," every administrative appeal is therefore subject to separate regulations. In the administrative practice, this implies, inter alia, (1) different time limits, (2) motivated and nonmotivated complaints, (3) various deadlines to pronounce a verdict, etc.

Both the federal act and the Flemish decree on the access to administrative documents[16] stipulate the obligation to mention the remedies and modalities of the specific administrative appeal in the decision sent to the person concerned;

[13] Ibidem.

[14] For example in Flemish educational matters: internal administrative appeal for disciplinary matters against pupils and examination decisions. External administrative appeal for refusal of enrollment of learners and disciplinary matters against or evaluation decisions of teachers.

[15] Council of State, May 2, 1958, no. 6,243, Vanwynsberghe.

[16] Article 2.4 Federal Act and article 35 Flemish Decree.

nonobservance of that obligation has the effect that the term to introduce a complaint is not running.

The organized administrative appeal has a devolutionary character as the applicant withdraws the file from the lower public authority, with the objective of giving the body of appeal the chance to decide once again on the case.[17] Because the organized administrative appeal has a devolutionary effect, the appellate body is obliged to express its own judgment and the decision of the body of appeal will replace the initial decision. The authority that made the initial decision loses its decision-making power.[18] The devolutionary effect also has the consequence that the appeal body can investigate the aspects of legality, as well as the aspects of opportunity. The Council of State considers this investigation as one of the essential characteristics of an organized administrative appeal.[19] Barring other stipulations, the body of appeal can change the initial decision and replace it with a decision of its own.[20] As a result of the devolutionary effect, the body of appeal investigates the entire case, and, principally, it is not possible to limit the dispute to certain aspects of the challenged decision. Only if a part of the decision can clearly be separated from the whole is it sometimes admitted that the administrative appeal is limited to that part of the decision.[21]

Lodging an administrative appeal does not have suspensive effect on the initial decision. This appeal shall suspend or interrupt the time limit of the judicial review; in principle,[22] no appeal can be lodged before the appeal body has taken and notified its decision.

In case of an organized administrative appeal, the body of appeal is obliged to answer the appeal with respect for the rules of procedure foreseen in the specific normative act. The obligation to give a ruling has two advantages for the interested party. Firstly, if the period in which a decision must be made is qualified as an indicative period and that period expires, article 14, §3, CoS-act offers the possibility to the interested party to urge the public authority to make a decision. If the public authority neglects to make a decision within a period of 4 months after the

[17] Council of State, 4 May 1995, no. 53,131, City of Aalst.

[18] Council of State, 23 February 2006, no. 155,470, Van Rousselt; Council of State, 12 March 2004, no. 129,175, City of Huy; Council of State, 9 February 1982, no. 21,992, Seunens.

[19] Council of State, 9 February 1982, no. 21992, Suenens; Council of State, 13 December 2000, no. 91611, Jacobs.

[20] Council of State, 14 November 1961, no. 8954, Van Coillie; Council of State, 12 December 1961, no. 9023, Schuermans; Council of State, 23 January 1962, no. 9123, Vertongen; Council of State, 26 October 1972, no. 15530, Klein; Council of State, 5 June 1973, no. 15904, Tegelhof; Council of State, 3 December 1981, no. 21633, Meertens en Moermans; Council of State, 23 June 1992, no. 39774, Sebreghts; Council of State, 28 January 1994, no. 45862, Quinet; Council of State, 17 January 2002, no. 102.580, Van De Voorde.

[21] Lust (2007), p. 36.

[22] An exception constitutes the contestation of examination decisions in higher education in the Flemish Community, where the internal appeal body should come to a ruling within 15 days. This term is an expiration term and no term of order as with other administrative appeal procedures.

demand, that silence will be considered as negative; thus, an application for annulment with the Council of State can be filed. Secondly, if the period in which a decision must be made is qualified as an expiry period, appeal to article 14, §3, CoS-act is not possible as the legislative act itself attaches consequences to exceeding the period.

Even in the case when the law does not provide a period, the public authority must honor the general principle of good governance of the reasonable time limit.[23]

In the case of an administrative appeal, the appellate body is always acting as an administrative authority and not as an administrative tribunal. Under Belgian administrative law, the administrative appeal is hence not seen as a judicial procedure referred to in article 6.1 of the European Convention on Human Rights (ECHR); however, the guarantees of fair trial are nevertheless respected by the appeal body.

Under a settled case law of the Court of Cassation, as well as the Council of State, impartiality of the members of the appeal body is imposed by the general principle of good governance but not by the guarantee of article 6 ECHR. Most regulations that provide an organized administrative appeal (1) stipulate that a member may be objected; (2) state that the public may be excluded from all or part of the procedure in the interests of private life and juveniles, morals, or public order; (3) prescribe the hearing of the person concerned, as well as witnesses, etc. Also, some guarantees of article 6.3. ECHR apply in these administrative appeal procedures, for example adequate time and facilities for the preparation of his/her defense, to defend himself/herself or through legal assistance, etc.[24]

Decisions of administrative appeal bodies are unilateral administrative acts; according to the provisions of the Judicial Code or the Council of State Act, every aforementioned decision may be the subject of a court action, either before a tribunal of the Judiciary or before an administrative tribunal.

As previously noted,[25] the remedies and modalities of the judicial review must be mentioned in the notified decision.

6.2.2.2 Some Statistics and Empirical Data

In order to see whether administrative appeals are really effective in practice, empirical research was conducted.[26] Criteria in this research were, amongst others, (1) time limit to lodge a complaint, (2) the appellate body and its composition,

[23] Opdebeek (2006), p. 397.

[24] Administrative authorities in Belgium are bound by strict rules on language use; therefore, a Flemish appeal body or a federal appeal body located in the Dutch language area may, in principle, only use Dutch as language of proceedings.

[25] The same obligation is imposed by article 19, §2, CoS-act.

[26] Under my supervision, a master student during the academic year 2010–2011 carried out an empirical research into some administrative appeals in Belgium and the Flemish Region—Buytaert (2011).

(3) the number of admissible and well-founded administrative appeals in the reference period, (4) the question whether the success on acceptance increases with a lawyer, (5) certain trends. As policy domains for the research were chosen the following: access to information (consult of administrative documents) at the federal and Flemish levels, suspension of unemployment benefits, and the granting or refusal of a building permit.[27]

Access to Information

Federal Level

When under the Federal Act on Transparency the right to access of an administrative document is refused, then a complex administrative appeal procedure is available. In such a case, the citizen must, on one hand, address a question for reconsideration to the authority that has rejected the access and, on the other hand, simultaneously address a question for advice to the Commission for Access to Administrative Documents. The Commission is an independent advisory body and consists of six members, including a Chairman—who is a member of the Council of State—and a Member Secretary. The four members, two French speaking and two Dutch speaking, are—for each group—one professor in administrative law and one high civil servant. The Secretary is, however, not entitled to deliberate and to vote. Within a period of 30 days, that Commission shall report to the denying authority an advice by which, according to it, the claim of access must be refused or granted; it is however a nonbinding advice. Finally, the initial authority takes the final decision.

During the year 2010, 73 demands for advice were formulated; 2 advisory requests were combined, and 2 requests were not treated since the applicants had withdrawn their demand. There were 38 admissible requests, so 26 requests were deemed inadmissible; the Commission was not competent with regard to five requests, and three requests were only partially admissible (Fig. 2.1).

From the analysis, we can, inter alia, ascertain that a request often will be inadmissible if there is no compliance with the principle of simultaneity, i.e., at the same time the question for reconsideration and the question for advice. Other reasons that occur frequently in order to declare inadmissible a request are, for example, that the concerned authority has already given access to the requested document or that an application was filed prematurely.

[27] The research also focused on persons' income tax; interviews with some civil servants of the tax administration showed that this authority does not keep statistics concerning the number of admissible and well-founded complaints. From the most recent annual report available in 2011, it could be deduced that only 16,062 complaints were submitted in 2007. In case of an appeal, this must be submitted within a period of 6 months; the appeal must be in writing, dated, and motivated. The appellate body is the regional director of the tax administration; it concerns consequently an internally organized administrative appeal.

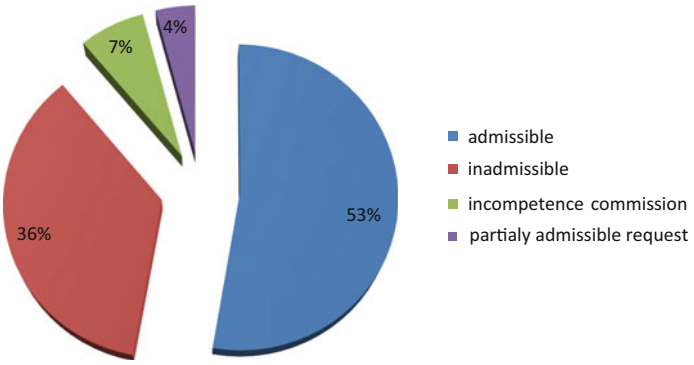

Fig. 2.1 Admissibility of requests. *Source*: data compiled by the author based on empirical data from Belgian public authorities

Of the 42 admissible requests, only 1 was assessed as totally unfounded. On the merits, we can say that as long as there are no exceptional grounds, the citizen has a great opportunity to get access to the requested document. There was only one request considered unfounded because of the confidentiality of the identity of the person who communicated the document or information in confidence to the administrative authority, and this with a view to the declaration of a criminal fact (Fig. 2.2).

Unfortunately, data are not available on how many of the well-founded opinions were also effectively followed by the authority concerned, and access to the complainer was granted. When there is no follow-up of the advice by the authority concerned, citizens can appeal to the judge or the Council of State.[28]

As to the importance of being assisted by a lawyer during administrative appeal proceedings, from an interview with Professor Schram, Secretary of the Commission, it turns out that there are "certainly not more chances of success when someone is assisted by a lawyer. On the contrary, with regard to the procedure, the lawyers themselves make mistakes" (sic).

The Commission notes that it is confronted with a "gap in the legislation on transparency." Its secretary pointed out that the legislature takes too little account of the fact of the creation of new federal organizations with its own legal personality after announcing the legislation; it would be useful in that context to adapt the legislation on openness/transparency to this context.

Flemish Level

When the right of access to an administrative document is refused under the Flemish Decree on Transparency, an appeal may be lodged before the Flemish

[28] A request for recognition of the right to court, the request for annulment of the unlawful decision at the Council of State.

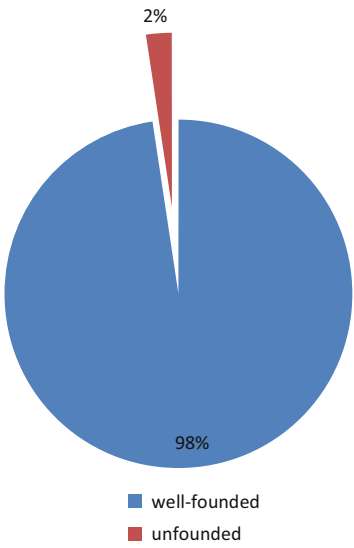

Fig. 2.2 Merits of the admissible requests. *Source*: data compiled by the author based on empirical data from Belgian public authorities

Appellate Body on the Openness of Government. This appellate body is an independent and neutral authority that, in the treatment of the complaints, can receive no instructions; however, it consists only of high civil servants of the Flemish administration and no external members, which entails some remarks on the independence and impartiality of the appellate body.

This appeal must be in writing, by letter, by fax, or by email and must be submitted within a period of 30 calendar days; just for the access to information of a personal nature, the applicant must demonstrate an interest.

The appellate body adjudicates on the appeal and notifies its decision in writing, by fax, or by email to the appellant within a period of 30 calendar days; the appellate body may exceptionally extend that deadline.

The organized administrative appeal discussed above differs in significant degree from the appeal at federal level; the appellate body has a competence to reform and can substitute its decision to the initial decision refusing access to the requested administrative document. To the extent that the appellate body accepts the appeal, it gives admission to the disclosure of the requested document.

In a year's time (July 1, 2009 to June 30, 2010, for instance) a number of 269 appeal files were discussed, an increase of 67 %.[29] Of the 269 appeals, 123 were related to the Flemish administration, 107 complaints concerned decentralized authorities (municipalities, provinces, etc.), and 35 files were related to other bodies. Of the 269 treated appeal files, 119 cases were entirely rejected (inadmissible or unfounded). There were 52 files considered as fully justified, where the disclosure of the requested documents was therefore allowed; in

[29] The main reason for that increment: 93 reviews were submitted with respect to the same file.

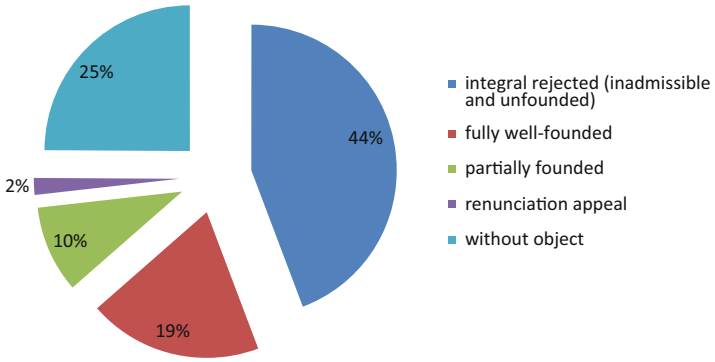

Fig. 2.3 Summary of appeals examined

26 appeal files, the disclosure was partially allowed. In five complaints, the applicant renounced his/her appeal, so no ruling had to be done by the appellate body. In addition, there were also 67 appeals without object (see Fig. 2.3).

The analysis shows that the following reasons make an appeal inadmissible: (1) the matter falls within the competence of the federal legislation or falls outside the scope of the Flemish decree, (2) the appeal was premature, (3) the appellate body has no competence to hear the case, and (4) there is absence of the required interest.

Of the admissible files, one case was brought before the Council of State; it was a request for annulment of a decision of the appellate body. The low number of requests for annulment constitutes a solid argument in the direction of effectiveness of the administrative appeal.

The Chairman of the appellate body informed us about a growing trend of appeals that are submitted by a lawyer; this, however, would not affect the chances of the various appeals. He argues that each appeal is approached with the same attention, and the fact that a lawyer has lodged an appeal does not necessarily increase the chances for the acceptance of the appeal.

Unlike the federal level, this organized administrative appeal is concrete and clearly organized. Furthermore, it is cheap and fast, and assistance of legal counsel is not required.

Suspension of Unemployment Benefits

After a third assessment conversation, an unemployed person who does not agree with a decision on suspension or exclusion of unemployment benefits can lodge an appeal with the National Administrative Commission. This Commission consists of Dutch- and a French-speaking section; each section is composed of a chairman, two members representing the employers' organization, two members representing the

employees' organizations and a member who represents the minister of Employment. Each section is assisted by a secretary and deputy secretaries.

The unemployed person must submit the appeal to the National Administrative Commission within the month after receiving the decision for temporary or definitive suspension of the benefit; the term to lodge the administrative appeal can be extended for 21 calendar days if the deadline begins during the period from July 1 to August 15. The appeal will only be admissible if it is in writing, signed, dated, and sent by registered letter; the administrative appeal with the National Administrative Commission is not suspensive.

The National Administrative Commission shall take a decision on the appeal within 2 months; this period is extended to 4 months if the complainant must undergo a medical examination or if the investigation at the request of the complainant is being postponed. If the Commission within this term, if ever extended, takes no decision, the appeal ex officio shall be declared well founded.

The National Administrative Commission considered in 2010 115 appeals; this number is therefore very low relative to the number of 8,799 unemployed persons temporarily or definitively suspended from unemployment benefits during that year. The small number of appeals can be explained through several reasons. Firstly, we are referring to a group that is often in a poor financial situation, and although the appeal, in principle, is free of charge, the concerned people most often do not take that step. Secondly, in most cases it concerns low-skilled persons or persons with an intellectual backlog. Thirdly, internal administrative appeal within the employment service has given rise already to three consecutive decisions.

Sixteen appeals were declared inadmissible for nonfulfillment of the formal requirements, lack of timeliness of the appeal, and lack of a valid reason; in addition, fifteen appeals were without object because the contested decision was withdrawn or they were directed against a different kind of decision on unemployment benefits. Nine appeals were fully founded, and thirteen appeals were partly justified; fifty-one appeals were rejected (Fig. 2.4).

In these matters, the complainants can, for free, be assisted by a representative of the trade union, also "pro deo" lawyers, who often act in the framework of this administrative appeal. Given the great knowledge of the representative of the trade union or the specialized knowledge of the lawyer in this matter, the complainant shall be superbly assisted and his/her chances for a more favorable outcome will increase.

Judicial review against the decision of the National Administrative Commission is possible at the Labor Tribunal; each section of this tribunal is composed of a professional magistrate-chairman and two laymen judges, respectively a representative of the employers' organization and a representative of the trade unions.

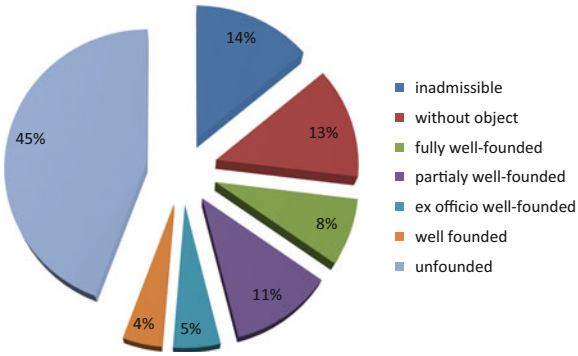

Fig. 2.4 Summary of appeals based on their grounds

The Granting or Refusal of a Building Permit

A person who doesn't agree with the decision of the College of mayor and aldermen regarding a building permit can appeal to the deputation of the province[30] in which the municipality is located. The complaint can be lodged by (a) the applicant for such permit, (b) any natural or legal person that directly or indirectly can suffer disadvantages, (c) associations acting on behalf of a group whose collective interests are threatened or prejudiced by the contested building permit decision, (d) the regional urban development officer, and (e) the advisory bodies on condition that they have provided timely advice or—wrongly—were not invited give advice.

The appeal must be submitted within a period of 30 days; depending on the applicant party, the term runs from another time. Exceptional for an administrative appeal, the three first categories of complainants must pay a fee of €62.20.

The deputation takes its decision on the basis of the report of the provincial urban planning officials and after the deputation or its delegate has heard—at their request—in written or oral the interested parties. The deputation shall take a decision within a period of 75 days; if the oral or written hearing is applied, this term can be extended up to 105 days. The appeal shall be deemed rejected if the deputation's decision is not taken within the above mentioned time limit (Fig. 2.5).

For the year 2010, the deputation of the Province of East Flanders received 1,067 appeals; in the same year, it made 1,081[31] decisions. Eighty-two appeals were inadmissible; the same number of complaints was withdrawn. Twenty-two appeals were without object. Eight hundred and eighty-one appeals were dealt with respect to the content; four hundred and seventy-seven complaints were (partial and conditional) granted, and four hundred and four appeals were rejected. It must be clear that, if the complaint is granted, this doesn't always mean that the building

[30] This body is composed of the political majority parties and is the Executive Board of the province; it acts as an administrative authority and not as administrative tribunal (as with disputes concerning some local taxes).

[31] Some files from 2009 were just dealt with in 2010.

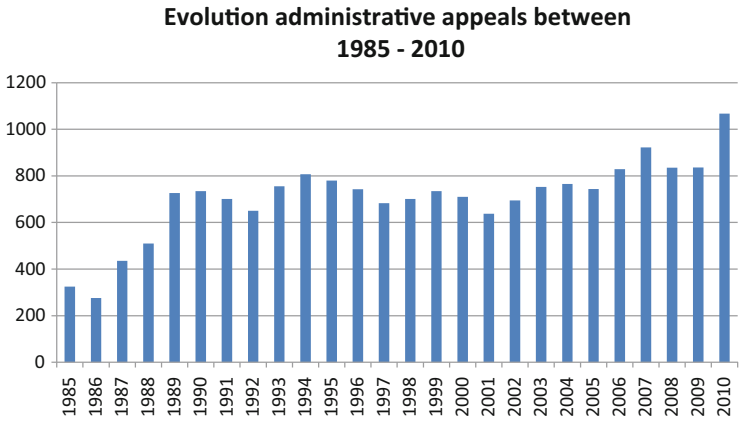

Fig. 2.5 Evolution of administrative appeals from 1985 to 2010 (building permits)

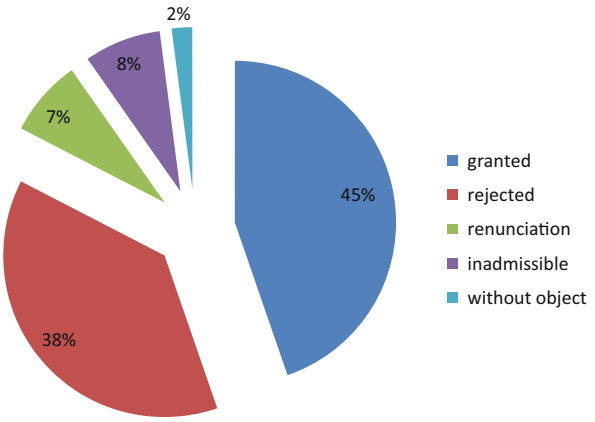

Fig. 2.6 Summary of administrative appeals concerning building permits 2010

permit is granted. After all, in case of appeal by a neighbor or by the urban planning official, this may also mean that the granting of the permit is irregular (Fig. 2.6).

From an interview with the provincial urban planning officer, it can be concluded that the intervention of a lawyer is especially reserved for judicial review.[32] However, it may be noted that the complexity of the legislation on urban planning and the rules of procedure make it more likely for the citizen to be assisted or advised by a specialized lawyer to win the case. It was also emphasized that, for the citizens, the prescribed form requirements are far too complex. In addition, the

[32] On the legal appeal in first and last instances, a specialized administrative tribunal for the Flemish Region is established, in particular, the "Council for license disputes"; an appeal in cassation against the verdict of this specialized tribunal is possible before the Council of State.

term—from the point of view of an efficient legal protection of citizens—to make a decision concerning the administrative appeal is too long. To the extent that the practice in the administrative appeal requires already the assistance or the representation of a lawyer, a considerable cost is connected with this administrative legal protection.

All these reasons and the fact that there are still too many cases of judicial review after the administrative appeal make the administrative appeal procedure only moderately efficient and effective.

6.3 Dispute Settlement by the Ombudsman[33] in the Federal Kingdom of Belgium

6.3.1 History

Unlike many other Western European countries, the institution of the Ombudsman in Belgium is a fairly recent phenomenon. Where in certain private sectors ombudsmen were installed, the legislative initiatives that led to the effective establishment of an Ombudsman go back to the last two decades.[34] In the framework of solving the gap between citizens and politics in the late 1980s, from the beginning of the 1990s the effort toward administrative innovations is a crucial topic in the political policy; in that regard can be mentioned a constitutional right to consult any administrative document.

In its Decree of October 23, 1991, on transparency and openness of administration, the Flemish Community created its first Ombudsman[35]; this was, however, no parliamentary Ombudsman but an Ombudsman within the Executive,[36] and its function was limited to complaints about and mediation decision concerning access to information (administrative documents).[37] In imitation of this Flemish initiative during the subsequent years also at the Federal Government and Federated Entities, parliamentary Ombudsmen were established.

[33] For some literature on the Ombudsman in Belgium: Veny et al. (2011), pp. 147–171; Anderson and Goorden (2000), pp. 107–126; Monette (2000), pp. 269–288; Van Roosbroek and Van De Walle (2008), pp. 287–302.

[34] While a first initiative was already taken in 1965.

[35] Cf. article 11 and following.

[36] By Decree of July 7, 1998, a Flemish parliamentary Ombudsman was created.

[37] The decision he made could be challenged at the Council of State.

6.3.2 Normative Issues

6.3.2.1 Normative Source

As opposed to other modern human rights, such as transparency and the right to consult any administrative documents,[38] the right to resort to the Ombudsman or its organization has no basis in the Belgian Constitution.

The organization of Ombudsman institutions is based on statute (law). Since each Government has the power to establish its own Ombudsman, different regulations coexist in this area. Consequently, we can mention the following:

- The Federal Law of March 22, 1995, created the Federal Ombudsman; as a matter of fact, the Federal Ombudsman consists of two persons, respectively a Flemish and a French institution, acting as a board.
- The Flemish Decree of July 7, 1998, regulates the Flemish Ombudsman.
- The Walloon Ombudsman was established by the decree of the Walloon Parliament of December 22, 1994.
- The French Community Ombudsman was created by the Parliament of the French Community by the decree of June 20, 2002.
- In the smallest linguistic region, the Ombudsman of the German-speaking Community was created by the decree of May 26, 2009.
- Belgium also has separate Children's Rights Commissioners for the French and Flemish communities.
- Adjacent to this, there is a Pensions Ombudsman service, a Railway Ombudsman, an Ombudsman for the Telecommunication, a Post Service Ombudsman,[39] an Ombudsman for Energy, etc.
- Finally, also a number of cities—on the basis of the idea of local autonomy guaranteed by article 41 BC—have created a local Ombudsman.[40]

6.3.2.2 Scope of Control

Although different statutes exist, the regulations themselves exhibit great similarities. The Federal Ombudsman handles citizens' complaints with regard to the conduct of federal administration [i.e., federal public services or federal public institutions such as independent social security services, federal agencies for the

[38] Article 32 of the Belgian Constitution on the right to consult any administrative document empowers the Federal State, the Communities, and the Regions to regulate the right to consult and the right to obtain a copy; this means that the federal acts of parliament, as well as the federated decrees, stipulate the conditions and the exceptions on these constitutional rights. On openness of administration, see Veny and De Munck (2011), pp. 277–293.

[39] Chapter X, Federal Act of March 21, 1991 on the reform of certain economic public companies.

[40] I.e., the City of Antwerp, the City of Ghent, the City of Bruges, the City of Leuven and the City of Mechelen.

security of food supply, federal agency for asylum (seekers), etc.] and seeks solutions; it examines the functioning of the administration of the federal parliament and formulates recommendations on the basis of the declared tasks of the federal administrative services and the Parliament. Concerning its jurisdiction, it has to be mentioned that it cannot handle any complaints regarding matters for which specific Ombudsmen are appointed.

The mission of the Flemish Ombudsman includes investigation of complaints on the functioning, actions, and treatment of administrative institutions of the Flemish Community and the Flemish Region (i.e., Flemish ministries, youth care and educational organizations, Flemish Housing Company, Flemish Environmental Company, etc.); in first instance, the Ombudsman has a role of mediation. Besides, he refers a complaint to the competent authority if a complaint does not cover his competence, and he formulates recommendations to improve the public service of the aforementioned institutions.

If necessary, he gives full protection to whistle blowers. He also investigates notification concerning omission of function, abuse, and offences committed by civil servants within their function.

At last, he informs immediately the Flemish Parliament of infractions of the code of behavior by Flemish Members of Parliament.

In connection with the other Ombudsmen, we can mention that the Walloon Ombudsman seeks to help any person, natural or legal, who is experiencing difficulties with the Walloon regional authorities to arrive at a solution without litigation. The French Community Ombudsman is responsible for handling complaints of citizens who encounter a problem with any administrative unit of the French Community; its mission is to promote a dialogue between the citizen and the administration concerned. The Ombudsman of the German-speaking Community mediates between citizens and the administrative authorities and seeks alternative way to resolve conflicts, to settle disputes, and, in some cases, to avoid litigation.

The points of attention of the Flemish Children's Rights Commissioner are, on one hand, the organization of a complaints line for minors leading to research and mediation and, on the other hand, offering of advice to the Flemish Parliament and Executive, the Flemish administration, and agencies on children's rights.

It should be stressed that the Ombudsmen do not settle administrative disputes but, when faced with complaints, only try to mediate and to formulate advice for better governance; the Ombudsmen do not have therefore the task to remedy the unlawful conduct of public services, but rather their research opportunities are extensive. Its opinions/advice are not binding but are, in principle, generally followed; nevertheless, in certain cases, year after year the same thought must be expressed and a similar opinion must be reported.

6.3.2.3 Own Motion Investigation

No legal provision stipulates the possibility for the Federal Ombudsman or for the Flemish Ombudsman to act on its own motion.

6.3.2.4 Time Limit for Complaint Before an Ombudsman

According to the provision of article 9, paragraph 1, for the Federal Ombudsman, a manifestly unfounded complaint is inadmissible. Furthermore, a complaint is not admissible if the complainant has not previously tried to contact the proper authority to obtain settlement from the administrative service concerned. Finally, the Ombudsman rejects any complaint that is a reiteration of a previously rejected complaint and contains no new facts. The treatment of a complaint can also be refused if (a) the identity of the complainant is not known and (b) the complaint relates to facts older than 1 year before the submission of the complaint.

At the Flemish level, the same inadmissibly counts for all the above cases apply. Nonetheless, if regarding the complaint an administrative or judicial appeal was lodged, in that case the duration of the procedure is not counted with a view to the admissibility of late complaints. In addition, the Ombudsman deals with any complaint that relates to labor relations, working conditions, or the legal statute of civil servants of Flemish administrative authorities. Whenever a complaint concerns another authority, from the federal or the federated level, the Ombudsman is obliged to redirect the complaint to the proper Ombudsman.

6.3.2.5 The Relationship of the Ombudsman with the Courts

At the federal level, the investigation of a complaint shall be suspended when the facts are object of an appeal to the Court or an organized administrative appeal is lodged; the administrative authority shall inform the Ombudsman of its knowledge of such an appeal. In that case and without delay, the Ombudsman notifies the complainant of the suspension of the treatment of his/her complaint. The submission and the examination of a complaint by the Ombudsman do not suspend the time limits for appeals before the Court or organized by administrative services or tribunals.

At the Flemish level, the investigation of a complaint is suspended if an appeal regarding some facts was lodged at a judicial college or at an administrative authority. The involved administrative service informs the Flemish Ombudsman of an appeal and of the consequence that it has. If an appeal is lodged, the Flemish Ombudsman notifies the interested party without delay of the suspension of the treatment of his/her complaint. The submission and the examination of a complaint by the Ombudsman do not suspend the deadlines for the submission of an administrative appeal, which is organized on the basis of the competence of the Flemish Community or the Flemish Region.

Table 3.1 Federal level

	Yes	No	Other
Based on the Constitution		X	
Based on statute	X Parl. Act		
Scope of control of the Ombudsman[a]			
Own motion investigation		X	
Is there a stop of time limits for the court proceedings?		X Art. 13	
Can the Ombudsman act when the court acts/has already acted?			X-Art. 13 Suspension
Time limit for complaint before an ombudsman	X-Art. 9 1 year		

Source: author's compilation based on national legislation
[a]According to section 6.3.2.1 Normative Source

Table 3.2 Flemish level

	Yes	No	Other
Based on the Constitution		X	
Based on statute	X Parl. Decree		
Scope of control of the Ombudsman[a]			
Own motion investigation		X	
Is there a stop of time limits for the court proceedings?		X Art. 13	
Can the Ombudsman act when the court acts/has already acted?			X-Art. 13 Suspension
Time limit for complaint before an ombudsman	X-Art. 13 1 year		

Source: author's compilation based on national legislation
[a]According to section 6.3.2.1 Normative Source

6.3.2.6 Schematic Overview

Above, there is a schematic overview of the regime of the Federal and the Flemish Ombudsman institutions (Tables 3.1 and 3.2).

6.3.3 Empirical Data

6.3.3.1 Federal Level

The following schematic overview is to be read as follows (Table 3.3). The first three themes are almost exact figures about the year in question. The other digits in the number of dossiers handled in that year also cover files of the previous year. The

Table 3.3 Summary of the Ombudsman activity at the federal level

	2011	2010	2009	2008	2007
Number of cases dealt with by the Ombudsman (per year)	7,682	8,231	6,429	5,466	5,257
Number of cases out of the competence of the Ombudsman (per year)[a]	1,221	1,494	1,253	1,153	1,016
Number of cases within the competence of the Ombudsman (per year)[b]	4,073	5,470	5,176	4,313	4,147
Number of closed[c] cases (per year)[d]	4,617	3,824	3,388	4,367	2,722
Cases handled within 6 months	55.9 %	68.8 %[e]	57.8 %	63.7 %	58.1 %
Number of cases solved differently[f] (per year)	865	917	719	520	343
Number of special reports (if applicable) (per year)	[g]	[g]	[g]	[g]	[g]
Use of special powers by the Ombudsman (if any) (per year)					
Number of admissible complaints with positive result	81.21 %	96.0 %	92.6 %	87.1 %	75.2 %
Followed by the Administration (correction or partial correction)	[g]	91 %	[g]		
Recommendations of the Ombudsman (per year) in %	Parliament: 03 Administration: 10	Parliament: 08 Administration: 06	Parliament: 04 Administration: 08	Parliament: 03 Administration:08	Parliament: 08 Administration: 03
Number of judicial reviews of ombudsman decisions (if applicable) (per year)[h]					

Source: data compiled by the author from the reports of the Federal Ombudsman

[a]Reasons: absence of prior steps at the concerned administration, federal Ombudsman is not competent because other Ombudsmen are competent (whereupon transmission), manifest unfounded complaints, facts older than 1 year, inadmissible complaints *rationae materiae* (approximately 50 up to 65 % of inadmissible complaints)

[b]The figures above cannot be settled arithmetically. Annually, a large number of files can be considered as mere questions for information and no complaints in the strict sense. The number of inquiries for information is 1,388 (2011), 1,267 (2010), 1,184 (2009), 957 (2008), and 1,141 (2007)

[c]A case is also closed in case of an organized administrative appeal or judicial review

[d]This number also includes the attempts at mediation

[e]For 78 complaints, the term of treatment amounted to more than 720 days

[f]Attempts at mediation

[g]No precise figures available

[h]Not applicable

main policy domains for the federal Ombudsman are justice, home office,[41] taxes, social security and social institutions, private organizations with public service, etc.

Following an inventory of ways of reasoning about possible reforms of the Institution of the "Federal Ombudsman," a valorization report was published.[42] The proposals for strengthening the institution are developed from an external perspective: provide a clear and effective intervention of the Ombudsman so that long-term service to the society will improve. Six elements of change are put forward: constitutional anchoring of function and the establishment of Ombudsman; better connection between the profession of the Ombudsman and the judicial professions; own motion investigation for the Ombudsman; strengthening of the competence of recommendation of the Ombudsman; power to propose a fair solution; extension of the scope to other federal institutions.

6.3.3.2 Flemish Level

The main policy domains for the Flemish Ombudsman are (social) housing policy, mobility and infrastructure, education, urban planning and environmental policy, welfare, utility policy, employment policy (with the exception of unemployment benefits), property tax, etc. (Table 3.4)

Since the year 2010, detailed annual reports has not been available, and a kind of synthesis of the operation of the Flemish Ombudsman is published every year in parliamentary documentation.

6.3.4 Conclusion

In the Belgian public law, the Ombudsman is not a settler of disputes but a mediator. The empirical data show, however, that in the majority of the admissible and well-founded complaints the citizen gets his/her rights restored; in addition, with its general and specific recommendations to the Government, the Ombudsman stimulates hopefully more legitimate and good governance in the future.

On the other hand, the large number of inadmissible complaints indicates a serious problem; a conglomerate of a dozen or so Ombudsmen at the central level with only powers concerning their own material matters places the citizen, and probably even lawyers, in the context of an inaccessible maze. Although the respective regulations prescribe, in cases of inadmissible complaints, a referral to the competent Ombudsman, with a view to efficiency, this is a drop in the ocean.

[41] Including police forces!

[42] Hubeau and Blero (2011).

Table 3.4 Summary of the Ombudsman activity at the Flemish level

	2011	2010	2009	2008	2007
Number of cases dealt with by the Ombudsman (per year),[a] some of which are whistle-blower cases	7,751	6,634	6,712	5,674	6,572
	3		1	1	
Number of inadmissible cases	[b]	5,463	4,991	4,083	4,070
Number of cases within the competence of the Ombudsman (per year)	[b]	1,171	1,771	1,581	1,755
Number of fully or partially founded cases (per year)[c]	[b]	633	995	748	791
Unfounded cases		295	334	374	347
Other cases		243	346	345	300
Number of cases solved differently[d] (per year)					
Number of special/thematic reports (if applicable) (per year)					
Use of special powers by the Ombudsman (if any) (per year)					
Own motion investigation (not applicable) (per year)					
Recommendations of the Ombudsman on policy domains (per year)	[b]		36	33	30
General recommendations			6	5	
Proposition			2	3	
Number of judicial reviews of ombudsman decisions (not applicable) (per year)					

Source: data compiled by the author from the reports of the Flemish Ombudsman
[a]Including questions for information: 493 (2008), 747 (2007)
[b]No data available
[c]Of which irreparable or reparable complaints: 442 (2009), 179 (2008), 177 (2007)
[d]According to section 6.3.2.1 Normative Source

6.4 (Other) Tools of Alternative Dispute Settlement (ADR) in Administrative Law[43]

6.4.1 ADR in Administrative Law

The rise of ADR in administrative law has been initiated and backed by an increasing horizontal nature of the relationship between citizen and administration. Instead of a strict vertical relationship, we can see more and more contractual and bilateral relations. This doesn't only open the door to ADR in a practical manner but also create a shifted mindset in which reciprocity gains value. In this view, negotiating with the administration about administrative actions instead of simply undergoing them becomes conceivable, acceptable, and, with time, normal.

Application of ADR in the run-up of an administrative action has multiple advantages. Consultation and negotiation strengthen the effectiveness of the decision because they contribute to a decision that is more in tune with the concrete

[43] Section based on De Geyter (2006), 366 p.; De Geyter (2005), pp. 751–802; Hubeau (2000–2001), pp. 410–444.

circumstances, which in turn help in acceptance and compliance. As a result, fewer conflicts are to be expected afterwards.

Concerning the conflicts that arise after the administrative action has been taken, the reason for the attraction of ADR can be found in a diminishing faith in and the legitimacy of the judiciary as a conflict-resolving institution. ADR can also be seen as an attempt to avoid and diminish the overcharge of and the congestion in the courts.

Furthermore, judicial procedures are time consuming and expensive, and the trust in the expertise of the judges has eroded.

These reasons count for ADR in public and also in private laws. Specifically relative to ADR in administrative law, the nature of administrative procedural law stimulates the use of ADR. In principle, the administrative judge will examine and evaluate the administrative actions separately and not in their interconnectivity. The regularity of the action will be the criterion, whilst it is not possible to consider neither potential alternatives nor the examination of the action in the context of a global project.

In general, the choice for ADR instead of judicial or administrative appeal constitutes a choice against head-on confrontation and for a dialogue, cooperation, and a sound mutual relationship in the future.

While the development of ADR is a result of the increasing horizontal nature of the relationship between citizen and administration, it has in itself the effect of facilitating and improving this reciprocal relationship because dialogue, communication, and mutual understanding are stimulated.

The concrete ADR methods that can be found in Belgium administrative law have not been the product of a general or unified theory. Actually, it is a patchwork of specific and limited procedures that were developed each time to face a specific problem. The development has carried on without a firm doctrinal base to answer fundamental questions concerning the compatibility between ADR and the specific principles that govern administrative law.

ADR can be found in the regulations concerning local administrative sanctions, fiscal disputes, the right of education, environmental protection, urban development, social protection, housing, institutional consultation structures between the federal and regional authorities.

6.4.2 Mediation

The limited scope of this contribution does not cover an extensive discussion about all the (im)possibilities of alternative dispute resolution. The following analysis will therefore be limited to the question of whether the Judicial Code admits "mediation" for administrative authorities, as well as some thoughts about it. After all, in many cases, mediation may prevent later judicial review; this can be thought of the domains of urban planning, environment, expropriations, appointment of civil servants, etc.

Article 1724 JC determines: "Any dispute that is susceptible to be controlled via a settlement, may be the subject of mediation, as well as: 1° - 4° [not applicable to public legal persons]. The legal persons governed by public law can be a party to mediation in the cases established by law or by Royal Decree." At first sight, the aforementioned article limits drastically mediations in the previous matters although mediation in some of those conflicts could offer favorable perspectives. This is all the more surprising because the legislature stimulates mediation in numerous other hypotheses and provides legislation for that purpose; it is also strange in the context of a recommendation of September 5, 2001, of the Council of Ministers to encourage alternative dispute resolution between Government and citizen since ADR disputes can not only solve but also prevent disputes.

The initial bill included no restriction for public legal persons. The adjustment—and limitation—was justified by the argument that public legal persons are not able to mediate their disputes just like that; it was, moreover, pointed out that a similar scheme—and limitation—also exists in the case of arbitration.[44]

According to certain legal doctrine, the reading of articles 144 and 145 BC—the judiciary is responsible for disputes regarding subjective rights—must result in the conclusion that the limitation of the third paragraph of article 1724 JC only applies to this subjective litigation; the notion of "litigation" is now wider than the concept of "conflict." In cases where public legal persons would be involved in conflicts that are not disputes, they can be party in mediation.[45]

While the Judicial Code focuses more on subjective litigation, mediation would in principle be possible within the framework of the objective litigation, i.e., the judicial procedure before the Council of State. So according to certain legal doctrine, mediation would not be inconceivable in the framework of licensing policy; within the decision-making process, mediation would then be situated in the period preceding the granting of the permit.

6.4.3 Mediation in Urban Planning in Flanders

A permit of the local authority is needed for a lot of changes concerning the urban development, such as chopping a large tree, building, or renovating a house. When a local authority decides whether or not to grant a planning permission, it is bound by a number of legal rules. On the other hand, the local authority has autonomous discretion that leaves room for policy decisions. The local authority therefore has to first and mainly take into account the general interest and also the individual interests of the citizens. For example, building an industrial building may cause nuisance to local residents. The mediation between the planning permission

[44] For which to date no implementing law or Royal Decree has been issued.

[45] It should be observed that conflicts in the administrative practice relates mostly to the way in which citizens are treated rather than to legal issues.

applicant, residents, and any other government can be helpful. As stated earlier, there is almost no regulation of the mediation concerning granting a planning permission.

It should be noted that in the procedure for planning permissions, there is a participation possibility for citizens: the so-called public inquiry. At this stage of the proceeding, anyone can submit objections to the permission application. The licensing authority is required to take into account the concerns and handle them. Despite the possibility of the "public inquiry," mediation can be useful since "public inquiry" is not aimed at adjusting and negotiating the planning permission but at weighing whether or not to refuse permission.

The procedure for a planning permission starts form the moment the applicant has submitted an official request to the local government. Given the limitations of this procedure, the preceding mediation will be the most efficient. As written in the Belgian legal doctrine, the only form of mediation in urban development is the so-called project meeting, which can only be used under strict terms.[46] In addition, informal mediation is still possible. Last mentioned is, in practice, the most used form since the constraints of the "project meeting" do not apply.

In practice, it is not easy to take the decision to use a form of (semi-)mediation before the procedure for planning permissions is started. Usually, problems and conflicts between the planning permission applicant, the government, and/or other stakeholders arise during the procedure for planning permissions since this is the the time that the proposed plans in the urban development are concretized. Therefore, it is appropriate for the permission applicant to be vigilant and to detect possible tensions in advance.

Persons responsible for the development and implementation of major constructions or building projects may request to the advisory and the licensing authorities a "project meeting."[47] This request can't be refused.[48] In this meeting, possible conflicts and tensions are eliminated in advance.

In our opinion, this can't be called mediation. Firstly, this is not a voluntary process. The concerned authorities may not refuse the request. Secondly, an independent, impartial, and neutral third party (mediator) is not presented. Thirdly, there is no question of equality between the parties since the concerned authorities also act as the advisory and the licensing authorities after the mediation. Finally, we should note that the "project meeting" does not take into account the interests of the local residents, neighborhood associations, and other interested parties.

However, this may be categorized as a *sui generis* form of ADR, which may be called, for instance, *conciliation of interests*.

Obviously, the planning permission applicant, the authorities, and/or the other stakeholders are allowed to consult on the plans in advance. The fact that a procedure is nonbinding is not relevant. In practice, for large projects, such

[46] Lancksweerdt (2010), pp. 229–259.

[47] Art. 5.3.2., §1 Flemish Codex of Urban Planning.

[48] Art. 5.3.2., §2 Flemish Codex of Urban Planning.

informal meetings are organized because a large number of complaints can be avoided. Yet it is difficult to speak in this case of mediation as usually a neutral mediator is not involved since, in practice, the licensing authority shall take this role.

The mediation agreement resulting from this must also be nuanced. Firstly, third parties who were not involved in the mediation can still file a complaint or lodge an appeal during or after the procedure for the planning permission. It's important to involve the relevant actors to ensure a legal certainty. Secondly, the question arises whether the public authority can give up its public power through a private agreement. As stated earlier, the constitution and the laws indicate what is attributed, how it should be exercised, and the fact that no agreement can be made concerning the way an administrative body will exercise its powers. The private agreement, as the result of the mediation, should contain a reservation concerning the fact that the authority can bypass the agreement for reasons of the general interests. For these reasons, in practice, there is rarely a successful informal mediation preceding the procedure for planning permissions.

The Flemish legislator has not provided a mediation option when the procedure for planning permissions is ongoing. In addition, informal mediation won't be evident. It is very difficult to conduct a profound mediation as the legal delays in which the government must come to a decision on the planning permission are too short.[49] Moreover, there is an important legal principle that states that a planning permission application may not be fundamentally modified after the public inquiry.[50]

For that reason, in practice, we rarely see a successful mediation during the procedure for planning permissions. Given the absolute prohibition to change the planning permission application after the public inquiry, the essential characteristic of mediation—a search for a satisfactory solution—is completely nullified. However, it should be noted that it is theoretically possible that, arising from the mediation talks, the planning permission procedure is stopped and the applicant applies for a new (modified) planning permission.

Finally, it should be emphasized that in this form of (semi-)mediation, there is no question of equivalence between the parties and a neutral mediator is rarely called in.

[49] The terms vary between 75 and 150 days. Cf. art. 4.7.18, §1 Flemish Codex of Urban Planning.

[50] Council of State, 28 November 2007, nr. 177,326, Bernaert; Council of State, 10 August 2007, nr. 173,955, Carron en Callewaert; Council of State, 19 November 2007, nr. 172,417, nv Prima; Council of State, 14 February 2007, nr. 167,789, Collaert; Council of State, 4 August 2008, nr. 183,773, nv D.M.P.

6.4.4 *Intermediate Conclusion*

Many obstacles still exist before public legal persons could be involved in mediation. To emphasize is the compelling public law framework within which the Government must act: the powers, the legal position, and the right of disposal of the Government; the principle of legality (i.e., the hierarchy of norms, the assigned nature of and the principled ban on delegation of powers of the Executive, etc); the general principles of good governance (especially the principle of equal treatment); the principle of the variability of the public service; the principle of the openness of the Government; and, last but not least, the uncertain legal value of an agreement resulting from mediation.

6.5 Conclusion

Government action is no longer accepted as evident; also the citizens expect the Government to be acting within the legal framework. Year after year, citizens are becoming more aware of their right to lawful government action. Judicial review, however, is still a step too far for many reasons, including unfamiliarity with the legal world, the often very long procedures, the (useless, principled, etc) procedural struggles that lawyers sometimes carry out on behalf of the Government, the costs of legal procedures (in which higher appeal and appeal in cassation are not uncommon), etc.

While judicial review therefore is not always able to guarantee the necessary legal protection against the Government, other mechanisms of legal protection should be provided. In the first instance, for the Belgian administrative law talking about remedies against unlawful government action, the means *par excellence* is the administrative appeal. This means appeal to the supervisory authorities and the (preferably) external organized administrative appeal.[51] The effectiveness of the administrative appeal will depend on the jurisdiction of the appellate body, little effectiveness of a decision in appeal that constitutes a nonbinding opinion, great effectiveness in case of reform of the contested administrative act. Also in favor of administrative appeal are a low threshold; little to no formal requirements to lodge the appeal; almost free procedure;[52] short time limit for appeal and, in general, short answering deadlines; and—at all times—the possibility of judicial review against the decision in appeal. A prior and mandatory organized administrative appeal is already prescribed in many cases; that trend will certainly continue.

Provided that an important part of the disputes are be settled in favor of the citizen following an administrative appeal to an independent appeal body, this will decrease the number of cases of judicial review; this arithmetic has against it the

[51] Instead, the usefulness of internal administrative appeal may be doubted.

[52] Unless already in this phase a recourse to a lawyer is done.

hypothesis where the administrative authority—at least in principal matters—will still resort to judicial review.

It is not inconceivable that in the future at the Flemish level certain disputes in first and last instances will be taken out of the jurisdiction of the Council of State and then assigned to specialized administrative courts and then only an appeal in cassation to the Council of State will be possible. Taking into account the fact that, before going to court, also an organized administrative appeal must be exhausted, the citizen runs against the danger that the final solution of the dispute will drag on for longer periods of time. From the point of view of effectiveness and efficiency, serious question marks can be placed with this trend.

The Ombudsman has only a mediating role but cannot reform challenged government action; its impact is therefore difficult to measure. This does not mean, however, that an appeal to the Ombudsman is completely useless; annual reports put the finger on the problem of improper government action. The extent to which the Flemish governmental institutions meet the nonbinding opinions and comments is conjecture. To believe is that the absence of new similar complaints means that the public administrations concerned take into account the opinions and observations into account. Experience shows, however, that this is not always the case.

Despite the 10-year-old European recommendations[53] on alternative dispute resolution in the form of mediation or conciliation, the administrative authorities in Belgium are still not familiar with the institution. Although legally provided, the absence of legal implementing measures, in principle, makes consultation, mediation, and arbitration in administrative practice almost unfeasible. However, the question arises whether, with strict conditions for insertion in the law, the scope of consultation, mediation, and arbitration cannot be extended to public legal persons; a greater efficiency and effectiveness of these ADR mechanisms in comparison with legal procedure cannot be denied.

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[53] See Commission Recommendation no. 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes; Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

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Chapter 7
Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of "Tribunalization" of Administrative Disputes

Friederike Bundschuh-Rieseneder and Alexander Balthasar

7.1 Preliminary Remarks

The system of administrative justice in Austria has currently been facing its major change since the single Administrative Court was established by the Law of 22 October 1875[1] one and a half centuries ago: competent, with rare exceptions, as first and sole instance of judicial review for the whole range of administration[2] within the entire Austrian part ("im Reichsrathe vertretene Königreiche und Länder," "Cisleithania"[3]) of the Austro-Hungarian Empire.

[1] Gesetz betreffend die Einrichtung eines Verwaltungsgerichtshofes—VwGG 1875, Imperial Law Gazette (Reichsgesetzblatt—RGBl) 1876/36. The constitutional basis was Article 15 (2) of the Fundamental Law on the Judiciary (Staatsgrundgesetz über die richterliche Gewalt - StGG, RGBl 1867/144).

[2] Section 2 (2) of the Law of 22 October 1875 explicitly stated that one could lodge a complaint not only against decisions of State authorities but also against those of the (autonomous) regional administrations, as well as against those of districts and municipalities.

[3] Therefore, this court was competent not only for the territory of the current Republic of Austria (with the exception of the region of "Burgenland," then belonging to the Hungarian part of the Empire) but also for complete territories of modern Czech Republic and of Slovenia, as well as parts of Italy (Trento/Southern Tyrol as well as parts of Friulia and Trieste), Polonia (Krakow, "Galicia"), Croatia (Dalmatia), Ukraine (Lemberg, Czernovitz), and also Romania (southern part of Bukovina).

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By amendment of the Federal Constitution[4] of 5 June 2012,[5] nine regional and two federal Administrative Courts of first instance were now created under the Administrative Court (as well as under the Constitutional Court). This reform—which needed to be implemented by ordinary legislation[6]—took effect on 1 January 2014. At the same time, almost[7] all sorts of administrative appeals and all kinds of existing administrative tribunals[8] ceased to exist.[9]

So exactly at the time this book is published, the Austrian system just underwent a stage of transition—a situation that requires some flexibility when reporting the country's situation within the framework of the general questionnaire. We aim, therefore, to give first a comprehensive overview of the *historical development* of administrative justice since 1876 before outlining the *future structure* of the triangle between administration, administrative justice, and the Board of the Ombudspersons—here with specific regard to questions of options of "alternative dispute settlement," which could in fact arise for the *first* time in Austria.

7.2 Historical Survey

7.2.1 The Classical System of Administrative Justice

7.2.1.1 The Administrative Court

When the Administrative Court started in 1875/1876, administration was already *separated* from the judiciary for more than one century.[10] So it was not only not a

[4] Bundes-Verfassungsgesetz—B-VG.

[5] Federal Law Gazette (Bundesgesetzblatt—BGBl) I 2012/51.

[6] See, for the major general steps on federal level, BGBl I 2013/33.

[7] The only exception explicitly stated in the amended Constitution (Art 118 [4] B-VG in the version of BGBl I 2012/51; cf. also Articles 115 [2] and 132 [6] B-VG in that version) is that for municipal self-government where two administrative instances may persist, as long as legislation does not cancel the second one. By way of analogy (argumento a minori ad maius) one might, however, question whether two administrative instances could also be kept within the structures of professional self-government (Art 120a–120c B-VG).

[8] See, in more detail below, Sect. 7.3.2. Already in 2008, the former Federal Independent Asylum Senate (an administrative tribunal) was changed to the "Asylum Court" (the main purpose of this reform being to cancel the Administrative Court's judicial review in asylum matters). Also, this (specialized) court is now to be dissolved (or, more exactly, serves as institutional basis for one of the two new federal administrative courts of first instance).

[9] See below Sects. 7.4.1 and 7.4.2.

[10] See for the following already Balthasar (2011), pp. 343ff, for the Administrative Court in general, Stelzer (2011), pp. 192ff. Like in France, also in Austria, this separation was not so much an implementation of the rule of law, deemed to protect courts from governmental influence but, right to the contrary, paid tribute to the requirements of efficiency: during the wars against Prussia (1740–1763), the minister of the Interior (supreme chancellor) of the time, F.W. Haugwitz,

realistic option to confer the task of judicial review of administrative decisions (again) in general to the ordinary judiciary[11], but also even the role of the new Administrative Court versus the administration[12] had to be confined to a rather restrictive approach: "adjudication, but not administration,"[13] as Joseph Unger, then member of the Austrian Government and later president of the "Reichsgericht,"[14] had put it in parliamentary discussions on the draft bill.[15]

The main restrictions of the Court's powers were the following:

– The review was carried out only on the basis of the administrative authority's file, not on evidence taken by the Court itself.[16]

held that the State authorities then competent for legal, as well as political, and for administrative issues proceeded in too formal a way and were, thus, not flexible (and, perhaps, also not loyal) enough to meet the needs of warfare. So he restricted these authorities to the tasks of ordinary judiciary (private and penal law) while creating new ones for all issues of general administration (1749). See, in more detail, Balthasar (2000), pp. 63ff; Jabloner (2009), p. 3.

[11] Nevertheless, there had been some general attempts in that direction still in 1763/1782 see Balthasar (2000), pp. 72 f, and Article 15 (1) StGG RGBl 1867/144 (as well as Article 94 [2] B-VG, original version of 1920) opened this way again insofar as an administrative authority had to decide on conflicting private rights of individuals. Although the scope of this constitutional provision (which was cancelled in 1929) remained always rather limited [cf. Winkler (1979b), p. 137 (149)], it was never possible to extinguish this path completely. Jurisprudence invented therefore, in order to avoid infringement of the principle of separation of administration from the ordinary judiciary (Article 94 [1] B-VG, original version; cf. Wiederin (2011), pp. 351ff), the scheme of "subsequent competence" ("sukzessive Zuständigkeit," cf. Öhlinger and Eberhard (2012), point 606). The current reform allows again explicitly legislation to state (though only exceptionally) that an administrative decision is not to be challenged before one of the new administrative courts but before the ordinary judiciary. This provision (Article 94 [2] B-VG in the version of BGBl I 2012/51) is, furthermore, no longer restricted to private law issues but could also be applied to all other sorts of administrative law, including penal (administrative) law. In addition, since 1948 the ordinary courts have been competent to decide on compensation for maladministration ("Amtshaftung").

[12] According to § 10 (4) VwGG 1875, at least half of the members of the Administrative Court had to be qualified as judges (of the ordinary judiciary). This quota (which was later on, as such, inserted in the original version of the B-VG (Article 134 [3]), but only 5 years later lowered to 1/3 (version of BGBl 1925/367, and was now deleted altogether, as part of the reform of 5 June 2012), had not been proposed by the Government but was inserted during parliamentary debate and followed the Prussian model (cf. Balthasar (2000), p. 52, fn 225; Olechowski (1999), pp. 134f. Stelzer (2011), pp. 188f).

[13] "Judiciren, ... aber nicht administriren"—to decide on the lawfulness of the contested administrative decision but not to take over the role of the administrative authority.

[14] This court, also a novelty of the 1867 Fundamental Laws (the "December Constitution"), can be considered as a sort of predecessor of twentieth century constitutional courts.

[15] See, e.g., Olechowski (2010), p. 33. And also Karl v. Lemayer, later on vice president of the Administrative Court and member of the Austrian House of Lords ("Herrenhaus"), firmly was of the same opinion; see Jabloner (2001), pp. 137ff.

[16] Section 6 (1) VwGG 1875; cf. still § 41 (1), first sentence VwGG 1985 (version in force until 31 December 2013). It is true, however, that these legal provisions, as such, would have allowed somewhat more discretion than the Court itself thought it appropriate to make use of, as, in particular, Ringhofer (1976), pp. 363ff and 372ff) had pointed out; see also, quite recently, the

– The Court was not allowed to modify the contested decision but was confined to either reject the complaint or to annul the contested decision, the latter option either due to flaws of procedure[17] or due to error in law.[18]

Furthermore, the small size of the Court[19] required also the exhaustion of administrative legal remedies as a precondition for the admissibility of a complaint.[20] As a rule, therefore, the supreme administrative authority had to be appealed to before a complaint could be lodged before the Administrative Court.[21]

7.2.1.2 The Twofold System of Administrative Legal Remedies

From the very beginning, the Austrian system of legal remedies in administrative proceedings has been *twofold*:

– First, in the majority of cases,[22] it was mandatory to appeal to at least one, and *sometimes even three*, administrative authorities.[23] The rules therefor had to be, to a large extent, developed by the Administrative Court itself during the first decades of its existence[24] and were codified in 1925.[25]

Judgment of the Constitutional Court of 28 June 2011, B 254/11 (Official Collection [VfSlg] No. 19.425).

[17] § 6 (2) VwGG 1875.

[18] § 7 (1) VwGG 1875.

[19] The Court started with 12 members; in 1918, this number had increased to 49 (see http://www.vwgh.gv.at/Content.Node/geschichte/rechtshistorische-entwicklung/1876-1918/1876-1918.at.php). Just for comparison: nowadays, the Administrative Court (competent only for the territory of the Republic) comprises 67 members.

[20] § 5 (2) and (3) VwGG 1875.

[21] This rule survived, although more and more modified by specific exceptions (on constitutional level, as well as by ordinary legislation), as the underlying principle also in the still current administrative law (cf. Hengstschäger and Leeb (2007), point 21).

[22] No administrative appeal at all was necessary where the supreme administrative authority (in most cases, a minister or a regional government) was competent to decide as authority of first instance.

[23] Cf. still the Judgment of the Constitutional Court of 16 June 1992, B 1319/90 et al. (VfSlg 13.092).

[24] The legal basis for this lawmaking turned out to be § 6 (2) VwGG 1875, where the Administrative Court was called to annul the contested decision when major elements of the administrative procedure had been neglected ("wesentliche Formen des Administrativverfahrens außer Acht gelassen")—an element requiring first the establishment of these "major elements," either by the legislator or, insofar as it remained silent, by the Court's case law itself.

[25] The so far most important law of this codification is the General Administrative Procedures Code (Allgemeines Verwaltungsverfahrensgesetz—AVG), which is, as such, still in force.

– Only after exhaustion of all stages of administrative appeals access to the Administrative Court (and, also, to the Constitutional Court[26]) was allowed, with only few exceptions.[27]

In the course of time, the two systems did not assimilate but tended even to *aggravate* their substantive *differences*. Thus, in contrast to the restricted competences of the Administrative Court outlined above, the administrative appeal authorities were explicitly called to modify the contested decision as they thought it appropriate, even to replace it altogether, under their own full responsibility and discretion, without being bound by the appeal of the party concerned or by the appealed decision itself; as a consequence, jurisprudence considered *reformatio in peius* as perfectly correct.[28]

On the other hand, the Administrative Court considered cassation as an *essential feature* of the Administrative Court's procedures and, therefore, quite jealously narrowed down any attempts of administrative appeal authorities to make more than very exceptional use of the cassation provision enshrined in paragraph 66 (2) of the General Administrative Procedures Code (AVG[29]).[30]

Whereas suspensive effect of a complaint had to be granted, quite exceptionally, by the Administrative Court,[31] an administrative appeal had, as a rule, suspensive effect. In exceptional cases, however, this effect could be cancelled by the authority that issued the contested decision.[32]

Legal representation was only mandatory before the Administrative Court, not before the administrative authorities.[33] Similarly, administrative procedures were, as a rule, mostly free of charge, whereas before the Administrative Court there was not only an admissibility fee to be paid but also some compensation for the costs of the successful party by the opponent authority.

[26] Complaints to the Constitutional Court have to be based on an (alleged) infringement of a constitutional (fundamental) right or the allegation that parts of the legislation applied is unconstitutional (Article 144 B-VG).

[27] See right below Sect. 7.2.2.

[28] Cf. still currently Hengstschäger and Leeb (2007), point 91. Already Tezner (1925), pp. 297f. had contested this view. In 1986, the Administrative Court itself developed, by a famous judgment explicitly discarding its former case law, some limits. See, for more details, Hengstschäger and Leeb (2007), point 68.

[29] See above fn 2.

[30] Cf. Hengstschäger and Leeb (2007), point 9ff.

[31] § 30 (2) VwGG 1985.

[32] § 64 (2) AVG.

[33] To be precise, paragraph 24 (2) VwGG 1985 (version in force until 31 December 2013) required only that the complaints had to be submitted by a legal representative, and paragraph 23 (1) leg cit allowed parties to act during the proceedings without representation. But in practice (in particular, considering that oral hearings were very rare), paragraph 24 (2) VwGG 1985 had the effect that almost every party opted for full representation.

7.2.1.3 Some Data on Complaints before the Administrative Court

In a structure as outlined above, it is quite hard to assess the effectiveness of administrative appeals on the basis of statistical data. Nevertheless, the following data on the complaints lodged before the Administrative Court may be of importance:

- The total number of complaints that have been lodged before the Administrative Court every year against administrative authorities: according to the most recent Annual Report of the Administrative Court (for 2012), during the last decade (2001–2011), the total number of incoming complaints varied between 6,000 and 8,000, except in the last 3 years, when access to the Administrative Court was no longer allowed with regard to decisions of the Asylum Court established in July 2008. Although during all these years the amount of delivered decisions surpassed the number of new cases, the backlog of pending cases continued to be higher than the output; 2012 was the first year where the relation was reversed.[34]
- The average duration of proceedings during the last decade was between 19 and 23 months.[35]
- The percentage of successful complaints: in 2011, out of more than 6,000 completed cases, about 25 % contested administrative decisions were annulled, in 2012 the percentage was slightly higher.[36]

The reasons to complain have been so manifold that one could not infer much from these data as to the *quality* of the contested administrative decisions. For instance, the Administrative Court being the sole instance to provide judicial review, it was sometimes a matter of "prestige" not to stop proceedings below the stage of the Administrative Court. This effect was further enlarged by the habit of many parties to consult a lawyer for the first time when they had received the administrative decision of last instance. Moreover, in matters where suspensive effect was granted quite frequently by the Administrative Court,[37] sometimes the prospect of enjoying this effect for a considerable period of time was motivation enough to lodge a complaint. Even when an administrative decision was annulled, this fact did, more often than not, only mean that the Administrative Court was not fully convinced by the reasons given (note that the Administrative Court did not allow itself to take evidence,[38] so that already the need felt by the chamber to pose one single clarifying question to an expert could lead to cassation) than that the contested decision was wrong in substance. As a Member of the national Parliament stated on 5 December 2007 in the plenary debate, his main motivation to endorse the establishment of the Asylum Court (which meant that complaints in asylum

[34] See Annual Report, 2012, p. 7.

[35] See Annual Report 2011, p. 9; Annual Report 2012, p. 6.

[36] See Annual Report 2011, p. 8; Annual Report 2012, p. 6.

[37] Regarding asylum and expulsion cases.

[38] Note that the Administrative Court did not allow itself to take evidence (see above Sect. 7.2.1.1).

matters to the Administrative Court were no longer allowed) was the fact that, during the last 3 years, out of more than 4,000 annulments only in 1 % of the cases had the administrative authority come to another decision after further proceedings.[39]

And, as of now, not even a provision like paragraph 64a AVG, enabling the administrative authority that had issued a decision to modify it on its own motion as a result of an appeal, had been able to produce any effects in respect to easing the workload of the Administrative Court because this provision had only been applicable *within* the system of administrative authorities, not with regard to administrative authorities the decisions of which were contested before the Administrative Court.[40]

7.2.2 The Alternative to the Twofold System

There had, however, always been an alternative to the model just outlined above in Sect. 7.2.1: according to paragraph 3 lit h, second element of the Law on Procedure before the Administrative Court then in force (the VwGG 1875), no complaint to the Administrative Court was allowed in cases where the administrative decision was taken by a mixed council composed of administrators and judges (acting, as a rule, as avocational members).

In contemporaneous view and still when the B-VG (original version of 1 October 1920) came into existence[41] and also afterwards, such authorities ("Kollegialbehörden mit richterlichem Einschlag") were considered to fulfill all the necessary requirements of judicial independence and were considered as (special, not ordinary) "courts."[42] Additional judicial review by the Administrative Court was, therefore, considered unnecessary.[43] Nevertheless, their competence to settle the case as any other administrative authority—i.e., to decide on the merits, amend, modify, or replace the contested decision (if there was any)—was never disputed.[44]

[39] See Balthasar (2010), p. 191, fn 953.

[40] Now, however, a similar provosion is applicable also in relation to administrative authority/administrative courts of first instance. See below Sect. 7.4.5.

[41] In its Article 131 (1), the B-VG (original version) inserted the relevant content of § 3 lit h, second element VwGG 1875 into constitutional law. The major difference was that since then also participation of citizens being neither "administrators" nor "judges" as members of these authorities has been allowed (see closer Pernthaler (1977), pp. 19ff: "bürgerschaftliche Komponente").

[42] Cf. Pernthaler (1977), pp. 17f. 26; Balthasar (2000), pp. 14ff.

[43] Cf. Hiesel (2001), pp. 321ff and 328f, referring in fn 60 also to Kelsen et al. (1922), p. 245: "Wo in erster oder höherer Instanz am Verwaltungsakt ein Richter einer kollegialen Verwaltungsbehörde beteiligt ist, ist eine Rechtskontrolle durch ein besonderes Verwaltungsgericht überflüssig."

[44] Pernthaler (1977), p. 47, 133.

7.3 Further Developments

7.3.1 The Weakening of the Classical System

The original version of the B-VG weakened the system (as outlined above in Sect. 7.2.1.1) for the first time when explicitly stating the competence of the Administrative Court to decide on the merits of a case insofar as the authority issuing the contested decision was not entitled to discretion (Article 133 [3]). This provision was cancelled some years later[45] and, furthermore, was almost never applied.[46]

But Article 164 (3), second sentence of the Constitution 1934[47] simply equalized the fact that the administrative authority (of highest[48] instance[49]) had not, within 6 months, issued a decision at all to issuing a rejecting decision. In these cases of administrative delay (administrative silence), therefore, a complaint to the Administrative Court was now perfectly possible. Unavoidably, in these cases, the Administrative Court[50] had to replace the administrative authority in every respect and, in particular, to establish the facts itself.[51] In 1946, the essence of these provisions was inserted into the restored B-VG[52] and the Law on Procedure before the Administrative Court (VwGG)[53]; they have always been in force since then, with only slight modifications. Being part of the current reform but already in force,[54] the Administrative Court is now called—without any constitutional amendment[55]—to decide on the merits if this can be done on the basis of the

[45] By the first two amendments of the B-VG, subsequently, cf., Balthasar (2003), p. 262 (fn 69).

[46] See Winkler (1979c), pp. 116ff.

[47] This constitution (of 1st May 1934, BGBl II 1934/1) established the "Federal State of Austria," which lasted till March 1938 and was not restored in 1945 after the end of the German period.

[48] The principle of exhaustion of legal remedies within the administration was transferred to this constellation.

[49] Legal protection against delay of lower instances was already provided by § 73 AVG.

[50] Under the Constitution 1934, the tasks of the Constitutional Court were also conferred upon the Administrative Court, and the institution was named, more generally, "Federal Court" ("Bundesgerichtshof").

[51] § 51 (2) of the Law of 12 July 1934 on the establishment and procedure of the Federal Court (Bundesgerichtshofgesetz—BGG).

[52] Article 132.

[53] Cf paragraph 42 (4) VwGG 1985 (version in force until December 2013).

[54] § 41 (3a) VwGG 1985 (version in force until December 2013) had already been applicable since 1 July 2012 (see § 80 (10) leg cit); see now § 42 (4) VwGG (current version).

[55] It is true, however, that since 25 December 1946 (the coming into force of the constitutional amendment BGBl 1946/211) the principle outlined supra in Sect. 7.2.1.1. was not stated clearly any more on constitutional level, the relevant wording being the quite general "erkennen", i.e. "to judge". Hence, the Constitutional Court had indeed stated that there was no constitutional provision restricting the Administrative Court to cassation (Judgment of 19 June, G 183/94 et al., Official Collection No. [VfSlg] 14.164, referring to VfSlg 8202).

evidence already available in the file and is convenient, rational, and helping to save costs a provision that the Court already applied.[56]

7.3.2 *The Two Stages Structure*

On the other hand, the second constitutional amendment of 7 December 1929[57] enabled the legislator to provide judicial review by the Administrative Court also for decisions of the mixed councils (dealt with above in Sect. 7.2.2); from that point in time, the Constitutional Court considered these councils no longer as courts but as purely administrative authorities that were at any rate subordinated to the Constitutional Court, even if the legislator had not called the Administrative Court for judicial review.[58]

The result was that since then in administrative proceedings, the former alternative had changed its character, showing the feasibility, under the B-VG, of an administrative legal remedy structure of two stages of independent institutions, namely

- on first stage, an independent body, organized more or less like a court but deciding on the merits; and
- on second stage, the Administrative Court, still confined to the traditional restrictions of judicial review, also with regard to these independent bodies.

It was exactly this structure that substantially gained ground during the last decades: a veritable flood of independent administrative bodies (tribunals), either of the traditional kind of mixed councils[59] or, as a novelty, of different kinds of "independent senates"[60] composed of full-time members, without a quota of

[56] See the two Judgments of 4 September 2012, 2012/12/0032 and 2012/12/0007, respectively.

[57] BGBl 1929/392.

[58] Cf. Balthasar (2000), pp. 15f.

[59] Cf. the Judgment of the Constitutional Court of 15 February 1999, VfSlg 16.189 ("Deren Zahl steigt neuerdings im Bereich des Bundes an. Auch das Gewicht der von ihnen zu besorgenden Angelegenheiten nimmt deutlich zu, ..." ["within the federal administration, their number is recently increasing, as well as the importance of the issues conferred to them ..."]). Some of these senates, like the fairly newly founded one for environmental affairs or the Senate for Patent Affairs (which has enjoyed already a long tradition), had an excellent record and a high quality of members (a mixture of university professors, high-ranking administrators of different kind, and judges of the ordinary judiciary, including members of the supreme court), which will be impossible to maintain under the new structure. For a warm appraisal, see, in detail, Pernthaler (1977) and, in particular, pp. 93ff.

[60] To start with, in 1988 nine "unabhängige Verwaltungssenate" ("independent administrative tribunals")—one for each region—were established, to deal with appeals in administrative penal law proceedings, complaints against administrative orders, and acts of direct enforcement outside formal administrative proceedings; in addition, legislation was enabled to confer all other sorts of subject matters to these senates. In 1998, a federal independent senate was added to deal with

judges,[61] and all considered as parts of the "administration," filled the country.[62] Again, it is hard to prove the effectiveness with figures[63]; but the very fact that this structure developed as rapidly as it did seems to indicate its overall need.[64]

Since 1998, an additional feature was added, allowing the Administrative Court to dismiss a complaint against a decision of (at least some types of) these tribunals if no important legal question was raised.[65] Although the application of this provision was not really satisfactory,[66] it helped again to raise awareness that the alternative "two stages structure" was indeed different, compared to the classical one.

asylum cases. In 2002, this structure served as a slightly modified model for a specialized senate for federal procurement matters (which have, in most regions, been conferred upon the administrative senates; only in two regions exist separate independent bodies), in 2003 followed the "independent taxation senate." See Larcher (2012); Kahl and Rosenkranz (2012), pp. 121ff; Brunner and Pavlik (2004); Balthasar (2000), pp. 81ff.

[61] Note that originally the Government did not even propose a quota of judges for the Administrative Court (see above fn 12).

[62] Nevertheless, it is remarkable how long it took until the seed of the reform of 1929 really gained ground: already Article 11 (5) B-VG in the version of BGBl 1929/392 provided for independent senates (although composed not of full-time but of avocational members) competent for the decision in administrative penal law cases; this constitutional promise, however, was never implemented until, six decades later, the reform of 1988 took place, and the first competence the independent administrative senates had aimed for in the then governmental proposal was exactly these decisions in administrative penal law cases. For the overall motivation of this reform—which was very much the same as that of the current reform—see below Sect. 7.4.1.

[63] In some areas, in particular where the establishment of a new senate was accompanied by the creation of a new administrative authority of first instance as it was the case in asylum matters, the case law of the senate stimulated a considerable increase of quality also of the first instance decisions. On the other hand, the obligation of the new senates to decide on the merits, in combination with their competence to establish all the necessary facts by themselves, in particular by an oral hearing, and the lack of any power to give instructions to the administrative authorities could also have the effect that the procedure of first instance lost a lot of its former quality (this happened mostly in administrative penal law cases), so that the proceedings before the new senate turned out to be the real "first instance," with only an insignificant administrative prelude. If one does not compare the senates with the first, but with the highest instance of the former system, the assessment is even more complicated: while it is beyond question that senate decisions show more quality than former appeal decisions of subordinate bodies, it may be different when one compares with former decisions of ministerial departments, which disposed of lots of information and resources senates often lack.

[64] It is worth noting that Article 6 ECHR and, most recently, also Article 47 EUCFR do not require the two stages structure: as the Constitutional Court ruled quite recently (see above fn 16), the Administrative Court has always disposed of sufficient competences to secure alone compliance with the mentioned provisions (apart from administrative penal law proceedings). But Article 267 TFEU could indeed speak strongly in favor of two stages of administrative courts (cf. Balthasar (2000), p. 351).

[65] Article 131 (3) B-VG.

[66] The Administrative Court did not make use of this provision to dismiss the complaint a limine but continued to carry out its regular procedure and referred only to this provision in case of rejection (in order to spare itself to give elaborated reasons).

And it is exactly this alternative structure that served as the model for the reform of 5th June 2012: all 11 administrative courts have "independent senates" as institutional precursors, namely

- the regional administrative courts (one for each federal State[67]) are, to a large extent, composed of the former members of the former "independent administration senates"[68];
- the federal administrative court for financial matters, in practice, just replaced the former "independent taxation senate"[69]; and
- the main stock of the federal general administrative court was taken from the "Asylum Court," which, in turn, had been the institutional successor of the former "independent asylum senate." In addition, the tradition of the independent procurement senate ("Bundesvergabeamt") is preserved in the new court.[70]

This new structure will be presented in Sect. 7.4. In Sect. 7.5, we will deal with the institution of the "Ombudspersons" (which is, at least when compared with administrative justice, fairly new in Austria) and its relation to the new structure. Eventually, Sect. 7.6 will assess the reform in terms of Good Governance and Public Administration.

In the following section, we want to highlight the gradual development of what is now a core feature of the new structure.

7.3.3 The Vanishing of Administrative Appeals

Although in theory one could in fact imagine also that decisions taken by a "tribunal" can be appealed against before an administrative authority of classical kind (may it be the government itself or a body subordinated to it), such a return would, of course, be useless from the point of view of providing "judicial review" of administrative decisions (which is the evident raison d'être of administrative tribunals or even courts).

[67] Cf. Article 2 (2) B-VG: Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg, Vienna.

[68] Cf. Article 151 (5) (5) B-VG (version of BGBl I 2012/51), read in conjunction with the preceding subparagraphs.

[69] Cf. Article 151 (5) (2) (b) B-VG (version of BGBl I 2012/51). Hence, the president of the "independent taxation senate" was appointed president of the Taxation Court.

[70] Cf. Article 151 (5) (2) (a) and (5) (7) B-VG (version of BGBl I 2012/51). Hence, the president of the Asylum Court and the president of the procurement senate were appointed president and vice president of the General Administrative Court, respectively.

Against that background, however, the establishment of the "two stages structure" of administrative tribunals/courts outlined in Sect. 7.3.2 triggered by the very nature of facts a reduction of administrative appeals, mainly due to two reasons:

– First, it is not only the final quality but also the overall length of proceedings that matters; therefore, there has always been a certain pressure to compensate for the additional tribunal proceedings by reducing the number of purely administrative instances: Article 130 B-VG (original version) had enabled legislation to reduce the stages of administrative appeal in all matters where a complaint to the Administrative Court could be lodged.[71] Then, in 1974, it was stated at constitutional level that only exceptionally there should be more than two administrative instances (beneath the Administrative Court) in most fields of administration.[72] Thus, already for decades, the idea has gained ground that administrative proceedings should, as a rule, comprise not more than three stages, the supreme level of Administrative Court included.
– Second, there was also a motive that could be named "avoiding a protocolary inconsistency": "supreme administrative authorities," like members of the federal government (i.e., ministers) or regional governments (within the range of regional competences), simply tried to avoid review of their own decisions by other independent authorities than the supreme courts of public law, i.e., the Administrative Court or the Constitutional Court.

So we find, quite characteristically, already as a corollary to the establishment of the first "independent senates" a revival of the old Article 130 B-VG (original version): Article 129a (2) B-VG (version of BGBl 1988/685) enabled legislation to cancel any (other[73]) stage of administrative appeal in matters where such a (regional) "independent senate" was competent to decide "after exhaustion of administrative remedies." And legislation had followed this model to the widest extent.

[71] The contemporaneous comment of Kelsen et al. (1922), p. 244, clearly points out the background of three or even four administrative instances (cf. above fn 23), and even if it might be true, from a mere legal point of view, that legislation could have done the desired reductions also without this specific constitutional provision, its existence shows how deeply rooted had been, at that time, the principle mentioned above (at the end of Sect. 7.2.1.1).

[72] Article 103 (4) B-VG (version of BGBl 1974/444), covering the huge field of federal administration carried out by regional authorities.

[73] It was only due to the semantic artifice to consider the "independent senates" not as tribunals outside the administration but as a court-like form of administrative bodies (see above Sect. 7.3.2) that the abolishment of administrative appeals allowed for already by Article 129a (2) B-VG was still disguised until the reform of 2012.

7.4 The Reform of 5 June 2012[74]

7.4.1 The Motivation

The official motivation of the undergoing reform can be found in the "preliminary remarks" of the government draft bill[75]: there we learn that it is, in first line, the aim of relieving the burden of the Administrative Court; in second line, there is also allusion to better compliance with the rule of law and to the principle of federalism.[76] This set of reasons was already the same when this reform was, for the first time, discussed during the 1980s of the last century,[77] obviously against the background of the guarantees enshrined in Articles 5 and 6 EHRC.

With regard to quality, the restriction to cassation—the characteristic feature of the Administrative Court[78]—did not suffice, at least not in administrative penal law. The solution that could have come first in mind is just to enable the Administrative Court to decide on the merits, with full cognition also as to facts—turned out to be unviable with regard to the quantity of cases concerned. If, however, additional tribunals were established, access to the Administrative Court could be restricted, or even cancelled completely in some matters.

Of course, this well-known line of thinking alone would not have required such a clear and uniform structure as realized now (see right below Sect. 7.4.2); looking closer, one can also identify other reasons: during the first decade of this century, there had been several voices complaining that the existing structure was excessively nontransparent; consequently, the reform was cherished for its singular aesthetical effect of setting a uniform structure.[79] And there was also a certain personal influence of a renowned scholar.[80]

[74] Cf. for the following already Lienbacher (2011), pp. 328ff and, recently, Balthasar (2014), 38ff. For a slightly earlier stage of discussion, see e.g. Holoubek and Lang (2008).

[75] RV 1618 Blg NR XXIV. GP.

[76] Federalism comes into play because wide areas of administrative law have been executed by regional authorities. So when creating administrative courts of first instance, it was felt the need to establish them under the responsibility of the regions. In contrast, all courts of the ordinary judiciary belong to the federation.

[77] See, in more detail, Balthasar (2011), pp. 348f. with further references.

[78] See above Sect. 7.2.1.2.

[79] Cf. the references given by Balthasar (2011), p. 353, fns 97f.

[80] It was first the former judge Robert Walter who, as a most influential professor of constitutional and administrative law, proposed in 1986 to establish administrative courts following the example of the ordinary judiciary. See Balthasar (2011), 348f.

7.4.2 The Overall Structure

From 1st January 2014 on, the overall structure will be as follows:

- Administrative authorities of first instance will continue to conduct their proceedings as they did before, mostly under the supervision of their superior authorities and bound by their instructions[81]—but there will be no administrative appeal any more (within the proper meaning of the term, i.e., no "Berufung"),[82] except within municipal[83] (and, perhaps, also professional[84]) self-government.[85]
- Instead, every party to the administrative proceedings will be entitled to lodge a "complaint" ("Beschwerde") before one of the 11 administrative courts of first instance.[86] These courts will be competent to decide on the merits but not be obliged to do so in all cases.[87] R*eformatio in peius* will be possible (with the only exception of administrative penal law)[88]—although this looks now a bit strange with regard to courts deemed to act within the limits of the complaint lodged before them.
- The judgments of the administrative courts of first instance will be open to judicial review before the (supreme) Administrative Court.[89] In addition, a "complaint" can be lodged before the Constitutional Court on grounds of infringement of a "constitutional right"[90] or of application of unconstitutional legislation.[91]

[81] This is, of course, not true to the extent that "independent administrative authorities" (cf. Article 20 [2] B-VG) are competent to act in first instance.

[82] See Part IV, section 1 of the AVG (§§ 63–67).

[83] See above Sect. 7.1.

[84] See above fn 7.

[85] The Government draft bill (RV 1618 Blg NR XXIV. GP, 4) of the 2012 reform held, in its explanatory memorandum, that regarding administrative appeals "the Draft proposes to change the system and to abolish it completely. With the sole exception of municipal self-government there shall be, in the future, only one administrative instance. Each administrative authority shall be 'first and sole' instance the decisions of which can be appealed against before the respective administrative court."

[86] Article 130 (1), (2) in conjunction with Article 132 (1) (1) B-VG (future version).

[87] Article 130 (4) B-VG (current version).

[88] One of the traditional arguments in favor of reformation in peius in all other fields of administrative law was the fact that reformatio in peius was only explicitly excluded in paragraph 51 (6) of the Administrative Penal Law Procedures Code (Verwaltungsstrafverfahrensgesetz, VStG; see Hengstschäger and Leeb (2007), point 91). This legal situation, however, was transferred to the new law where we find a prohibition of the reformation in peius only in the section dealing with administrative penal law (paragraph 42 VwGVG, see below fn 97). What is more, the Explanatory Memorandum (RV 2009 Blg NR XXIV. GP, 8) explicitly states that the new provision was shaped against the model of the old one.

[89] Article 133 (1), (4) B-VG (current version).

[90] I.e., rights granted on constitutional level; most of them are human or fundamental rights.

[91] Article 144 B-VG (current version).

- Whereas the Constitutional Court, as of now, is still restricted, by its rules of procedure, to cassation, this is no longer true for the Administrative Court: as stated above, since 1 July 2012, its competences have been enlarged as to enable it to render also modifications of the decisions contested before it. However, access to this "review" is now more restricted than it was before. In the old system, the Administrative Court could, in principle, be appealed to in every case, although it was entitled to declare complaints inadmissible when the contested decision had been issued by a tribunal[92]; now, review is only allowed in cases of major legal importance.[93]

7.4.3 Provisional Appraisal

This reform will be the final step of a long-lasting process, in the course of which the original exception served as the model for the new rule. The fact that already during the last decades tribunals gained more and more ground in administrative (appeals) proceedings seems to show that this new system can really work. One should not overlook, however, the main difference between a system based mainly on independent judges and its antagonist, based on central instructions: notwithstanding all efforts to reach conformity and consistence of jurisprudence,[94] case law produced by independent judges, belonging to different courts, will always differ more than administrative decisions issued under the final responsibility of one central authority. In addition, also the remaining competence of superior authorities to instruct their subordinated authorities of first instance will lose efficacy because whenever, in a concrete proceeding, the competent administrative court issues a decision based on a legal opinion incompatible with the instruction, the court's opinion will prevail. So—curiously enough, given the evident aim of the rule of law to reduce arbitrariness—the shift of responsibility for the final content of an administrative decision to the administrative courts will increase the unpredictability of the decision for the respective parties of a concrete procedure. This effect will, however, increase the tendency to exhaust all legal remedies available wherever.

[92] Article 131 (3) B-VG (version in force until 31 December 2013).

[93] Article 133 [4] B-VG (current version).

[94] Usually, it is a core task of the president of a court to motivate, while fully respecting the independence of the judges concerned, consistency of jurisprudence; in addition, deviation of the well-established case law may be made difficult by the requirement to enlarge the chamber.

7.4.4 Administrative Petitions as an Alternative to Court Proceedings

Especially against the background just outlined at the end of the previous section, the reform could open the door for an element that had been, as to now, fairly unfamiliar with the Austrian system, i.e., the competition between administrative and judicial remedies.

This element of competition results from the fact that in the new system the administrative courts of first instance are no longer considered to deal with administrative appeals. Therefore, the administrative decisions of sole instance become—with the possible exception within the area(s) of self-government—final at once, notwithstanding the option of challenging them before the administrative courts.

According to paragraph 68 AVG (also in its revised version), "final" administrative decisions (i.e., all decisions against which no administrative appeal can be lodged) may be modified and even quashed by the issuing authority or its superior authority on its own motion under the following conditions.

Whereas pure modifications in favour of all parties are always allowed[95] (evidently, this provision has most importance in one party proceedings), it is possible also to reduce rights insofar as necessary for the protection of life or health of people or for the sake of national economy.[96] In addition, decisions issued by an incompetent authority or contrary to penal law or that cannot be implemented due to factual obstacles may be cancelled; finally, decisions may be declared void due to explicit provisions of the competent legislation.[97]

Against this legal background, any party not satisfied with the administrative decision could, from 1 January 2014 on, lodge a formal complaint before the competent administrative court, and, at the same time, try to ask, by way of petition ("Aufsichtsbeschwerde"), the issuing authority or its superior to make use of its powers under paragraph 68 AVG.

Of course, paragraph 68 (7) AVG clearly states that the party has no *right* to require that authorities apply these powers—this is the crucial difference between the vanishing administrative appeals of the old style and the remaining "petitions."[98] However, it is highly probable that, in the long run, the principle of equal treatment and nondiscrimination[99] will substitute for that formal denial of a

[95] See paragraph 68 (2) AVG.

[96] See paragraph 68 (3) AVG.

[97] See paragraph 68 (4) AVG.

[98] The corollary is that the "petition" is not needed altogether in case the authority has made up its mind to act, the competences being construed as exclusively ex officio ones.

[99] Article 2 of the Fundamental Law on the General Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger—StGG, RGBl 1867/142); Article 7 B-VG; Article 1 (1) of the Constitutional Law on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (BGBl 1973/390); Articles 20, 21 of the Charter of Fundamental Rights of the European Union (EUCFR).

subjective right, at least when an administrative authority had already, for the first time under the new system, reacted to a petition in a comparable case.[100] So, in the end, the intentions of the reform could be foiled at least to a considerable extent by this institute of "administrative petition" gaining new importance in a changed context.

7.4.5 *Alternative Dispute Settlement During Court Proceedings*

There is, however, still another element in the new structure deserving consideration from the point of view here at issue: whereas paragraph 64a AVG[101] remained unchanged but will, due to the almost complete cut of formal administrative appeals,[102] lose most of its applicability, in the new structure, a similar provision will govern the relation between administrative authority (of sole instance) and administrative court (of first instance).

According to paragraph 14 (1) of the new Code of Procedure of the Administrative Courts (VwGVG[103]), the administrative authority that receives, pursuant to paragraph 12, VwGVG, the complaint first may, within 2 months, decide on a complaint with full competence: it may declare the complaint inadmissible, reject it on the merits, or decide as to modification or cassation.[104] In these cases, it is up to each party of the procedure to claim that the file be eventually submitted to the administrative court. However, the object of the "claim to submission" will no longer be (as it was, under the regime of paragraph 64a AVG) the original administrative decision but the administrative decision on the complaint (the "Beschwerdevorentscheidung").[105]

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[100] Cf. the case law of the Austrian Supreme Court (in private and penal laws), i.e. its Judgment of 24 February 2003, 1 Ob 272/02 k (SZ 2003/17), where the State is considered to be obliged, by virtue of the principle of nondiscrimination, to conclude contracts with every subsequent applicant in the same way as it was done in a comparable situation in a preceding case even when legislation has explicitly denied any right to contract.

[101] See above Sect. 7.2.1.3, last paragraph.

[102] See above Sect. 7.4.2, first bullet.

[103] Bundesgesetz über das Verfahren der Verwaltungsgerichte—Verwaltungsgerichtsverfahrensgesetz.

[104] The Explanatory Memorandum (RV 2009 Blg NR XXIV. GP, 5) states on that provision: "the administrative authority against the decision of which a complaint was lodged shall have the option to decide on that complaint, even to reject it or to give additional reasons." From the fact that the administrative court is competent to decide by applying the principle reformatio in peius, it may be inferred that this element will be within the powers of the administrative authority acting under § 14 (1) VwGG as well.

[105] This is clearly stated in the explanations forming part of the government draft bill (RV 2009 Blg NR XXIV. GP, 5): "Beschwerdegegenstand im Bescheidbeschwerdeverfahren der

In principle, paragraph 14 (1) VwGVG could very well turn out as the second[106] backdoor by which the administrative appeals just thrown out through the front-door creep back into the house of administrative law.

It has to be noted that only the administrative authority has the power to decide[107] whether this alternative dispute resolution by administrative decision ("Beschwerdevorentscheidung") is made use of, as there is no right for the party. So in a way—i.e., with regard to the powers of the administrative authority—also this instrument resembles a "petition" insofar as the party concerned has no right that the authority will act; what is more, the authority may, as well as under § 68 AVG, act also under § 14 (1) VwGVG against the declared will of the parties.[108]

As far as it can be estimated at present, the only serious challenge to the effectiveness of this new institution will be the *time limit of two months*, which will, most probably, bar the administrative authority a priori from any attempt to solve more complicated cases. Should that limit be modified, however, either by law or by case law,[109] this provision could get real significance in the future, in particular, when it turned out that the new courts need to be relieved of their workload.

7.5 The Board of Ombudspersons and Alternative Dispute Settlement

Since 1977, also, Austria has been equipped with a Board of (three) Ombudspersons who are competent to deal with maladministration in the proper sense, i.e.—with only very few recent exceptions—only within the field of administration;

Verwaltungsgerichte soll – sofern die Behörde von der Ermächtigung des vorgeschlagenen § 14 Gebrauch macht – die Beschwerdevorentscheidung sein."

[106] Note that, at least in theory, both doors may be opened simultaneously because even action of the administrative authority under § 14 (1) VwGVG does not affect the decisive element of § 68 (1) AVG that the decision concerned is "final" in the sense that no administrative appeal can be lodged against it any more.

[107] This feature seems to be a major difference to comparable institutes in other legal orders, where the choice is up to the party (cf., for the German "Widerspruchsverfahren," e.g. Wolff et al. (2010), point 14ff, Langbroek et al. (2012), pp. 76ff; for the French "recours administratif préalable" Langbroek et al. (2012), pp. 44f.

[108] Cf. Hengstschäger and Leeb (2007), commentary on paragraph 64a, point 6, for the predecessor of § 14 [1] VwGG.

[109] As to the current § 64a AVG, the element "within two months" is interpreted strictly (see Hengstschäger and Leeb (2007), commentary on paragraph 64a, point 8); as a consequence, after the expiry of this time limit, the administrative authority loses any further competence ex lege. This is a remarkable difference to the provisions on administrative delay (§ 73 AVG; § 8 VwGVG), where a complaint is to be rejected in cases where the delay is objectively justified (not due to maladministration).

in contrast, they are barred from supervising the judiciary (with the sole exception of complaints concerning judicial delay). Since July 2012, the Board has also been in charge of the protection of human rights, but again only with regard to administrative custody, to the exercise of direct administrative law enforcement, and to the treatment of disabled persons by administrative bodies.

In 2012, the number of complaints amounted to 15,649, most of them arising in the field of social and internal security. In 2012, around 9,315 cases were completed (which is, compared with 2011,[110] an increase of 11 %). In 1,519 cases (16.3 %), the Board found maladministration.[111]

The Board remaining focused on the administration (not including the "administrative courts"), it will, by the current reform, lose all competence with regard to the new complaints procedures. Although it is true that Article 148a (1) B-VG has always barred an individual to lodge a complaint before the Ombudspersons as long as a legal remedy was still available, in the past the Ombudspersons treated, as a rule, the inadmissible complaint as a mere petition and therefore as a sufficient basis to act on their own motion. That meant that the Ombudspersons interfered, to a large extent, in administrative appeals procedures, even when the appeal authority was a tribunal.

In the future, this option will be no longer available. As a consequence, the Ombudspersons will address themselves, most probably, to the administrative authority of first instance even if the case is already (or still) pending before the administrative court.

In that context, the pressure on the administrative authority of first instance to make (premature) use of its powers under paragraphs 14 (1) VwGVG or 68 AVG (outlined in the previous sections) could still increase, the more so because the figures cited above seem to show that there is a real need for Ombudspersons' interference.

7.6 Final Considerations: The Reform Assessed from the Perspective of "Good Governance"

As stated above, Austria is currently undergoing a fundamental change in its system of administrative justice, the core element of which is the elimination of (almost) any appeal within the administration, combined with reduced accessibility of the (supreme) Administrative Court. Consequently, most responsibility for legal protection in administrative affairs lies now on the eleven administrative courts of first instance. Is this reform an example of good governance?

Following Article 9 (3) of the Cotonou Partnership Agreement,[112] "Good Governance" can be defined as "the transparent and accountable management of human,

[110] In 2011, 8,377 cases were completed, and in 1,041 cases the Board stated maladministration.

[111] See Report of Ombudspersons, 16ff.

[112] No. 2000/483/EC, OJ 2000 L 317, p. 3, as amended by OJ 2010 L 287, p. 10.

natural, economic and financial resources for the purposes of equitable and sustainable development, in the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law."[113]

In other words, Good Governance includes not only procedures within administration but also the proper functioning of legislation and justice with specific regard to respecting the principles of responsibility and accountability; so, as a broad term, it includes all aspects of how public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights. Good Governance is therefore, also and in particular, linked to the principle of the rule of law—which in turn is very opposite to arbitrariness and corruption within the public sector. In this respect, an effective system of administrative justice is crucial.[114]

When looking closer, one may distinguish several characteristics of Good Governance with regard to the issue of this contribution: openess, participation, legitimacy, effectiveness, efficiency, and transparency matter most.[115]

In that context, when assessing the reform from the perspective of good administration principles, we have to distinguish two opposed aspects:

- On one hand, concentration of the appeals' procedures at eleven administrative courts may render the system more open, transparent, and—by virtue of the famous "economy of scales" allowing to make better use of the overall resources accorded to the judiciary—more efficient in reducing procedural periods and costs.[116]
- On the other hand, the reform could result in a kind of *competition between administrative and judicial remedies*[117] against the background of (and perhaps even stimulated by) a loss of competence of the Board of Ombudspersons in respect of the second stage of administrative procedures now almost completely conferred upon the administrative courts of first instance.[118]

[113] Regarding the realization of the rule of law in this context, see further, e.g., Rothstein and Teorell (2008), pp. 180ff; European Commission (2004), pp. 57ff.

[114] Bundschuh-Rieseneder (2008), pp. 26 (27f); Cotonou Partnership Agreement, Art 9.3; Dolzer (2004), p. 535 (535ff); Rothstein and Teorell (2008), pp. 168ff; Wimmer (2010), pp. 249ff; Bundschuh-Rieseneder (2011) 253ff; Frederickson (2007) 283ff, 292ff; Jann (2003) 449ff; OECD (1997) 60ff; OECD (1999) 11ff; OECD (2005a) 10ff, 27ff.

[115] See i.e. Bundschuh-Rieseneder (2011) 253ff; European Commission (2001); OECD (2005b) 3ff.

[116] Performance orientation and transparent procedures are key facts of effective public management. Further, an associated element of regulatory effectiveness is the need to minimize unintended outcomes. That means avoiding the creation of unnecessary barriers that can frustrate and inhibit reforms, repress economic activity by reducing entry, and exit to particular sectors and markets. Therefore, effectiveness is also ensuring that regulations are precise, not only in identifying the right targets but also in confining the extent of their impact. In fact, that means doing the right things in the right way.

[117] Regarding the relations between administrative procedure and judicial review, see, e.g., Woehrling (2009), pp. 11f; further, Woehrling (2005), pp. 2ff.

[118] See Sects. 7.4.3 and 7.5.

In the latter scenario, just the realisation of the overall "tribunalization" might increase the influence of politicians (and of members of the public service perhaps more interested in "new public management," i.e. "efficacy,"[119] than in the respect for the rule of law) on the content of administrative decisions. Increased margins of maneuvre, combined with a decreased respect for the rule of law, however, more often than not pave the way to corruption.[120] This prospect should be taken seriously: already during the last years, and irrespective of the reform now at issue, intensified efforts have been considered to be necessary in order to combat growing corruption, among them, in the field of penal law, the Act establishing the Anti-Corruption Office[121] and, in the field of institutional law, the Incompatibility and Transparency Act[122] or the Lobbying and Representing Interests Transparency Act.[123] Furthermore, Austria signed the UN Agreement against corruption.[124] Last but not least, the Austrian Federal Ministry of Justice developed a new homepage for whistle-blowers,[125] which enables everybody to inform the public prosecutor on cases of corruption without revealing his/her identity.

So, at the threshold of the new age, we can only hope that the new system will indeed meet the requirements of good administrative justice[126] and, therefore, also of Good Governance and will not, right to the contrary, even aggravate the problems we face already now with regard to securing the rule of law.

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[119] For the exact meaning of this term, with regard to "effectiveness" as well as to "efficiency", see closer Isak (2013), pp. 242ff.

[120] Bresser-Pereira (2004), p. 274.

[121] Gesetz über das Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung—BAK-G, BGBl I 2009/72 as amended by BGBl I 2013/65.

[122] Unvereinbarkeits- und Transparenzgesetz, BGBl 1983/330 as amended by BGBl I 2012/59.

[123] Lobbying- und Interessenvertretungs-Transparenzgesetz, BGBl I 2012/64.

[124] See BGBl III 2006/47 as amended by BGBl III 2011/59.

[125] See, e.g., http://derstandard.at "Justiz startete Whistleblower-Website" 20.03.2013; http://www.diepresse.com "Website für Whistleblower geht in Betrieb" 20.03.2013.

[126] See, in more detail, Administrative Justice & Tribunals Council, pp. 7ff; further, Fabunmi and Araromi (2009), pp. 197ff.

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Chapter 8
ADR Tools in Spanish Administrative Law

Susana Galera, Pablo Acosta, and Helena Soleto

8.1 Administrative Appeals in Spain[1]

8.1.1 Background and Current Regulation

The Spanish model of judicial review was originally set up in 1845 following the French model: such function was initially assigned to the *Royal Council*, later renamed as *Council of State*, which was an administrative consultative body also in charge of controlling the active public administration. However, during all the nineteenth century, political instability was as well reflected in the changing options for judicial review: from 1845 to 1854, it was the *Council of State*; from 1845 to 1856, a specialized judicial body; from 1856 to 1868, back to *Council of State*; the 1868 Revolution brought back a judicial body, the High Court.

The first Spanish Judicial Review Act was adopted in 1888, and it created a mixed body that was made up of professional judges and civil servants; from then on, the *Council of State* remained as a consultative body for the Government. Later, the 1956 Judicial Review Act set up a full judicial system for administrative control, as it was attributed to specialized judicial bodies taking part in the ordinary judicial organization and made up of professional judges.[2]

[1] This section was written by Susana Galera.

[2] See the historical evolution in Martin Rebollo (2012) and a general scope in Galera Rodrigo (2010).

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The 1978 Constitution sets out a new model of Public Administration and a new concept of its relationship with citizens. On one hand, it stated the guiding principles of administrative action, guaranteeing that its activity is fully subject to the legislation and legal order. On the other hand, it considerably enlarged the chances for the citizens to challenge the administrative action due to the "right of a fair trial to protect their legitimate rights and interests," which is now constitutionally provided to all.

Even though predemocratic Acts have been in force for years,[3] the direct legal efficacy of the 1978 Constitution has implicitly repealed those portions of the Acts that set constraints on the full Public Administration's submission to the legislation and the law or on the possibility for the citizens to challenge administrative actions—or inactions—that damage their legitimate rights and interests. This preconstitutional legislation was basically represented by the Administrative Proceedings Act of 1958, the Legal Regimen of the State Administration Act of 1957, and, regarding judicial review, the 1956 Act.

This preconstitutional legislation has been later formally substituted by the Legal Regimen of State Administration and common Administrative Proceeding Act of 1992, num. 30 (Act 30/1992 from now on), and the Act on the Jurisdiction for Judicial Review 1998, num. 29 (Act 29/1998 from now on), among others.

One of the most important changes operated by the constitutional provisions were those relating to the accessibility of citizens to the channels allowing for the administrative action to be reviewed: according to the Constitution—article 24—access to justice is provided to *all* in order to protect their legitimate rights and interests. That meant that preconstitutional restrictions either on *who* is empowered to challenge administrative decisions or on the *scope* of the administrative activity that could be challenged had finally been removed from the Spanish administrative legislation.

Current regulation for administrative remedies is stated in general terms in the 30/1992 Act, allowing interested parties to challenge an administrative resolution they consider illegal trough different types of action. These resources aim to establish a faster way to solve such conflicts, as larger procedures at the judicial stages could theoretically be avoided. On the other hand, the system also allows the hierarchical superior to monitor the administrative activity of his/her dependents according to the hierarchy and the competence principles. In some cases, administrative appeal is compulsory for having access to the jurisdiction; in some other cases, administrative appeal is just an option.

8.1.2 Types of Administrative Appeals

The system of administrative remedies established in the 30/1992 Act is organized around two basic lines. The first one regards ordinary remedies—where the revision is promoted by interested parties—and ex *officio review* for reasons of annulment—

[3] In this respect, it is interesting to realize the legal transition process regarding Administrative Law being adapted to the new constitutional order, a process that took nearly two decades; see Martín Rebollo (2010).

where public administration itself initiates a specific procedure to annul a decision it has previously issued (these situations are strictly defined in 30/1992, Article 62). Besides that, the Taxes General Act provides a specific channel for challenging economic administrative resolutions, and the Public Procurement Act states a special administrative appeal for administrative acts applying its provisions (as requested by the European Union legislation).

In both cases, a controversial issue arises, which has been referred to as the "jurisdictionalisation" of the administrative appeal, meaning that the decision of the administrative appeal is not to be taken by an administrative body but by an Administrative Tribunal, which is taking part in Public Administration but has independence, thus being assimilated to quasi-judicial bodies.

8.1.2.1 Ordinary Remedies

The three types of ordinary remedies are provided for "interested parties," a concept that, as already said, has been notably enlarged due to the constitutional requirements.[4] The concept of "interested party" is now established by 30/1992 Act, article 31, which states:

1. The following are considered interested parties to an administrative proceeding: a) Those initiating it as holders of rights or legitimate individual or collective interests; b) Those who, while not initiating the procedure, hold rights which may be affected by the decision reached by an administrative decision/action; c) Those whose legitimate individual or collective interests may be affected by the resolution and who attend the proceedings before a final resolution is handed down.
2. Associations and organizations representing financial and social interests hold legitimate collective interests in the terms of acknowledged by Law.

In addition to this wide concept of interested parties, other options to challenge administrative resolutions are provided by the Spanish legal system: the public action that is specifically established for particular issues: urban planning,[5] cultural heritage,[6] coastal areas,[7] national parks,[8] and environmental issues.[9]

[4] The preconstitutional legislation required *direct affectation on rights* for one to be allowed to bring an action against the administrative activity. This requirement of *direct* affectation made the standard to sue narrower than is stated in the current regulation (*affectation on rights and legitimate interests*); sadly, *direct affectation* is still a controversial requirement for citizens to bring an annulment action before the European Court of Justice according to article 263, fourth paragraph, TFEU.

[5] Real Decreto Legislativo 2/2008, article 48.

[6] Act 1985, num. 16, article 8.

[7] Costal Zone Act 1998, num. 22, article 109.

[8] National Parks Act 2007, num. 5, article 22.

[9] Access to justice and environmental information Act 2006, num. 27, article 22.

Concerning the type of administrative acts that can be challenged by means of an administrative appeal, the Spanish administrative system distinguishes among the following:

- Normative and nonnormative administrative acts: normative acts are not permitted to be directly challenged by means of an administrative appeal but just through judicial review.
- Final acts and preparatory or intermediary acts: only the first ones can be the object of an administrative appeal, as they put an end to administrative procedure; preparatory acts, which are produced while the procedure has been handled and before the final resolution, could be opposed in the appeal brought against the final act, except in a few cases when a separate appeal is admitted.[10]
- Acts that conclude[11] (or not conclude) the administrative channels: for those concluding the administrative channels, administrative appeal (through *Recurso de Reposición*) is optional; otherwise, the administrative appeal (through *Recurso de Alzada*) is compulsory for further judicial review action to be lodged.

The 30/1992 Act provides three types of ordinary remedies.

– Ordinary Appeal (*Recurso de Alzada*) is mandatory for resolutions that are not final at administrative level, settled by the authority hierarchically superior to the one that issued the resolution. Resolution of this appeal concludes administrative channels, opening the access to the administrative courts. This appeal could be replaced by appeals provided for similar purposes by specific legislation.

  The appeal, regulated by 30/1992 Act, articles 114 and 115, has to be filed within 1 month if the decision was expressly adopted and 3 months since the effects of nonresponse (administrative silence). The resolution has to be adopted and the parties notified in 3 months; otherwise, it has to be considered negative silence, meaning that it has been rejected, with the exception that the challenged resolution was not specifically adopted but arose as well by administrative silence: in such cases, the legal presumption applies in a positive way, that is, (non)resolution has to be considered positive silence.
– Protestation Appeal (*Recurso de Reposición*) is optional and may be filed against administrative decisions concluding the administrative channels that are able to

[10] According to the 30/1992 Act, article 107, administrative remedy could be brought against intermediary acts if they decide directly or indirectly on the substance of the matter, making it impossible for the proceeding to continue, thus causing loss of defense or irreparable loss of legitimate rights and interests.

[11] According to 30/1992 Act, article 109, the following acts conclude the administrative channels: Resolutions in administrative remedies before the hierarchically superior body (*Recurso de Alzada*) or those adopted in other objection proceedings that legally substitute this precedent one; Resolutions of administrative authorities without hierarchical superior, unless otherwise provided for in an Act of Parliament; Resolutions of other administrative authorities when so established in a legal provision or regulation; agreements, arrangements, settlements, or contracts deemed to end the proceeding.

be directly challenged before the administrative jurisdiction. It takes place before the issuing body (30/1992 Act articles 116 and 117).

Although it is an optional appeal, once it has been filed before the administrative authority, the appeal for judicial review may not be filed until a specific resolution is adopted expressly or by administrative (negative) silence. Time limits for filing the remedy are the same as for the Ordinary Appeal; however, the term to answer the appeal is shorter (1 month).

– Extraordinary Revision Appeal (*Recurso Extraordinario de Revisión*) can be used in extraordinary and specific cases provided by law against any final decision. It is regulated by 30/1992 Act, articles 118 and 119.[12]

Additionally, it is possible to distinguish between *internal and external appeals,* depending on whether it is for the same or for a different administrative body to repeal the challenged resolution. In the Spanish legal system, there are two internal remedies, Protestation Appeal (*Recurso de Reposición*) and Extraordinary Revision Appeal, while the Ordinary Appeal (*Recurso de Alzada*) is external as is for the hierarchically superior final decision. Specific remedies that are for quasi-jurisdictional bodies—taxes and public procurement—are external remedies as well.

8.1.2.2 Ex Officio Review

Regarding the ex officio review, the possibility for the public administration to annul its own acts constitutes a classical debate opposing the principle of legality (claiming for illegal acts to be annulled) and the principle of legal security (working for the maintenance of the already issued acts).

The Spanish law distinguishes two basic situations, depending on the acts being favorable or adverse to the interested parties. Regarding the *favorable* acts, revision at the administrative level is allowed just for a higher degree of invalidity (annulment), while in other cases the administrative authority just formally points out the illegality (annullability), having to refer to judicial bodies for the declaration of annulment.

Strictly speaking, ex officio review is limited to those acts having the most serious legal breaches, Which are exhaustively listed by article 62, first paragraph,

[12] Such exceptional circumstances are the following: (1) their issues involved a factual error arising from the documents incorporated into the file; (2) documents appear of essential value for the resolution of the matter, which, while posterior, evidence the error in the resolution appealed; (3) the resolution was decisively influenced by documents or testimony declared in a final court ruling prior to or following said resolution to have been false; (4) the resolution was handed down as a result of prevarication, bribery, violence, fraudulent conspiracy, or some other punishable conduct declared in a final court ruling. In the first of these causes, the term is 4 years following the date of notification of the resolution challenged; in the remaining cases, the period is 3 months from disclosure of the documents or the time when the court ruling becomes final. Term to issue and to notify a resolution is 3 months.

30/1992 Act.[13] The procedure to annul them is regulated by article 102, and the supportive opinion of the *Council of State* on the annulment is required.

This action in fact comprises also an additional action of annulment for interested parties. Although the annulment procedure is initiated ex officio, interested parties are able to ask the public authority to do so, as the annulment procedure is initiated by the Public Administration "on its own initiative or at the request of an interested party." The decision of the public authority refusing to initiate the special annulment procedure can be challenged before the administrative jurisdiction by interested parties, no matter if it is a specific written decision or has been provoked by administrative silence. The Spanish law reinforces such possibility as in cases of higher invalidity—annulment, ex article 62—is not an option but a mandate—"shall to declare"—for Public Administration to declare such annulment.

As the ex officio annulment procedure can be initiated with no deadlines ("at any moment," according to the law), the petition for the initiation of such procedure could be submitted with no deadlines as well.[14] That practically means that administrative revision of acts incurring in full annulment causes is always possible in the Spanish legal system, even when the deadlines for the ordinary remedies have expired a long time ago.

Contrary to the ordinary remedies, ex officio review is admitted relating to administrative provisions having normative nature (general acts), in the following cases: they infringe the Constitution, the legislation, or other higher normative provisions (normative hierarchy principle); those regulating matters reserved to the law (legality principle) or that create retroactivity of penalty provisions, not favorable to or restrictive for the individual rights.

In the second type of *ex officio* review, the procedure is initiated by the administrative authority at the administrative level and is concluded by the judicial body at the administrative jurisdiction level. It relates to illegal acts other than those qualified as absolutely null, that is, the so-called *annullable decisions*, which are all of them infringing legal provisions, including deviation *(détournément)* of power (30/1992 Act, article 63). In these cases, the administrative authorities issue the declaration as to the decision being "detrimental for the public interest"; later, this authority has to challenge the decision in a judicial review procedure.[15]

[13] That is, (a) When they infringe constitutionally protected rights and liberties; (b) when handed down by an authority manifestly incompetent because of the subject or territory; (c) when the content is impossible; when constituting criminal infraction or handed down as a result thereof; (e) when they totally and absolutely ignore the legally established procedure or the provisions containing the essential rules for the creation of collective authorities will; (f) specific or presumed decisions contrary to the legal provisions by which powers or rights are acquired, when the essential prerequisites for such acquisition are absent; (g) any other expressly created in a legal provision.

[14] Although there is no specific deadline, there is a general limit, as the review cannot be intended "when because of negative prescription of actions, the time elapsed or other circumstances, it conflicts with equity, good faith, individual rights or the legislation" (30/92 Act, article 106).

[15] It is regulated by the 1992 Act, article 103.

Finally, and regarding nonfavorable or adverse acts, the 30/1992 Act, article 105, enables the Public Administration to revoke them, provided that such revocation does not mean an exemption that is not permitted by law or is contrary to the principle of equality and public interest of the legal provisions. As well, it is allowed to rectify them, regarding factual or arithmetical errors.

8.1.2.3 Specific Regulations: Taxes and Public Procurement

In Spain, fiscal complaints are dealt with by the specialized administrative bodies, *Tribunales Económico Administrativos*: the General Tax Act no. 58/2003 provides that management, clearance, and recovery of taxes, on one hand, and dealing with complaints, on the other, are entrusted to different bodies. Even though they are administrative bodies attached to the Ministry of Economic Affairs and Finance and are made up of administrative officials, the regulation assimilates theses bodies to judicial ones. In fact, final decisions of the *Tribunales Económico-Administrativos* may be neither overturned nor modified by the tax authority,[16] which must enforce them and, where appropriate, implement a rectification of the contested act or reimburse sums paid in error. This independency was pointed out by the European Court of Justice,[17] who admitted a preliminary rule submitted by these kinds of bodies, considering them courts in the sense of article 267 TFEU.

It is for the Local, Regional, or Central *Tribunal Económico Administrativos* to deal with the fiscal claims depending on the territorial scope of the authority that issued the challenged resolution. The jurisdiction of those *Tribunales* is compulsory, as the decisions of the tax authority can be challenged before the administrative courts only after complaint proceedings have been brought before them.

Concerning Public Procurement issues, the Spanish regulations have been hugely influenced by the European Union Directives and case law, particularly relating to the definition and scope of the concept of "public powers" being submitted to the Directive's rules. Based on the European Union Directives,[18] there are specific ways to challenge administrative decisions issued during public procurement procedures, a specific remedy that substitutes the general ones—Ordinary Appeal and Protestation Appeal. This regulation has been adopted by the 34/2010 Act, which has been later integrated into the currently in force 3/2011 Act. However, it has to be pointed out that these specific remedies are just applied in the cases covered by the European Directives—when the contract's value at stake is above the EU threshold; in practice, that means that there is a dual regime: a specific remedy, which is dealt with by the Administrative board for Public Procurement

[16] Occasionally, the Minister for Economic Affair and Finance is to rule on fiscal complaints that the Tribunal Económico Administrativo Central has judged, by reason of their nature, the amount involved, or their importance.

[17] Judgement of the court of 21 March 2000, Cases C-110/98 to 147/98.

[18] Directive 2007/66/CE.

and applied when contracts' value is above the EU threshold, and the ordinary remedies, when the contracts' value is below this threshold.

Besides the procedural aspects—such as time limits for applying, form, procedural stages—the most peculiar aspect in this specific remedy is the possibility to provide for a minimum standstill period during which the procedure cannot go further. Breaking the general Spanish rule working for administrative remedies—nonsuspensive effects—the suspension of the procedure is automatic when the challenged resolution is the award decision.

8.1.3 Suspensive and Devolutive Effects

The general rule in Spanish Administrative appeals is the nonsuspension of the challenged administrative decisions. This rule is consistent with the two main prerogatives attributed to the public administration: on one hand, self-declarative power (30/1992 Act, article 56), according to which there is a validity presumption of administrative decisions, having effects from their date of issuance,[19] and, on the other hand, self-executive powers (30/1992 Act, article 94), according to which decisions of the public administration are enforceable immediately as a general rule.

It is for the competent body dealing with the appeal to decide about the possible suspension of the challenged decision, *ex officio* or at the appellant's request. It has to decide on the basis of two types of considerations: on one hand, the damage "which would be caused to the public interest or third parties by the suspension" and, on the other hand, the damage "which would be caused for the appellant by immediate enforcement of the decision against which remedy is brought." In any event, it is required that "the enforcement may cause loss which is impossible or difficult to redress" and/or that "the objection is based on any of the causes of absolute annulment provided for in article 62."

Suspension may continue beyond exhaustion of the administrative channels when there are precautionary measures whose effects extend to the channels of judicial review. If the interested party files appeal for judicial review seeking suspension of the decision that is the subject of the procedure, such suspension will remain in place until the courts rule on the application.

Regarding *ex officio review*, once a review procedure is issued *ex officio*, the authority with competence to resolve this may suspend enforcement of the decision if it may cause losses of impossible or difficult redress (article 104).

There are some special rules on suspension of challenged decisions for specific issues, among others:

[19] Except if there are subject to notification, publication, or approval at a higher level or it order otherwise.

- Decisions applying penalty proceedings will not be enforceable until the decision ends the administrative channels[20]; that means that if the resolution is able to be the object of an Ordinary Appeal (*Recurso de Alzada*), it will have suspensive effect until the appeal is being decided.
- Economic administrative decisions applying tax procedures are not enforceable if a claim has been brought and financial guarantees or deposit has been presented.
- The special appeal in public procurement procedures has, in some cases, suspensive effects paralyzing the procedure until its resolution.[21]

8.1.4 The Scope of the Review

The resolution deciding the administrative appeal may, according to 30/1992 Act, article 113, declare the plea inadmissible, uphold fully or partly the plea, or dismiss it.

The competent authority has to rule on any matters submitted by parties that have been raised in the proceedings. Additionally, it has a wide discretion to introduce new ones; the interested parties also have in this case the right to bring pleas, and always the observance of the prohibition of *reformatio in peius* is assured. Third paragraph of article 113 states:

> The authority deciding the remedy will rule on any matters or form and of substance, raised in the proceeding, whether or not alleged by those interested. In the latter case, they will first make submissions. However, resolution must be consistent with the petitions brought by the appellant and may no under any circumstances aggravate its initial situation.

This provision omits any reference to the possible contents of the resolutions except its obligation of being consistent with the appellant's petition. When the precedent article 110 rules on "filing the remedy," it misses as well indications on the petition's content, as it only refers to the requirement that the remedy must indicate "the decision appealed an the reason for challenging it"; that is, it lacks any reference to the kind of petition the appellant is allowed to submit (annulment and/or restoration of individual situation and/or compensation for damages).

The procedural economy principle works for all the matters raised in the proceeding, directly or indirectly, which will be decided. However, and regarding possible compensations arising from the challenged activity, there is a specific procedure stated in article 142, attributing the competence to decide to the Ministry[22] concerned, based on a previously favorable rapport of the Council of State.

[20] 30/1992 Act, article 138.

[21] Real Decreto Legislativo 3/2011, article 45.

[22] Or the Council of Minister, the autonomous governments, the local authorities, depending on each case.

Contrary to this, in the case of the resolution coming from an ex officio procedure, the law specifies that "the resolution can as well indicate the compensation which must be granted to the interested –when legal requirements are complied with-, even when the decision contested in the application remains in place" (article 102, fourth paragraph).

At least, as a legal possibility, the 30/1992 Law provides for the termination of the administrative procedure by means of alternative dispute resolution tools (pacts, agreements, conventions or contracts) under the condition that the issue may be the object of such transaction. These possibilities are specifically stated for the general administrative procedure, but nothing prevents their application in the procedure of administrative appeal.

8.1.5 Judicial Review

Administrative jurisdiction in Spain is a specialized judicial section being part of the ordinary judicial system that is governed by the Organic Law 29/1985 regulating judicial power. The Spanish Constitution establishes a single judicial power in the Spanish territory: according to this, regional courts (Superior Justice Courts), whose territorial competence coincide with the territory of the Autonomous Regions, constitute an intermediate level in the organization—above the Administrative Judges and below the Supreme Court.[23] These bodies are governed by the General Council of Judicial Power.

Specifically, since 1998, administrative jurisdiction has been governed by the 29/1998 Act, which substitutes the former one that dates from 1956 and establishes the specific competences of each of the judicial bodies and its specific standard of operation. There are not advisory functions attributed to the administrative jurisdiction but just the legal control of the administrative activity.

The control of the activity (or inactivity) of the public administration *stricto sensu*, and also of other public bodies—the legislative, high courts, or other constitutional bodies—falls under the competence of the administrative courts. In this regard, 29/1998 Act, article 1 states:

1. Single- and multi-judge administrative courts shall hear demands entered in connection with the action of the public administration subject to administrative law, in connection with general provisions of a rank below that of act, and in connection with legislative decrees that overstep the limits of sub-delegation.
2. For the intents and purposes of this act, public administrations shall be understood to be:
   a) The national state administration.
   b) The administrations of the autonomous communities.
   c) The entities belonging to local administrations.

[23] There is an additional judicial body, the Audiencia National, which has been trusted for specific issues. See Palomar Olmeda (2008–2010).

d) The entities organised under public law that are dependent on or linked to the state, autonomous communities or local entities.

3. Single- and multi-judge administrative courts shall also hear demands entered in connection with:
   a) Acts and provisions in matters of personnel, administration and asset management subject to public law adopted by the competent authorities of the Congress of Deputies, the Senate, the Constitutional Court, the Court of Auditors and the Ombudsman, likewise by the legislative assemblies of autonomous communities and the autonomous community institutions analogous to the Court of Auditors and the Ombudsman.
   b) Acts and provisions by the General Council of the Judiciary and administrative activity by governing bodies of single- and multi-judge courts, in the terms of the Constitutional Act on the Judiciary.
   c) Action by the election administration, in the terms of the Constitutional Act on General Election Procedure.

8.1.5.1 Standing

The 29/1998 Act establishes in its article 19 that all persons or entities that have a right or a legitimate interest can bring a complaint before the judge. Moreover, the right to act is accorded to affected companies, associations, trade unions, groups, and entities legally entitled to protect legitimate rights and collective interests. This right to act is also extended to all citizens who make use of the "popular action" whenever the law specifically establishes this possibility (town planning, environment, cultural heritage).

Regarding the public entities, the general Administration of the State can dispute the acts of the autonomous and local administrations. These autonomous and local Administrations, in order to guarantee their autonomy, can also dispute acts of the general Administration of the State.

Finally, the entities of public law having their own legal entity, which belongs to the "Institutional Administration," have the right to act against the acts or the provisions that affect them.

8.1.5.2 Scope of Review

According to the 29/1998 Act, those who are entitled to act are empowered to challenge not only administrative resolutions and normative provisions but also unlawful inactivity and material activities constituting *ultra vires* action, that is, those material activities set up without the required procedural guarantees (*via de hecho*, as a material occupation with no previous expropriation procedure).

Normative provisions have to be directly challenged by judicial appeal as administrative remedies are not allowed; contrary to it, administrative resolutions are only admissible for judicial appeal once they "have exhausted administrative channels," that is, they have been provided by an administrative authority whose

resolutions have *per se* such character, or, otherwise, the administrative resolution has been already appealed by an Ordinary—administrative—Appeal (*Recurso de Alzada*).[24]

8.1.5.3 Types of Procedural Rules

There are two general procedures to be followed in the judicial procedure: a short procedure, which starts by filling the principal complaint (29/1998 Act, article 78), and a general one, which starts with a written application that merely cites the provision or administrative activity and complaint to be considered (29/1998 Act, articles 45 and ff.). In this last case, the judicial body asks the administrative body (the defendant) to provide the whole administrative file that will be sent to the claimant in order to provide all the information necessary to file the principal complaint.

Beside those, there are specific procedures for particular issues: first, the procedure for the protection of fundamental personal rights (29/1998 Act, article 114 and ff.); second, questions of illegality (29/1998 Act, article 123 and ff.); third, prior suspension of administrative resolutions of public entities or corporations (29/1998 Act, article 127).

Regarding *links between administrative review and judicial review*, it has to be pointed out that the claimant is not allowed to change the demands he/she has made on the administrative appeal. However, the introduction of new legal reasoning that has not been invoked at the administrative level is specifically allowed by article 56, first paragraph, 29/1998 Act.[25]

On the other hand, whether the challenged decision has been already suspended in the administrative appeal, if the interested party brings the judicial review seeking suspension of the decision, such administrative suspension will remain in place until the courts rule on the application (30/1992 Act, article 111, fourth paragraph).

While the proceeding is pending, the Spanish judge is allowed to have an active role: in this regard, it is for the judge to admit evidence that has been proposed by parties, depending on the importance of facts according to his/her opinion (article 60, paragraph 3); the judge is allowed to admit evidence ex officio, giving the parties the right to participate and to plea (article 61); as well, the judge is allowed to include grounds relevant to the judgment that have not been considered by the parties, having the right to be notified about and to be heard on these new grounds (article 65, paragraph 2).

[24] As the resolution of an ordinary remedy, Recurso de Alzada, exhausts the administrative channels.

[25] Although it is not always directly applied, particularly concerning tax claims. For confirming this possibility, see Constitutional Court Judgments no. 58 and 61/2009 of 9 of March and no. 155/2012, of 16 of July.

8.1.5.4 The Ruling

The control performed by the judge is a legality one, and consequently the "ruling shall uphold the claim for judicial review when the provision, action or acts commit any legal offense, including *détournement du pouvoir*." In these cases, and depending on which demands have been stated in the request, when the ruling upholds the claim (article 71, paragraph 1):

a) It shall declare the protested provision or act unlawful and quash it in full or in part or shall order the challenged action stopped or modified.
b) If the claimant sought acknowledgement and reinstatement of a legal situation specific to an individual, the ruling shall acknowledge the said legal situation and take such measures as necessary for the full reinstatement of the said legal situation.
c) If the measure consists in issuance of an act or performance of a legally binding action, the ruling may set a period for compliance with judgement.
d) If a demand for damages is upheld, the right to redress shall at all events be declared, indicating likewise who is obligated to pay compensation. The ruling shall also set the amount of the compensation when asked expressly by the claimant to do so and sufficient proof is a matter of case record. Otherwise the bases for determining the amount shall be established.

There are two specific limits for rulings (article 71, paragraph 2), having their roots in the *separation of power principle*: on one hand, if a normative provision has been annulled, the judge is not allowed to "determine how the precepts of the provision must be worded" and, on the other hand, he/she "may not determine the discretionary content of the annulled acts."

Finally, and still from the separation of power's perspective, the 29/1998 Act makes huge changes regarding the former regulation on execution of rulings. According to the 1956 Act, once the ruling is final, it is communicated to the public administration that is compelled to adopt all the resolutions that are needed to comply with the ruling. Besides that, there are some possibilities for the Council of Ministers to declare the suspension or nonexecution of the rulings. After the Constitution of 1978, this regulation conflicted with the constitutional provision, attributing to the judges the power to judge and to execute the rulings. The Constitutional Court's doctrine reinforced the constitutional inconsistency as it interpreted the "right to a fair trial" as comprehensive as well of the "right to get the rulings executed" besides the right of access to court and the right of having a ruling based on law.[26]

The current 29/1998 Act adopts this constitutional perspective, excluding governmental interferences at the execution stage and reinforcing the judge's faculties at such stage.

[26] See Constitutional Court, Judgment 32/1982, 7 June.

- Firstly, it declares that "the power to have rulings and other judicial decisions executed belongs exclusively to the courts of this jurisdiction" (article 103, paragraph 1); it rules such execution in voluntary terms and, on a subsidiary basis, the compulsory execution by means of an incidental question (article 109, paragraph 1) that could be completed by the statement of periodic fines (article 112).
- Secondly, it reduces the possibility for the governmental suspension or nonexecution of ruling; currently, such possibility requires, on one hand, the "expropriation of legitimate rights or interest" and, on the other hand, "causes making physically or legally impossible to execute the ruling" to be invoked by the government and accepted by the judge, who will state the appropriate compensation (article 105). Furthermore, it is specified what "causes of public or social interest" to expropriate a ruling means (article 105, third paragraph), being finally stated that "acts and provisions contrary to the pronouncement of rulings and dictated with the end of evading compliance shall be null and void" (article 103, fourth paragraph).
- Thirdly, if the ruling compels the public administration to do a specific activity, in the event of noncompliance it is permitted to execute the ruling with the court's own means or even to demand the cooperation from the same or other public administration (article 107).

Finally, it has to be pointed out that the ruling can state the "nonadmission of the claim" for judicial review, according to article 68, 29/1998 Act. This event, when there is a too long period between the initial claim and the final—nonadmission—judicial resolution, is able to mean an infringement of the right of a fair trial granted not only by the Spanish Constitution but also by article 6 of the European Convention of Fundamental Rights, as its judicial body has already stated.[27]

8.1.6 Empirical Data

It is not easy to get actual data on administrative appeals such as number of requests, estimative resolutions, dismissal of petitions' resolutions, or failure to prosecute the action. We've asked for such data from different departments at the central level, having short reply from those who deal with Administrative Appeals submitted in the framework of specific regulations (see above Sect. 8.1.2.3): economic administrative appeals and special appeals on public procurement (this last adopting its first resolution on November 2010). The data gathered are presented in Tables 6.1 and 6.2.

[27] See Judgments of the ECHR 7 of June 2007, Case Salt Hiper, and 15 of December 2009. Case Llavador Carretero, among others.

Table 6.1 Economic administrative appeals

	2007	2008	2009	2010	2011
Resolutions	1,329	1,204	1,503	2,099	2,705
Upholding pleas	134/10.0 %	83/6.7 %	97/6.4 %	48/2.3 %	69/2.5 %
Dismissing pleas	1,195	1,121	956	2,051	2,636

Source: Data compiled by the author based on empirical data from Spanish public authorities

Table 6.2 Special appeal on public procurement

	2010[a]	2011	2012[b]
Resolutions	37	335	132
Upholding pleas	1	42	38

Source: Data compiled by the author based on empirical data from Spanish public authorities
[a]First resolution delivered on November 2010
[b]From January to June the 30th

8.2 The Spanish Ombudsman[28]

8.2.1 The Spanish Ombudsman: Legal Framework

It is well known that the institution of the Spanish Ombudsman, *Defensor del Pueblo*, has its immediate predecessor in the Swedish parliamentary Ombudsman created in 1809.[29] Distant in time, but closer to the Spanish tradition, another precedent can be found in the Iberian peninsula during the Muslim occupation that started in the year 711 (AC). A peculiar institution for the protection of the weak, a magistrate named Sahib al-mazalim, which means "Lord of the injustice," existed in Al-Andalus.[30]

The Constitution adopted in 1978 is the supreme law in Spain. From a historical perspective, this Constitution is the result of the need to overcome a 40-year lasting military dictatorship, a long period during which political freedom and civil rights were not on a par with European modern democracies. As a consequence of this process, the 1978 Spanish Constitution is biased towards a strong protection of civil rights. The constitutional text is directly applicable as a law, and the civil rights are written in the Constitution, the Law of Laws. Any citizen may appeal for his or her rights before ordinary courts or before a special jurisdiction embodied in a Constitutional Court, following a specific procedure for the protection of the constitutional rights.[31]

[28] This section was written by Pablo Acosta, Doctor of Law, Senior Lecturer at the Universidad Rey Juan Carlos, Madrid, Spain.

[29] Peñarrubia Iza (2001), p. 25. A general Approach in Gil Robles (1979 and 1981).

[30] García de Valdeavellano (1977), p. 671.

[31] This procedure is named "recurso de amparo."

The framework of the civil rights protection was completed with the insertion in the constitutional text of a new figure. For the first time in our constitutional history, the institution of the Ombudsman was brought into the Spanish legal system, under the name *Defensor del Pueblo*.[32]

The fact that this institution is included in the constitutional text has a special value, as the Spanish Constitution has a direct legal value. The Spanish Constitution is a true law, Law of Laws. All other acts and regulations are submitted to the Supreme Law, the Constitution, following a principle of hierarchy. Any law or regulation that is contrary to the Constitution will be declared unconstitutional and therefore null by the Constitutional Court or by the ordinary courts, depending on the rank of the regulation. This fact has a crucial political consequence: the constitutional institutions are protected against political changes. The constitutional reform is such a complex process that a simple political change is not sufficient to modify the constitutional provisions. The upcoming of a new Government, whatever its ideology, will not change the basic institutions of the Spanish legal and political systems, including the Ombudsman.

8.2.2 The Defensor del Pueblo *as an Adaptation of the Swedish Ombudsman*

It is undeniable that the Spanish institution finds its roots in the Swedish Ombudsman, but the *Defensor del Pueblo* is not a mere copy of it but an adaptation of the peculiarities of the Spanish system and needs.

The Defensor is, as his Nordic counterpart, a high commissioner of the Parliament, appointed by the Congress and the Senate for a period of 5 years (legislative election is called every 4 years) to act with broad independence in the defense of constitutional rights, having the power to supervise the activity of any public administration, to investigate public officers' conduct, and to disclose cases of maladministration.

The Spanish Defensor provides an alternative dispute resolution tool in relation to court proceedings. In his/her work, the Defensor operates as a device meant to settle disputes, different from the courts. Quite often, the simple communication of a complaint to the concerned administration serves as a stimulus to solve the problem, as no public authority will be willing to appear in the activity of the Defensor as an example of maladministration or breach of rights.

[32] Spanish Constitution, article 54: "An organic act shall regulate the institution of the Defensor del Pueblo as the High Commissioner of the Parliament appointed for the protection of the rights contained in this title, for which purpose he may supervise the activity of the Administration, informing the Parliament of it."

8.2.3 The Defensor as an Independent Authority Only Subject to the Law

The role of the Defensor as a guardian of civil rights is essential in the Spanish administrative design; the institution is a device of control over the State's administrative performance, together with other judicial, parliamentary, budgetary, or internal controls. The Spanish Ombudsman, taking root inside the supreme organ of control, the Parliament, however operates with independence, only subject to the law. The Defensor's mission is essentially legal and his/her action is fully independent. In the words of the Ombudsman law, the Spanish Defensor shall not be subject to any binding terms whatsoever and shall not receive or admit instructions from any authority. He/she shall perform the inherent duties independently and according to his/her own criteria.

Legal instruments protect the independence of the Defensor: he/she enjoys legal immunity and is subject to a broad regime of incompatibility. The strong independence of the Defensor does not mean, in any sense, that he/she may act beyond the boundaries of the rule of law. The Defensor is tied to the Constitution and the laws, as any other public authority or institution. In his/her investigations and recommendations, the Spanish Ombudsman must respect, defend, and promote the law, with no exception. The institution of the Spanish Ombudsman is also ruled by a specific law[33] that the Defensor must observe in his/her duties.

8.2.4 The Spanish Defensor Towards the Citizens and the Scope of Competence

The Defensor del Pueblo is meant to have a close relationship with the citizens. In fact, no special requirements are needed to become a candidate other than the political support of the political parties in the chambers, as any Spanish citizen who has attained the age of majority and enjoys full civil and political rights may be elected Ombudsman. The Congress is a House of Representatives where the popular sovereignty is deposited, so it would not make sense to require an exceptional profile from the candidate; the purpose is to elect a citizen to defend other citizens' rights and interests.

The Ombudsman may investigate and pursue, by own motion or in response to a request from the party concerned, any investigation conducive to clarifying the actions or decisions of the Public Administration and its agents regarding citizens,

[33] Organic Act 3/1981, April 6th, regarding the Ombudsman. Organic acts require a reinforced majority to be passed.

with special observance to the constitutional rights proclaimed in Part I of the Spanish Constitution.[34]

Any individual or legal entity that invokes a legitimate interest may address the Ombudsman, without any restrictions whatsoever. There shall be no legal impediments on the grounds of nationality, residence, gender, legal minority, legal incapacity, confinement in a penitentiary or, in general, any special relationship of subordination to or dependence on a public administration or authority.

Nowadays, electronic communication with the Defensor's office is possible through the Internet and has become a primary way for the public to access the institution. The office of the Defensor is thus easily reachable. Besides, the access to the Defensor is also free of charge for the party concerned, and attendance by a lawyer or solicitor shall not be compulsory.

The Ombudsman shall inform the party concerned of the results of his/her investigations and operations and similarly of the reply from the Administration or civil servants involved, except in the event that on account of their subject matter they should be considered confidential or declared secret.

The scope of the competence of the Spanish Ombudsman extends not only to the National Administration but also to the Autonomous Communities, Local Administrations, State Institutions, and other public legal entities. Therefore, the scope of competence covers all national territory and every public administration. The Autonomous Communities are allowed to have their own Ombudsmen, and most of them have adopted the institution. The relationship between national and regional institutions is based on the principle of cooperation.

The scope of the competence of the Defensor is not confronted with any territorial limit and also extends to all the territory and all the Administrations, including civil and military. A caution is imposed: his/her investigations may not produce any interference in the command of the National Defense.[35]

8.2.5 The Defensor del Pueblo as an Alternative to the Judiciary and the Administrative Appeal

As judges and prosecutors may do, the Ombudsman has authority to investigate the activities of Ministers, administrative authorities, civil servants, and any person acting in the service of any public administration. But in opposition to the Judiciary, the Defensor does not have the power to declare invalid or null an administrative act, nor can he/she impose any conduct. The Defensor's opinions and recommendations are not even imperative.[36]

[34] Astarloa Villena (1994), p. 45.

[35] Peñarrubia Iza (2001), op. cit., p. 105.

[36] Fairén Guillén (1982), p. 86.

The Defensor del Pueblo is an authority but does not have specific law enforcement powers. Instead, his/her powers have to do with persuasion. In fact, persuasion is the most characteristic feature of the Ombudsman institution.[37] Quite often, the Defensor will face the usual bureaucratic reactions to the institution's queries as dodging, denial of collaboration, or lack of response. In these cases, drive, ingenuity, and charisma are valuable personal skills. The lack of enforcement instruments is not a fault of the Spanish system but a convenient piece of the Defensor's design. Law enforcement instruments belong to Public Administration and to the courts; the Defensor operates on a different way, using the tools of persuasion. The Defensor is not a judge nor an inspector but a defender of civil rights. Therefore, the Ombudsman and courts operate at different levels.

Being different in proceedings and means, both the Judiciary and the Ombudsman are dispute resolution institutions. The Judiciary is more formal in its strict proceedings; the Ombudsman is more efficiency oriented. The Ombudsman provides the citizens with an alternative dispute resolution tool in relation to the Judiciary and the administrative appeal. Addressing a complaint to the Ombudsman may result in a fast and free resolution of a conflict. Bringing a conflict before the courts may result in an endless and expensive legal dispute with an uncertain end.

Regarding mediation, the Spanish regulation does not assign specific powers to the Ombudsman, so his/her faculties in this field are informal rather than formal.[38]

The tools of the Ombudsman are informal mediation and persuasion, but the Defensor may also report maladministration and promote the punishment to the responsible. The Ombudsman may, by own motion, bring actions for liability against all authorities, civil servants, and governmental or administrative agents, including local agents, without needing under any circumstances to previously submit a written claim.

Despite this authority to force the collaboration of the civil servants and authorities, the Defensor is not empowered to modify or overrule the acts and decisions of the public administrations and is neither empowered to ask the Judiciary to do so. The prerogative to judge is reserved to the Judiciary.

8.2.6 Empirical Data

The Defensor del Pueblo receives complaints and produces outputs in three different ways: answering to the citizens, issuing annual reports, and addressing to the Parliament. Reports[39] provide the numerical data that permit a quantitative tracking of the institution. The 2011 Annual Report shows that the number of cases delivered in this period ascended to 24,381. This number may be split as follows: 31 %

[37] Corchete Martín (2001), p. 129.

[38] Carballo Martínez (2008), p. 262.

[39] http://www.defensordelpueblo.es/en/index.html.

Table 6.3 Summary of activity of the Spanish Ombudsman 2007–2011

Spanish Ombudsman	2011	2010	2009	2008	2007
Individual complaints	16,353	16,759	18,392	15,804	14,254
Collective complaints	7,522	17,449	3,626	7,842	2,857
Own motion investigations	506	466	269	253	262
Total cases	24,381	34,674	22,287	23,899	17,373

Source: Data compiled by the author based on empirical data from the Spanish Ombudsman Institution

collective complaints, 67 % individual complaints, and 2 % own motion investigations. One of the reasons for the raising number of complaints may be the availability of electronic means to communicate with the Defensor's office. Two-thirds of the total complaints were addressed through e-mail or through the application forms available on the website of the institution.

The different investigations of the Defensor in 2011 have been classified by the institution by areas and percentages as follows: home affairs and justice, 24.5 %; economic affairs, 23.7 %; health and social affairs, 13.0 %; education and culture, 12.7 %; housing, urban development, and environmental issues, 9.5 %; migrations and equality of opportunities, 8.6 %; public employment, 7.3 %; police, army, and other security bodies, 0.5 %.

Table 6.3 shows the evolution of cases brought before the Defensor's office during 2007–2011.

The strong peaks shown in the collective complaints tracking have an explanation: moments of social conflict give groups the incentive to involve the Defensor in the resolution of such conflicts (for instance, the conduct of the police forces before the massive demonstrations of the 15-M movement). Therefore, collective complaints are quite variable from 1 year to the other, as they depend on the initiatives of social groups and the collection of adhesion signatures. Collective complaints are stimulated by political facts and social reaction; the amount of individual complaints is more stable, as the issues that concern individuals do not suffer such variations. The increase in the number of own motion investigations shows the efforts of the Defensor's Office to be proactive in certain areas where complaints are scarce, for whatever reason.

Summing up, the Spanish Ombudsman is the High Commissioner of Parliament appointed by it to defend the rights established in Part I of the Constitution, for which purpose he may supervise the activities of the Administration. The main characteristics of the institution are independence, the protection of civil rights, and the supervision of the Public Administration's activity to fight maladministration. But the Spanish Defensor cannot be considered a formal alternative way to the exclusive role of the Judiciary. The decisions of the Defensor do not have any normative value.

8.3 ADR Techniques in Administrative Proceedings[40]

ADR in administrative matters is still in its infancy in Spain. There are no ADR proceedings imposed by law before resorting to courts in administrative law matters. However, there are some legal rules allowing the introduction of mediation by law, but they are seldom used. Only some regions of the country have developed referral to mediation in administrative disputes on the frame allowed by the general administrative Spanish legislation.

8.3.1 The 2012 Mediation Law and the Exclusion of Administrative Matters

Mediation in Spain is an institution under development in the most basic fields. Spain is a country with a very conservative conflict resolution system. Until the beginning of the current century, administrative appeal or jurisdiction was regarded as the only way to control the Administration's activity, even though the administrative legislation has been open, already since 1992, to the introduction of alternative dispute resolution in administrative matters.

Resistance to alternative dispute resolution was patent in the transposition of the 2008 EU Directive for mediation in civil and commercial matters, which was not carried out until the spring of 2012, and this happened only after an infringement procedure was initiated by the European Commission.

The first and only general law regarding mediation was issued in June 2012, and it established the basic principles of mediation and specifics related to civil procedure. The scope of the 2012 Spanish mediation law on civil and commercial matters was generous, and instead of focusing only on cross-border issues, the national law did regulate mediation for all civil and commercial matters. However, the law was not applicable to administrative, criminal, and labor cases or to consumer issues.

It is common among the more conservative administrative systems to mistrust solutions that do not consist in an the administrative decision or a Court resolution, and the 2012 legislator opted for a careful approach regarding what could touch administrative matters, dismissing the possibility to offer some common ground for mediation also for administrative conflicts.

For now, there is some possibility to reach agreements in many fields, such as fiscal decisions (one of the issues asked in the research) and other matters, such as civil servant issues, damages, free competence, environmental responsibility. It would be easier to introduce court-connected mediation, as we would not need any legal modification to allow the Court to make some referrals then develop

[40] This section is written by Helena Soleto.

mediation as a legal procedure, something that is being given to general inclusion in the future.

8.3.2 Is There Room for ADR Procedures in the Administrative Law?

The Spanish administrative system is currently prepared to introduce mediation as an alternative dispute resolution tool.[41] It seems that the Spanish legislator is immune to general soft law instruments regarding mediation, and initiatives such as the Council of Europe Recommendation Rec (2001) 9 of the Committee of Ministers to Member States, on alternatives to litigation between administrative authorities and private parties, have had null or very little impact.

Spain's basic administrative law, the 30/1992 Law (Ley de Régimen Jurídico de las Administraciones Púbilcas y del Procedimiento Administrativo Común, LRJPAC), has allowed, since 1992, the replacement of the traditional administrative decision making by agreement between administration and individuals (art. 107.2). This law also allows the conclusion of the administrative procedure when an agreement is reached and as long as it is not against the public interest, meaning that it is not contrary to public regulations and it is not touching upon nonnegotiable matters (art. 88).

8.3.2.1 Development of Mediation Procedures as an Alternative to the Administrative Appeal Ex. Art. 107 LRJPAC

It is possible, since it is thus stipulated by art. 107, to replace the administrative appeal, in certain cases or areas, with other methods of dispute, claim, conciliation, mediation and arbitration, corporate bodies or commissions to specific unsafeguarded hierarchical instructions and with respect to the principles, guarantees, and terms of the same act.

In Spain, there are three main Administrations with power to develop some legislation, always respecting the main directives of the central Administration. Thus, the most modern regions in the country have developed this possibility ex art. 107 and established mediation procedures that are alternative to the administrative appeal. Article 79 of the Catalonian Act of 26/2010, of 3 August, on the legal and procedural aspects of the Catalan government, opens the door to mediation on those fields, and the Basque Country legislation did introduce mediation as a mechanism for the protection of the environment (Chapter V of Act 3/1998 of February 27, general environmental protection Basque Act).

[41] See some classic problems of ADR relating administrative issues on Cordón Moreno (2010).

8.3.2.2 The Replacement of an Administrative Decision by an Agreement Reached by Mediation, Conciliation, or Other Procedures

In its second paragraph, art. 88 of the LRJPAC mentions that "The government may conclude covenants, agreements or contracts with public or private individuals, provided those are not contrary to the legal system or concerning matters not subject to transaction, and that they are intended to satisfy the public interest within the scope, purpose and specific legal regime provided, and such acts may be regarded as a conclusion to the administrative procedure. . .."

Article 88 does not specifically mention the mediation agreement as a way of termination of the procedure, but it seems that there would be no objection to integrate it therein, given its conventional nature.

Many administrative acts have developed the mechanism of the convention, but almost none of them have included mediation as an instrument. For example, the act that rules Government liability (RD 429/1993, of 26 March) regulates administrative procedures concerning liability, including certain conventional procedures.

Also, sanctioning administrative law reveals the existence of conventional mechanisms in the completion of certain procedures. Article 22 of RD 1398/1993 allows for establishing a procedure of conventional termination for fixing the amount of damages that may arise, if any, for any damage or loss incurred by the public administration as a result of the commission of an offense against the citizen. RD 261/2008 develops a similar solution in art. 39 in order to guarantee free competition. Law 26/2007, of 23 October, on environmental responsibility, also includes the conventional termination of the administrative procedure. Royal Decree 1778/1994, which includes the rules for the issuing of permits, provides in Article 5 the possibility of termination by agreement in this area, as long as this is compatible with the nature of the activity regulated. In the taxation act, the possibility of an agreement between the citizen and the Administration, to end the taxation procedure, has been established since 2003. Article 155 of the Ley General Tributaria (tax system act) allows an agreement between the citizen and the tax inspector. The issues that can be managed between the parties have to be related to facts, assessments, and indefinite juridical concepts. Some point out that this possibility was offered in prior legislation but was never developed.

8.3.3 Further Developments Concerning ADR Law

In Spain, the first and most important impulse to mediation came from GEMME, the European Group of Magistrates for Mediation and the General Council of the Judiciary, which wants to promote legislative reform to reflect mediation in a specific law (and subsequent regulations). Seminars for judges have been held and revealed a great interest in the matter, as information of the practices in other countries.

As for the court-connected mediation, article 77 of Law 29/1998, of 13 July, regulating the administrative court proceedings, states:

> In proceedings in first or single instance, the judge or court, by its own motion or upon request, once the complaint and the answer have taken place, may submit to the consideration of the parties the acknowledgment of facts or documents, and the possibility to reach an agreement to end the dispute, when judgment is promoted on matters subject to transaction and, in particular, when it deals with the estimation of an amount.

This paragraph allows the referral to mediation, a practice almost not known in the administrative courts. It is interesting to be aware that at this moment it would be easier to develop mediation connected to the court than practice mediation on administrative matters because of different issues, but mostly because of the involvement of judges in the development of mediation in Spain and because of the easier legal structure to practice referral to mediation. Many magistrates are curious about foreign practice in other countries in the administrative field, and some of them have initiated some experimental activities related to mediation.

8.4 Final Considerations

In general terms, it can be stated that the Spanish system of administrative justice has been improved since the 1978 Constitution. From then on, the legal regulation has reinforced the chances for citizens who aim to challenge different types of administrative activity affecting them: normative and nonnormative, material activity, inactivity, and even some elements of political decisions; a wide concept of *interested party* who is allowed to bring actions has been set up by the case law and, later, by the legislature; finally, protection of legitimate collective interest provokes the recognition of public action in specific issues.

At the same time, alternative channels have been stated as well: on one hand, specific boards has been gradually set up for dealing with disputes in specific issues (taxes, public procurement, consumers); although they have an administrative nature, they work as quasi-judicial bodies due to their authority and independence; on the other hand, the Spanish Ombudsman has gradually reached great visibility regarding complains against the public administration brought by the citizens—even if not allowed to bring actions by itself before the judicial bodies.

However, in this process, the weight of ADR tools is not really significant in administrative disputes, even such remedies that have been theoretically allowed by the Spanish legislation since 1992. The recent 2012 Mediation Act specifically excludes administrative issues from its scope, being focused on civil and commercial issues. On the other hand, some regional pieces of legislation expressly refer to mediation in general administrative issues (Catalonia, 2010) or in specific ones (Basque Country, 1998, environmental issues): as far as Autonomous regions are empowered with the most part of executive competences, the regional public administration are the actors who are in the best position for a future consolidation of ADRs on administrative disputes.

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Chapter 9
ADR in the Administrative Law: A Perspective from the United Kingdom

David Marrani and Youseph Farah

9.1 Introduction

In a 2004 White Paper, "Transforming Public Services," the British government promised to "[develop] a range of policies and services that, as far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible"[1]; the latter provision came to be known as Proportionate Dispute Resolution (hereafter PDR). While PDR enhances citizens' redress and is fundamental to the system of administrative justice, the means of attaining it, for example through an alternative dispute resolution mechanism (hereafter ADR), nonetheless poses certain challenges.

The backdrop that informs this analysis of administrative ADR is the continuing expansion of judicial review. This expansion has inevitably led to inefficiencies, such as delays and disproportionate litigation costs, which have compromised the courts' ability to safeguard PDR and diminished their ability through judicial review to communicate good administration values to public bodies. The basic question posed by this chapter, then, is whether ADR can occupy the sensitive terrain that judges have ploughed for many years: that is, can it protect citizens from

[1] 'Transforming Public Services: Complaint, Redress, and Tribunals', DCA July 2004, para 2.2, available online at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf. The government pledged its support and use of ADR whenever feasible in order to "[monitor] the effectiveness of Government's Commitment to using ADR" [July 2002 and August 2003], online available at www.dca.gov.uk. Last accessed 10 February 2013.

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unlawful action or inaction by public officials while safeguarding constitutional values?

Administrative ADR encompasses a number of grievance mechanisms that provide an alternative to court litigation. However, due to space constraints, we will focus on three types of ADR here, namely, "internal appeal," "mediation," and the "public Ombudsman." A central claim of this work is that there exists a fine balance between PDR and the constitutional values that are intrinsic to a system of administrative justice. Because it is almost impossible to maximize these constitutional values and PDR at the same time, it may be useful to utilize the complementarities among judicial review, the tribunals system, and administrative ADR. There is sufficient evidence, for instance, to suggest that public Ombudsmen, despite their shortcomings and need for reform, have the greatest potential to strike this fine balance between PDR and fundamental constitutional values. That said, there are many more issues that should be looked at here, some of which are fundamental, such as the place of ADR in common law and the issue of ADR specifically in public law, while one may still want to be cautious about the divide between public law and private law in the context of the common law. Finally, there is also an issue of balance to be sought between the use of ADR and the quality of administrative justice.

9.1.1 Trial and Common Law Reasoning: Is There a Place for ADR?

It is possible to trace the archeology of judicial review in the traditional Anglo-American analytical jurisprudence of Bentham and Austin. Both scholars built their theories on Hobbes' writing, and both rejected as fiction the ideas of the state of nature and the social contract to keep their focus on the concept of sovereign.[2] Both were concerned with law as a command and with a sovereign—person or body—issuing those commands: "law always depends on some sovereign person or assembly of persons who others, in a certain territory, do in fact habitually obey, for whatever reasons. Laws then are whatever the sovereign issues by way of general commands."[3] However, there are also many differences in the ways Austin and Bentham defined their sovereign, which are crucial to the present work. For Austin, the sovereign was somehow without limits, while Bentham looked favorably on the idea of a limited legislative body. The result of this difference is clear and has serious implications here. If the sovereign can be limited, there is scope for the introduction of a mechanism that allows control of the actions of that sovereign. What does this mean in legal rather than politicolegal terms? It means that the norms created by the sovereign are no longer "supreme" but may be scrutinized by

[2] Veitch et al. (2012), p. 16.

[3] Ibid.

the courts. In consequence, there needs to be a mechanism of legal accountability in place, which in the UK examines the work of the executive, where "the claimant is not appealing against the merits of what the administration has decided, but is rather seeking a review of the legality of what has been done, or is proposed to be done."[4]

This consideration may be addressed through further explanation and another level of abstraction. First, we will carefully analyze the "creator" of the main legal event of common law culture—the trial—before considering the specific challenges posed by the use of ADR in public law.

According to Bix, "common law reasoning involves (1) incremental development of the law, (2) by judges, (3) through deciding particular cases, (4) with each decision being shown to be consistent with earlier decisions by a higher or co-equal court."[5] Judges and trials, then, seem to have a fundamental role to play in the constitution of the common law, not only in the creation of the norms themselves but also in terms of the spirit—the culture—of the common law. Hence, one may look with suspicion at entities/"things" that may decrease this fundamental role, such as ADR. In fact, we may go further and consider that the scope of certain facts may be so wide and so exceptional that these facts affect both the individual and society. We should also consider here the concept of the (legal) event. The term event implies through its etymology (*e-venire*) that facts come and give a result (they "come out"). For Garapon, "[t]he legal event is part of justice as well as the law itself: it is the foundation."[6] The event, therefore, is the advent of social reality finalized, and for us lawyers, academics, or professionals, particularly in the common law world (or worlds), the trial is one of these realities, and as such, it is important and exceptional.

The term trial owes its origin to the French word *triable*, sortable, and thus is closely tied to that which can be sorted or separated. This dynamic process, understood as an event for the parties and for society, must achieve a result: the separation of the good from the bad. Understandably, the trial is an important legal event for the common law. It is a flagship event that carries both powerful magic and value judgment. It is, in fact, the legal event *par excellence*. In the courtrooms and in the classrooms of our law schools, one can legitimately call the trial an "event" and see through the judicial process what should or should not be—in the present time for the parties, and in the future for society. The trial is also an expression of a certain kind of magical thinking. It is therefore an open and specific expression of the *raison d'etre* of common law lawyers, which is brought about through dramatization. The common law, through precedent, reminds us of the past and brings to our present an unconscious fear of power and authority through the unconscious fear of the totem and the taboos that are outlined in Freud's work.[7] The trial is an ambivalent legal event and itself resembles Freud's notion of the totem

[4] Tomkins (2003), p. 171.

[5] Bix (2009), p. 152.

[6] See Garapon (1997), p. 19.

[7] See Marrani (2010), esp. pp. 3–4. See also Assier-Andrieu (2011).

described in the 1910s.[8] The totem, this object, this "thing" that holds a symbolic position for both the individual and the society is the foundation of a system of beliefs that create the basis of microsocial organization. This thing also manifests in the legal field—and is expressed in the norm.[9]

It is when the parties decide to go to trial that the similarity to the taboo emerges. The very notion of the trial can operate as a deterrent, with the consequence of encouraging individuals to "stay in line," to conform to the rules, or to "settle" in order to avoid facing trial because it creates fear for the parties involved. Paradoxically, the trial is both the event needed to create the law and the event that we must avoid at all costs, because we fear it as we fear the totem—and perhaps this is how we have ended up with ADR.

One illustration of this point can be found in a speech on ADR given on 29 March 2008 by Lord Phillips of Worth Matravers; he was the most senior lawyer in England at the time, as president of the Supreme Court of the United Kingdom. Lord Phillips' narration concerning his first client illustrates our point perfectly: "I met my client for the first time in the corridor outside the court on the day that the Action was due to begin. She was obviously very nervous. The first thing that she said to me was 'I won't have to give evidence will I?'" He then met his colleague:

> I saw my opponent at the opposite end of the corridor. He was a very experienced counsel who regularly acted for the insurance company involved. I went up to him and explained that I had only just come into the case. I said that my view was that my client had been foolish to reject the 50 % offer (so it was, but I did not tell him why). I asked whether the offer was still open for acceptance. Experienced as he was he viewed my question with some suspicion. "Is your client actually here?" he asked? I assured him that she was and pointed her out to him.
>
> He then took instructions and returned to say that the insurance company would still settle for 50 %, so I quickly clinched the deal on that basis.

Lord Phillips' next comments are very interesting in this context: "She was relieved to miss her day in court, but I was very disappointed to miss mine," clearly demonstrating how the fear of trial operates:

> That was my first lesson in the merits of alternative dispute resolution. It avoids the trauma of court proceedings. If, like my client, you are not prepared to undergo that trauma at any price, then there is no alternative to alternative dispute resolution, and in the first thirty years of my life in the law, the only form of ADR was negotiation. Any sensible person who finds himself party to a dispute will wish to resolve it, if possible, by negotiation. Over 90 % of actions that are commenced in England end in a negotiated settlement before trial'.[10]

[8] Freud (1983), esp. pp. 1–17.

[9] Freud (1981), p. 51. Freud mentions the first code when he considers the taboos. We should remember, of course, the famous words, "qui ramène le droit à son fondement l'anéantit."

[10] Speech by Lord Phillips of Worth Matravers, Chief Justice of England and Wales, "Alternative Dispute Resolution: An English Viewpoint", India 29 March 2008, available online at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf. Last accessed 17 February 2013.

Arriving at the trial stage to some extent demonstrates the faults, defects, and limitations of social organization. In the UK, the governing body, the equivalent of the state, is very "discreet" and exercises minimal interference. In a way, it feels more like a kind of self-regulated society, with a strong and important civic sense than anywhere else in Europe. The trial, therefore, is both the result and the proof of the imperfection of the law. That this event should be avoided is the main evidence—the obvious demonstration—of how complex the law is and of how complex it would be to arrive at a "perfect" social structure.[11]

In a way, the trial appears to be instructive. It informs us about the existence of law as "science": it assumes a consistency in the legal process and also demonstrates its imperfections—the gap between law and justice is steady. The trial informs us about membership and the position of the actors in the legal system through the theatricality of justice. It also tells us about a society that aims to redress mistakes harmoniously, with no intervention by the law, which is itself imagined to be as "naturally" perfect as an English rose garden. Basically, the science of law is thus a "human science"[12]—and is thus imperfect, and the *trial* is an expression of its practice, through its ambivalence and its games of truth. The trial gives a fundamental place to the figure of the judge, who becomes the predicator of social truth, or "the truth."[13]

A trial is regarded as a specific event that characterizes the Anglo-American judicial space. It is a living place that has autonomy, that should be respected, and that should then be avoided. But the avoidance of trials might lead us to a strange situation because the common law has its source in trials, and therefore the absence of trials might end the novel written by judges. In addition, it is impossible to conceptualize a perfect society that would never need to rely on trials, which would become a necessary tool but one that was insufficient to redress societal dissonance. *Like totems*, trials are manifestations of a certain holiness in our society. They are full legal events for common law lawyers. They are simply what happens, and they cannot be denied; they take place in the context of a complex relationship among reality, truth, and justice.

For David and Jauffret-Spinosi, "The *common law* is the legal system that was designed in England principally through the activity of the Royal Courts of Justice since the Norman Conquest."[14] This highlights the position of the judge in the creation of the law in *common law* together with the importance of common law

[11] This vision, slightly idealistic, might refer to a society that does not exist, like Utopia. While this society does not exist, it does not mean that a society does not intend to reach towards the ideal. In addition, the ideal society, like the ego ideal, contributes to the creation of an image that ensures and also reinforces the impossibility of social organization.

[12] Lacan (1999), p. 341. See also Lacan on the "science humaine" and the comments on structuralism by Jucquois (1997), pp. 46–47, n1.

[13] Lord Denning in *Jones* v *National Coal Board* [1957] 2 All ER 155 tells us that the role of the judge is to decide "where" the truth is: "and at the end to make up his mind where the truth lies."

[14] David and Jauffret-Spinosi (2002), p. 221.

reasoning.[15] From case to case, the *ratio decidendi* is established. Indeed, "[t]he creation of rules through judicial precedent, in turn based on the concept of impartial adjudication, is one of the cornerstones of a common law system."[16] Hence, the crucial question to be asked of ADR: does it have an impact on the common law? In this regard, it has been noted that

> the doctrine of precedent is equated with a public good in this analysis—adjudication is unnecessary, and in fact may be detrimental to the fabric of a society based on the rule of law if it were to occur in every dispute without regard as to whether such adjudication served to promote and enhance the doctrine of precedent.[17]

What seems to happen is a differentiation between private law and public law. It is obvious that ADR predominantly concerns private law, while cases of public law are in fact very close to serving and promoting the doctrine of precedent. However, ADR and public law should not be contradictory but complementary. The need for this mutual support is heightened in England because common law reasoning relies on the incremental development of the law by judges through deciding particular cases'.[18] It must be acknowledged that ADR, if not carefully thought through, could reduce "access" and the "involvement" of the court and thus undermine the incremental development of the common law.

9.1.2 ADR and Public Law: Contraction or Complementary?

Since what is under examination here is an alternative (including accompanying) to judicial review in court, it is necessary to explore the question of proportionality in relation to the constitutional function that judicial review occupies. It was stated in *R* v *Ministry of Defence* that the courts have "the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people'."[19]

Thus, what we need to ask is how to enhance citizen access to justice by committing to the values of PDR while preserving the constitutional values alluded to above. Can administrative ADR, as an alternative, perform the fundamental and constitutional duties that were described above in *R* v *Ministry of Defence*?

We should remember, before we turn to administrative ADR, that civil courts are experienced in handling ADR; indeed, the courts encourage parties to resort to this

[15] See Laprise (2000); and Samuel (2003).

[16] Gruin (2008), pp. 206–213, esp. p. 206.

[17] Loc. Cit., p. 209.

[18] Bix (2009), p. 152.

[19] R v Ministry of Defence ex p Smith [1996] QB 517.

mechanism.[20] The issue is of particular concern here, in part because administrative ADR is still in its infancy and in part because resolving public law disputes or judicial law disputes by ADR magnifies the constitutional clash discussed above. As stated previously, it is obvious that the introduction of ADR predominantly concerns private law, but we have also been reminded of its importance in public law in *R* (*C*) v *Nottingham City Council* [2010] EWCA Civ 790. Lord Woolf in *Cowl* v *Plymouth City Council*[21] gave further legitimacy to ADR in public law when he stated:

> The parties do not today, under the CPR, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process.[22]

Lord Justice Jackson echoes Lord Woolf's words here. In paragraph 34, he commented that in this case involving Nottingham City Council (a public body), the Court of Appeal refused the claimants' application for judicial review of the Council's refusal to treat them as "relevant children" for the purposes of the Children (Leaving Care) (England) Regulations 2001. The Court of Appeal made the following two key observations. It stated that, first, litigation should only be commenced and/or continued if it is unavoidable and, second, that judicial review was a remedy of last resort.[23] If it was to be a last resort, then other remedies should have been sought previously. This case opened up the potential for a clear development of ADR in public law. Indeed, "[t]here is a risk that the current ADR trend will take us to a point where judicial review becomes as rare a form of litigation as it was 40 years ago."[24] This point has been clearly illustrated by Resnik:

> As this century draws to its end, we can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants. The focus is shifting from adjudication to resolution. Frank Sander's lovely image of the accessible, multi-floored courthouse—with one door wide open for adjudication—has now been eclipsed. The door to the twentieth century's version of adjudication is closing.[25]

We are of course aware that these mechanisms have been used predominantly in private law and are just beginning in public law; as such, one should perhaps approach Lord Woolf's enthusiasm for ADR with a certain amount of caution.

[20] Civil Procedure Rules 1.4.

[21] (Practice Note) [2001] EWCA Civ 1935; [2002] 1 WLR 803.

[22] Ibid., para 14.

[23] (*R (on the application of C and another)* v *Nottingham City Council* [2010] EWCA Civ 790).

[24] C. Collier, J. Halford, and K. Ashton, 'ADR and Judicial Review – Funding and options', The Public Law project, LAG, July 2002.

[25] Resnik (1995), pp. 211–262, esp. p. 262.

For instance, mediation in public law disputes remains rare.[26] In addition, Lord Irvine has warned that there are certain types of disputes where the use of mediation should be approached with great care; these "included cases concerning the establishment of precedent, administrative law problems, and cases which 'set the rights of the individuals against those of the state'."[27] Then again, if Irvine's traditional view has not left much space for administrative ADR, it should also be noted that he spoke of "mediation" and that therefore one may want to extend (or not) his view to all types of ADR. All these should be taken into careful consideration because a balance must be sought between the use of ADR and the quality of justice.

9.1.3 Between Dispute Resolution and Quality Justice: A Difficult Balance

ADR functions within a well-established system of administrative justice; administrative ADR is not a unique form of administrative justice, and therefore ADR should, as a matter of principle, conform to the inherent tenets of administrative justice, which are "openness, fairness, and impartiality."[28] Furthermore, administrative ADR should not be viewed in isolation and must be designed to operate in harmony with other forms of dispute resolution, such as the courts, and the tribunal system.

In an exciting debate, Le Sueur argues that there is a clash between two sets of values in administrative justice: the first "rooted in constitutionalism," which champions the rule of law and the delivery of fair and quality justice; the second set is rooted in the achievement of efficient dispute resolution. The latter can be summarized by looking at this in terms of a desire to design a system of administrative justice that is cheap, accessible, expedient, and free from technicality and that provides specialist knowledge of the particular dispute.[29] This design should enhance "good administration," which has gained momentum in terms of forming an important goal of administrative justice and which should be "a fundamental expectation of the modern state."[30]

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[26] V. Bondy and L. Mulcahy, 'Mediation and Judicial Review: An empirical research study', The Public Law Project, 2009, online available at www.publiclawproject.org.uk. Last accessed 10 January 2013.

[27] See Lord Irivine's speech at the 'Inaugural Lecture to the Faculty of Mediation and ADR' (1999) at www.dca.gov.uk/speeches/1999/27-1-99.htm. Last accessed 17 February 2013. See also Bondy and Mulchay for analysis and further review, pp. 2–3.

[28] Gillies v Secretary of State for Work and Pensions (Scotland) [2006] UKHL 2.

[29] See Report of the Committee on Administrative Tribunals and Enquiries (Franks committee) Cmnd 218, London: HMSO, 1957.

[30] Buck et al. (2001), pp. 20–29, esp. p. 22.

Let us start with the proposition that public bodies have a constitutional responsibility to deliver "justice."[31] This includes administrative justice, which should be open, fair, and accessible. However, it has become increasingly apparent that in order to "achieve the constitutional goal of administrative justice in full, the contributions of bodies outside the courts are essential."[32] It is common knowledge that ADR could contribute to the efficiencies of the procedure and improve the dispute resolution experience of disputants.

It would be wrong, however, despite the promise of ADR, to jump on its bandwagon too quickly. There is a danger that administrative ADR would closely resemble ADR as traditionally used in private law disputes. In that private sphere, the main purpose of dispute resolution is to resolve the grievance, which can be described as facilitative justice. There is a danger that too much emphasis would be placed on the private value inherent in resolving the dispute in an efficient and proportionate manner, ignoring the public nature of the dispute. With this approach, a host of matters that are fundamental to public law, such as the rule of law and the delivery of quality justice, could be at stake. It is therefore important that administrative ADR should be tailored in such a way that it would have noticeable influence over the improvement of the work of public officials or organizations—thus providing a benefit that transcends the interests of the disputant (in the private sphere) in order for it to be experienced by many others.[33]

Thus, it is important to get it right first time. This can be achieved by feeding back "constructive criticism and advice to administrators."[34] It has been argued that the courts have had some success in providing a "long-term impact on administrative practice"[35]; indeed, it seems fundamental that any system of administrative ADR should be highly visible, proactive in a way that supports complementarities with other systems, and loyal to the values of public law. Administrative ADR that is modeled on private logic falls short of satisfying the constitutional values of administrative justice. The most it does is to facilitate dispute resolution (as opposed to facilitative justice), which admittedly is often cost-effective in redressing citizens' grievances.

Furthermore, orthodox types of ADR that utilize negotiation in dispute resolution may struggle to fulfill the constitutional values of administrative justice. It has been argued that central government decisions cannot be negotiated: they are either legal or illegal.[36] However, it would be wrong to treat all types of ADR in the same way. Some mechanisms overemphasize the interest of the disputants, such as mediation and negotiation, while others place significant weight on public

[31] *Niazi* v *Secretary of State* [2008] EWCA 755, p. 722. See also Le Sueur et al. (2010), p. 674, and the Franks Committee report.

[32] Buck et al. (2001), p. 22.

[33] Le Sueur et al. (2010), p. 678.

[34] Buck et al. (2011), p. 24.

[35] Loc. Cit.

[36] See Boyron (2006), p. 321, citing Ashton et al. (2002), p. 31.

values—as exemplified in the system of the ombudsman—and, to a certain extent, by "internal appeals." Consequently, not all types of ADR are suitable for resolving "disputes of point of law, or to decide on rights and civil liberties questions and to tackle abuse of powers and issues of public interest,"[37] and therefore these must be avoided in the current private-value-driven approach when resolving disputes that fall within the sphere of public law.

9.2 Forms of Administrative ADR

This section lists grievance mechanisms that are being used in the system of administrative justice. These could be engaged unilaterally or, where possible, as part of a coherent system of administrative justice; for example, mediation could be used alongside judicial review. As noted in the introductory section, we will restrict our comments here to internal appeals, mediation, and the system of ombudsman.

9.2.1 Internal Appeals

Internal appeals exist in many jurisdictions. As such, ADR, in this example, seems to follow the trend of civil law tradition.[38] It is not unusual to start dispute resolution with an internal appeal to the relevant public body, or to an external appointed authority, regarding the public authority's "action, lack of action or standard of delivery."[39] Common practice is to include a two- or three-tier system, in which formal complaints are dealt with first by frontline staff, which can be escalated to senior officer or chief executive level. For obvious reasons, these are not "necessarily progressive stages," and important cases could proceed directly to the highest level.[40]

What is distinctive about the internal appeal dispute resolution mechanism is the ability to instigate direct action by public bodies in order to conduct an internal review. Thus, the processing and review of internal appeals can inform public bodies of how to follow "effective decision-making processes,"[41] and this will hopefully lead to "good administration." In terms of efficiency of means, internal

[37] See Boyron (2006), p. 333. The author of this article has a more strongly held view of the place of ADR in public disputes than the current authors.

[38] See, for instance, the *recours gracieux*, the internal appeal against the authority that made the decision, and the *recours hiérarchique*, the internal appeal against the authority above the one that made the decision, in French administrative law.

[39] Law Commission, Administrative Redress: Public Bodies and the Citizen, 2008, esp. p. 12 para 3.28.

[40] Ibid., para 3.3.

[41] Harris (1999), p. 44. See also Law Commission report.

appeals offer the most proportionate form of dispute resolution. The process should normally be speedier and less expensive than review by an external body, such as mediation, ombudsmen, or courts.[42]

In a study conducted by David Cowan and Simon Halliday in relation to homelessness applications, the authors found a number of reasons why some applicants failed to challenge adverse decisions.[43] They found that among the reasons for failure to pursue internal appeal are the applicants' "ignorance of right to internal appeal," "applicant fatigue," and "internal review scepticism." These reasons can be explained by a combination of bureaucratic factors and factors relevant to the individual circumstances of the applicant.[44] For example, in relation to not knowing about the right to internal appeal, evidence shows that citizens failed to understand the decisions that determined their requests. Some applicants failed to understand the terms of the decision letter, either because of general confusion or because it is difficult to understand the content of what may be deemed legalistic and formal letters.[45] "Applicant fatigue" is also caused by factors such as the "length and complexity of bureaucratic process" and personal "emotional stress."[46]

Internal appeal has been criticized for lacking independence and impartiality in accordance with Article 6(1) of the European Convention on Human Rights.[47] This is not especially problematic since aggrieved individuals should, in principle, have the option to seek external review following an unsuccessful internal appeal. But it is vital as a matter of good administration that the internal appeal process minimizes any dependence on or objective links between the initial decision maker and the party involved in reviewing the appeal. While this is unlikely to remove justifiable doubts as to the impartiality of the system in place, it would nonetheless be a welcome step towards good administration.[48]

One serious weakness in relation to the system of internal appeal is that it often falls short of holding the public authority to account for its action or inaction. Internal appeals struggle to conform to the traditional conception of accountability, which is "associated with the process of being called 'to account' to some authority for one's actions."[49] This is particularly important because citizens challenging a decision in addition to seeking redress—such as overturning an adverse decision in relation to their rights—often seek to be heard and understood and wish to hold the bureaucracy to account.[50]

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[42] See Law Commission report, p. 13. para 3.34.

[43] Cowan and Halliday (2003), esp. chapter 5.

[44] Ibid. p. 149.

[45] Ibid., pp. 115–117.

[46] Ibid.

[47] Bailey et al. (2005), p. 92.

[48] See *Magill* v *Porter* [2002] 2 AC 357 for the Supreme Court's approach to impartiality.

[49] R. Mulgan, "'Accountability": An ever-expanding concept?', *Public Administration*,78, 2000, pp. 555–573, esp. pp. 555–556.

[50] Cowan and Halliday (2003), pp. 153, 156. See also Hunter and Cowan (1997).

On a functional level, internal appeals are unlikely to work where maladministration exists on institutional level, such as an underperforming public administration.[51] It is therefore important that there should be a meaningful process in place to ensure the citizen's participation in the review process and that at the heart of it are decision makers who are committed to due process and good administration.

Finally, because judicial review, as we have seen, must be a remedy of last resort, aggrieved citizens may have to exhaust the course of the internal appeal system before being able to approach the court with a request for judicial review.[52] There are a number of policy justifications behind this rule, but ultimately it is in place in order to relieve the case docket at the high court, thus saving valuable public resources. For this reason, it seems reasonable to consider internal appeal in public administration as a common sense procedure, not only in the UK but also in any country with a developed and fair system of public administration, which has an idea of what the rule of law is or should be.

9.2.2 Mediation

Mediation can be an alternative form of dispute resolution to court litigation, or it can be annexed to court litigation. The core values that are inherent in any system of dispute resolution also apply to mediation. Thus, mediation must conform to the values of "openness, fairness, and impartiality."[53] Parties in mediation essentially entrust an independent and impartial third party to either find a bridge between the parties and thus some form of settlement, or evaluate the situation and offer a resolution that is acceptable to the disputants. The informal nature of mediation and its autonomous nature make mediation less adversarial than other forms of ADR.

Furthermore, mediation is a confidential process, which means that in the event that the parties fail to arrive at a resolution, all evidence and exchange of documents cannot be later used subsequently by any of the parties in a court action. This basis for mediation processes. This nature of mediation can be regarded as an obstacle to ensuring public bodies' accountability to members of the public: given the seriousness of maladministration, it is a citizenship right to seek transparency in relation to the operation of governance. It is important to recognize that good administration may best be served by a visible dispute resolution mechanism that is accountable to the rule of law, unlike the confidential nature and private ordering of dispute

[51] For a critical review of the South African experience in relation to internal review, in which the author argues that public bodies at the time were not ready to embrace "internal appeal" and that it was wrong under the Act to require exhaustion of remedy before being granted the right for judicial review, see Plasket (2002), p. 50.

[52] In French administrative law, for instance, it is possible to initiate a process equivalent to judicial review, even though there has been no use of the internal appeal procedures. That said, it is always advisable to start with internal appeals.

[53] These values were identified in the Franks Committee report.

resolution that is customary under mediation. It could also be argued that confidentiality compromises the principle of equality, because mediation of similar or identical disputes could have different outcomes.[54]

Mediation is said to help parties reduce the cost of dispute resolution and to arrive at a resolution much more quickly than in court litigation. Furthermore, increased recourse to mediation could relieve courts of the increasing workload that has arisen from dealing with administrative disputes. In the UK, it is not simple a task to determine the number of administrative disputes, but it is a problem experienced by the judiciary. English courts, unlike their German and French counterparts, benefit from a large number of predispute or (during) settlement; the tribunal system also resolves a large number of (judicial) disputes.[55]

It is important to appreciate that due to the nonadversarial nature of mediation (which is essentially conciliatory), parties are more likely to preserve their relationship. However, public law disputes often concern a relationship between two parties of unequal authority. In this instance, the individual or company that has been harmed by an administrative decision will hardly be concerned about preserving a relationship with the public administrator (unless the dispute concerns a purely contractual matter); thus, the kinds of advantages that are valued in private law disputes are not equally appreciated in public law disputes.

Mediation can improve the range of remedies that are available to the parties; in France, for example, the only remedy available is to quash an administrative decision or act.[56] Mediation can allow the parties to be inventive, and thus among the remedies that could be available are apology, promise to reform, and damages, which are not available under judicial review.

"The outcome of mediation is not about *just settlement,* it is *just about settlement*."[57] It is often argued that mediation diminishes *the quality of justice*—a means test for the constitutional perspective of the "delivery of justice" (including the quality of "fairness"). Therefore, all ADR mechanisms must make "justice a paramount consideration"[58]; otherwise, they will fail to perform the fundamental function of administrative justice.

According to Sourdin, "fairness (or justice) [is] a core element in the effective resolution of disputes."[59] Nonconsideration of justice might mean that the underlying issues in the dispute remain unresolved, even where the parties reach a settlement. This will result in an unjust outcome. Thus, in criticism of mediation, the mediator is mainly entrusted to resolve the dispute between the parties: justice cannot be his/her main consideration, however collateral this value may be in the eyes of the mediator. It is inevitable, then, that justice will be diminished when

[54] Bondy, p. 34.

[55] Boyron (2006), p. 322.

[56] Ibid., pp. 327–328.

[57] Glenn (2010), p. 117.

[58] See Ojelabi (2012), p. 318, relating to the fundamental goal of the courts to deliver justice.

[59] Sourdin (2008), pp. 12–15. Also Ojelabi (2012), p. 320.

emphasis is placed primarily on dispute resolution and where the interests of the parties trump other considerations.[60] However, it is important not to be too critical and to realize that many of the problems of mediation are also present in directly negotiated settlements, and these are entered into as a matter of routine.[61]

9.2.2.1 Can Parties Be Forced to Use ADR?

An important aspect of this debate concerns whether ADR should be made compulsory. In England and Wales, this is a complex matter. Indeed, under doctrines of English contract law, an agreement to agree does not create binding obligations,[62] so, for example, it would be difficult to enforce an agreement to mediate. Equally, and in a similar vein, parties cannot be forced to reach a resolution under mediation; the parties can walk away and resort to other forms of binding dispute resolution.[63] While ADR can be sanctioned by empowering the court to take into consideration the parties' unreasonable refusal to use ADR when assessing costs,[64] it remains problematic to lock the parties into ADR until a resolution is reached.

Further, it was argued in *Hasley* v *Milton Keynes General NHS Trust* (*2004*) that forcing a party to use ADR may infringe Section 6 of the Human Rights Act.[65] However, answering this contention, Sir Anthony Clarke MR pointed out that *Hasley* had not established an authority in relation to the use of mandatory ADR. Rather, he argued that the issue before the court concerned when a court could impose cost sanctions against a successful litigant that had refused to use ADR.[66]

This sanction was confirmed in Civil Procedure Rules 1.4 (hereafter CPR), which provide that

> (1) The court must further the overriding objective by actively managing cases;
> (2) Active case management includes- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.

Indeed, CPR 1.4 empowers the court to exert pressure on the parties to further the overriding case management objective: "the unreasonable refusal to engage in ADR may constitute a breach of this duty . . . a refusal to use ADR is certainly an aspect of the conduct of the parties which the court is entitled to take into account in deciding what orders to make as to costs under CPR 44.3(4)(A) and CPR 44.5." A court can stay proceedings for the purposes of ADR under CPR 26.4.[67] In *Dunnet* v

[60] See Glenn (2010).
[61] Fiss (1984), p. 1075, arguing against settlement.
[62] *Watford* v. *Miles* [1992] 1 All ER 453.
[63] See Yu (2009), p. 517.
[64] 'CPR 44.3(4)(A) and CPR 44.5' (Civil Procedure Rules).
[65] See Yu (2009), p. 521.
[66] Loc. Cit., p. 522.
[67] Supperstone et al. (2006), p. 301.

Railtrack PLC,[68] the Court of Appeal made no order as to costs because the defendant, despite winning the case, had unreasonably turned down the claimant offer to use ADR. In *Hasley* v *Milton Keynes General NHS Trust*, the court stated that there should be no presumption in favor of ADR and that the "unreasonableness" in refusing ADR must be determined "having regard to all the circumstances of the case."[69] The court could factor into the "unreasonableness" assessment of the following considerations:

> (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.[70]

Further to this mechanism, which strongly links public law and civil law, there is another form of administrative ADR that has been widely used in many jurisdictions—the system of Ombudsman.

9.2.3 The Ombudsman

The public Ombudsman system is integral to the system of administrative justice.[71] Public Ombudsmen are free to access, less formal than judicial review, and almost entirely paper based.[72] Public Ombudsmen, which are often organized under statute, such as the Local Government Ombudsman, have their mandate limited to the investigation of maladministration of public authorities.[73] Furthermore, unlike judicial review, their role is mainly inquisitorial. Richard Crossman understood maladministration to include "bias, neglect, inattention, delay, incompetence, perversity, turpitude, arbitrariness and so on."[74]

However, confining the role of ombudsmen to one of control does not reflect fairly the function that public ombudsmen perform. There is an increasing recognition that ombudsmen go beyond their understood scope of controlling maladministration: in recent years, they have, rather than limiting their role in this way,

[68] [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434.

[69] [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002. See Supperstone et al. (2006), p. 303.

[70] Loc. Cit., pp. 303–304.

[71] Law Commission, p. 5, para 2.17.

[72] Ibid., paras 3.71 and 3.72.

[73] The distinction between public and private ombudsmen is not a binary one; for example, the financial ombudsman administers disputes between individuals and financial institutions; it is part of the administrative justice system. See Buck et al. (2011), p. 7.

[74] 'Parliamentary Commissioner Bill', HC Deb 18 October 1966 vol 734 cc42–172, available at http://hansard.millbanksystems.com/commons/1966/oct/18/parliamentary-commissioner-bill. Last accessed 10 January 2013.

promoted good administration.[75] Therefore, any investigation of maladministration should encompass the "wider principles of procedural fairness and contemporary expectation of what constitutes good administration."[76]

As the Ombudsman's role has become more proactive in promoting good administration, it has rightly been labeled as "fire watching," in addition to its reactive "fire-fighting" role.[77] Ombudsmen therefore identify systematic failures in addition to resolving disputes and providing redress for government failures. As a result of this proactive role, ombudsmen are best placed to support the constitutional values present in judicial review.

For example, public Ombudsmen have used human rights rhetoric when assessing the conduct of public authorities. This newly exercised competence can be justified by their inherent "responsibilities as public authorities under the Human Rights Act [HRA] 1998."[78] However, this has mainly been limited to a finding that, for example, the local authority failed to consider sufficiently the provisions of the 1998 HRA, which led to a finding of maladministration.[79] This does not mean that ombudsmen can determine the legality of the administrative action or adjudicate on points of law.[80] They can, however, recommend redress where the administrator fails to take into consideration human rights. It is thus important to distinguish between illegality and maladministration. A finding of maladministration does not necessarily lead to a finding of illegality of the actual decision of the public authority.[81] Therefore, redress could still be recommended for maladministration despite the fact that the act of the public authority was not deemed unlawful.[82] In recent years, however, some ombudsmen have been given increased powers under which they have competence to investigate the standard of service delivery.[83] Thus, when the ombudsman safeguards citizens' expectations of good administration, it confirms that "the ombudsman has become one of the essential institutions that a constitution should possess."[84] Ombudsmen perform a "constitutional service in the upholding of integrity in governance and administrative justice."[85]

[75] O'Brien and Thompson (2010), p. 508.

[76] Kirkham (2004), p. 181.

[77] See Harlow and Rawlings (2009), cited Buck et al. (2011), p. 12.

[78] O'Brien and Thompson (2010), p. 506; see also p. 507 for further discussion regarding the constitutional role of the Ombudsman. See also O'Brien (2009), p. 468.

[79] Injustice in Residential Care, HSO and LGO 2008, para 81–82; see also discussion in Buck et al. (2011), p. 111.

[80] See Law Commission, para 3.61.

[81] *Secretary of State for the Home Department* v *R* (S) [2007] EWCA Civ 546, [2007] All ER 193 at [41].

[82] See *Reeman* v *Department of Transport* [1997] 2 Liyds's Rep 648.

[83] See National Health Reorganisation Act 1973, s 115.

[84] Buck et al. (2011), p. 3.

[85] Ibid. pp. 18–19, esp. p. 14.

Ombudsmen make decisions in the form of a recommendation: other than being morally binding, however, a public body is under no obligation to follow this recommendation. Nevertheless, once a finding has been established that the complainant has suffered "injustice" as a result of maladministration, the public ombudsman will often have a wider range of remedies than those available under judicial review. The public ombudsman can, for example, recommend that the public body should provide financial compensation or an explanation and acknowledgment of what went wrong. Furthermore, the ombudsman can recommend that the public body reconsider its decision or recommend a specific action.[86] It is worth noting here that monetary compensation under judicial review is discretionary and only exceptionally ordered by the court.[87]

9.3 Conclusion

The goal of public law is to contribute to organizing society in such a way that "the individual is normatively acknowledged, structurally advantaged, and institutionally protected."[88] Courts presiding over judicial review have, for many years, played a significant role in safeguarding basic citizenship rights and have promoted values that underpin the constitutional order, such as the rule of law. Courts have called public bodies to account and ensured that they are committed to good administration.[89] This is not, as we will see in this edited collection of chapters, specific to the UK. However, history and tradition mean that it was probably more difficult in the context of the common law to see how ADR would actually work in administrative law. The main issue, therefore, was whether administrative ADR could rise to this unquestionably fundamental role of good administration.

There is much evidence to suggest that administrative ADR can excel in advancing proportionate dispute resolution; however, the greatest challenge lies in the issue of whether ADR can deliver the constitutional values that are intrinsic to all systems of administrative justice. A fine balance between constitutional values and PDR can best be achieved if all ADR mechanisms are complementary to each other rather than competing. In particular, internal appeals combined with the ombudsman system could promote PDR and the constitutional set of values. This is feasible because the public ombudsman system is highly visible and less confidential. Moreover, because public ombudsmen are organized under statute, their organization could be stipulated in such a way as to optimize the goals of public law.

[86] Law Commission, para 3.74–3.77.

[87] Ibid., para 3.101.

[88] See Carolan (2009), p. 105, cited in Buck et al. (2011), p. 105.

[89] Ibid, p. 24.

However, the ombudsman's role in the system of administrative justice could benefit from some reform. In particular, and because it is envisaged that public ombudsmen will increasingly engage in human rights rhetoric, for example, and disputes relating to the quality of service provided by public bodies, it is suggested by the authors that ombudsmen should be able to refer questions of law to a court.[90] Such reform would place the Ombudsman firmly within the administrative justice system and confirm its constitutional role.

On the other hand, while mediation seems to be beneficial in supporting PDR, it may fall short in supporting the constitutional values of administrative justice.

The main issue here, to return to the points raised at the start of this introduction, is the ambivalence of the trial and the ambivalence of ADR: neither is it completely good nor completely bad, nor very good nor very bad. Much depends on the lens through which you choose to look at the case you need to consider, as it also depends on the space and time allocated to the examination and who is undertaking it. A harmonious society may benefit from ADR because it has the capacity for a simple resolution of disputes. And although ultimately we risk ending up with a lack of norms, this has never been a problem for a liberal society. Hence, ADR may very well be the liberal answer to the complexities of legal life in the twenty-first century.

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Chapter 10
Administrative Appeals and Other Forms of ADR in Hungary

Anita Boros and András Patyi

10.1 An Outline of Administrative Law and the System of Legal Protection in Hungary

In Hungary, the structure of public administration and administrative law is subject to continuous reshaping, similarly to most of the former socialist countries.[1] Administrative law, which constitutes an essential part of the Hungarian legal system, basically forms shape in statutes and decrees, i.e., it is the result of a lawmaking process. However, its fundamental rules and fundamental core principles have been fostered by case law. This type of legal development could only occur after the constitutional reform of 1989 (in particular, following the establishment of the Constitutional Court in 1990). In order to describe the status quo of the legal system, some historical aspects shall be mentioned.

10.1.1 Constitutions and Constitutional Review

For centuries, the country did not have a written constitution; after the First World War, two (transitory) constitutional statutes were enacted; then in 1920, the historical constitution (based on several key acts enacted at different times) was reestablished. Act XX of 1949, enacted during the Soviet occupation after World

[1] Comprehensive studies on the restructuring of the system of public administration available in English: Public Administration in Hungary, Budapest, 1992, Hungarian Institute of Public Administration; Hungary in: Galligan and Smilov (1999), pp. 115–138; Balazs (2007), pp. 83–116.

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War II and worded in a Soviet pattern, was the third written constitution considering the historical antecedents. It was in force until 31 December 2011, though with nearly 70 amendments. The sweeping, comprehensive reform of 1989, which changed the political and constitutional system, represents a milestone among the amendments. Not only did the aforementioned reform establish the Constitutional Court with such broad jurisdiction that is unique in Europe, but it also enhanced the complete reshaping of constitutional and administrative law by codifying the fundamental rights and creating their system of protection, as well as by formulating the rule of law.

Between 1897 and 1949, a separate *administrative court* operated in Hungary. It was dissolved in the year of 1949 and with the aim of developing the Soviet-type dictatorial state (similarly to the other countries falling under Soviet influence at the time). This court (the Hungarian Royal Administrative Court) was situated at the highest level in the judicial system, it had no equivalent lower courts, and basically the cases included in an exhaustive list falling within its jurisdiction. It had the right to rule not only on administrative legal disputes but also on facts and even had the right to overturn an administrative decision in the course of the operation of this court, the fundamental rule prevailed that only definitive (final) administrative decisions could be brought before it, and the supreme supervisory authorities (ministries, ministers) had no right to take measures in relation to administrative cases tried by the court. In order to make appropriate "preparations" for the Court procedures (administrative proceedings), many elements of administrative proceedings were regulated by law; however, no uniform administrative procedure code was adopted.

Between 1949 and 1989/1990, administrative cases could hardly be brought before court, but if they were, only ordinary judicial body could try them; the court had no right to change the facts of the case; it could only examine the formal legality of the decision. According to the basic principle of the Soviet-type administrative law, noncompliance with regulations and unlawfulness had to and could be remedied within the system of public administration by means of administrative proceedings, firstly, by means of appeal; secondly, by means of extraordinary remedies; and, thirdly, through actions by the public prosecutor. This situation remained unchanged following the adoption of the first Procedural Act of 1957 and its comprehensive amendment in 1981. The decree of the Council of Ministers (i.e., not an Act) on the implementation of the Procedural Act of 1981 stipulated the scope of the cases that could be brought before court after administrative redress. This Decree and the restriction of the scope of legal remedies to such an extent became noncompliant with the amended constitutional provisions of 1989.[2]

[2] The history of administrative justice is outlined by: Patyi (2011), pp. 51–58.

Since the new democratically elected Parliament did not reestablish the Administrative Court (it has not done so up to this day), it did not remove restrictions on legal remedies, nor did it draw up effective rules pertaining to administrative proceedings, it was incumbent on the Constitutional Court to take decisions. These decisions were taken on the basis of several provisions of the Constitution in force between 23 October 1989 and 31 December 2011; however, the shaping of the public law system is still going on, even after the new Constitution (the Fundamental Law) entered into force in 1 January 2012. In order to assess the former and new constitutional provisions, it shall be underlined that the Constitutional Court held in one of its decisions—taken at the beginning of its functioning—that "the rule of law is attained by the fact that the Constitution becomes actually and unconditionally effective," i.e., it is applied or enforced in practice. According to the decision, "not only shall the legislation and the operation of public bodies be strictly in compliance with the Constitution, but the conceptual culture and the values enshrined in the Constitution shall be absorbed by the whole society. This is the rule of law; this makes the Constitution genuine."[3]

10.1.2 The Rule of Law

The requirement for the de facto and effective rule of law even in the field of public administration is the supervision of the prevalence and enforcement of the Constitution. In modern constitutional states, this task—as the requirement of the rule of law—is incumbent upon the extensive protection system of administrative law, in particular, upon arbitration. Article 2(1) of the former Constitution stipulated that the rule of law prevailed in the Republic of Hungary. According to the Constitutional Court, one of the fundamental requirements of the rule of law is that each public authority, including public administration, shall be subordinated to law: "Pursuant to one of the fundamental requirements of the rule of law, public authorities holding public power conduct their activities within the organizational framework established by law, in the operational system set by law, within the limits regulated by law, in a manner that is perceivable and foreseeable by citizens."[4]

[3] The Decision No. 11/1992. AB (5 March) of the Constitutional Court (concerning the statute of limitation of crimes) confirms Decision No. 44/1998 (14 October) of the Constitutional Court (annuls the indication "socialist" word in the legislative Act).

[4] The Decision No. 56/1991 AB (18 November) of the Constitutional Court, Constitutional Court Decisions (ABH) 1991, 454, 456. The latest confirmation: Constitutional Court Decision No. 8/2011 (18 February), Constitutional Court Decisions (ABH) 2011, 49, 79.

10.1.3 Judicial Control

In addition to the (above-mentioned) Article 2(1) on the rule of law, the former Constitution laid down several rules that were directly related to and consequently had a direct effect on administrative law and administrative remedies. It expressly stipulated that cases of infringement on fundamental rights may be brought before a court of law [Article 70/K(1)], but in the absence of specific procedural rules, it was not sufficient for the courts to pronounce judgment on claims related to constitutional law, through the direct enforcement of the Constitution. The stipulation "courts shall review the legality of administrative decisions" [Article 50(2)] was a cardinal rule concerning jurisdiction (and the separation of powers); this rule was the basis of the overall judicial review created by the Constitutional Court. A specific provision (basic right) guaranteed the judicial process and fair conduct of proceedings in cases of legal disputes [Article 57(1)]. The Constitution stipulated the right to legal remedy as a basic right [Article 57(5)]. There was no provision concerning the establishment of a separate administrative court having full competence. The fact that administrative legal disputes could be brought before the different courts at different levels of the ordinary court system was enough to satisfy the constitutional requirements. Consequently, no specific administrative procedure has been developed and the administrative legal disputes have been subject to the general rules of civil procedures and some special provisions up to this day.

10.1.4 Constitutional Court Decisions

Among at least 100 Constitutional Court Decisions related to administrative law, the following Decisions need to be highlighted.

On the basis of Article 50(2) on the judicial review of the legality of administrative decisions, the Constitutional Court Decision of December 1990 annulled the legislative provisions and decrees on the exclusion and restriction of judicial review against administrative decisions and set a time limit for the adoption of an appropriate legislative regulation for administrative justice.[5] The Act was drafted only after the expiry of the deadline, but no new administrative procedure or new organization of court was created to fulfill this task. Act XXVI of 1991 maintained the procedural rules and means inherited from the time of socialist law. The courts were not prepared to handle the multiplied number of claims compared to the previous years, and protracted lawsuits became common practice. As a

[5] Constitutional Court Decision no. 32/1990 (22 December), Constitutional Court Decisions (ABH) 1990, 145.

consequence of the fact that the Act was not well considered, the cases were generally subject to a three-tier judicial procedure subsequent to a two-tier administrative procedure. In the first instance, the local court proceeded; in the second instance, the case was heard in the county court subsequent to the filing of an appeal; and, in most of the cases, an extraordinary remedy was available according to the civil procedures. The end of the procedure could even result in the repetition of the whole administrative procedure. These rules were not changed substantially until 1999, and since that year administrative judicial proceedings have been conducted in a one-tier system, which may be followed by an extraordinary review.

The takeover and application of rules that were not suitably updated (drafted in the former political and legal system) raised doubts as to the capacity of the courts to review the facts of the case established in administrative proceedings and as to what extent they may review the discretion of administrative bodies. Moreover, where a relatively free discretion forms the basis of the administrative decision, i.e. it barely has any legal framework, how can the given administrative decision be subject to a review? The Constitutional Court stated regarding all administrative decisions that courts shall have jurisdiction in order to review the facts (they may collect new evidence), and each act where the term and content of administrative decision are not stipulated shall be deemed unconstitutional. These laws prevent the courts from reviewing the decisions taken by public administration on the merits.[6] The opposite also applies. The Constitutional Court has annulled the tax laws (the so-called *luxury* tax, and the local tax based on calculated value), where the Act and the decrees on local taxation issued for the implementation of such Act determined expressly the real properties' value (by regions and streets) and, thereby, the level of taxation too. According to the Constitutional Court, these tax laws determined the contents of the administrative decision to such an extent that it could not be reviewed by the court either, which violated the principle of the rule of law and the right to have recourse to the courts.[7]

The restrictions in force during the socialist regime prevented citizens from having recourse to the courts against punitive administrative decisions (decisions on infringement). When the country joined the European Convention on Human

[6] Constitutional Court Decision 5/1997 (7 February), Constitutional Court Decisions (ABH) 1997, 55, 66. and Constitutional Court Decision 39/1997. (1 July), Constitutional Court Decisions (ABH) 1997, 263, 272. Further decisions confirming the latter: Constitutional Court Decision 67/1997 (29 December), Constitutional Court Decisions (ABH) 1997, 411, 416; Constitutional Court Decision 33/2002. (4 July), Constitutional Court Decisions (ABH) 2002, 173, 184; Constitutional Court Decision 53/2002. (28 November), Constitutional Court Decisions (ABH) 2002, 327, 335; Constitutional Court Decision 37/2008. (8 April), Constitutional Court Decisions (ABH) 2008, 377; Constitutional Court Decision 210/B/1999, Constitutional Court Decisions (ABH) 2005, 879, 882; Constitutional Court Decision 534/B/2003, Constitutional Court Decisions (ABH) 2005, 1187, 1188.

[7] Constitutional Court Decision no. 155/2008 (17 December), Constitutional Court Decisions (ABH) 2008, 1240, 1268.

Rights, it made a reservation over this issue. Thus, in these cases, which are less serious than criminal offences, the appeal was the only available remedy on the merits, and, furthermore, it was handled by administrative bodies (civil or police authorities). The Constitutional Court has held that the lack of judicial review violates the Constitution of Hungary. In essence, the Decision states that if these decisions were considered administrative decisions, they establish the right to have recourse to the courts. In case these decisions were considered criminal decisions (by virtue of their contents), it can be stated that any criminal charge shall be tried in court, even the very minor ones.[8]

Under the rule of law, the requirement that public administration shall be subordinated to law affects not only the outward activities of public administration. The full, substantive judicial control of administrative decisions was excluded by the fact that pursuant to an Act adopted in 2010, the legal status of government officials could be terminated through discharge without motivation. In the absence of motivation, the court could not decide whether or not the decision about the discharge was legal and substantiated.[9]

Besides the Constitutional Court, the division (in Hungarian: *kollégium*) of the Supreme Court (since 1 January 2012 the Curia of Hungary) handling administrative legal disputes has adopted several decisions of fundamental importance. In the Hungarian legal system, the Curia reshapes the activity of the courts not only by passing final judgment in individual cases in the last instance but also by issuing interpretative decisions. Its interpretative decisions are binding on the courts. Such an interpretative decision has made court actions available against police actions. Pursuant to the original provisions of the Police Act, a complaint could subsequently be filed against the contested police action (identity check, body search, etc.) and an appeal could be brought against the decision responding to the complaint to a higher level police authority. The Act did not provide for having recourse to the court. The Curia considered the police decision on the appeal as an administrative decision, thus enabling recourse to the courts in such cases as well.[10] The Curia's decision had a great importance, since police actions are always accompanied by the restriction of constitutional rights, and even the subsequent examination of their legality is a basic criterion of the rule of law and a key area of law protection. The key elements of the decision were subsequently enshrined in the Police Act.

[8] Constitutional Court Decision no. 63/1997 (11 December), Constitutional Court Decisions (ABH) 1997.

[9] Constitutional Court Decision no. 8/2011 (18 February), Constitutional Court Decisions (ABH) 2011, 49, 77, 79.

[10] 1/1999 KJE. http://www.kuria.birosag.hu/hu/joghat/11999-szamu-kje-hatarozat.

The other landmark interpretative (i.e., uniformity) decision clarified the relation between the form and content of administrative decisions.[11] A resolution shall be issued by the authorities on the merits of the case, while a ruling shall be issued concerning other procedural matters. Only resolutions are subject to a full and unconditional judicial control, while certain rulings may be reviewed in a simple procedure (conducted without hearing). According to the Curia, the content prevails over the designation, i.e., in case a resolution on the merits is issued in a ruling by the authority, this fact may not restrict the right to have recourse to the court or judicial control. In other words, the courts are entitled and obliged to adjust the way, procedure, and extent of law protection to the contents of administrative decisions.

10.1.5 The New Constitution

The former Decisions of the Constitutional Court basically continue to be governing also in the legal order of the new Fundamental Law, which entered into force on 1st of January 2012, since several provisions pertaining to administrative law and administrative law protection are included with the same or similar wording in the new Constitution.

The constitutional framework we had before 2012 could not give answer to a number of legal disputes and legal situations arising in the course of phenomena that are radically different from the old ones, nor did it give answer to the rather complex and completely original questions that are triggered by the increased application of civil law (contracting out, privatization, requirements of economic efficiency) or the new expectations raised and demanded vis-à-vis public administrative operations (transparency, partnership, substantial participation of the parties concerned).

Before the creation of the new Constitution, which was enacted in Parliament on 18 April 2011 and promulgated on 25 April 2011, a Parliamentary Committee had been set up for elaborating the concept and main principles of a possible new constitution (Committee Preparing the Constitution). During the preparations, there was serious hope that the regulation of judicial review (administrative justice) would be more detailed and would bring about a more pragmatic change. In view of this, the new Constitution could have prescribed that for the purpose of maintaining the subordination of administration to the law, separate administrative courts would have the power to supervise the lawfulness of all public administration activities and public administrative actions. The supervision of the exercise of both regulatory and adjudicative powers of public administration would not only mean the judicial control of the constitutionality and legality of these actions but also the control of its compliance with the objectives that justify it.

[11] 1/2009 KJE. http://www.kuria.birosag.hu/hu/joghat/12009-szamu-kje-hatarozat.

The protection of the rights of local municipalities should be ensured, public administrative legal disputes should be judged and, in the course of this, efficient legal protection should be provided as prescribed by law, supervision should be exercised over the lawfulness of local government decrees (bylaws) and other normative decisions in the manner defined in a separate law.

Finally, a simplified version was incorporated into the 20 December 2010 proposal of the Ad Hoc Committee, which was approved at the meeting held on and submitted under No. H/2057 (proposed parliamentary decision on the regulatory principles of the Constitution of Hungary).

A number of provisions of the new Constitution (The Fundamental Law of Hungary) suggest a similar approach to the previous one. According to Section (1) of Article B), Hungary is an independent, democratic state under the rule of law. As we have seen, it was the provision on the basis of which the CC interpreted the consequences of the subordination of public administration to the law. Section (1) of Article XXVIII [in the same way as in yesterday's Section (1) of Article 57] provides for everyone's right for a fair trial and access to courts (everyone shall be equal before the law, and, in the determination of any criminal charge against them or in the litigation of their rights and duties, everyone shall be entitled to a fair and public trial by an independent and impartial court established by statute.) According to Section (2) of Article 25, however, the courts decide not only in criminal cases and civil disputes and other cases defined by law [subsection a)] but also about the lawfulness of public administrative decisions and have the power to decide whether local by-laws violate any statute or any other legal rule and also have the power to nullify it [subsections b) and c)]. In addition, the courts decide whether the local municipality has failed to fulfill its obligation to regulate (omission of regulatory obligation) prescribed by law [subsection d)].

All these judicial competences and powers could form a basis for a fully functional administrative justice, for a real judicial review of administrative acts. Section (4) of Article 25 also refers to this: "Separate courts can be set up for certain groups of cases, particularly for public administrative and labour law disputes."

10.1.6 The Administrative Courts

1st January 2013 represented a landmark in the judicial review against administrative decisions. Specialized courts have been created within the framework of the ordinary court system—the administrative and labor courts. They operate in each county and in the capital as well, but there is only one of them in each county; they are at the lowest level of the judicial system. No such specialized courts have been created at higher levels (counties and regions) of the judicial system; in the Curia there is an Administrative and Labour Department.

The former first instance jurisdiction of the county courts and the Metropolitan Court of Budapest in administrative proceedings has been transferred to the administrative and labor courts. It is important to note that not all types of administrative

disputes were heard before county courts (having both first instance and appellate jurisdiction); there were a lot of exceptions to this rule. Administrative proceedings have been conducted as a special type of civil procedure up to this day under one of the chapters (Chapter XX) of Act III of 1952 on the Code of Civil Procedure, and they are subject to the rules pertaining to civil procedures. In particular, a one-tier court procedure is followed by a one-tier extraordinary remedy procedure to be conducted in the Curia. While in the administrative proceedings the court considers whether or not the provisions indicated in the claim have been violated in the course of taking the administrative decision, it can be challenged before the Curia whether the court of first instance has judged the claim in a proper way. In exceptional cases, the Curia may also decide on the original claim after repealing the court of first instance ruling.

Data concerning the operation of the new courts are not available yet. According to the most up-to-date, recently published[12] data, the number of administrative proceedings initiated in general courts amounted to 6,424 in the first half of 2012, which shows a 6 % increase compared to the data concerning 2011. The administrative law actions represent slightly more than 3 % of the total number of court actions (approximately 195,000) in Hungary. Considering the fact that the administrative court actions provide only limited opportunity for appeals within the framework of the judicial system, in this term 326 appeals were filed with the Metropolitan Court of Appeal (5 % of the total number of administrative court proceedings). On the other hand, among the review (i.e., extraordinary recourse) procedures (3,600) initiated in the first 6 months of 2012 in the Curia, there were 885 administrative court proceedings, which amount to 24.5 %! Then, 22.2 % (835) of the cases finalized by the Curia (3,745) were related to public administration. It means that the rate and importance of administrative cases in extraordinary recourse procedures heard before the Curia are seven to eight times higher compared to the national rate of administrative procedures.

10.2 The Instruments of Administrative Legal Remedy and Their Effectiveness

10.2.1 The System of Administrative Legal Remedies

Pursuant to Article XXVIII(7) of the Fundamental Law of Hungary, "Every person shall have the right to seek legal remedy against any court, administrative or other official decision which violates his or her rights or lawful interests."

[12] http://birosag.hu/kozerdeku-informaciok/statisztikai-adatok/birosagi-ugyforgalom-2012-i-feleves-adatai.

There are two types of *decisions*[13] in Hungarian administrative procedure: *resolutions* and *rulings*. Resolutions are made on the merits of the case, while rulings are made in every other case. Article 71 (1) of the AP states that the authority shall close out cases by way of resolution and shall deliver rulings in other issues during the process. They are different in their legal status, legal effects, and also the remedies that can be used against them.

The remedy system of the Hungarian administrative law presents a varied picture: for the purposes of classifying the different forms of the prevailing remedy, the following types shall be identified: *remedies a) applied in administrative proceedings or related to administrative decisions, or b) related to administrative decisions of non-official nature*.

The general rules of administrative proceedings are set out by Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter referred to as "AP"); however, some procedures are not subject to the stipulations of the AP and not even only of statutory law with respect to the remedy system. For instance, according to Article 14(1) of the AP, an act or government decree may stipulate different regulations from the provisions of this Act in a procurement remedy procedure. In addition, the statutory regulations of the AP shall only be applied in cases of act regulating certain high-priority proceedings (e.g., industrial property rights and copyright proceedings, proceedings on compulsory contributions to the state budget stipulated by law and shared with the Community budget, and proceedings on subsidy from the central budget and the allocated public funds based on legislation, expropriation proceedings) unless the type of case is otherwise stipulated in the act. These rules have been highlighted because apart from the above-mentioned exceptions, the rules pertaining to remedies are laid down at statutory level, namely in the AP, and any other legislation may only derogate from its provisions of the AP if the AP expressly provides for it.

Article 95 of the AP regarding the regulation of the administrative procedure stipulates that regulations on the first instance, i.e. the main proceedings of the AP shall be applied according to the derogations enshrined in the respective chapters on remedies, shall be highlighted.

A very important general rule of the AP sets out that the decisions of the authorities may be appealed independently.[14] An administrative *ruling* shall only give rise to independent appeal proceedings if it is allowed by an act; in any other case, the right of appeal is against the act; in the absence thereof, it shall be exercised within the frame of the available remedies against the termination of the proceeding.

[13] Decision is a collective noun that contains resolutions and rulings.

[14] According to Article 71(1) of the AP, the authority shall close out cases by way of resolution and shall deliver rulings in other issues during the process. In addition, there are some special forms of decision, such as the approval of settlement by composition and the administrative agreement, which are subject to special rules concerning remedies.

The AP explicitly specifies which types of remedy may be applied in administrative proceedings: under Article 97 of the AP, a redress procedure shall be launched upon request, whereas procedures for the review of decisions are opened ex officio.

Redress procedures available upon request are appeal procedures, judicial review, reopening procedure, proceedings opened on the basis of the Constitutional Court decision.

Administrative decisions are reviewed ex officio within the frame of the procedure of the decision making authority initiated in its jurisdiction, within the frame of supervisory procedure, and upon the prosecutor's intervention.

The other type of administrative decisions is represented by the *decisions of a non-official nature*. Such administrative decisions are considered individual administrative decisions too, but they are of a nonofficial nature. Of course, the availability of legal remedy specified by the Fundamental Law shall also be ensured in the case of such decisions. Consequently, the review of such individual administrative decisions may be conducted in the form of a remedy within the framework of public administration or in court.

For instance, Article 90(1) of Government Decree 368/2011 (31 December) on the Implementation of the Act on Public Finances stipulates that, unless otherwise provided by an Act or a government decree, in case of grants awarded through a tender to a beneficiary, which does not form part of the central budget, by an administrative decision of a nonofficial nature, the applicant for or the beneficiary of the grant may file an *objection* to the head of the entity governing the given budget chapter, if he perceives that the procedure related to the tender procedure, the decision concerning the award of the grant, the issuing of the grant documents or the conclusion of the grant agreements, the payment or the reclaim of the grant violate the relevant legal regulations. If the objection is well founded, the head of the entity governing the given budget chapter imposes the necessary measure to remedy the situation contested in the objection. The same procedural rules shall be applied to the objection lodged in relation to the budget support coming from an EU source, although the detailed rules thereof are specified by another government decree.

10.2.2 Legal Remedies Available Within Public Administration, in Particular, the Administrative Appeal

10.2.2.1 Introduction

In Hungary, the antecedents of the regulation of administrative procedural law go back to the end of the nineteenth century. Following the dissolution of the Austro-Hungarian Monarchy, an independent codification was started in many fields of

law. Although in case of numerous legal institutions the Austrian model was used, changes were brought about in the field of administrative law as well—the financial and then the ordinary administrative courts were established—and as the need for a legislative basis for the administrative procedural law arose, the first Hungarian Administrative Procedure Act, Act IV of 1957 (hereinafter referred to as the PA), was adopted, based on the model of the Austrian procedural Act of 1925. The first characteristics of Hungarian administrative remedies appeared long before the statutory regulation of administrative proceedings: statute XX of 1901 on the simplification of the administration limited the former many-branched system of remedies to a two-tier system,[15] and then *Act XXX of 1929* on the modernization of the system of administrative remedies introduced a one-tier system.[16] The latter shall be highlighted for having stipulated, for the first time, that a remedy shall be available against all the administrative decisions (measures), except where any legislation excludes a remedy.[17] The first Hungarian administrative procedure Act has already provided for the means of the review of decisions launched upon request, as well as the one opened ex officio. The further amendments of the PA and then the new PA—entered into force in 2005—did not change the original conception of remedies, thus providing for remedies within the framework of public administration and remedies out of the scope of public administration.

In the Hungarian law in force, the legal basis of the application of administrative remedies is provided by the Fundamental Law, as well as the AP, with the exceptions referred to in Sect. 2.1. In the decision, the client shall receive appropriate information on the availability of remedy, which is one of the basic conditions of the enforcement of remedy law.[18] According to Opinion No A 7/2010 (XI.8) KK, in case the administrative body in the first instance has provided an erroneous remedy information on the right to appeal against the decision and it led the party concerned to file a petition instead of lodging an appeal, the court shall order that the submission be referred to the body that has the jurisdiction to decide the appeal.[19]

The most typical form of ordinary remedy is *the appeal*. Pursuant to Article 98 (1) of the AP, the *client* (the AP calls interested persons "clients") may appeal any resolution in the first instance, but—as opposed to the judicial review—the right to appeal is not bound to specific motives; an appeal may be made for any reason that the person affected deems unjust. Other parties to the proceedings may also lodge an independent appeal against any provision of the resolution in the first instance that pertains to him or against a ruling in the first instance pertaining to him. The sector-specific legislative acts may derogate from these provisions based on the

[15] Magyary (1942), p. 612.

[16] Szűcs (1976), p. 116.

[17] Patyi (2009a), p. 36.

[18] According to Article 72(2)(d) of the AP, information on the most important rules set out by law pertaining to the legal remedy available shall also be given to the client, in the operative part of the authority's decision.

[19] Bírósági Határozatok (*Court Rulings*) 2011, no. 2.

empowerment of the AP—for instance, in the remedy stage of the public procurement procedure, the number of entities entitled to initiate the remedy procedure and the grounds therefor are relatively limited. An application may be submitted by the contracting authority whose right or legitimate interest is being harmed or risked by an activity or default that is in conflict with this Act. The chambers or interest representation organizations with an activity related to the subject matter of procurement may submit an application regarding the illegal nature of the contract notice, the invitation for submission of tenders, the invitation to participate, the documentation, or the amendment thereof.[20]

Pursuant to decision no. 21/1997 (III.26.) of the Constitutional Court, the authority—which is competent in handling fees—may decide on the applications for modification/correction/cancelation in separate resolutions, without prejudice to the right of remedy. In this respect, the Supreme Court has underlined that in each case the contents of the submitted application determine whether the application shall be considered an appeal or a new application.[21]

As was already mentioned, no legal reasoning is necessary for the appeal. In one of its Decisions, the Supreme Court underlined that the appeal may pertain to the rights, the legitimate interest, or the legal situation of the client, although it is not subject to any condition as regards the reasoning.[22]

10.2.2.2 Time Limits for Appeals

With respect to the prescribed time limit, it shall be underlined that under the general rules of the AP, an appeal shall be lodged within 15 days following the date of delivery of the decision—unless otherwise prescribed by an act or government decree—however, in order to help swift enforcement, the Act also stipulates that the person entitled to appeal may waive his right to do so orally or in writing within the time limit in which an appeal must be filed. Although the time limit for appeals is shorter than the time limit for initiating a judicial review, experience shows that the time limit for appeals is appropriate.[23] The case law is consistent in the item (Kf. II.39.736/2001/4 ad hoc decision) that if the client fails to enforce his right after becoming aware of the decision, he may not exercise his right to appeal at a later date. He may not contest or challenge a resolution several years later of which he was aware before and that he did not contest within the set time limit, by the exercise of rights in good faith. In the court case in question, the date of becoming aware of the resolution is not clarified; this date may only be determined after

[20] Article 137(1) of the Act CVIII of 2011 on Public Procurement, published: 20 July 2011 in the Hungarian Official Journal

[21] Judgment Kfv.VI.35.207/2009. no. 6. of the Supreme Court.

[22] Judgment Kfv.I.35.285/2011/ no. 4 of the Supreme Court.

[23] According to Decision, Constitutional Court Decision no. 24/1999 (30 June), the actual exercise of the right for remedy requires that sufficient time be allowed for the filing of the remedy.

obtaining further evidence, but it is not possible in the course of the review procedure; thus, the legal dispute may not be handled.[24]

As regards the time limit for appeal, certain sector-specific legislative acts lay down further rules, for instance, in tax administration proceedings the appeal shall be lodged within 30 days[25] with respect to posteriori tax assessment or in case of a resolution on the refusal to issue a tax number within 8 days following the notification of the resolution. Compared to the general provisions set out in the AP, it is a very important difference, such that in the latter case the failure to meet the time limit for appeal means the forfeiture of the right, since in case of noncompliance with the time limit of 8 days no application for excuse may be submitted. According to the general rules, an appeal that is lodged beyond the deadline shall be dismissed by the authority without any excuse of its merits; however, if the client has submitted an application for excuse for failing to meet the time limit for appeal, the starting date of the time limit shall be the day on which the decision on the acceptance of such application becomes binding.

In the Administrative Uniformity Decision No. 1/2010, with regard to proceedings on imposing fines, the Curia underlined that in case the 60-day time limit stipulated by Article 21(4) is exceeded, the regulations on the time limit of administration shall be applied, and in the course of calculating the time limit, the fine shall be deemed imposed on the date of delivery of the provision, carried out according to the Act on the General Rules of Administrative Proceedings and Services.[26] Administrative Uniformity Decision No. 3/2010 (V. 27) overruled the Administrative Uniformity Decision mentioned above; therefore, it is not applicable anymore. This situation however generated many court cases.

In order to properly enforce the right to seek legal remedy, the AP introduces certain rules offering guarantee, for instance, if the appeal is wrongly addressed—to the supervisory authority, i.e., at the authority of appellate jurisdiction instead of the authority having jurisdiction in the first instance—the authority of appellate jurisdiction shall forward it to the authority of first instance.[27] The appeal may not be dismissed on the grounds of delay if the person entitled to appeal files the appeal within the deadline for appeal at the authority of appellate jurisdiction. In case of failing to observe the time limit for appeal, the client may submit an application for certification: if the client lodged an application for waiving the time limit for appeal, the time limit shall begin after the decision allowing for such continuation becomes operative. If the client submitted a petition of cost exemption, the time limit shall begin after the decision becomes operative. If the appeal is submitted to

[24] Judgment Kfv.VI.37.290/2011/ no. 5. of the Curia of Hungary.

[25] Article 136(4) of the Act XCII of 2003 on the Rules of Taxation, published: 14 September 2003 in the Hungarian Official Journal.

[26] See also the judgment Kfv. IV. 39.119/2011 of the Curia of Hungary.

[27] Article 102(1) of the AP.

the authority with appellate jurisdiction, the time limit shall begin on the delivery of the appeal to the authority of the first instance.[28]

In terms of the decisions subject to appeal, distinction may be made between the resolution and the ruling[29]—the ruling may be contested only in an appeal filed against a resolution or, failing this, against rulings for the termination of the proceedings, with the exception of some types of rulings enumerated by the AP and other acts of legislation, for instance, an independent appeal may be lodged against first instance ruling on a petition rejected without substantive examination, on the termination or suspension of proceedings. With respect to nonsubstantive (procedural) decisions, certain sector-specific legislative acts extend the set of rulings[30] that may be contested in an appeal, in the proceedings related to the given sector.[31]

Moreover, under Article 100(1) of the AP, the appeal may only be limited *in some explicitly specified cases*. There shall be no appeal if it is excluded by law; against resolution approving settlement between parties; against official registration of any data, fact, or eligibility without discretion unless otherwise provided for in legislation; if the decision has been made by a minister, autonomous state administration body, independent regulatory body, or the head of government office unless otherwise provided for in an act or government decree, if the first instance decision was made by the head of central state administration agency; against decisions on cases of municipal authority made by the representative body; or against decisions of proceedings in imposing administrative penalty stipulated by Act CLXXXIX. 51(4) of 2011 on Hungarian Local Governments made within delegated powers. In Decision No. 77/2008 AB (V.29.), the Constitutional Court has held that in order to enforce the clients' right to seek legal remedy, the appellate system shall be organized in such a way as to ensure the existence of a body that has jurisdiction to adjudicate the appeals. Pursuant to Article 100(1)(a) of the AP in force between 1 January 2007 and 13 November 2007, in administrative actions, the appeal may be excluded by law or a government decree. The Constitutional Court concluded in its Decision No. 90/2007 AB (XI.4.) that the wording "or a government decree" of Article 100(1)(a) of the AP is unconstitutional, and annulled it.[32] In its decision, the Constitutional Court referred to Article 57(5) of the Constitution being in force at that time, under which the right to seek legal remedy is a fundamental right that may be exercised by everyone, in accordance with the provisions of the law, and that may only be restricted by a statute. According to the AP in force, the right to appeal may only be excluded by a legislative Act. On the basis of Article 57(5) of the Constitution and Article 106(1) of the AP, without

[28] Article 102(6) of the AP.

[29] See reference no. 14.

[30] See reference no. 14.

[31] See Article 136(3) of the Act XCII of 2003 on the Rules of Taxation.

[32] ABK November 2007, 1045, 1058–1059.; 90/2007 Decision No. 90/2007 AB (14 November) of the Constitutional Court, ABK November 2007, 1045, 1059.

prejudice to the provisions set out in Articles 13 and 14 of the AP, in case of the decisions (resolutions, rulings) on administrative actions conducted by the Center, the right of the client to seek ordinary legal remedy (the appeal under Articles 98–102 of the AP) may not be excluded by a government decree.[33]

10.2.2.3 The Suspensive Effect of the Administrative Appeal

The appeal *shall have a suspensive effect on the decision*, except if the decision is enforceable under the provisions set out in the AP notwithstanding any appeal or if the authority has declared the decision enforceable, excluding the suspensive effect of the appeal. In such cases, the right conferred in the decision appealed may not be exercised.[34] The following cases represent an exception to the above-mentioned rule: the provisions of the decision shall be carried out notwithstanding any appeal if it prescribes a one-time or regular payment of money to the benefit of the client, cash benefits—including benefits in kind that can be expressed in a cash equivalent—and the appeal the client has lodged pertains to any extra claim in addition to the amount granted; moreover, an appeal filed against a ruling for a provisional protective measure or for the approval of a petition for the limitation of access to documents shall have no suspensive effect; furthermore, an appeal filed against a decision for determining and for the bearing of procedural costs shall have no suspensive effect concerning the other provisions to which the appeal does not pertain.[35] In the above-mentioned cases, *ex lege* there is no suspensive effect in terms of the implementation, but there are some cases in which the decision may be declared enforceable by the authority notwithstanding any appeal. The related criteria are expressly laid down in the AP, for instance, where it is necessary to prevent any life-threatening or potentially devastating situation or to mitigate any detrimental consequences, any delay is likely to cause irreparable harm, or the decision provides for the husbandry and care of any person.[36] Certain sector-specific legislative acts specify further cases where the decision may be declared enforceable notwithstanding any appeal. For instance, in certain administrative

[33] For instance, the decision on the authorization of noninterventional trials subject to the Act on Medicinal Products for Human Use and on the Amendment of Other Resolutions Related to Medicinal Products, in the case of which no appeal may be lodged [Article 164/A(4) of Act CLIV of 1997]; Article 22 of Act LXXXIV of 1998 on Family Support excludes the appeal against the resolution of the President of the Hungarian State Treasury, issued in exercising his equitable right, on the granting of eligibility to childcare allowance; furthermore, Article 43(5) of the Act also provides for this possibility in cases where the amount of the family support that was disbursed without a legal basis and that shall be repaid by the individual on the basis of a legally binding resolution is remitted or reduced by the President of the Hungarian State Treasury, in exercising his equitable right, upon application of the individual.

[34] Article 101(1) of the AP.

[35] Article 101(2) and (3) of the AP.

[36] Article 101(5) of the AP.

proceedings concerning health, the decision taken by the health authority may be declared enforceable notwithstanding any appeal, for public health or epidemiological reasons.[37]

The authority shall expressly declare its decision enforceable notwithstanding any appeal, including reasoning, and shall provide for the means of enforcement and implementation in the decision. If such decision contains a deadline for performance, enforcement may be launched only after noncompliance with this deadline.[38]

10.2.2.4 The Scope of Administrative Appeal

With respect to *the devolutive effect* of the appeal, the following shall be underlined: in administrative actions where the decision can be appealed on the basis of law, the authority of first instance and the authority of appellate jurisdiction shall not be one and the same body and the authority of appellate jurisdiction and its director shall not be able to instruct the head or any officer of the authority of first instance—except for the discharge of certain functions or to make amends relating to some discrepancy—even if otherwise having jurisdiction to do so.[39] The appeal shall be submitted to the authority that adopted the decision contested.[40] The authority of the first instance shall forward the appeal to the authority of appellate jurisdiction[41] within 8 days following the time limit for appeal—or within 15 days where a special authority is required to participate—unless the authority has withdrawn or supplemented the appealed decision or made the requested amendment or correction or dismissed the appeal without any examination as to its substance and also unless the appeal has been withdrawn before being forwarded. The authority of first instance shall forward the appeal with all documents attached and shall make a statement on its opinion concerning the appeal.[42]

> AP, Section 104
>
> (1) Where the decision of the authority is not amended or withdrawn according to the appeal as described in Section 103, the appeal shall be adjudicated by the authority vested with powers to do so.
>
> (2) The authority of the second instance shall obtain the assessment of the special authority appointed in the second instance. If the appeal is not concerned with the assessment of the specialist authority of the first instance, the authority of the second instance shall not contact the specialist authority. If a specialist authority is not required

[37] Article 65(2) of the Act CLIV of 1997 on Health, published: 23 December 1997 in the Hungarian Official Journal.

[38] Article 101(6) of the AP.

[39] Article 106(1) of the AP.

[40] Article 102(1) of the AP.

[41] See Patyi (2009a), pp. 116–117.

[42] See Kilényi (2009), p. 367.

in the second instance pursuant to an act or government decree, the authority shall have powers to adjudicated the part of the appeal pertaining to the special authority's assessment.

(3) The authority of the second instance shall examine the contested decision and the proceedings preceding it; in this examination the authority shall not be bound to what is contained in the appeal.

(4) The authority of the second instance shall terminate the appeal proceedings if all appeals have been withdrawn.

Section 105.

(1) The authority of the second instance shall either sustain, reverse, or annul the decision. In the cases defined by law the authority of the second instance may not establish an obligation more severe than what has been adopted in the decision in the first instance under the right of deliberation. The authority of the second instance shall have powers, regardless of whether it is stated in the appeal or not, to prescribe a new deadline in the appellate procedure, where it is deemed justified on account of the appellate procedure.

(1a) The decision of the second instance may be declared enforceable irrespective of any petition for the suspension of enforcement, if the conditions for enforceability notwithstanding any appeal are satisfied. Subsection (6) of Section 101 shall apply to having a decision declared enforceable irrespective of any petition for the suspension of enforcement.

(2) The authority of the second instance may annul the decision and order the authority of the first instance to reopen the case if the available data and information is insufficient to adopt a decision in the second instance, when new facts are brought to its notice or if further evidence is required to ascertain the relevant facts of a case, or shall proceed to obtain additional evidence on its own accord, and shall adopt a decision accordingly.

(3) The authority of the second instance, if it concludes that other clients are to be involved in the case, shall annual the decision in the first instance by way of a ruling and shall order the authority of the first instance to reopen the case.

(4) In the new proceedings the authority of the first instance shall be bound by the operative part and by the justification of the resolution of the second instance.

(5) The decisions referred to in Subsections (1)–(3) shall be delivered to the person who filed the appeal and to all other persons to whom the decision of the first instance was delivered. (. . ...)

(7) The authority of the second instance shall return the documents it has received in connection with the appeal after the decision referred to in Subsections (1)–(3) is adopted to the body of the first instance, together with the decision, and this authority shall take action to have the decision delivered.

The Constitutional Court has examined in its Decision No. 19/2007 AB (III.9.) the appropriateness of the situation where a central administrative body has first instance jurisdiction, while the President of the body has second instance jurisdiction. The Constitutional Court has held that the President of the body shall not be considered a separate body from the body headed by him in terms of organization and tasks.

In another Decision, the Constitutional Court has held that a system of two-level proceedings shall not be created with the participation of the separate organizations of the same administrative body in the absence of a legislative regulation. Considering the requirements established in Decision No. 513/B/1994 AB of the Constitutional Court, the separation of authorities within the appellate system may be ensured by appropriate public law guarantees: the separation of regional and central bodies shall be ensured in terms of the scope of tasks (in this respect, the actual separation of the regional bodies' competences from the competences of the central

body shall be unambiguously determined); the separation of regional and central bodies shall be ensured in terms of the organizational structure (in this respect, it shall be clearly stated that the regional body—irrespective of whether it has legal personality or not—is headed by a person who is not the same person as the head of the central body and is independent from the latter); the person who exercises the powers for the issuance of official copies related to the administrative decisions taken by the regional body shall not be instructed by the head of the central body and, with respect to the work carried out by him, is only subject to the acts of legislation. These requirements were already transposed by the AP, and it stipulates that "body" means, in particular, the central, regional, and local branches of the central government body, irrespective of whether it has legal personality or not.[43]

If the first instance authority finds, following an appeal, that its decision is unlawful, it shall amend or withdraw the decision. In case of appeal, the authority may withdraw its lawful decision or amend it as requested in the appeal if it is in agreement with the reasons stated therein, provided that there is no adverse party involved in the case. The competent authority, if it finds, following an appeal, that its resolution is unlawful, shall amend the resolution in question.[44]

Where a resolution of a competent authority has been appealed and found lawful, the competent authority may amend its assessment nonetheless, as requested in the appeal, if it is in agreement with the reasons stated therein and if there is no adverse party involved in the case.[45]

Where the decision of the authority is not amended or withdrawn according to the appeal, the appeal shall be decided by the authority empowered to do so.[46]

The Hungarian system of appeals allows new facts and evidence to be presented in the appeal[47]; the authority of second instance shall obtain the resolution of the competent authority designated for the purpose of the proceedings of second instance, and it is crucial that the authority of second instance shall examine the contested decision and the procedure preceding the decision, in the course of which it is not bound to the contents of the appeal. Consequently, the appellate procedure may basically consist of the repetition of the whole underlying procedure, which means that the appellate procedure is not specifically limited to the review of the decision. With respect to the conduct of the proceedings of second instance, it shall also be underlined that some procedural acts may not be repeated in the proceedings of second instance, such as the regulatory inspection, which is nonrecurring. In certain cases, the inspection is considered an infringement that may not be remedied in any court action and affects the decision on the merits of the case as well; moreover, it may not be carried out in a new procedure or in case of obtaining new evidence.[48]

[43] Article 106(2) of the AP.

[44] Csiba (2011), pp. 2–3.

[45] Article 103 of the AP.

[46] Article 104(1) of the AP.

[47] Article 102(2) of the AP; see also Boros (2010), pp. 209–238.

[48] Judgment Kfv. I. 35.145/2008. of the Supreme Court.

Pursuant to Article 105(1) of the AP, the authority of the second instance shall confirm, reverse, or annul the decision; in the cases defined by law, the authority of second instance may not establish an obligation more severe than what has been adopted in the decision in the first instance using its discretion.[49] In administrative proceedings related to taxation, the so-called restriction of aggravation may be considered a similar rule, which stipulates that if a resolution has been adopted in conclusion of a previous audit, no new resolution changing the tax liability, tax base, tax amount, the base and amount of central subsidy to the detriment of the taxpayer may be adopted more than 1 year following the time when the audit was concluded or if the audit has been concluded without the opening of an official proceeding. Furthermore, a new resolution cannot be adopted if the resolution adopted in the original proceeding is overturned by the superior tax authority and a new proceeding is ordered or if the tax authority of first instance has withdrawn the resolution.[50]

If the available set of data is not sufficient to take second instance decision or any new fact has arisen following the decision of first instance or further clarification of the fact of the case is needed, the authority of second instance may, in addition to annulling the decision, order the authority of first instance to conduct a new procedure or obtain additional evidence itself and take its decision on the basis thereof. The Act does not exclude the conduct of an evidence procedure in the second instance proceedings repeated on the basis of a judicial final judgment.[51]

It is also important that the authority of second instance, if it concludes that other clients are to be involved in the case, shall annul the decision in first instance by way of a ruling and shall order the authority of first instance to reopen the case.[52]

Article 105(3) of the AP may be applied, in particular, where the authority of second instance concludes, irrespective of the appeal lodged, that other clients are to be involved in the case or it shall be clarified whether the client status shall be granted to persons or organizations not involved in the proceedings in the given case. The client status shall be established in the first instance proceedings, and—in accordance with Article 105(3) of the AP—in the course of the second instance proceedings, there is no legal possibility to enforce the client status not established in the first instance proceedings.

The fact that certain provisions of the AP, in particular Article 105(2), provide for additional evidence in the appellate procedure does not mean that the exercise of the client's rights not enforced in the first instance proceedings may be fully enforced in the course of the second instance proceedings. Supposing the acceptance of the defendant's opinion, the administrative proceedings would become one-level proceedings for the plaintiffs considered to be clients, since only the defendant second instance authority would examine its representations and

[49] cf. Boros (2012), pp. 244–248.

[50] Article 142(1) of the Act XCII of 2003 on the Rules of Taxation.

[51] Judgment Kfv. VI. 37.666/2010. of the Supreme Court.

[52] Article 105 of the AP.

statements on the merits of the case. The procedural rights specified by the AP shall be exercised by the client in the first instance proceedings; the defendant—in his capacity as the supervisory body—may only carry out substantive examination of the first instance authority's decision, if it was related to proceedings in which the client's rights could actually be exercised.[53]

Certain sector-specific proceedings extend the effect of the second instance decision to other issues otherwise not subject to any appeal: for instance, in real estate registration procedures, the effect of the second instance decision taken on the basis of the appeal may also cover further registrations based on the contested registration.[54] In this respect, it is worth referring to an interesting provision in our Act on Real Estate Registration: if an appeal may be filed against a resolution and the body having jurisdiction to adjudicate the appeal has ordered to conduct new proceedings, the land title office shall cancel the contested entry and the entry on the appeal when registering the status quo in accordance with the outcome of the new proceedings. The resolution thereon shall be delivered together with the decision of the body having jurisdiction to adjudicate the appeal.[55] The land title office shall act in accordance with the provisions set out by the legislative acts on Real Estate Registration. Consequently, it may not derogate from the provisions of the Act on Real Estate Registration, which stipulates the simultaneous delivery of the second instance decision and the new first instance decision, notwithstanding the contradiction between Article 105(7) of the AP and this provision. This apparent contradiction may not be eliminated by the land title office by derogating from the procedural rules pertaining to it when delivering the resolution.[56]

Since the issue of judicial reviews shall be dealt with later, first we shall present the other remedies—launched upon request—applicable in administrative proceedings. In this respect, it shall be noted that some authors consider the legal institution of *application for excuse* (waiver) a remedy.[57]

10.2.2.5 Reopening Administrative Proceedings

The possibility to reopen proceedings has been introduced in the Hungarian administrative proceedings by the AP. Such proceedings may be conducted if the client

[53] Judgment Kfv.II.37.201/2011/ no. 4. of the Supreme Court.

[54] Article 56(5) of the Act CXLI of 1997 on Real Estate Registration, 17 December 1997 in the Hungarian Official Journal.

[55] Article 57(4) of the Act CXLI of 1997 on Real Estate Registration.

[56] Judgment Kfv.III.37.346/2009/no. 8 of the Supreme Court.

[57] Any person who was unable to keep a deadline or time limit in the proceedings for reasons beyond his control may lodge an application for excuse. The application for excuse shall be adjudged by the authority proceeding at the time of the omission. An application for excuse for failure to observe the deadline for filing an appeal or for filing for legal action shall be adjudged, respectively, by the authority of the first instance or by the court of jurisdiction for administrative actions (Article 66(1) and (2) of the AP); see Magyary (1942), p. 614.

obtained any fact, information, or evidence after the operative date of a final resolution that already existed before the resolution was adopted but it was not presented during the proceedings although it is of essence for the judgment of the case, a request for reopening the case may be lodged within 15 days after gaining knowledge, provided that it carries the potential to produce a resolution that is more beneficial for the client.[58] A request for reopening the case shall be judged by the authority of the first instance.[59] In the reopened proceedings, the authority may either amend or withdraw the final resolution or may adopt a decision consistent with the new evidence presented.[60] If the newly obtained facts and evidence would have blocked the obligation—in full or in part—that was conferred in the final resolution, the reopened proceedings shall address the matter of settlement of the situation arising upon the performance (enforcement) completed up to the time of submission of the petition or until the enforcement procedure is suspended, the elimination of any unjust and adverse disposition the obligor has suffered, and the matter of compensation for damages and procedural costs.[61] Pursuant to the AP, the authority shall reject a request for reopening the case without substantive examination if supported by a fact that occurred after the final resolution was adopted or by any subsequent changes in the relevant legislation; if a judicial review is in progress; or if the court of jurisdiction for administrative actions has adopted a resolution in the judicial review, after 6 months following the operative date of the decision; or if excluded by an act or government decree and, in administrative actions of local authorities, a local government decree. On the basis of the latter, under Article 74(4) of Act CLXXXIII of 2005 on Railway Transport, no request for reopening the case may be lodged against a final decision concerning the authorization of railroad tracks and related equipment that form part of the national, regional, suburban, and local rail infrastructure or of railroad buildings; Article 15/A of Government Decree No. 149/1997 (IX.10.) on Child Protection and Guardianship Proceedings (10 September) stipulates that there is no possibility to conduct reopened proceedings in cases related to the authorization for the marriage of minors, legal declaration of eligibility for being adopted, authorization and cancelation of adoption, temporary placement, appointment of a temporary conservator or sequestrator.

Proceedings may be initiated on the basis of the Decision of the Constitutional Court, where a constitutional complaint is submitted by a party against any legislation or statutory provision that is contrary to the fundamental law, based on which the resolution for approval of the settlement between the parties was adopted and on that basis the Constitutional Court annuls the legislation or statutory provision in question, and if the Constitutional Court did not declare the annulled legislation or statutory provision applicable in the case invoking the proceedings of the Constitutional Court, the party may submit a petition within 30 days following the date of

[58] Article 112(1) of the AP.
[59] Article 112(4) of the AP.
[60] Article 112(5) of the AP.
[61] Article 112(7) of the AP.

delivery of the Constitutional Court resolution to the authority that approved the settlement for the amendment or withdrawal of the resolution. If, acting on a constitutional complaint, the Constitutional Court declared only a potential interpretation of a specific statutory provision contrary to the fundamental law, the above-mentioned proceedings shall be conducted in relation to the resolution that was adopted relying on the interpretation that was declared contrary to the fundamental law.[62]

With respect to the remedy system of the administrative proceedings, the other group thereof consists of the ways of review of decisions that may be opened *ex officio*. Some of these remedies are available within the public administration, such as the amendment and withdrawal of the decision by acting within the authority's own jurisdiction or in its supervisory capacity. In the case of the former, the authority, if it finds that its decision that has not been judged by an authority or supervisory organ vested with powers to adjudicate appeal cases or by a court of jurisdiction for administrative actions is unlawful, shall amend or withdraw the decision in question. This possibility may only be used by the authority once and, unless otherwise prescribed by law, within 1 year from the date the decision was delivered. Where judicial review of the decision is pending, the authority may withdraw its decision before a counterclaim is lodged on the merits.[63] With respect to the supervisory proceedings, it shall be underlined that the supervisory organ shall have powers to examine ex officio the proceedings of the competent authority, and its decision, and shall consequently take the measures necessary to eliminate the infringement, if any, and shall exercise its supervisory competence.[64] If the decision of the authority is found to be unlawful, the supervisory organ may reverse or annul such decision. If necessary, the supervisory organ[65] shall adopt a ruling to annul the unlawful decision and shall order the authority to reopen the case. The decision shall be delivered to any person to whom the unlawful decision was delivered.[66]

10.2.2.6 Administrative Appeals in Data

Unfortunately, statistics on public administration are only available up to 2009. A potential (and relatively obvious) method for evaluating administrative efficiency is to analyze the relation between administrative cases (petitions) and administrative appeal cases. Administrative cases initiated at the level of local government

[62] Article 113(1) and (2) of the AP.

[63] Article 114(1) of the AP.

[64] Article 115(1) of the AP.

[65] According to the Supreme Court, Article 115 of the AP also allows the supervisory body to exercise its supervisory competence in cases where the first instance decision is not final (Judgment Kfv.III.37.584/2009/no. 5 of the Supreme Court).

[66] Article 115(2) of the AP.

authorities add up to 0.8 cases per capita in 2009.[67] Out of this vast ocean of cases, only 0.002 % of the cases are followed by administrative appeal procedures. On one hand, the extreme low rate of appeals may indicate a superefficient administrative culture, but more likely it might indicate serious distrust in appeal procedures. According to the general perception in Hungary, appeal cases and especially judicial proceedings are lengthy, costly, and unpredictable.

Taking this as a hypothesis, statistics indicate the following. Out of a total of 9,776,797 public administrative cases at local governments (cases where local governments act as local representatives of the national public administrative system) in 2009, correction and replacement affected 4,207 cases; cases affected by an administrative appeal totaled 16,410; and appeals that were effective in terms of having changed the decision of first instance summed up to 2,362 cases.

In cases falling under the competence of local governments, the total figure in 2009 was 1,564,135. Correction or replacement affected 1,276 cases; appeals affected 3,157 cases; and successful administrative appeals totaled 518.

Concerning judicial procedures, both case types provide extreme low figures: 325 and 89 cases, respectively, were subjected to judicial review.

All in all, it can be stated that considering the figures, administrative appeals prove to be efficient means of remedies.

10.2.2.7 Remedies Against Nonadministrative Acts of the Public Administration

In addition to the above, our acts of legislation lay down several forms of remedy against individual administrative decisions of nonofficial nature. Referring to the example mentioned above—see Sect. 10.2.1—the most characteristic forms of remedy in such procedures are the *objection* and the *complaint*. An objection may be lodged in relation to the use of European Union resources and the award of certain state subsidies.[68] The applicant for or the beneficiary of the grant, from the date of submission of the application, in the eligibility period, may file an objection addressed to the National Development Agency at the intermediate body against the decision of the intermediate body or file an objection addressed to the Minister responsible for the development policy at the National Development Agency against the decision of the National Development Agency, if he perceives that the procedure related to the tender procedure, the reception of the application for the grant, the decision concerning the award of the grant, the issuing of the grant documents or the conclusion of the grant agreements, the payment or the reclaim of the grant issued from the budget violates the legal regulations or the grant

[67] Hungary had approx. 10,032,000 inhabitants in 2009.

[68] Article 81(1) of Gov. Decree No. 4/2011 (I. 28.) on the rules for the use of funds from the European Regional Development Fund, the European Social Fund, and the Cohesion Fund in the programming period 2007 to 2013, published: 28 January 2011 in the Hungarian Official Journal.

agreement. With regard to the state support, a similar remedy is made available by Article 24 of Gov. Decree No. 285/2012 (9 October) on the detailed rules pertaining to the use of the Own Resources Fund of the European Union.

The number of objections was 539 in 2011, whereas in 2012 there were 1,118 cases. In 2011, the number of the applications for remedy against infringement proceedings was 145, while in 2012 it was 228. According to the available information, 45 % of the decisions were upheld, 13 % were terminated by the minister, and in 42 % of the cases decisions were made on the termination of the infringement decision or the proceeding body was ordered to carry out new proceedings.

Act LXIII of 1999 on public domain inspectorates[69] has introduced an interesting solution, which stipulates that the provisions of the AP or the Act on contraventions shall be applied to the procedures of Civil Enforcement Officers, depending on the nature of the given case. If neither administrative proceedings nor remedy proceedings regarding contraventions are initiated following the measures taken by the civil enforcement officer, a complaint may be lodged against it. Complaints shall be decided on the basis of Act CXX of 2012 on the Activity Performed by Persons Fulfilling Certain Law Enforcement Tasks, as well as the Amendment of Certain Acts with the aim of Addressing Truancy.[70]

10.2.2.8 Administrative Appeals in the Public Interest

The legal institution of the so-called *complaints* and *notifications* on behalf of the public shall be distinguished from the above. Pursuant to the Act XXIX of 2004 on the amendment and repeal of certain laws, as well as the establishment of certain regulations relating to Hungary's accession to the European Union,[71] complaints and notifications on behalf of the public shall be handled according to this Act by public and local authorities. The complaint is a petition, which aims to eliminate individual grievances or harm done to someone's interests, and its handling does not fall within the jurisdiction of any other procedure, in particular judicial, administrative procedures.

On the other hand, notifications on behalf of the public draw attention to any circumstance that shall be eliminated or remedied in the interest of a given community or the whole society. Notifications on behalf of the public may also include recommendations.

Complaints and notifications on behalf of the public may be submitted by any person—orally, in writing, or by electronic means—to the authority that has

[69] Act LXIII of 1999 on public domain inspectorates, published: 21 June 1999 in the Hungarian Official Journal.

[70] Article 23 of the Act referred to above.

[71] Act CXX of 2012 on the Activity Performed by Persons Fulfilling Certain Law Enforcement Tasks, as well as the Amendment of Certain Acts with the aim of Addressing Truancy, published: 23 July 2012 in the Hungarian Official Journal.

competence in the given subject. Oral notifications shall be put in writing by the authority that has competence in the given case.[72]

On the basis of the complaint or the notification on behalf of the public—if it proves to be well founded—the situation suitable for public interests shall be restored, the otherwise necessary measures shall be taken, the cause of the detected deficiencies shall be addressed, the harm done shall be remedied, or, furthermore, in justified cases, responsible entities shall be held accountable.

The following provision may also be considered noteworthy: according to Act CXX of 2012 on the Activity Performed by Persons Fulfilling Certain Law Enforcement Tasks, as well as the Amendment of Certain Acts with the aim of Addressing Truancy, any person whose rights or legal interests have been violated by the application of coercive measures may file a complaint with the chamber specified in Act CXXXIII of 2005 on Security Services and the Activities of Private Investigators in case of private security guards and, in all other cases, with the police. The entity that has competence to examine the complaint shall issue its decision within 30 days following the date of receipt of the complaint, in accordance with the rules pertaining to administrative proceedings.[73]

10.2.2.9 Special Appeal Procedures

In case of some fields of administrative law, the rules pertaining to remedies show a specific nature: for instance, where an autonomous body has jurisdiction in the first instance, exercising a quasi-judicial power, because the given body settles the legal dispute of adverse parties. For instance, for the purposes of contract award procedures, Article 134(2) of Act CVIII of 2011 on Public Procurement (hereinafter referred to as the PPA) stipulates that proceedings initiated against any infringement of the legislative provisions applicable to public procurement, contract award procedures, qualified public procurements, qualified contract award procedures, procurements in the field of defense, as well as contract award procedures in the field of defense shall fall within the competence of the Public Procurement Arbitration Board, with regard to the contract award procedure. In such proceedings, other alternative dispute settlement techniques arise too, in particular, the issue of preliminary dispute settlement.[74]

10.2.2.10 On the Possibility to Award Damages Through Administrative Appeal

The legal basis of the *liability for damages* of the administrative authority is Article 4(2) of the AP, which stipulates that administrative authorities shall be subject to

[72] Article 141 of the Act referred to above.

[73] Article 22 of the Act referred to above.

[74] See the section 4 on other ADR tools.

civil liability for damages caused by any unlawful proceedings. It may also include the liability for damages caused by an improper administrative decision—possibly of the second instance. According to the aforementioned definition, the claim for damages may not be enforced in administrative proceedings, only in a separate (civil) action for damages subject to civil law rules pertaining to damages. Since the above-mentioned rule set out by the AP is a relatively new legal institution in the Hungarian administrative procedural law, no elaborated case law is available yet in relation thereto, in particular, relating to the liability for damages caused in the course of remedy proceedings.

10.2.3 The Fundamental Features of the Administrative Justice (in Hungarian: Közigazgatási Bíráskodás*), the Judicial Review (in Hungarian:* Bírósági Felülvizsgálat*), and Administrative Court Proceedings (in Hungarian:* Közigazgatási per*)*

10.2.3.1 Introduction

As it was mentioned before, the comprehensive amendment of the former Hungarian Constitution created the constitutional rules that were able to provide the legal basis for the judicial review of administrative decisions.[75] Act XLII of 1989 established, as of 11 December 1989, the administrative divisions[76] (i.e., a panel of judges responsible for the supervision of administrative decisions) of the Supreme Court (the current Curia) and the county courts (the current regional courts), but the extension of the judicial review of administrative decisions was only stipulated later by a legislative measure. Act XXVI of 1991[77] basically provided for the widespread availability of judicial reviews—which had been of a limited availability—in administrative cases, but most of the time it is referred to as the reestablishment of administrative justice.[78] This Act had a significant impact,

[75] Az egyes alkotmányi rendelkezések bírósági felülvizsgálathoz való viszonyának elemzésére *(Study of the relation of certain constitutional provisions to the judicial review)* See Patyi (2009b), pp. 1756–1764.

[76] Article 18(6) of Act XLII of 1989 on the amendment of certain Acts relating to the amendment of the Constitution, published: 11 December 1989 in the Hungarian Official Journal.

[77] This Act has already been repealed as redundant in 2007, and the rules pertaining to judicial reviews are set out by the Code of Civil Procedure and the Act on the General Rules of Administrative Proceedings and Services.

[78] For instance: Ádám (1996), pp. 705–712; Gaál (1996), pp. 390–392; Kilényi (1991), pp. 296–303; Petrik (1991), pp. 289–295; Petrik (1993), pp. 81–92; Takács (1992), pp. 207–216; Trócsányi (1992).

but its adoption was urged by a Decision of the Constitutional Court.[79] Furthermore, it is worth mentioning that all of the provisions of this Act were amending provisions to other Acts, and it was meant to be a transitional act of legislation by the Parliament. According to its Preamble, it was drafted for the period "until the whole system of administrative justice is created." Even the Act itself distinguished between the two concepts. Up to the present day, no independent, separate Act has been adopted on the integrated administrative justice, and it has not been established yet, and, since 1989, no independent, separate higher court has been created to replace the Administrative Court dissolved in 1949. Practically, all the decisions (among others, the normative ones as well) of the Hungarian public administration may be contested in court, although within the framework of several types of procedures.

10.2.3.2 The "Administrative Justice" Concept

One of the ways of drawing a distinction between administrative justice and judicial review is related to the judicial organization of the entity conducting the review. The term "administrative justice" is referred to as a general term for the activities of the separate administrative courts that are independent from the organization of public administration and of the ordinary courts.[80] The distinction is worth making even in the absence of a separate court. The administrative justice is a broader term: the activity related to the review of legality of decisions taken by the administrative authorities and other legal entities entitled to take administrative decisions, carried out by any court, both within the framework of a remedy (review of a subjective nature) or within the framework of the protection of law (review of an objective nature); the rules pertaining thereto, in particular, the provisions relating to the jurisdiction of the court and the rules on court proceedings and, furthermore, the provisions concerning the organization and the legal status of the courts carrying out such activity.

Judicial review is a narrower term: it refers to the remedial means and procedure available upon request for the review of legality of administrative resolutions and, on an exceptional basis, of certain rulings, institutionalized and regulated within the framework of administrative proceedings; its fundamental objective and function is to protect the citizens' rights and legitimate interests and to prevent the enforcement of any unlawful decision, as well as to enforce the taking of a lawful decision.

On the other hand, the administrative *court proceedings* are *inter partes* proceedings regulated in a separate Chapter of Act III of 1952 on the Code of Civil Procedure and conducted by a court, in which the court shall carry out the review upon request (claim) of the entity concerned, applying the rules partly derogating

[79] Constitutional Court Decision no. 32/1990 (22 December), Constitutional Court Decisions (ABH) 1990 145–148. Its effect is studied in detail by Patyi (2009b), pp. 1756–1764.

[80] For instance: Martonyi (1960); Kilényi (1981), pp. 653–667.

from the rules pertaining to ordinary civil procedures and, by adjudicating the claim and reviewing the legality of the administrative decision in terms of the infringement indicated in the claim, shall pronounce a final decision.

10.2.3.3 The Procedure of Judicial Review

The judicial review was originally regulated in the Administrative Procedure Act (in 1957). According to its basic function, it was considered an extraordinary remedy against administrative decisions, subject to limited availability. Since this type of remedy is ensured by a court, certain rules appeared in the Code on Civil Procedure as well. As a result of a long lawmaking process (i.e., the constant amendment of the Code on Civil Procedure), all the rules pertaining to review have been transferred to the Code on Civil Procedure, since 2012. The AP simply refers to it among the remedies and does not regulate in an exhaustive way its basic terms either.

However, it stipulates the principle of *finality and priority*. The principle of finality establishes the relation between the final decision of the court and the administrative decision in procedural terms, and it basically means that if the court of jurisdiction for administrative actions has adopted a decision on the merits of the case, new proceedings may not be opened at the same authority in the same case, under the same grounds, except where new proceedings were ordered by the court of jurisdiction for administrative actions, while the principle of priority means that the authority shall be bound by the operative part and by the justification of the decision adopted by the court of jurisdiction for administrative actions and shall proceed accordingly in the new proceedings and when adopting a decision. In other words, the authority shall be bound by the final decision of the court, while the court is not bound by the decision of the authority, i.e., the final decision of the court shall take priority over the decision of the authority. Despite the fact that the administrative proceedings are closely related to administrative court proceedings in terms of logic, time, and facts, the administrative court proceedings may not be considered the continuation of the administrative proceedings; thus, the former does not form part of the latter. It may be considered one of the types of civil actions, thus part of the administration of justice in civil law. The administrative court proceedings may not be completely separated from administrative proceedings since the court performs a specific supervising—review activity—and the legal effect of the final decision affect particularly the administrative decision. These two types of proceedings are linked to each other by numerous legislative provisions; the major elements of these provisions will be studied together with the relation between the appeal and the judicial review.

The judicial review is an extraordinary remedy, which is available against formally binding (final) administrative resolutions (or rulings), has partly a transferring effect, is subject to a time limit, does not prevent automatically the enforcement of legally binding decisions, and may only be sought in case of infringements. It is considered extraordinary because it may only be requested if the party has

already exhausted his right to appeal (or where the appeal is precluded by law). The submission of the petition for review does have automatically a suspensive effect in terms of the implementation of the binding decision (the exercising of the rights emerging from the decision). An independent court, which is not part of the administrative system, shall adjudicate the petition for review (i.e., external remedy). In the remedy procedure, the authority that has taken the binding administrative decision has the role of the defendant (in nonlitigious procedures related to rulings, the petitioner); its procedural rights and duties become equal to—though not completely balanced with—that of the plaintiff, in terms of procedural law. The so-called partly transferring effect (which transfers adjudication and decision) means that in the course of the administrative court proceedings or nonlitigious procedure (i.e., the process of the judicial review), the authority does not completely lose its right to exercise power over the decision.

Consequently, a judicial review may be sought against resolutions on the merits of the case and the rulings that can be appealed separately (substantial procedural decisions). It may only be sought if one of the parties entitled to appeal in the administrative procedure has exhausted its rights for remedy or if the appeal is precluded. The rights for appeal may be considered to be exhausted if the body adjudicating the appeal has taken a (formally binding) second instance decision. In such cases, the second instance decision may be contested in court, and the authority that has taken it shall be the defendant.

The judicial review (both in terms of the litigious from, i.e. against resolutions, and in terms of the nonlitigious form, i.e. against rulings) is a fundamental institution of the state of law, which aims to ensure that the public administration be subordinated to law. Considering that according to the Fundamental Law it falls within the jurisdiction of the courts to adjudicate the legality of administrative decisions, it is clear that the judicial remedy under the AP also concerns the legality of the contested decision. The Fundamental Law, similarly to the former Constitution, lays down the adjudication of the "legality" (the review of legality) of the resolution (decision), while the former provisions set out by the AP and the CP (Act III of 1952 on the Code of Civil Procedure) and the current provisions laid down by the CP provide for the adjudication on the grounds of "infringement."[81] The court may abolish or reverse the unlawful administrative decisions (Article 339 of the CP). Legality and lawfulness may not be separated from and especially may not be opposed to each other. An administrative decision that violates the relevant legislation (or any provision thereof) is not lawful, not legally possible, because only a lawful decision may be taken, issued in conformity with the acts of legislation. The relevant Decisions of the Constitutional Court also underline the requirement to be bound by the legislation (and not "only" by law). However, the acts of legislation

[81] The first sentence of Article 30(2) of Act III of 1952 on the Code of Civil Procedure (published: 6 June 1952 in the Hungarian Official Journal): "The statement of claim shall be submitted – alleging infringement – to the body having rendered the administrative decision in the first instance within thirty days from the time of publication of the decision to be reviewed, or shall be sent by registered mail."

are not of an identical nature; thus, the ones pertaining to administrative decisions may basically be divided into material and procedural (formal) rules. According to KK Opinion no. 1/2011 of the Curia (Supreme Court) (9 May), in administrative court actions the court adjudicates, in particular, whether the decision is in conformity with the material rules. The violation of a procedural rule in itself does only justify the annulment of the decision if the violation in question has also affected the merits of the case. The court may not abolish the administrative decision if the violation of the procedural rule does not affect the merits of the case.

The adjudication of the discretion is a different question. "In administrative court proceedings, the court is not bound by the facts established in the administrative decision, and it may also override the discretion of the administrative authority.[82] When adjudicating the discretion (i.e., to choose between alternatives of decision that are equally lawful), the court shall not exercise "over"-discretion but "overriding." It may only do so in types of cases where the court may reverse the administrative decision. An administrative decision rendered on a discretionary basis (or a part of the decision established on a discretionary basis) shall be construed lawful if the administrative body has appropriately ascertained the relevant facts of the case, if it complied with the relevant rules of procedure, the points of discretion can be identified, and the justification of the decision demonstrates causal relations as to the weighing of evidence.

As a general rule, the court shall *abolish* any administrative decision that violates the relevant legislation. The court's substantial act is differentiated in Hungarian law even by its name from the acts taken by the entity adjudicating the appeal or taking a decision in the supervisory procedure, namely the *annulment* and the *withdrawal* by acting within the entity's own jurisdiction. In addition to the abolition of the unlawful administrative resolution, if necessary, the court shall order the body having adopted the administrative resolution in question to reopen the case; the authority shall be bound by the operative part and by the justification of the decision adopted by the court and shall proceed accordingly in the new proceedings and when adopting a decision. In relation to the abolition of the administrative resolution and the order addressed to the body having adopted the resolution to reopen the case, a special situation may arise if the court deems it appropriate to have another resolution rendered on a different legal basis.[83] In cases prescribed by law, the court may reverse the resolution. It means that if the court's decision is in favor of the claim, it is not obliged to reverse the resolution. If it reverses the resolution, it replaces the decision of the authority with its own decision. The term *reverse* differentiates the act of the court from the *amendment* made in the administrative proceedings (within the entity's own jurisdiction or within the jurisdiction of the supervisory body). If, according to the court, the infringement indicated in the petition for review is unfounded or the court has

[82] Constitutional Court Decision no. 39/1997 (1 July), Constitutional Court Decisions (ABH) 1997, 263, 272.

[83] Article 339(3) of the Act III of 1952 on the Code of Civil Procedure.

established a violation of the procedural rules that did not affect the merits of the case and it does not deem appropriate to have another decision rendered on a different legal basis, the court shall reject the petition. This decision is again substantially different from the decision sustaining the first instance decision, which may be issued in the course of an appeal.

The judicial review is also a remedy; thus, the administrative court proceedings are a type of remedy procedure. Moreover, as a general rule, court action may only be initiated after a two-level administrative proceeding. Thus, it is not surprising that no appeal may be lodged against the substantial decision (judgment) of the court in the judicial remedy procedure, with a limited number of exceptions. A court decision may be subject to appeal if the administrative action was filed for the judicial review of a judgment rendered in the first instance, which cannot be appealed through administrative channels, and the court has powers to reverse such decision based on law (The Metropolitan Regional Court has appellate jurisdiction in such cases).

10.2.4 Empirical Data

In connection with the research conducted for this chapter, we have asked experts on administrative law on their opinions regarding the effectiveness of ADR tools in administrative law.

We have contacted the leaders of 20 government offices,[84] the head of the highest judicial authority: the president of the Curia, the bar associations, the leaders of the most important organs with autonomous status, the Office of the Commissioner for Fundamental Rights, and the General Prosecutor. We have examined the electronically available official statistics and contacted administrative bodies that carry out legal remedy procedures of nonadministrative authority nature. We were collecting information for approximately 2 months: from April to May in 2013. Within the framework of the survey, we wanted to know to what extent appellate procedures, other alternative methods of settling disputes, and Ombudsman proceedings are effective and, at the same time, alternative solutions in practice instead of (already available) court proceedings in the application of Hungarian law; what percentage of the cases appealed are corrected (reversal and/or annulment), and, compared to this measure, in what percentage those entitled submit a judicial review; what types of legal remedies law enforcement officials meet in the course of their duties (appeal, inspection procedure, General Prosecutor's measures, Ombudsman proceedings in individual cases, other administrative remedies of nonauthoritative nature), and what percentage of the cases are

[84] The Metropolitan and county government offices are the territorial state administrative bodies of the Government with general authority.

accounted for per types; what roles other dispute settling methods have in the system of administrative remedies, according to law enforcement officials.

10.2.4.1 Data from Bodies with Autonomous Status

In the Hungarian legal system, several administrative bodies have a special legal status: the Public Procurement Authority, Equal Treatment Authority, Hungarian Competition Authority, and the Hungarian National Authority for Data Protection and Freedom of Information. They are public authorities, exercising public power, while another one, the National Election Office, is not exercising the power of administrative authority.

We have examined the above bodies exercising authority power because, at times, they are entitled to make decisions on legal disputes between opposing parties in the course of their proceedings, and as they are bodies subordinated to the Parliament, their decisions can only be reviewed by courts (i.e., administrative appeals of these cases are precluded).

Regarding its structure and operation, the Public Procurement Authority (hereinafter referred to as PPA) is also a body with special status. Basically, the Authority carries out official registration-record duties regarding the official cases; however, the Public Procurement Arbitration Board within the organization of the Authority is a public procurement remedy forum, whose decisions can exclusively be appealed before court.[85] As a rule, the Public Procurement Arbitration Board judges the legal dispute between opposing parties in quasi-judicial proceedings. In 2012, the Public Procurement Arbitration Board carried out 565 proceedings; 130 court actions were filed challenging its decisions, out of which 35 obtained the force of *res iudicata* in court proceedings until March 2013. Twenty-five out of the 35 completed court proceedings were rejected, four were reversed, the Arbitration Board was ordered by the court to commence new proceedings in five cases, and in one case the decision was modified.

Based on the parliamentary record of 2011, 932 administrative proceedings were carried out by the Equal Treatment Authority,[86] out of which 42 cases were considered infringements. We do not have available data on the number of court

[85] The decision on the legal dispute regarding the contract concluded on the basis of public procurement procedure and the civil claims about public procurement procedures fall within the court's jurisdiction. The proceedings against the infringement of legislations on public procurement, public procurement procedure, qualified acquisition, qualified acquisition procedure, defence procurement and defence procurement procedure, regarding the public procurement procedure, falls within the Public Procurement Arbitration Board.

[86] According to Article 33(1) of Act CXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunity (published: 28 December 2003 in the Hungarian Official Journal), the enforcement of the requirements of equal treatment is supervised by the authority.

actions, but in the majority of the court procedures that we have examined the authority's decisions were shared by the court.[87]

In 2011, the Hungarian Competition Authority[88] commenced altogether 109 competition proceedings and completed 114, out of which 73 cases ended with Competition Council decisions, whereas 36 cases were dismissed. There were five cases of covenant, and in ten cases the Authority carried out postreviews. In 2011, the Metropolitan Court handed out 30 decisions, out of which 12 cases obtained the force of *res iudicata*. Each of these lawsuits was in connection with consumer manipulation, and the Metropolitan Court upheld the decision of the Hungarian Competition Authority in each case (even the amount of fines). In 2011, the Regional Court of Appeal of Budapest made 27 decisions regarding the decisions of the Competition Authority. Twenty-one cases were completed, in five cases in the Metropolitan Court, and in one case the Competition Authority was ordered by the Regional Court of Appeal of Budapest to start new proceedings. Four out of the judgments having the force of res iudicata made by the Regional Court of Appeal of Budapest were reviewed in 2011.[89]

The Hungarian National Authority for Data Protection and Freedom of Information[90] was established on 1 January 2012. The data protection proceedings can exclusively be commenced ex officio; it is not considered a proceeding on request even if the data protection proceeding has been preceded by an investigation based on the notice of the Authority. In 2012, investigation of 2,929 notifications were launched before the Authority; however, there were few proceedings instituted by the public authority—only 33.[91]

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[87] www.egyenlobanasmod.hu (04.15.2013).

[88] According to Article 24(1) of Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (published: 28 June 2008 in the Hungarian Official Journal), the consumer protection authority or—based on the Act on the Hungarian Financial Supervisory Authority and its provisions with regard to the commercial activity supervised by the Hungarian Financial Supervisory Authority and its relevant Code of Conduct—the Hungarian Financial Supervisory Authority proceeds in the infringement of the regulations on business commercial activity and illicit sponsorship.

According to Article 24(3) of the referred Act, in cases of prohibited, misleading, and comparative commercials, the Hungarian Competition Authority or the court proceeds—in line with the regulations on the share of authority stipulated by the Act.

[89] www.gvh.hu (04.20.2013).

[90] According to Article 60(1) of Act CXII of 2011 on Informational Self-determination and Freedom of Information (published: 26 July 2011 in the Hungarian Official Journal), the Authority may commence data protection proceedings instituted by public authority in order to enforce the right of personal data protection. The data protection proceedings instituted by public authority shall exclusively be commenced ex officio; it is not considered proceedings submitted on application even if the data protection proceedings instituted by public authority was preceded by an examination based on an application filed to the Authority.

[91] www.naih.hu—Annual report of National Media and Infocommunication Authority of 2012 (04.25.2013).

10.2.4.2 Data from Self-Regulatory Administrative Bodies

Based on Article 23 of the Fundamental Law of Hungary, the Parliament is entitled to establish self-regulatory bodies to fulfill and perform certain duties. The head of the self-regulatory body is appointed by either the prime minister or the president—on the prime minister's proposal—for the term stipulated by establishing law. The head of the self-regulated body issues regulation within his/her competence stipulated by law on the basis of the power granted by law.

The Media Council[92] operates within the National Media and Infocommunications Authority. In 2011, the Media Council issued 2,050 decisions and ordered *ex officio* proceedings in 151 cases but did not commence proceedings in 31 cases. In 2011, there were 263 administrative appeal proceedings, followed by 14 lawsuits arising from complaints, 7 from the infringement of Article 13 of the Act on Freedom of Press and Basic Rules of Media Content (the requirement of balanced information), 241 originated from other debts of ORTT/Media Council due to administrative decisions, and one of them to broadcasting fee. Fifty-eight cases of the 263 lawsuits obtained the force of res iudicata that year; however, there were 205 cases in progress at the end of 2011. According to the statements of the annual report available on the webpage of the National Media and Infocommunications Authority, the duration of the lawsuits involving the National Media and Info-communications Authority is around 1–1.5 years—with few exceptions. In Hungarian national circumstances, it can be considered a rather reasonable period. The relatively short administrative court duration is due to the fact that the court rarely employs seconded experts in the course of the cases, and even the parties make every effort to prepare the negotiations well, so in the majority of the cases judgment is made at the first trial. The administrative decisions of the Media Council obtain the force of res iudicata at the time of the judgment; consequently, in the course of the court proceedings, the broadcasters have to submit an application for the suspension of enforcement at each time.[93]

The Hungarian Financial Supervisory Authority[94] made 13,933 decisions that could be objected by individual appeal. In 2012, there were 132 contentious and

[92] According to Act CLXXXV of 2010 on Media Services and Mass Communication the National Media and Infocommunications (published: 31 December 2010 in the Hungarian Official Journal), the Authority is a self-regulatory body, which is exclusively subordinated to the Act. The Media Council is the body of the Authority with competence of its own, a legal entity under the supervision of the Parliament. The Media Council is the legal successor of the National Radio and Television Body. Among others, the Media Council fulfills the supervisory and controlling duties stipulated by Act.

[93] The source of the statements on NMHH is the parliamentary report on the activity of the Media Council of the National Media and Infocommunications Authority of 2011. http://mediatanacs.hu/tart/index/993/Orszaggyulesi_beszamolok 2013.05.21; pages 118–130.

[94] According to Act CLVIII of 2010 on the Hungarian Financial Supervisory Authority, the Hungarian Financial Supervisory Authority (hereinafter referred to as Authority) (published: 22 December 2010 in the Hungarian Official Journal), is a self-regulatory body supervising and

noncontentious[95] proceedings, and 158 proceedings were completed; in 146 cases, the Supervisory Authority was granted the action, and in five cases the opposing party won.

The bodies examined in this paragraph are atypical administrative bodies subordinated to the Parliament. They do not have the characteristics of the classical authority forum system or remedy regulations due to their status. The number of the proceedings instituted by public authority and substantial decisions is not high in the cases of authorities we have examined, and in the majority of the cases there are few court actions against administrative decisions. In the cases where the particular data of court reviews were available, it can be stated that the court proceedings in administrative cases mostly uphold the administrative authority decisions.

10.2.4.3 Data from Appellate Bodies

According to the Act on the General Rules of Administrative Proceedings and Services, the government offices have the competence to hear in appellate procedure (second instance) decisions of the city clerk or the district government offices issued in first instance. The data made available by the Ministry of Public Administration and Justice showed that 9,027,275 first instance decisions and 1,845,011 first instance rulings were made in 2011. The number of the appealed first instance decisions was 48,107, whereas the number of rulings were 7,995 in the period examined. The decisions were changed or withdrawn in 12,277 cases based on appeals, while this occurred for 3,292 rulings. The number of modified or annulled decisions was 12,360, whereas corrections occurred in 1,176 cases of rulings. Those entitled commenced court proceedings against second instance decisions in case of 9,114 decisions and 649 rulings. In the course of court proceedings, 2,157 decisions and 160 rulings were annulled or modified.

Based on the above, it can be stated that most of the problems can be tackled through review proceedings (appeal, supervisory proceedings), and court proceedings are commenced only in 1 % of the cases.

controlling the financial intermediary system and fulfilling authority duties, which is only subordinated to the Act.

[95] Contentious proceedings—opposed to noncontentious ones—are proceedings that shall be executed under the conditions that borrow features from the court procedure. These are considered typical. In spite of noncontentious proceedings, contentious proceedings usually include hearing of the parties and an evidence-based procedure.

10.2.4.4 Data on Court Proceedings

According to the president of the Curia,[96] the institution does not keep a record on the rate of corrections regarding any content of administrative decisions in administrative lawsuits. However, he estimated that 85–90 % of the review applications to the Curia regarding administrative lawsuits is the final decision of the administrative case even if the Curia rules to repeal the court ruling or terminate the defendant's decision and rules on new proceedings (see Tables 2.1, 2.2, and 2.3).

10.2.4.5 Data on Prosecutor's Investigations Based on Complaint

Based on the information of the Prosecutor General's Office, the institution proceeded in 2,933 cases on the bases of applications indicating administrative infringements and other notifications in 2012, and 415 calls were submitted in order to remedy the investigated infringements in the same year. Of the calls, 374 were successful, i.e., the infringements were repaired. In the cases where the body concerned did not eliminate the infringement based on its own decision or at the call of its supervisory authority, the prosecutor filed an action with the court—the majority of the lawsuits are still in progress.

In public procurement proceedings, prosecutor action occurs in two to three cases a year before the Public Procurement Arbitration Board, but there is no statistics available as to the outcomes.

10.2.4.6 Conclusions

The appellate proceedings carried out by government offices prove to be efficient remedies in the national legal system, in the context in which court proceedings do not seem a viable alternative, considering the current regulations of court proceedings. The decisions in the majority of the cases obtain the force of *res iudicata* in the administrative stage. The relatively short second instance proceedings enable quick reparation, and, based on the available data of court reviews, the majority of the administrative decisions objected in court stage are upheld by the court, i.e., in the light of court case law the administrative stage—focusing on the proceedings of government offices—was not appropriate only in a small percentage of the cases.

[96] The authors required data in written form, and they received an answer from President Dr. Péter Darák, dated 25 April 2013.

Table 2.1 The number of completed administrative litigations before the county courts in 2012

Region	Pieces	Period of proceedings (%)						
Budapest Metropolitan Court	4,882	0–3 months	3–6 months	6–12 months	1–2 years	2–3 years	3–5 years	Over 5 years
Tribunal of Pécs	311	24.0	19.0	28.0	22.3	4.7	1.6	0.4
Tribunal of Kecskemét	530	58.5	30.2	7.7	2.9	0.6	–	–
Tribunal of Gyula	598	50.8	27.9	15.3	5.1	0.8	0.2	–
Tribunal of Miskolcs	659	29.6	46.3	23.2	0.8	–	–	–
Tribunal of Szeged	766	52.8	29.4	14.3	2.3	0.9	0.3	–
Tribunal of Székesfehérvár	433	35.8	27.9	32.2	3.0	0.9	0.1	–
Tribunal of Győr	414	37.0	38.1	19.2	3.7	0.7	0.5	0.9
Tribunal of Debrecen	713	27.8	11.6	28.5	23.7	8.0	0.5	–
Tribunal of Eger	197	41.2	39.8	15.4	3.1	0.4	–	–
Tribunal of Szolnok	369	25.4	26.9	32.0	11.7	2.5	1.0	0.5
Tribunal of Tatabánya	229	32.8	35.5	26.8	4.6	0.3	–	–
Tribunal of Balassagyrmat	201	38.4	24.0	22.3	12.2	2.2	0.9	–
Tribunal of Budapest region	1,222	51.7	26.4	16.4	4.5	0.5	0.5	–
Tribunal of Kaposvár	384	27.3	37.3	23.4	10.2	1.6	0.1	0.2
Tribunal of Nyíregyháza	692	34.4	33.9	27.3	3.6	0.8	–	–
Tribunal of Szekszárd	192	59.0	29.2	9.7	1.7	0.1	0.3	–
Tribunal of Szombathely	189	68.8	17.7	12.0	1.6	–	–	–
Tribunal of Veszprém	321	57.1	27.5	11.6	3.7	–	–	–
Tribunal of Zalaegerszeg	297	47.0	31.5	16.5	3.7	0.9	0.3	–
Total	13,599	65.3	22.2	7.7	4.0	0.3	–	0.3

Source: Data compiled by the authors based on empirical data gathered from the Hungarian court system

Table 2.2 The number of completed administrative litigations before the regional courts of appeal in 2012

		Period of proceedings (%)						
		0–3 months	3–6 months	6–12 months	1–2 years	2–3 years	3–5 years	Over 5 years
Region	Number of administrative litigations	Appealed administrative litigations						
of Budapest	600	45.5	48.2	5.5	0.5	0.3	–	–
of Debrecen	63	100.0	–	–	–	–	–	–
of Győr	29	100.0	–	–	–	–	–	–
of Pécs	–	–	–	–	–	–	–	–
of Szeged	–	–	–	–	–	–	–	–
Total	692	52.2	42.2	4.8	0.4	0.3	–	–
		First instance administrative litigations						
of Budapest	35	97.1	–	2.9	–		–	–

Source: Data compiled by the authors based on empirical data gathered from the Hungarian court system

Table 2.3 Curia—case turnout data of appealed second and third instance cases and supervisory proceedings in 2012

	Received				Completed				In progress			
	Appealed				Appealed				Appealed			
Name	Second instance	Third instance	Review	Total	Second instance	Third instance	Review	Total	Second instance	Third instance	Review	Total
Administrative College	30		1,666	1,696	26		1,488	1,514	9		1,220	1,229
Name	Total number of cases		Period of proceedings (%)									
			0–3 months		3–6 months		6–12 months		1–2 years		Over 2 years	
First instance cases												
Administrative College	97		49.5		43.3		7.2		–		–	
Appealed second instance cases												
Administrative College	26		76.9		23.1		–		–		–	
Criminal College	381		98.7		1.3		–		–		–	
Supervisory proceedings												
Administrative College	1,488		18.1		6.1		58.8		16.9		0.1	

Source: Data compiled by the authors based on empirical data gathered from the Hungarian court system

10.3 Dispute Settlement by the Ombudsman

In Hungary's history of law, the amendment of the Constitution promulgated on 23 October 1989 has introduced two new legal institutions: the Constitutional Court and the Commissioner for Fundamental Rights.[97] The first "ombudsman laws" were adopted some years later.[98]

With respect to the current legislation, Article 30 of the Fundamental Law, which lays down the constitutional legal status of the Commissioner for Fundamental Rights, shall be highlighted. It stipulates that the Commissioner for Fundamental Rights shall undertake activities aimed at protecting fundamental rights and the Commissioner's proceedings may be requested by anyone. In addition, the Commissioner for Fundamental Rights shall himself or herself investigate—or have investigated by others—any wrong related to fundamental rights that have come to his or her knowledge and shall initiate general or specific measures for his remedy. It is a very important rule that Parliament shall elect the Commissioner for Fundamental Rights and his or her deputies for a period of 6 years with the votes of two-thirds of all Members of Parliament. The Commissioner's deputies shall be responsible to protect the rights of future generations and nationalities and ethnic groups living in Hungary. The rules pertaining to the activity of the ombudsman are set out by Act CXI of 2011 on the Commissioner for Fundamental Rights (hereinafter referred to as CFRA).

In terms of administrative proceedings, it shall be underlined that anyone may turn to the Commissioner for Fundamental Rights if in his or her judgment the activity or omission of a public administration organ, a local government, a nationality self-government, a public body with mandatory membership, the Hungarian Defence Forces, a law enforcement organ, any other organ acting in its public administration competence in this competence infringes a fundamental right of the person submitting the petition or presents an imminent danger thereto, provided that this person has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or that no legal remedy is available to him or her.[99]

The Commissioner for Fundamental Rights may conduct ex officio proceedings in order to have such improprieties terminated as are related to fundamental rights and that have arisen in the course of the activities of the authorities. Ex officio proceedings may be aimed at conducting an inquiry into improprieties affecting not precisely identifiable larger groups of natural persons or at conducting a

[97] Kerekes (1998), p. 143.

[98] The responsibilities of the Parliamentary Commissioner for Data Protection were set out by Act LXIII of 1992, the general act of legislation on the ombudsman is Act LIX of 1993, and, finally, Act LXXVII of 1993 on the National and Ethnic Minorities Rights. But the first Commissioners were elected only in 1995.

[99] cf. Somody (2006), pp. 242–249; Hajas (2008), pp. 137–170; Varga (2010), pp. 427–439.

comprehensive inquiry into the enforcement of a fundamental right.[100] If a final administrative decision has been taken in the case, a petition may be filed with the Commissioner for Fundamental Rights within 1 year from the notification of the decision. The Commissioner for Fundamental Rights may not proceed in cases where court proceedings have been started for the review of the decision or where a final court decision has been rendered.[101]

If, on the basis of an inquiry conducted, the Commissioner for Fundamental Rights comes to the conclusion that the impropriety in relation to a fundamental right does exist, in order to redress it, he or she may—by simultaneously informing the authority subject to inquiry—address a recommendation to the supervisory organ of the authority subject to inquiry. Within 30 days of receipt of the recommendation, the supervisory organ shall inform the Commissioner for Fundamental Rights of its position on the merits of the recommendation and on the measures taken. If the supervisory organ does not agree with those contained in the recommendation, within 15 days of receipt of the communication thereof the Commissioner for Fundamental Rights shall inform the supervisory organ of the maintenance, amendment, or withdrawal of his or her recommendation.[102] If, according to the available data, the authority subject to inquiry is able to terminate the impropriety related to fundamental rights within its competence, the Commissioner for Fundamental Rights may initiate redress of the impropriety by the head of the authority subject to inquiry.[103]

If the authority subject to inquiry does not agree with the initiative, it shall, within 30 days of receipt of the initiative, submit the initiative to its supervisory organ, together with its opinion thereon. Within 30 days of receipt of the submission, the supervisory organ shall inform the Commissioner for Fundamental Rights of its position and on the measures taken.[104] In addition, in order to redress the uncovered impropriety related to a fundamental right, the Commissioner for Fundamental Rights may initiate proceedings for the supervision of legality by the competent prosecutor through the Prosecutor General.[105]

If the authority subject to inquiry or its supervisory organ fails to form a position on the merits and to take the appropriate measure or the Commissioner for Fundamental Rights does not agree with the position or the measure taken, he or she shall submit the case to the Parliament within the framework of his or her annual report and may ask the Parliament to inquire into the matter. If, according to his or her findings, the impropriety is of a flagrant gravity or affects a larger group of natural persons, the Commissioner may propose that Parliament debate the matter before

[100] Article 18(4) of the Act CXI of 2011 on the Commissioner for Fundamental Rights, published: 26 July 2011 in the Hungarian Official Journal.

[101] Article 18(5) and (7) of the CFRA.

[102] Article 18(5) and (7) of the CFRA.

[103] Article 18(5) and (7) of the CFRA.

[104] Article 18(5) and (7) of the CFRA.

[105] cf. Kaltenbach (1996), pp. 71–75; Varga (2008), pp. 82–99; Somody (2011), pp. 73–74.

the annual report is put on its agenda. Parliament shall decide on whether to put the matter on the agenda.[106]

Over the past 15 years, more than 20,000 reviews have been carried out by the Ombudsman in the vast majority of cases in relation to the proceedings of administrative authorities. According to the Constitutional Court, legal certainty requires the state to ensure that the law as a whole, the individual fields of law, and also the individual regulations be clear, unambiguous, and reliable and that their impact be foreseeable for those bound by the rules.[107] But the requirement of legal certainty is not limited to the lawmaking process; it does not only require that the rules be unambiguous but also that the operation of each legal institution, i.e. the lawmakers' attitude, be foreseeable.[108] The legality of public administration may only be achieved if it operates in a legally regulated procedural framework and the authorization for restriction of rights shall be explicitly specified.[109] The consistent case law of the Constitutional Court refers several times to the fact that the procedural guarantees for the enforcement of the rights and duties of citizens stem from the constitutional principle of legal certainty: in proceedings conducted without suitable procedural guarantees, legal certainty is prejudiced.[110]

Since the establishment of the Ombudsman's institution, the complaints, petitions, and notifications have concerned, in particular, the enforcement of legal certainty and of the requirement of fairness in relation to the activity of authorities and bodies providing public services (their procedures, decisions, defaults, etc.) and the relevant legislation.[111]

In the course of the protection of natural and legal persons' rights to "good public administration" in its broadest sense, the Ombudsman's range of tasks to protect the individuals' fundamental rights, to supervise the functioning of public administration (public service), to detect maladministration and his role as subjective protector of fundamental rights of citizens and objective protector of the constitution, supervisor of the respect of the requirements of the democratic state of law, are closely interlinked. Typical improprieties related to the requirement of legal certainty and the right to a fair trial are, in particular, protracted proceedings, noncompliance with the procedural deadlines, "silence" of the administrative authority or public service provider, i.e., nonformulation of a substantial response, unsatisfactory clarification of the matters of fact, noncompliance with the obligation of documentation. Of course, the administrative defects may also lead to improprieties related to fundamental rights other than the right to a fair trial,

[106] Article 18(5) and (7) of the CFRA.

[107] cf. 9/1992. (30 January) Decision of the Constitutional Court.

[108] cf. 72/1995. (22 December) Decision of the Constitutional Court.

[109] cf. Jakab (2009), p. 164.

[110] cf. 75/1995. (21 November) Decision of the Constitutional Court.

[111] Hajas and Szabó (2012).

Table 3.1 The number of proceedings handled by the Commissioner for Fundamental Rights

	2009	2010	2011	Total	%
Rejection	6	541	2,610	3,157	52.3
Termination	162	328	1,220	1,710	28.3
Total number of cases subject to an inquiry	548	1,300	4,189	6,037	100.0

Source: Author's compilation based on Office of the Commissioner for Fundamental Rights, http://www.ajbh.hu

Table 3.2 The reason for rejecting petitions submitted to the Commissioner for Fundamental Rights

The reason for rejecting the petition	Number	%
The petition is of minor importance	2	0.1
A court action is in progress, or a final court decision has been rendered in the given case	754	23.9
The case occurred before the adoption of Act XXXI of 1989	6	0.2
The subject of the petition was not originated within a period of 1 year	63	2.0
The available administrative legal remedies have not been exhausted	521	16.5
The petition is unfounded, does not concern any constitutional right	652	20.7
The petition is a repeatedly submitted petition, which does not contain new data	144	4.6
The subject of the petition is not against any authority's action	992	31.4
The petition is not submitted by the person or entity concerned	23	0.7
Total	3,157	100.0

Source: Author's compilation based on Office of the Commissioner for Fundamental Rights, http://www.ajbh.hu

especially where the subject of the given procedure is the exercising of another fundamental right or is closely related thereto.

Tables 3.1 and 3.2 provide specific empirical information on the work of the Hungarian Ombudsman.

In 2011, citizens drafted 5,191 petitions in their submissions addressed to the Parliamentary Commissioner with a general mandate.

Cases related to health, pension fund, and work constituted a major share of petitions; these were followed by cases concerning taxation, financial institutions, and insurance.

For the purpose of this study, we conducted interviews with judges, administrative law practitioners, and lawyers in order to determine the perception of the Ombudsman institution in Hungary.

Thus, in connection with the Ombudsman's activity, the Bar Chamber of Budapest—representing most of the lawyers—is of the view that the operation of the Ombudsman, earlier ombudsmen, is highly respected by the lawyers. The well-founded scientific methodology and dogmatic standard of the Ombudsman examinations can be considered satisfactory. According to their observations, the starting point of the commissioners' legal principle is consistent with the West European

legal development processes harmonizing on the basis of fundamental rights; it fully meets the requirements of checks and balances in the system of public power. Consequently, this institution in its current form, has significant moral and jurisprudential effect, which, as we have observed, significantly decreases the reasons for administrative disputes and reduces the risks of starting legal disputes.

As for the relation between Ombudsman recommendations and the content of court decisions, the opinion of the judges is that Ombudsman examinations and reports related to the cases can be found in a small percentage of the court decisions.

10.4 Alternative Ways of Dispute Settlement in Administrative Proceedings

In administrative proceedings, Article 41(1) of the AP stipulates that in the interest of settlement of disputes between the authority and the client, and adverse parties, the authority may employ a *liaison officer*. Considering the fact that under Article 95 of the AP the provisions of the AP shall apply to redress procedures and review procedures subject to the exceptions set out in the Chapter pertaining to remedies, the application of the rules concerning liaison officers is also possible in the remedy stage.

In addition, it is worth highlighting the procedural institutions aimed at settling disputes between adverse parties. For instance, the issue of the *composition* and the approval of settlement by composition: where so prescribed by law or (if the authority holds a hearing) at the hearing, the authority shall—before making its decision—attempt to mediate a settlement between the parties by way of composition. Settlement by composition may also be attempted where it appears feasible due to the nature of the case.[112] If a settlement is reached in the proceedings of the authorities, the authority shall fix the settlement in a resolution and shall approve it, provided that it complies with the requirements set out in the relevant legislation, it is not against public interest or the rights or lawful interests of others, furthermore, it covers the deadline for performance and the costs of the proceedings.[113]

In the consumer protection proceedings, besides the chambers of commerce and industry, the proceedings of the conciliation board shall be emphasized. More than one decade of the experiences of the conciliation boards show that the judicial organization system definitely needs bodies providing an alternative.

At the initiation of the Hungarian Financial Supervisory Authority, the financial conciliation was established in Hungary, and based on statutory authority the Financial Conciliation Board started its operation on 1 July 2011. With the establishment of the Financial Conciliation Board, the role of the Supervisory Authority has been extended to the settlement of the private legal disputes of financial

[112] Article 64 of the AP.

[113] Article 75 of the AP.

consumers. The activity of the Hungarian Financial Supervisory Authority was extended to consumer protection on 1 January 2010, which made it possible to take official measures against the infringing practice regarding the legal provisions regulating the conduct of the financial institutions towards the consumers. However, the deficiency of the previous regulation was that, besides court proceedings, no impartial or efficient alternative-dispute-settling forum was available that would have decided on the civil claims of the consumers taking the services of the financial institutions. A total of 1,196 claims on settling consumer disputes were submitted to the Financial Conciliation Board in 6 months in 2011, 72 % of which were completed by the proceeding boards. The 1,196 claims within half a year show significant consumer trust because in the general system of conciliation the number of the financial service cases was altogether 880 in 2010.

In addition, some *sector-specific rules* also lay down alternative ways of dispute settlement: for instance, Gov. Decree no. 149/1997 (10 September) on the Public Guardianship Authorities, as well as the Child Protection and Guardianship Procedure, stipulates that if the parents or other entitled persons may not reach a settlement concerning the way and time of the contact keeping, the guardian authority shall inform the Parties of the availability of child protection mediation procedure. The mediation procedure may be requested in the course of the enforcement procedure as well. The mediation procedure may be launched upon joint request of the Parties or upon initiation by the guardian authority, with the approval of the Parties. If the mediation procedure proves to be unsuccessful after a period of 4 months, the mediator informs the guardian authority thereof. In such cases, the authority shall continue the procedure *ex officio*.[114] If the lack of success of the mediation procedure is due to the failure of any of the Parties to cooperate, the guardian authority may continue the procedure after the end of the period of 4 months, upon request of the other Party. Act CLV of 1997 on Consumer Protection establishes arbitration board functions. The competence of the arbitration board shall cover the disputes between consumers and business entities regarding the quality and safety of products and services, the application of product liability regulations, and the quality of services and relating to the conclusion and performance of contracts (hereinafter referred to as "consumer dispute"), with a view to reaching an extrajudicial settlement or, failing this, to adopting a decision in the case to enforce consumer rights simply and practically and under the principle of cost-efficiency. Upon request of the consumer or the business entity, the arbitration board offers advice on the rights and duties of the consumer.[115]

In the guardianship mediation proceedings, approximately 60 % of the cases reach an agreement; however, some of the parties do not keep to it.[116] Besides, the legislation gives the opportunity to proceed to mediation on child protection issues

[114] Article 30/A of the Gov. decree referred to.

[115] Article 18(1) of the Act referred to.

[116] The data was gathered via interviewing the representatives of the related authorities in written form from April to May in 2013.

upon the joint request of the parties—however, this occurs rarely because the parties do not take the costs associated with the mediation proceeding (for example, the fee). In the child protection mediation proceedings, the parties jointly appoint the mediator from the Expert Register of the National Child Protection of the National Rehabilitation and Social Authority or from the mediators listed in the mediators register recorded by the minister responsible for justice. Based on the information from the government offices,[117] the obligatory use of mediation preceding the regulation and the involvement of the experts at the child welfare services available free of charge would be a solution. The best interest of the children is served by the alternative methods of conflict resolution, and they are also the most appropriate for the parents to handle the conflicts.

The issue of *preliminary dispute settlement* in public procurement contracts may also be classified in this group. Thus, for the purposes of contract award procedures, Article 134(2) of Act CVIII of 2011 on Public Procurement (hereinafter referred to as the PPA) stipulates that proceedings initiated against any infringement of the legislative provisions applicable to public procurement, contract award procedures, qualified public procurements, qualified contract award procedures, procurements in the field of defense, as well as contract award procedures in the field of defense shall fall within the competence of the Public Procurement Arbitration Board, with regard to the contract award procedure. In such proceedings, other alternative dispute settlement techniques arise too, in particular, the issue of preliminary dispute settlement. The following entities may initiate a preliminary dispute settlement: (a) the tenderer or the candidate, within 3 business days after having knowledge of the illegal event, if it considers that the written summary or any procedural act of the contracting authority or any other document made during the contract award procedure, except for those listed in the point below, is partly or completely illegal; (b) any interested economic operator or the chamber or the interest representation body with an activity related to the subject matter of procurement not later than 10 days before the expiry of the time limit to submit tenders or to participate, in accelerated procedures or negotiated procedures without prior publication of a contract notice launched for extreme urgency until the expiry of these time limits, if he considers that the contract notice, the invitation to tender, the invitation to participate, the documentation, or the modification thereof is partly or completely illegal.

Where the infringement of law committed in the procedure is remediable through these procedural acts, the contracting authority may require—on not more than one occasion, not later than 3 business days after the reception of the preliminary dispute settlement application—the tenderers (candidates) to supply missing information, to provide information, or to provide an explanation, setting a time limit of 3 business days, even if the procedural rules would not allow him to do

[117] Data was gathered from all the related offices from April to May 2013.

so. In this case, the contracting authority shall inform the applicant for preliminary dispute settlement and the tenderers (candidates) about the submission of the application for preliminary dispute settlement on the date of dispatch of the request for the supply of missing information or for the provision of information or for explanation, and he shall inform the entities concerned about his response to the application not later than 7 business days after reception of the application. If a tenderer has submitted a preliminary dispute settlement application in connection with a procedural act done, document made following the opening of tenders within the aforesaid time limit, the contracting authority may not conclude the contract—if division into lots was possible, he shall not conclude the contract on the part of procurement concerned—before the end of a period of 10 days from the date of submission of the application, following the date of dispatch of its reply, even if the standstill period would otherwise expire until that date.[118]

Regarding the preliminary dispute settlement characteristics in public procurement procedure, it can be stated that the Public Procurement Arbitration Board, due to its position, only gets information on the preliminary dispute settlement if an appeal is submitted. Based on the available data provided by the Arbitration Board, it can be stated that before submitting the appeal a significant number of the applicants—117 cases out of 275—went for preliminary dispute settlement.[119] It is not rare either that more applications for preliminary dispute settlement are submitted in one public procurement procedure; moreover, there has also been a case when one applicant submitted applications for dispute settlement in several issues.

Amicable settlement often occurs in administrative proceedings instituted by public authority and carried out by the Equal Treatment Authority. In 2011, the majority of the clients reached an amicable settlement in the proceedings commenced against the operation of local governments. The cases ending in amicable settlement included claims on employment and treatment experienced in and objected to in the course of providing goods and services. A new element has emerged among the conciliations regarding employment discrimination, namely the amicable settlements between those having been complained against for harassment and those who have suffered harassment according to their subjective feelings, just as a growing number of complaints are being filed about harassment women have suffered due to their sex.

[118] Article 79 of the PPA.

[119] Letter from President of the Public Procurement Arbitration Board, Dr. Zoltán Kövesdi, dated 18 April 2013.

10.5 Conditionality Between Administrative Review/ Appeal and Judicial Review

The current detailed rules of the appeal and the court actions (judicial review) are the outcome of a continuous development of more than 20 years. The legislative provisions pertaining to administrative proceedings, as well as those pertaining to judicial proceedings, have been continuously and very often modified before they have achieved the current status quo. In the course of the amendments, the Supreme Court's (Curia's) decisions of fundamental importance have gradually been enshrined in the current Act on Administrative Proceedings and Services and the Chapter concerning public administration of Act III of 1952 on the Code of Civil Procedure; thus, the continuously monitored case law (precedents) has been raised to the level of legislation. Consequently, the legislative status quo reflects the changes and development of administrative proceedings in the past 20 years. The major elements of the general rules will be outlined below, but of course, many exceptional or special rules will not be covered.

Since the establishment of the Royal Administrative Court (1897), there has been a clear and consistent paradigm of the Hungarian legal system, according to which judicial proceedings may only be sought after rights to appeal have been exhausted, in other words, if the administrative decision is final and the party concerned has already tried to remedy the alleged or real grievance within the framework of public administration.

In Hungary, the right to remedy has been a legal right since 1929, and it basically means the right to appeal and the ensuing right to file for action. The appeal may only be excluded by a statutory provision, on condition that the decision may be contested in court. The appeal and the judicial control may not be regarded as equal; the appeal offers a much broader possibility for review, considering the fact that the judicial review may only be sought in relation to legal issues, and no harm done to someone's interests may be remedied in court.

But in most countries (in Hungary as well), public administration has, at least in part, a hierarchical organization, i.e., there is a higher level body above most of the bodies. This circumstance, and also the fact that public administration has always had the means of self-correction, renders a more complex relation to the appeal and other redress, and the judicial proceedings. On the basis of the appeal, the higher level body issues a new decision.

In case no first instance proceeding is ordered, this will prevail; it is the final provision that may be reviewed by the court.

The decision maker is also entitled and obliged to correct its own unlawful decision per se; it may withdraw or amend it if it has not been overridden on the merit by the court yet. Consequently, self-correction is also possible if the judicial procedure is already in progress but the court has not decided on the merits of the case yet. On the other hand, if the judicial review of the decision is in progress, the authority may only withdraw its decision until the answer on the merits of the case is lodged.

The fact that not only the Parties concerned may seek court action against a decision that prejudices their rights but also the public prosecutor may contest the given decision makes the relation between the appeal and the judicial review more sophisticated.

The Public Prosecutor has the right to review the lawfulness of administrative decisions and may request the judicial review thereof if the decision has been affected by the prosecutor's intervention (because he/she deemed it unlawful and it still does not comply with the provisions of the legislation within the deadline of the redress of infringement prescribed in the intervention).

Considering the fact that only final administrative decisions may be contested, the question is whether or not the statement of claim suspends invoking and enforcing the decision. Currently, the statement of claim shall have no suspensive effect on the enforcement of the decision. However, the claimant may appeal in the petition that enforcement be suspended, and it falls within the court's jurisdiction to decide. If the court suspends enforcement, it shall also apply to the exercise of rights conferred in the decision.[120]

While in the administrative appeal the claimant may contest the first instance decision for any reason, in the court action the claimant shall precisely specify the infringement, and the court shall limit the scope of its review thereto. The plaintiff shall be allowed to make changes in his claim on or before the first hearing. Such modification affects especially the legal basis since the claim may only be extended to cover any part of the administrative decision uncontested by the statement of claim—if it can be clearly separated from other parts of the decision—within the time limit prescribed for bringing action (which is quite short).

The legality control by the prosecutor and the control by the supervisory (administrative) bodies (the latter as the self-correction means of public administration) are exercised continuously. Thus, it may happen that a prosecutor's intervention is filed against the decision being under review by the court or the superior administrative body initiated the review thereof, that is, in its competence in nearly all cases. In such cases, the hearing shall be adjourned by the court until the prosecutor's intervention is judged, or until the new decision ordered by way of supervisory action is adopted, not later than 30 days. After the 30-day period has elapsed, the hearing shall be continued regardless of whether the administrative body has adopted a decision on the merits or not. If the new administrative decision satisfies the requirements stated in the claim, the court shall dismiss the case. Of course, the administrative body shall incur the unnecessary court costs related to the lawsuit.

If the new administrative decision adopted upon the prosecutor's intervention or the supervisory action meets only a given part of the requirements stated in the claim, the court shall dismiss the action in respect of this part only and shall carry on the hearing with respect to the claims that are not addressed in the new administrative decision, or the related decisions are not acceptable. The plaintiff shall have

[120] Statement of claims should not be confused with administrative appeals. The latter have a suspensive effect.

the right to modify his claim consistent with the new administrative decision. The court shall provide for the payment of costs charged to the administrative body in connection with the partial dismissal of the action in its resolution passed in conclusion of proceedings.

Due to some important circumstances, the general rule of the Hungarian law stipulates that the court shall annul unlawful resolutions and, if necessary, shall order to conduct new proceedings. The same rule was applied nearly uniformly in the socialist countries. The court may modify the decision—i.e., decide at its own discretion the administrative case—only in exceptional cases, on the basis of a specific authorization by law. One reason for this is that the former Constitution simply stipulated that the courts shall review the legality of the decisions of public administration; on the basis of this stipulation, the Constitutional Court has held that it is sufficient on the part of the courts to prevent the unlawful decision from being enforced (applied). In courts of jurisdiction, the expertise and knowledge in the field of public administration is not ensured; no special qualifications or competences are prescribed for judges hearing administrative cases (compared to other judges). The criminal, civil, or administrative law judges are subject to the same prescriptions concerning qualifications. Thus, the administrative and government authorities are constantly against a broader jurisdiction of the courts in terms of modification.

The court shall not be bound by the administrative matters decided with discretion or not by the administrative authority. These may also be the subject of a review by the court, in particular, it may conclude that the discretion was irregular or led to an irregular result. It may also hold that the facts are based on insufficient, unlawful evidence or the provisions on the taking of evidence were breached in the administrative proceedings. According to the above, the court may do so upon request by the plaintiff in the claim, provided the plaintiff could support his position. Hungarian administrative proceedings constitute a special type of civil procedure, where the obligation of lodging an appropriate claim, presenting legal arguments, and proper justification thereof is incumbent upon the plaintiff. The court may not extend the review to other legal grounds at its own discretion.

10.6 Europeanization of Administrative Remedies

One of the milestones in the Europeanization of Hungarian administrative procedural law is represented by Directive 2006/123/EC on services in the internal market, which stipulates certain requirements concerning remedies as well, such as—inter alia—the obligation to issue fully reasoned decisions and to provide information on the available remedies.[121] This Directive was implemented through

[121] See Article 10(6) of DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market.

the amendment of the AP and the adoption of Act LXXVI of 2009 on General Rules on Taking Up and Pursuit of Service Activities. On the other hand, no decision to be highlighted in relation to the Hungarian remedy system, in particular concerning the deficiencies in the appellate system, has been pronounced by the European Court of Justice. The current and previous infringement procedures, as well as the individual cases, have usually focused on the issue of the inappropriate implementation of one of the sector-specific directives.

The main reason for this is that for a long period of time, there was a marked tendency not to interfere in the public administration of Member States, especially as regards organizational issues. The drawing up of the new Regulation on the Administrative Procedural Law will definitely open up new possibilities for the development of the administrative procedural law in Member States.

In our view, the drawing up of the legislative basis of the EU procedural law[122] will represent the next step on the way to the Europeanization of administrative procedural law. It will help the procedural systems of the Member States to get closer to each other. In Hungary, similarly to other Central and Eastern European countries, administrative proceedings recently tend to be overregulated, and it can also be observed that several procedural issues—such as the judicial review referred to in this study and the system of measures taken by the prosecution—are incorporated into other acts of legislation. At EU level, there is a tendency to expect Member States to offer guarantees for the basic principles of procedural law; however, it does not mean that the lawmakers of the Member States shall try to provide normative regulation concerning each matter of fact. The administrative procedural law of Member States shall face new challenges everywhere: swiftly reacting, flexible rules may be suitable to respond to rapidly changing market demands, to develop a proper system for reacting to new types of problems related to natural and other catastrophes and economic issues. The regulation of the EU administrative procedural law will be of help to Member States without doubt. On the other hand, several elements of the issues to be addressed by the Committee according to the Resolution of the European Parliament have already been enshrined into the administrative procedural law of Member States, thus that of Hungary as well. Pursuant to recommendation 10 of the Resolution, "Administrative decisions shall clearly state—where Union law so provides—that an appeal is possible, and shall describe the procedure to be followed for the submission of such appeal, as well as the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it. Administrative decisions shall refer to the possibility of starting judicial proceedings and/or lodging a complaint with the European Ombudsman, where appropriate." In addition to the general obligation of administrative authorities to provide information, this rule has already been stipulated, for instance, by our first administrative procedure Act, Act IV of 1957 on the General Rules of Administrative

[122] See 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)].

Proceedings.[123] Later on, this rule has been further detailed. In any case, it is clear that in the course of the drafting of the EU rules of administrative procedural law, the best procedural practices of Member States may also offer guidance, in addition to the rules crystallized out of the EU legal sources.

10.7 Final Considerations

According to the Fundamental Law of Hungary, the right to seek legal remedy is a fundamental constitutional right: the actual and definite rule of law requires—also in the field of the operation of public administration—the supervision of law enforcement and, consequently, the enforcement of the Constitution that forms the basis for all rights.

In the light of this, the Hungarian administrative procedural law has established the system of ordinary and extraordinary remedies, and it can be stated that a very wide range of ways of remedies is available for the entities concerned; among these remedies, the administrative appeal is the most characteristic one. In addition, our acts of legislation lay down several forms of remedy against the individual administrative decisions that are of nonofficial nature, such as the objection and the complaint. With respect to the remedies out of the scope of public administration, the judicial review of decisions shall be highlighted: the judicial review (both in terms of the contentious form, i.e. against resolutions, and in terms of the noncontentious form, i.e. against rulings) is a fundamental institution of the rule of law, which aims to ensure that public administration be subordinated to law.

In addition, the legal institution of the Ombudsman is established in Hungary as well, and, furthermore, several legal institutions aiming at the alternative dispute settlement are incorporated in the Hungarian system, in particular, under the influence of the EU.

The Hungarian administrative procedural law is undoubtedly subject to continued development, systematic changes, but the guiding principles of the case law of the European Court of Justice and the other Member States also exercise influence on the Hungarian procedural law.

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[123] See Article 38.

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Chapter 11
Administrative Remedies in Polish Administrative Law

Andrzej Skoczylas and Mariusz Swora

11.1 Categorization of Available Remedies

The right to appeal is one of the fundamental rights of parties to the proceedings guaranteed in the Polish legal system. The Constitution of the Republic of Poland of April 1997 refers quite broadly to that right, in the context of stages of appeal (principle of two-instance system of proceedings). This provision is complemented by Article 78 Constitution, which stipulates that "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by the statute." The rule of two-instance system of court proceedings was additionally (partly) expressed in Article 176 (1) of Constitution—"Court proceedings shall have at least two stages". By presenting the model of administrative appeal procedure in the Polish legal system, it should be noted that administrative procedure in Poland is codified, and the most important legal act regulating administrative procedure is the Administrative Procedure Code Act of June 14, 1960,[1] regulating, mainly, the so-called *general administrative procedure*. Another important law is the Tax Ordinance Act of August 29, 1997,[2] regulating procedures in the so-called fiscal affairs (e.g., tax affairs). Usually, the issue of appeals in the Tax Ordinance (TO) is

[1] Administrative Procedure Code Act of June 14, 1960 (Journal of Laws of 2000, No. 98, item 1071, as amended), hereinafter APC.

[2] Consolidated text: Journal of Laws of 2005, No. 8, item 60, as amended, hereinafter TO.

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not to be presented separately because these regulations are very similar to those contained in the APC. In this respect, attention hereinafter will be paid only to the differences between the two procedures.

The APC is to be applied by public administration bodies in individual cases falling within the jurisdiction of these bodies, adjudicated by means of administrative decisions, as well as by other public bodies and organizations adjudicating individual cases by means of administrative decisions (whether statutorily or on a contractual basis). It needs to be explained that an individual case is one that relates to a specific party (e.g., a landowner) in a specific situation (e.g., pulling down a building). [3]

The Polish administrative procedure follows the principle of two instances based on the provisions of the Polish Constitution and defined in detail in procedural acts (APC and TO). It follows from the said principle that each party has the right to have the merits of the case heard twice[4] (hence, the two instances), which means that each first instance decision can be appealed against only once.

11.2 Internal and External Administrative Appeals

In the Polish legal system, the procedure for hearing administrative appeal (and rehearing requests) is an ordinary remedy. The administrative appeal is the key legal measure to be used by a party against an administrative decision.[5]

External appeal bodies at the higher instance level are independent of the primary decision maker. Their task in conducting merits review is to examine whether decision is substantively correct, after consideration of all relevant issues of fact, law, and policy.[6]

In the light of legal solutions applied in the APC, the party can appeal against any decision, and not only against negative decisions (i.e., including those decisions that approve only a part of the applicant's claims). The party defends its legitimate interests and has the right to evaluate whether or not the party's interests have been fully acknowledged.[7] The principle of two administrative instances further provides that "issuing two decisions by two bodies representing different instances" is not sufficient because such decisions must be "preceded by a procedure—to be carried out by the deciding body—enabling the accomplishment of objectives at which the

[3] *Cf*. Szubiakowski et al. (1998), pp. 10–12.

[4] Tarno (2011), pp. 60–65.

[5] Bińkowska et al. (2010), p. XXXIX.

[6] Asimow and Lubbers (2010), p. 263.

[7] Ruling of the Polish Supreme Administrative Court of July 3, 1992, SA/Wr 455/92, ONSA 1993, No. 3, item 62.

procedure in question is aimed."[8] An external appeal procedure cannot thus be limited to verification of arguments stated in the appeal (regarding the first instance decision).[9] Summing it up, the right to appeal may be exercised only once. Beyond any doubt, "in no case the administrative proceeding may have three or more instances."[10]

Internal administrative appeal is the legal measure (process) by which the first instance decision maker (a minister or a local government appeal board) exercises its self-control jurisdiction over his own decision. Internal administrative appeals (rehearing requests) concern the case of a decision issued in the first instance by a minister or a local government appeal board. In the case of this decision, the unsatisfied party may request the issuing body to reconsider the case (in other words, the party can exercise the so-called right of remonstrance—Article 127 (3) and (4) of the Administrative Procedure Code (hereinafter: APC). As already mentioned above, such request is not devolutive, which means that it does not transfer the case to a higher instance institution, but it requires the issuing body to reconsider it. The provisions on appeals apply accordingly to such procedures. In this manner, a fair hearing is provided second time inside the same administrative body.

As to the possibility to have decisions of autonomous bodies referred to a control body, Professor Z. Kmieciak (Supreme Administrative Court judge) concludes that "the Polish legislators decided not introduce the 'recours de tutelle' (. . .). Nor did they consider it necessary to provide a separate mechanism in which legislation issued by bodies of local government would be challenged through administrative proceedings (. . .). Finally, they did not deprive the interested parties of the right to appeal against the decisions made by these institutions."[11]

In the Polish administrative procedure, appeal is a nonformalized legal remedy—it does not require any detailed statement of grounds, and the appellant merely needs to state that he/she is not satisfied with the decision. However, detailed solutions in this respect can be imposed by specific legislations, thus requiring certain formal requirements to be met by appeals. It is worth mentioning here that certain formal requirements must be met in tax proceedings as well. Appeals against decisions of tax authorities should include arguments questioning the decision, specify the essence and the scope of the appeal, and provide supporting evidence.

[8] Ruling of the Polish Supreme Administrative Court of November 12, 1992, V SA 721/92, ONSA 1992, No. 3–4, item 95; Ruling of the Polish Supreme Administrative Court 15 V 2000, V SA 2722/99, LEX No. 56632; Ruling of the Polish Supreme Administrative Court of December 12, 2000, V SA 359/00, LEX No. 51287.

[9] Ruling of the Polish Supreme Administrative Court of March 22, 1996, SA/Wr 1996/95, ONSA 1997, No. 1, item 35.

[10] Zimmermann (2011), p. 60.

[11] Kmieciak (2011), p. 34.

As a general rule, the appeal body is the body directly superior to the body that issued the challenged decision.[12] Appeal bodies can never act *ex officio*—only once the party (or another entity authorized to do so) lodges an appeal may the superior body exercise the competences available to an appeal body.[13]

It is worth emphasizing that self-verification by the issuing body should take place within seven days after the delivery of the appeal (14 days in tax-related cases).[14] If the original decision is not verified by the issuing body, then the case will be taken over by the appeal body. First, in the so-called preliminary procedure, the appeal body will determine whether or not the appeal is formally admissible and has been lodged on time. If the appeal is not admissible, the appeal body will issue a decision. If it has been lodged after the prescribed time limit, the appeal body will issue a decision stating that the statutory deadline has not been observed.

11.3 The Devolutive Effect of the Administrative Appeal

An appeal is a relatively devolutive legal remedy, which means that in principle filing an appeal transfers the case to a higher instance institution (unless it is approved by the issuing body).

The appeal body can carry out additional investigations in order to gather more evidence or have such an investigation carried out by the body that issued the original decision. The right of the appeal body to investigate the merits of the case does not breach the principle of two instances—to the contrary, the said right guarantees that this principle is adhered to.[15]

Upon completion of the appeal procedure, the second instance body will issue the following[16]:

(a) Decision confirming the challenged decision: the appeal body will issue a decision sustaining the challenged decision if it finds out that the first instance decision is correct, i.e., it complies with the law and is reasonable. Such a decision will also be issued if the appeal body cannot modify the challenged decision due to the prohibition of *reformationis in peius* (issuing decisions to the detriment of the appellant).

[12] Bińkowska et al. (2010), p. XXXIX.

[13] Ruling of the Polish Supreme Administrative Court of May 25, 1984, II SA 2048/83, ONSA 1984, No. 1, item 51.

[14] Ruling of the Polish Supreme Administrative Court of September 4, 1981, II SA 52/81, ONSA 1981, No. 2, item 83; Ruling of the Polish Supreme Administrative Court of March 27, 1985, III SA 119/85, ONSA 1985, No. 1, item 16.

[15] *Cf.* Ruling of the Polish Supreme Administrative Court of April 5, 2000, I SA/Lu 1817/98, LEX No. 43025.

[16] *Cf.* Wróbel (2000), pp. 743 *ff.*

(b) Decision quashing the challenged decision in part or in whole and accordingly deciding on the merits of the case: the appeal body will issue such a decision if an investigation (or simply an analysis) of the challenged decision indicates that it violates applicable laws or is unreasonable and that no evidentiary investigation (full or partial) is required.
(c) Decision quashing the challenged decision and discontinuing the first instance procedure: the appeal body should issue such a decision if it finds out that the first instance procedure was insubstantial, for example, if the case has already been decided upon by virtue of a binding decision (validity decision), if the decision refers to a person not being party to the proceedings, if competence has not been observed, etc.[17]
(d) Decision on suspending the appeal procedure: such decision can be taken if the appeal is inadmissible or is lacking object. This will be the case, e.g., if the appellant withdraws his/her appeal (*cf.* Article 137 of the APC) or if the appeal has been filed by a person not being party to the proceedings.[18]
(e) Decision quashing the challenged decision in full and transferring the case for reconsideration by the first instance body (so-called decision in cassation). Such a decision can be issued if the case requires an investigation in full or in a substantial part (e.g., if the first instance body failed to carry out such an investigation or carried it out in a way violating the law to such an extent that the case remains uninvestigated in whole or in a substantial part). When transferring the case, the appeal body can specify the circumstances to be taken into account when reconsidering the case.[19]

As a matter of principle, appeal bodies decide on the merits of the case. It is worth noticing that administration bodies are not authorized to award compensatory damages as a result of appeals in administrative procedures. Compensatory damages constitute a civil law issue and can be awarded only by general (civil law) courts.

As mentioned above, *reformationis in peius* is disallowed in the general administrative procedure in Poland. Consequently, the appeal body cannot issue decisions to the detriment of the appellant (unless the challenged decision constitutes a gross violation of law or public interest). In other words, the appeal body cannot modify the content of the first instance decision in such a way that the decision becomes even more unfavorable to the appellant.[20] In the case of tax-related matters, the same issue is somewhat different. In this case, the said prohibition is purely

[17] Ruling of the Polish Supreme Administrative Court of May 7, 2002, NSA, I SA 2470/00, LEX No. 81745.

[18] *Cf.*, e.g., Ruling of the Polish Supreme Administrative Court of July 5, 2006, II OSK 942/05, ONSAiWSA 2007, No. 2, item 50, and Ruling of the Polish Supreme Administrative Court of October 14, 1999, I SA 980/98, LEX No. 48565.

[19] *Cf.* Ruling of the Polish Regional Administrative Court in Warsaw of April 25, 2006, I SA/Wa 2324/05, LEX No. 209735 and Wróbel (2000), pp. 743 *ff.*

[20] Skóra (2002).

theoretical because, in practice, it is thwarted by the so-called supplementary tax assessment. If the appeal body finds out that the amount of tax to be paid by the appellant is lower (or the amount of tax to be refunded is higher) than that prescribed in tax regulations or if the amount of the appellant's losses is overrated, then it will refer the case back to the first instance body in order to have the tax reassessed by means of altering the original decision. The new decision will reflect the laws in effect on the date of accruing the tax obligation. One may file an appeal against such decision, which will be considered in conjunction with the appeal regarding the original decision (Article 230 of the TO).

11.4 The Suspensive Effect of Administrative Appeals

As far as the suspensive effect of an appeal is concerned, it needs to be stressed that prior to the expiry of the term for filing the appeal, the decision will not be enforced, and then it will be suspended if the appeal has been filed on time. The suspension of a decision means that the decision in question has no legal consequences. Therefore, appeals have a suspensive effect in the Polish legal system.

There are, however, some exceptions to the above rule (so-called relative suspensive effect). These provisions are not applied in the case of an interim relief (decree *nisi*) accompanied by an order of immediate enforceability or if an interim relief is immediately enforceable by virtue of generally applicable laws (e.g., a decision on temporary seizure of an animal maltreated by its owner or guardian, decisions of local (municipal) Head of the State Fire-Fighting Service on suspension of works, use of equipment, buildings, or parts thereof, issued if any identified violations of fire fighting regulations may cause health hazard or risk of fire).

Any other decision can be made immediately enforceable if so required for the purpose of protecting human health or life or for securing national property against grave losses or due to any other public interests or exceptionally important interests of a party. If a decision is made immediately enforceable (or if it is immediately enforceable by virtue of generally applicable laws), the enforcement procedure can be held simultaneously with the adjudication procedure.[21] It should also be noted that a decree *nisi* can be enforced before the lapse of the term for filing an appeal if it fully satisfies the claims of all parties.

[21] Ruling of the Polish Supreme Administrative Court of March 30, 1999, III SA 5537/98, LEX No. 44836.

11.4.1 Administrative Appeals in Data

An analysis of the data from 2009 to 2011 relating to the Local Government Appeal Board in Jelenia Góra shows that in 2011 appeals were granted in approx. 58 % of all cases. Decisions on the merits were taken in approx. 33 % of the cases, while the remaining ones involved cassation (annulment) decisions. Similar figures were found for the previous periods:

- In 2010, appeals were granted in approx. 52 % of all cases. Decisions on the merits were taken in approx. 24 % of the cases, while the remaining ones involved cassation decisions.
- In 2009, appeals were granted in approx. 58 % of all cases. Decisions on the merits were taken in approx. 22 % of the cases, while the remaining ones involved cassation decisions.

In the case of the said Board, the rate of appeals to the administrative court was as follows: in 2011—10.71 % (approx. 25.6 % of successful appeals); in 2010—10.3 % (approx. 26 % of successful appeals); in 2009—12.29 % (approx. 18 % of successful appeals).

Similar figures were obtained from other Appeal Boards. For instance, in 2011 in the Local Government Appeal Board in Radom, tax cases represented approx. 17 % of all cases; cases related to planning and zoning—11 %; welfare and social security cases—54.5 %; environmental protection—3.9 %; commerce, sale, and serving of alcoholic beverages—2.2 %. Another 2.3 % of all cases were related to water law, and 7 % of all cases involved real property issues (including perpetual usufruct annuities). As many as 62 % of all appeals were successful (in 78 % of them, cassation decisions were issued, while decisions on the merits that finalized the procedure were issued in as little as 22 % of all cases). In as little as 33.3 % of the cases, the contested decision was confirmed, and in the remaining cases the appeal procedure was suspended (e.g., as a result of withdrawing the appeal). The rate of appeals against these decisions to the administrative court was low and amounted to 6.95 %. Approximately, one in every four appeals to the administrative court (23.6 %) was successful.

Analogous numbers for the Local Government Appeal Board in Koszalin were different, as 55.6 % of all cases were related to welfare and social security issues, while tax-related issues were addressed in approx. 14 % of all cases. First instance decisions were sustained in as many as 49 % of all cases, and 41.5 % of appeals were successful (decisions on the merits were issued in response to almost 45 % of the appeals). The remaining appeals were handled in an alternative way (e.g., by suspending the procedure).

Similar figures were found for the Local Government Appeal Board in Słupsk in 2008, where approx. 38 % of appeals were successful (in 32 % of cases, the appellants managed to obtain a decision on the merits).

In the case of central administration bodies, most decisions are appeal-proof. For instance, in 2007, in all cases involving heritage protection in the region of

Mazowsze (central Poland, featuring Warsaw, the country's capital city), only 0.25 % of all decisions issued by the Heritage Protection Authority were successfully appealed against (in administrative proceedings). As far as the decisions issued by the Building Inspectorate are concerned, only 2.9 %[22] of all first instance decisions were quashed.

However, a large proportion of the parties that do file an appeal are indeed successful. In 2011, in the region of Pomorskie, the rate of successful appeals against decisions of the Building Supervision Inspectorate exceeded 26 %. It should be noted, however, that appeals were submitted against as little as 5.8 % of all decisions. In the case of the Pharmaceutical Inspectorate, none of the 476 decisions issued by it was contested. As for environmental protection (body in charge: Environmental Protection Inspectorate), approx. 7 % of all cases involved an appeal, with some 8 % of those appeals being successful.

When discussing the issues related to public procurement, it needs to be noted that, in this particular context, an administrative appeal is a highly formalized legal measure, requiring the appellant to pay a high deposit. The said regulation was introduced to reduce the number of appeals, and the desired result was achieved. In the first year after its introduction (2007), the number of appeals was reduced by 48.5 %, down to 1,582 (as compared to 3,077 in 2006). Currently, the appeals are heard by a panel of three judges, who can not only require the procuring entity to take or retake an action but also waive the public procurement procedure in question.[23] In the light of the above, in the case of the Public Procurement Office, only 2,823 appeals were submitted in 2010 (as compared to 1,985 in 2009). Of which, 126 (4.5 %) were dismissed because no deposit had been paid [as compared to 107 (or 5.4 %) in 2009], 198 (7.0 %) were dismissed on formal grounds (there was no such option in 2009), 732 (25.9 %) were granted [as compared to 571 (or 28.8 %) in 2009], 879 (31.1 %) were denied [as compared to 803 (or 40.5 %) in 2009], 325 (11.5 %) were withdrawn by the appellant and thus discontinued [as compared to 269 (or 13.5 %) in 2009], 302 (10.7 %) were discontinued because the investor had agreed with the appeal (there was no such option in 2009).[24]

11.4.2 Tribunals

The Polish legal system lacks administrative bodies of appeal that can be considered as tribunals (courts) in the light of European law, thus being authorized to ask prejudicial questions to the ECJ, as per Article 234 of the TEC. This is the

[22] 2007 Annual Report of the Governor of Mazowsze.

[23] Public Procurement Office—Report on the functioning of the public procurement system in 2007, pp. 5–7.

[24] Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2010, p. 7.

prevailing opinion in the doctrine,[25] although some authors believe that the regulations on special appeal bodies dealing with appeals against decisions issued by local governments (i.e., local government appeal boards) are based on those applicable to administrative courts[26] and that local government appeal boards are quasi-judicial entities, seen as a kind of an "administrative tribunal."[27] Local government appeal boards are considered "a wholly original and unique institution in Europe."[28]

Justice J.P. Tarno (Supreme Administrative Court judge) noted that "as a result of review by appeal boards as higher instance, the probability of obtaining an administrative decision which is correct and conformity the law, as early as the stage of administrative procedure, without the necessity to resort to court intervention, has increased considerably."[29] Nonetheless, these boards are not independent. Kmieciak clarifies the difference between administrative tribunal and local government appeal boards, indicating that "*They differ from institutions known as administrative tribunals, which function in common law systems, in that they operate in an inquisitorial system. Local-government appeal boards are thus hosts of the trial, with the same adjudicative powers as bodies of local government (the bodies which examine cases in the first instance). They examine individual cases within full scope of their subject matter*."[30] As far as the number of an appeal, Sieniawska (Chairwoman of the National Representation of Local Government Appeal Boards) indicates that "*Local government appeal boards adjudicate on the basis of approximately 200 laws and ordinances and their instance control encompasses 2,873 local government units. Annual come in of cases has grown systematically and in 2010 there were more than 2,30,000 cases registered. The complexity of cases has*

[25] When analyzing the possibility of asking the prejudicial question (as referred to in Article 234 of the TEC) by appeal bodies, one needs to answer the question of whether Poland has special administrative appeal bodies that can be considered as courts (tribunals) pursuant to EU law. In this context, it needs to be emphasized that the admissibility criteria for asking the prejudicial question are specified in Article 234 of the TEC. Firstly, the question must be related to the interpretation and/or applicability of community law; secondly, the question has already been raised before any court or tribunal of a member state; and, thirdly, the question must be adjudicated so that a court or tribunal can give judgment. In accordance with the interpretation of the ECJ, national courts within the meaning of Article 234 of the TEC include bodies issuing judgments on a permanent basis, acting by virtue of law, settling disputes between parties, and being independent in their judgments (*Cf*. Biernat 2003, p. 340). The foregoing means that in Poland the bodies referred to in Article 234 of the TEC are common courts, Supreme Court, courts martial, Constitutional Tribunal, regional administrative courts, and Supreme Administrative Court (*Cf*. Biernat 2001, p. 28). Save for exceptional cases, the aforementioned conditions are not met by administrative bodies and professional self-government bodies (Mik 2000, p. 701; see also Biernat 2002, p. 2).

[26] Korzeniowska (2002), p. 287.

[27] Kijowski (2000), p. 12; see also Korzeniowska (2002), pp. 286–287, and literature quoted therein.

[28] Kmieciak (2011), p. 34.

[29] Tarno (2011), p. 64.

[30] Kmieciak (2011), p. 34.

also increased recently, and the administrative files frequently require that they should be sorted out, bound and completed."(. . .) In 2010 local government appeal boards decided in total 1,78,637 cases, including 17,000 cases regarding annual fees for perpetual usufruct decided after obligatory public hearing. In 2010 in all 49 local government appeal boards in three-person panels adjudicated 1,184 members, which means that each adjudicating panel decided 587 cases per year, which results in 196 cases per member per year."[31]

11.5 Conditionality Between Administrative Appeal and Judicial Review

The right to file a complaint with a first instance court is enjoyed by any person who has a legal interest and a public prosecutor, the Commissioner for Citizens' Rights, and a social organization within its constitutional range of activity in matters related to legal interests of other persons, provided it participated in the administrative proceedings.[32]

When analyzing an appeal procedure from the perspective of instituting a court audit of administrative proceedings, it needs to be stated that such a procedure is obligatory in Poland. The foregoing means that in order to file a complaint with an administrative court, one must exhaust all other means of appeal (internal appeal—if available to the complaining party), unless the complaint is filed by the prosecutor or the Ombudsman (the Commissioner for Citizens' Rights). If the law does not provide any remedies, a complaint can be filed after calling on the organ in writing to remove the breach of the law. A complaint is filed within 30 days from the day the complainant has been served with the decision in the case. However, a public prosecutor and the Commissioner for Citizens' Rights can file a complaint within 6 months from the day a party has been served with the decision in an individual case and, in other cases, within 6 months from the day an act has come into force or an action, justifying the filing of a complain, has been taken (with the exception of petitions concerning enactments of local law adopted by units of local self-government and field organs of government administration). The foregoing means that when acting before Polish administrative courts, the prosecutor and the Ombudsman enjoy certain procedural privileges. Neither of them needs to exhaust the so-called *sequence of instances*, and they can complain to the administrative court directly against the decision issued in the first instance, which obviously cannot be done by an ordinary party to the proceedings (a citizen being the addressee of the decision in question would first have to appeal against it at administrative level, and only then—if the decision was maintained in the second instance—could he/she complain to the administrative court).[33]

[31] Sieniawska (2011), p. 24.

[32] Skoczylas (2011), p. 399.

[33] Celińska-Grzegorczyk et al. (2009), p. 148.

A complain to an administrative court is filed through the organ whose action or inaction is the subject of the complaint. A *petition* is not a particularly formalized remedy for it is enough if it meets the requirements set for a pleading and additionally contains an indication of the decision, order, another act or action that it concerns, designation of the organ whose action or inaction is the subject of the petition, and description of the breach of law or legal interest. Hence, a complaint can be drafted without the assistance of a lawyer. The filing of a complaint does not stay the execution of the appealed decision or action; a decision may be stayed by the organ or the court but after the complaint is filed. The filing of a complaint obligates the organ to refer it to the court, together with the case file and an answer to the petition, within 30 days from the day of filing, and to consider a possibility of granting it in full, taking advantage of the procedure of self-review. In the event the organ whose action or inaction is the subject of the petition does not refer it to the court with the case file, the court may, on the motion of the complainant, fine the organ.[34]

Annually, around 72,000 complaints are filed with administrative courts, of which almost a quarter are granted, proving themselves to be effective and thus eliminating faulty acts or actions (e.g., decisions) by public administration organs. In such cases, the court quashes the appealed act or action or finds it void or in contravention of the law (a small number of cases are discontinued because, for instance, a complaint is withdrawn). It must be stressed that if a complaint concerns inaction of an administrative organ, then granting the petition means obligating the organ to deal with the case within a specified time limit.[35]

It needs to be emphasized that the scope of appeal in administrative procedures (internal appeal) does not affect the scope of appeal in court procedures, as the latter is not based on the former.

Generally, the case, after being heard in two instances by an administrative body can be heard by two instances of administrative courts.

Judicial control of public administration concerns only legality, i.e., the lawfulness of the action taken, conformity with the law of administrative acts or lack of acts, lack of due activity (i.e., a court cannot make, e.g., policy as a basis of a judgment).[36]

The fault of these regulations is that these can result in a "yo-yo effect." When the courts quash the decision of the administrative body, the case must be heard again by administrative body and can very often return to the court.[37] The Polish legislator is working on a concept of administrative courts that would have the

[34] Skoczylas (2011), p. 399.
[35] Skoczylas (2011), p. 400.
[36] Izdebski (2006), p. 95.
[37] See Jansen (2005), p. 54.

competence to make judgments that substitute decisions of administrative bodies. This concept was born due to the weaknesses of adjudication annulment (by administrative courts and administrative appeal bodies).[38]

The annually published "Administrative courts reports" show that in 2012 regional administrative courts received over 72,000 complaints (72,160, of which 68,006 were complaints against actions and decisions and the remaining 4,154 were appeals against inaction of public bodies). As compared to 2011, the number of complaints grew by 3.31 % (or 2,309 cases).[39] In total, regional administrative courts processed 71,866 complaints (in 2011—69,281 complaints), which represent 99.59 % of all complaints filed (in 2011, 99.18 %) and 76.46 % of all pending complaints (it should be remembered that 21,837 cases were carried over from the previous years). A comparison of the said rate against the previous years (2009, 2010, and 2011) shows that it has remained relatively stable.[40]

Statistical data also show that only the number of complaints submitted to regional administrative courts grows systematically. Namely, in 2012, the number of cassation (annulment) appeals to the Supreme Administrative Court falls down by nearly 1,000 cases. In 2012, the Supreme Administrative Court received only 15,017 cassation appeals,[41] as compared to 2011 (16,007[42]), which marked a growth by nearly 3,000, as compared to 2010 (13,130).[43] On top of that, the Supreme Administrative Court is burdened by hearing complaints against the decisions of regional administrative courts and the decrees of the chairperson—in 2012, a number of 4,861 of such complaints were submitted (in 2011—4,799), as well as other cases—such as complaints against violating the party's right to have a case heard by the court without undue delay—however, in 2012, only 92 of such complaints were processed (in 2011—140).[44]

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[38] Kmieciak (2011), p. 34.

[39] Informacja o działalności sądów administracyjnych w 2012 (*Administrative courts report 2012*), Warszawa 2013, p. 15. In 2011, regional administrative courts received nearly 70,000 complaints (69,851, of which 66,020 were complaints against actions and decisions and the remaining 3,831 were appeals against inaction of public bodies). As compared to 2010, the number of complaints grew by 2.58 %—Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 13.

[40] Informacja o działalności sądów administracyjnych w 2012 (*Administrative courts report 2012*), Warszawa 2013, p. 15, and Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 13.

[41] Informacja o działalności sądów administracyjnych w 2012 (*Administrative courts report 2012*), Warszawa 2013, p. 20.

[42] Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 16 and p. 325; Informacja o działalności sądów administracyjnych w 2010 (*Administrative courts report 2010*), Warszawa 2011, p. 13.

[43] Informacja o działalności sądów administracyjnych w 2010 (*Administrative courts report 2010*), Warszawa 2011, p. 314.

[44] Informacja o działalności sądów administracyjnych w 2012 (*Administrative courts report 2012*), Warszawa 2013, p. 21, and Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 328.

In the context of the increasing workload of administrative courts, attention should be paid to the issue of procedural speed and efficiency, as seen from the perspective of achieving the final decision in the case.

Thus, attention is drawn to the low efficiency of the cassation-based model of administrative court adjudication followed by Poland and many other European states. The said model allows for revoking the decision appealed against and for obliging the issuing body to rehear the case, taking into account the court's judgment. In accordance with the traditions of the Polish judiciary, the court merely monitors the activities of public administration, but is not empowered to act as a public administration body.

The existing legislation has not provided administrative courts with suitably efficient instruments, including sanctions, that could be used if an administrative body ignores the opinions expressed in the court's verdict or does not proceed at all or once again issues a decision that is essentially identical to the one that was previously revoked by the court.[45]

The above diagnosis seems to be confirmed by examples from verdicts of administrative courts.[46] It is emphasized that "*non-enforcement of a judgment shall be understood as failure to act, as continuation of the administrative procedure with an aim to close the case with an administrative decision or otherwise as provided for by applicable laws, or finally as procrastination of the proceedings*."[47] Although there are relatively few such cases (309 in 2011, 301 in 2010, 258 in 2009, 234 in 2008, 279 in 2007),[48] their number is constantly growing. However, in 2011, the value of penalties imposed using this procedure varied from PLN 15,000 to PLN 50, which has not always been in proportion to the gravity of the body's fault.[49] In the most outrageous situations, courts identified flagrant breach of the law by an administrative body, e.g., failure to take any action aimed at processing the case or processing of the case after a period of 6 years from the date on which the court's judgment became final. In the case in question, a building supervision body, guilty of a failure to enforce the judgment of the regional administrative court in Łódź (dated January 24, 2005, file No. II SA/Łd 967/03), was fined with a penalty of PLN

[45] Kmieciak (2010), pp. 105–107 Langrod (1929), pp. 160–161.

[46] If a body remains idle after a court judgment, the judgment's addressee can—pursuant to Article 154, § 1 of the law on proceedings before administrative courts—request the court to fine the body with a penalty. Such a penalty is payable from the body's budget, and its maximum amount is ten times the average monthly salary in the previous year, as published by the President of the Central Statistical Office (Article 154, § 6 of the said law). In addition, it should be remembered that in accordance with Article 154, § 2 of the said law, when adjudicating pursuant to Article 154, § 1, the court decides whether or not a body's inaction or procrastination involved flagrant breach of the law.

[47] http://orzeczenia.nsa.gov.pl.

[48] Administrative courts report 2011, Warsaw 2012, p. 252.

[49] In 2008, the average monthly salary amounted to PLN 2,943.88 (PLN 3,102.96 in 2009, PLN 3,224.98 in 2010, and PLN 3,399.52 in 2011—source: http://www.zus.pl/default.asp?id=24&p=1 accessed on September 6, 2012 r.; see also Administrative courts report 2011, Warsaw 2012, p. 252.

15,000.[50] In practice, however, idleness following an administrative court judgment is not the most common issue. Much more common are instances of ignoring the legal opinion and recommendations for further steps expressed in the court's verdict.[51] Therefore, it is of utmost importance to develop an efficient mechanism neutralizing the weaknesses of the cassation-based adjudication model—i.e., consecutive hearing of the same case by administrative bodies and then administrative courts of various instances without a conclusive decision on the case's merits. As pointed out by Kmieciak, theorists of law refer to such phenomenon as "*the yo-yo effect*."[52] In the cassation-type model of administrative jurisdiction, administrative courts (in principle) only investigate the administrative authorities' "*compliance with the law*."[53] Under such circumstances, in order to increase the efficiency of legal protection, Poland considers[54] to introducing a model used in many European states, whereby in exceptional cases administrative courts can decide on the merits, thus replacing the contested decision of the administrative body.[55]

It is also necessary to dramatically limit the possibility for the same case to pass many times through the same instances in court and administrative proceedings,[56] which could lead to a considerable reduction of cassation appeals. It is thus necessary to provide the Supreme Administrative Court with a greater power to decide on the merits. If the Supreme Administrative Court revokes a decision, it should always be empowered to hear the complaint as long as it finds that the merits of the case are clear enough. Multiple hearing of the same case by all instances in court and administrative proceedings is not uncommon, particularly because the right to file appeals stipulated in the law on proceedings before administrative courts stimulates the temptation to persistently defend one's standpoint originally expressed in an administrative case.[57]

At present, first instance administrative courts do not take over the case from the bodies handling it before, but they merely evaluate the legality of the item complained against. In such evaluation, they are not limited either by the boundaries or by the content of the complaint. A complaint to an administrative court is

[50] http://orzeczenia.nsa.gov.pl.

[51] Obviously, an administrative body's failure to comply with the legal views expressed in the court's judgment when rehearing the case constitutes a violation of the principle stipulating that court's views are binding. Therefore, the body's action is legally defective and can be contested again.

[52] Kmieciak (2010), p. 109.

[53] Kmieciak (2013), p. 149, Walter (1976), pp. 392–393.

[54] Presidential draft on amendment to the Act of 30th August 2002 Law on Proceedings in Administrative Courts; form 10.07.2013, Sejm of the Republic of Poland, 7th Term, Print vol. 1633; http://orka.sejm.gov.pl/Druki7ka.nsf/0/D19D22B3A179A839C1257BD400425C1F/%24File/1633.pdf.

[55] More: Skoczylas (2012), p. 21, Kijowski et al. (2000), pp. 30–31.

[56] Currently this problem affects over 20 % of cases—unpublished information from the Adjudication Office of the Supreme Administrative Court.

[57] Tarno (2004), np. 33, p. 40, Martysz et al. (2006), p. 30; see also Adamiak (2006), pp. 43 *ff*.

filed through the organ whose action or inaction is the subject of the complaint. A complaint is not a particularly formalized remedy, for it is enough if it meets the requirements set for a pleading and additionally contains an indication of the decision, order, another act or action that it concerns, designation of the organ whose action or inaction is the subject of the complaint, and description of the breach of law or legal interest. Hence, a complaint can be drafted without the assistance of counsel.[58]

Only the cassation appeal to the Supreme Administrative Court is a highly formalized means of appeal, where the appellant needs to state whether the ruling is complained against in part or in whole and to specify the requested scope of intervention, as well as provide a statement of grounds for cassation.[59] The Supreme Administrative Court hears cassation appeals against judgments and orders concluding the proceedings in cases, issued by the I-instance—voivodship administrative courts. The filing of a cassation appeal is subject to two requirements: it should be prepared by an attorney or legal counsel, and it should contain all elements specified by law.

The court may not, by its own initiative, commence any examinations in order to determine other (than presented in a cassation appeal) defects of the challenged resolution, unless the defects causing invalidity (nullity) of the proceedings exist, which the court takes into account by its own authority.

Contemporary Polish administrative court's system consists of the Supreme Administrative Court and regional (voivodship) administrative courts. The structure of administrative courts is two instances and consists of voivodship administrative courts as courts of the lower instance and the Supreme Administrative Court as a court of the upper instance.[60] Issues within the jurisdiction of administrative courts are heard, in the lower instance, by regional (voivodship) administrative courts, while the Supreme Administrative Court supervises the operation of voivodship administrative courts as regards adjudication in a mode specified by relevant acts and, in particular, hears recourses against judgments of those courts. It should be mentioned that in Poland judicial review is designed to prevent the excess and abuse of power by public authorities.[61]

It is worthwhile to emphasize that the norms of the Constitution of the Republic of Poland has indicated that administrative courts run the jurisdiction as a separate part of the judicial authority. These courts have been introduced to control the operation of public administration. It must be added that the judiciary model adopted in the Polish Constitution distinguishes two mutually independent judiciary divisions: one covering common courts and military courts (headed by the Supreme Court) and the second covering administrative courts (headed by the Supreme

[58] Skoczylas (2011), pp. 399–401.

[59] *Cf.* Skoczylas (2006), p. 379.

[60] There are 16 administrative courts of the lower instance and one Supreme Administrative Court, which has its seat in Warsaw.

[61] Supperstone and Knapman (2008), p. 14.

Administrative Court). Additionally, in Poland, there is a Constitutional Tribunal.[62]

In the end, it should be emphasized that, in principle, one of the major problems facing administrative bodies and administrative courts in Poland is still the duration of proceedings, in particular, appellate ones.

11.6 Time Limits for Administrative Appeals and Judicial Review

When discussing the question of the time for processing administrative appeals, it needs to be emphasized that Polish administrative procedures generally require that appeals be processed without undue delay. This should be treated as a general guideline requiring that all cases are to be handled in such a way as to not only meet the statutory time limit but also process the appeal as quickly as possible, even before the statutory deadline. In administrative procedures regulated by the Administrative Procedure Code, appeals need to be processed within one month after the delivery of the appeal, whereas tax-related appeal procedures should be processed not later than 2 months after the appeal is delivered to the appeal body (3 months in cases where a trial has been held or where the party has applied for a trial). The above terms do not include time periods statutorily available for completing certain requirements (e.g., provision of missing information in the application) or periods for which administrative proceedings are suspended, as well as periods of delay caused by reasons attributable to the party or resulting from circumstances beyond the control of the appeal body.

An analysis of files of administrative courts (including decisions indicating formal defects) shows that in the practice of many administrative bodies (particularly those dealing with supervision of building investments and environmental protection), the statutory time limits are sometimes grossly exceeded and proceedings take as much as several years. This may be seen as a breach of one of the fundamental principles of a democratic state (*rechtsstaat*), in accordance with which one has the right to have his/her case heard without undue delay in order to have one's interests protected by a public body acting in accordance with applicable laws.[63] An analysis of the judgments of the European Court of Human Rights[64] as regards lengthy court, and administrative procedures allow one to conclude that when evaluating the duration of procedures from the perspective of

[62] Skoczylas and Swora (2007), pp. 116–125.

[63] Skoczylas (2005), pp. 52–61. *Cf.* considerations of Wyrzykowski (1998) regarding one's right to court, p. 81.

[64] More: Skoczylas (2005), pp. 52–61; *cf.*, e.g., ruling of the ECHR of June 15, 2004, complaint No. 77741/01, Piekara vs. Poland, LEX No. 122542; ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Poland; ruling of the ECHR of June 1, 2004, complaint No. 33777/96, Urbańczyk vs. Poland.

breaching Article 6 of the convention, the ECHR frequently takes into account not only the court procedure but also the preceding procedures handled by administrative bodies. In particular, this approach is used if:

(a) despite being obliged by the administrative court to issue a decision or take action within a prescribed time limit, the administrative body remained idle and then the decision issued (or action taken) by the body has been challenged to the court[65];
(b) the administrative court has waived a decision of an administrative body, following which the said body issued another decision that has been challenged to the court[66];
(c) a considerable number of decisions issued in the same case (and then complained about to the court) implies—in the opinion of the ECHR—that the authorities failed to act with due diligence.[67]

The foregoing means that—when investigating the matter of exceeding reasonable time of procedure (Article 6, Section 1 of the Convention)—the ECHR considers not only the circumstances of the proceedings in the administrative court but also the "*total duration of the procedure*," commencing upon initiation of the administrative procedure.[68]

Ensuring that cases move quickly through the courts is not a simple matter; however much success has been achieved. It has to be noted in this context that in 1999 proceedings before an administrative court lasted on an average of 42 months; in 2003, it was 36 months; in 2006, it was about 11 months; and, in 2011, proceedings before I-instance courts lasted for only 3–5 months.[69]

In 2012, administrative courts of the first instance processed 49.87 % of appeals against actions, inaction, and decisions within a period of 3 months (50.37 % in 2011 and 50.6 % in 2010—data concerned with appeals against actions and decisions). Within 6 months, they processed over 80 % of such appeals (81.49 % in 2012, 81.89 % in 2011, and 85.3 % in 2010). As far as complaints in 2011 against inaction of a body are concerned, 69.5 % of them were heard within 3 months and 93.2 % within 6 months. For instance, in 2010, the average time necessary for the

[65] Ruling of the ECHR of June 15, 2004, complaint No. 77741/01, Piekara vs. Poland, LEX No. 122542.

[66] N*umerous reconsiderations of the case resulted in further delays*—ruling of the ECHR of June 1, 2004, complaint No. 33777/96, Urbańczyk vs. Poland.

[67] *Cf.* ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Poland.

[68] Ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Poland; Skoczylas (2005), pp. 52–61.

[69] The average time of handling a case before a second instance court is 12 months, so the total average time (from the first instance to the final decision by the higher instance administrative court) is 15–18 months—*cf.* Preventing backlog in administrative justice, *General report*, XXII colloquium of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, by Rusen Ergec, p. 33 and Informacja o działalności sądów administracyjnych w 2009 (*Administrative courts report 2009*), Warszawa 2010.

regional administrative court to hear a case was 1.86 months in Olsztyn and 3.4 months in Wroclaw. Within 6 months, the regional administrative court in Warsaw heard 83.4 % of the cases, as compared to 87.2 % in Poznań. Undoubtedly, the said figures are indicative of a high efficiency of proceedings before regional administrative courts.[70] In the Supreme Administrative Court, the rate of cases heard within 12 months amounted to 70.4 % (a growth by over 5 %, as compared to 2010[71]). This result was possible owing to a combination of factors, such as inclusion of a judge from a regional administrative court in the adjudication panel.[72]

11.6.1 Administrative Appeals and Other Forms of ADR

When considering the issue of the relationship between an administrative appeal and conciliation procedures (including mediation) in administrative cases, it should be noted that in certain appeal procedures an out-of-court settlement is possible, thus ending the procedure. The APC provides that settlements in administrative procedure are possible in cases involving at least two parties and requiring dispute solving and balancing of conflicting interests of the parties (e.g., in building permit cases) as long as they are not prohibited by law. Consequently, a settlement should make the procedure simpler or quicker.

If the parties jointly confirm their intent to settle the case, the appeal body is obliged to postpone the decision and to determine a time limit for reaching an agreement. Usually it is 7–14 days, depending on the specific nature of each case. Nonetheless, the appeal body is obliged to process the case if one of the parties notifies it that it is no longer interested in a settlement or if the parties fail to observe the time limit determined by the appeal body (Article 116, Clauses 1 and 2 of the APC).

Each settlement must be approved by the public administration body before which it has been reached. From the administrative point of view, settlements are made between the parties to the proceedings (and not between a party and the administration body).[73] An approval of the settlement, or a refusal to approve the same, takes the form of a decision, which can be appealed against. Public administration bodies can refuse to approve a settlement if it breaches generally applicable laws (e.g., if it is aimed at dodging laws imposing certain obligations on the

[70] Administrative courts report 2010, Warsaw 2011, pp. 11 and 12; Administrative courts report 2011, Warsaw 2012, p. 14.

[71] Administrative courts report 2011, Warsaw 2012, p. 19, and Ergec (2010), p. 53.

[72] Such a measure was necessary, *inter alia*, due to the fact that in 2011 as many as 10 Supreme Court judges quit their work (out of a total of 93 judges)—see Administrative courts report 2010, Warsaw 2011, pp. 11 and 12; Administrative courts report 2011, Warsaw 2012, pp. 19 and 270.

[73] Wróbel (2000), p. 153, and of the Polish Regional Administrative Court in Warsaw of November 28, 2005, IV SA/Wa 1648/05, LEX No. 196663.

parties), if it fails to consider the position of the cooperating body, if it is contrary to public interest or to reasonable interest of one or more parties.

An approved settlement will have the same consequences as a decision issued in the course of an administrative procedure (Article 121 of the APC), which means that it may be subject to forced execution by means of administrative enforcement. It needs to be remembered that if the settlement is reached in the course of an appeal procedure, then the first instance decision will become null and void on the date on which the decision approving of the settlement becomes final (Article 119, Clause 2 of the APC). It needs to be emphasized that representatives of public administration bodies declare that administrative settlements in appeal procedures are extremely rare.[74]

In its turn, standard mediation is not an alternative to an appeal, as it takes place already after the completion of the appeal procedure. Mediations can only be held after a complaint is filed with the court. To begin with, they are aimed at creating conditions for an earlier solution of the case, without the court's intervention. The date for a mediation meeting can be determined upon request of either the complainant or the decision-issuing body, or *ex officio*, even if the parties do not request mediation. However, mediation is not significantly effective in Poland. The key element of the mediation procedure is merely the presentation by the complainant and the decision-issuing body of their respective positions and response to actual and legal findings in the context of charges stated in the complaint. Under such circumstances, the public body—acting within the boundaries of the law and on the basis of arrangements made with the other parties—will be able to waive or alter the challenged measure (or take an alternative action), to the extent allowed by its own jurisdiction and competences (Article 117). The foregoing means that mediation actually constitutes "*an extension of the self-verification procedure, but on more favorable conditions*."[75] Decisions issued in this procedure can be complained in court (Article 118). Originally, it was assumed that if applied in a large number of cases, mediation will allow eliminating challenged decisions (including, in particular, those of smaller importance) from the legal system. In the early stage (since 2004), the average number of mediations was several hundred per year (678 cases), with settlements reached in approximately 30 % of all cases (170 settlements).[76] After some time, the number of mediations dropped dramatically. In 2009, only 21 mediation procedures were held, constituting as little as 0.027 % of all cases, and

[74] Martysz (2003), pp. 392 *ff*, Bojanowski and Skóra (2005), pp. 132–133.

[75] Jaśkowska [in:] Jaśkowska et al. (2004), p. 158.

[76] In 2005, number of mediations was 204, with settlements reached in 117 cases; in 2006, number of mediations was 172—settlements reached in 66 cases; in 2007, number of mediations was 87—settlements reached in 17 cases; in 2008, number of mediations was 36—settlements reached in 16 cases. See Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 16, and Informacja o działalności sądów administracyjnych w 2009 (*Administrative courts report 2009*), Warszawa 2010, p. 15.

only three of those procedures were successful.[77] Similarly, in 2010, the number of mediations was 11, with settlements reached in two cases (in 2011—23 mediations and 8 settlements).[78] It seems that the fundamental reason for the low importance of mediation in the Polish court and administrative procedures is the lack of the parties' intent to reach an agreement with the opposite party. Complainants are not interested in mediation because first instance court cases are heard in a relatively short period of time (3–5 months on average).[79] At their turn, public administration bodies are wary of being accused of corruption if reaching an agreement in an informal procedure.

11.7 Dispute Settlement by the Ombudsman

The official English wording of Polish Ombudsman is *The Human Rights Defender* (*Rzecznik Praw Obywatelskich*, hereinafter: the HRD). The Polish Ombudsman was introduced by the Act on the Human Rights Defender of 15 July 1987 (hereinafter: the HRD Act) and started his work in 1988—at the end of communist regime in Poland.[80] The model of the Polish Ombudsman was borrowed from Scandinavia and brought to Poland by scholars with experience acquired in Western Democracies.[81]

At the beginning of the history of the Human Rights Defender, the only legislative basis for his operation was the above-mentioned legislative act. Strong constitutional roots were attributed to the Ombudsman in the Constitution of the Republic of Poland of 2007. According to art. 207(1) of the Constitution, his/her basic task shall be guarding human and civic freedoms and rights specified in the Constitution and other legal acts. The Constitution also regulates his/her procedure of appointment. The high rank occupied by the institution among other public bodies is emphasized by the fact that he/she should be appointed in two-staged procedure before the Parliament (nomination by the Sejm upon the approval of the Senate). The Constitution expressed also the *incompatibilitatis* principle—the HRD cannot occupy other positions, with the exception of that of a university professor,

[77] Informacja o działalności sądów administracyjnych w 2011 (*Administrative courts report 2011*), Warszawa 2012, p. 16.

[78] See above, p. 16.

[79] The average time of handling a case before a second instance court is 12 months, so the total average time (from the first instance to the final decision by the higher instance administrative court) is 15–18 months—*cf*. Preventing backlog in administrative justice, *General report*, XXII colloquium of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, by Rusen Ergec, p. 33, and Informacja o działalności sądów administracyjnych w 2009 (*Administrative courts report 2009*), Warszawa 2010.

[80] Official Journal of the Republic of Poland of 2001, No. 14, position 147—consolidated version with further amendments.

[81] Letowska (1995), p. 63.

nor shall he/she carry out other professional commitments. According to art. 209 (1) of the Constitution, the HRD shall not be affiliated with any political party or trade union and shall not perform any public activities that could not reconcile with the dignity of his/her office. When we add the autonomy and independence stated in Art. 210 and the formal immunity from Art. 211 of the Constitution, the HRD can be described as an independent and autonomous public body protecting civic rights and constitutional freedoms, highly situated among other constitutional bodies. Such a high position of the HRD comes also from the fact that starting from the beginning of the office it was occupied by prominent professors of law. Origins of the HRD are rooted in the communist era, when the Ombudsman was created, although from the beginning it used to be seen as an independent entity. Treated by the communists as a trifling concession on behalf of the civil society, the HRD stood by the human rights and freedoms expressed not only in national but also in international law.[82] Traditionally, from the beginning, the philosophy of Ombudsmen was based on legal positivism—the mainstream philosophy of polish jurisprudence before 1989 and afterwards. In such a way, the HRD participated in creation of principles of the state ruled by law (*rechtsstaat*), and such an approach practically has not changed since today. It is also noteworthy that the first ombudsperson presented a rather liberal approach to human rights, and such a liberal vision influenced their activities and initiatives.[83]

The effectiveness of the HRD may be presented in terms of criteria of control. The only measure taken into account here is conformity with legal norms. Narrowing control measures only to law is sometimes criticized (mostly by legal naturalists and progressivists), but the point is that it is in fact the only clear criterion of control in the *rechtstaat*. The HRD did not develop its own system of control based on other norms but legal (although in the sphere of promotion of rights, but not execution, he/she may refer to systems other than legal). The scope and criteria of his control activities have been practically unchanged since the creation of the HRD, while the category of subjects protected has changed significantly (through protection of right of humans instead of protection of only citizens). Critics of legal formalism of the HRD used to argue that this institution does not respond to the needs of its stakeholders who demand rather protection of fairness than merely protection of legality. Narrowing the scope of control to legality cannot cover the positive assessment of the activity of the HRD focused on protection of humans rights and freedoms in difficult conditions of Poland as a state under transition from communism to democracy, where the mere conformity with legal norms, the level of legal education of the society, and availability of legal assistance still leave a lot to be desired.

When assessing the role of the HRD in legislative process, one has to notice that the HRD played very important role in the establishment of the *rechstaat* principle in the Polish legal system. Poland chose an evolutionary way of repealing old

[82] Idem.

[83] Finkel (2006/2007).

communist legal norms, and the role of the HRD here was crucial by its competence to initiate procedures before the Constitutional Tribunal.[84] As a result of his actions, many laws and regulations were clarified, amended, or repealed in accordance with the human rights standards of Western Democracies. A good example is tax legislation, where the Constitutional Tribunal, together with the HRD, developed a principle of not changing the tax law during the tax year, stating that the tax law cannot constitute a "trap" for a citizen—and many other principles shaping the constitutional basis for tax law system.[85]

The HRD in Poland does not have regulatory powers. His/her influence on legislation is indirect character by execution of his/her powers stated in article 16 (2) of the HRD Act. According to this Article, the HRD can

1) approach the relevant agencies with proposals for legislative initiative, or for issuing or amending other legal acts concerning the liberties and rights of a human and a citizen,
2) approach the Constitutional Tribunal with motions mentioned in Art. 188 of the Constitution (motions regarding conformity with constitution),
3) report participation in the proceedings before the Constitutional Tribunal in the cases of constitutional complaints and take part in those proceedings,
4) request the Supreme Court to issue a resolution aimed at explaining legal provisions that raise doubts in practice, or application of has resulted in conflicting judicial decisions.

The basis of actions of the HRD is normative (based on legal norms), although he/she actively promotes principles of good administration and good legislation.

The HRD used to play an active role in the promotion of principles of good administration. Those principles are enacted in the general part of the Polish Administrative Code (e.g., principle of legality, principle of taking into account the public interest and just interests of citizens *ex officio*, the principle of objective truth, the principle of deepening the trust of citizens to the state authorities).[86]

Together with prominent administrative law scholars, the HRD prepared the general part of administrative law act, although it was not adopted by the Parliament. The cross-fertilization between the HRD and courts may be presented in terms of educational role played by the HRD (open debates, workshops on human rights, conferences, reports, expert meetings, leaflets). Every year, problems regarding proper functioning of the judiciary system are important part of yearly report of activities of the HRD. In terms of the powers of the HRD, it has to be noted that the Ombudsman can directly participate in proceedings before courts. According to the provisions of the HRD Act, the Ombudsman may, in particular:

- demand that proceedings be instituted in civil cases, and participate in any ongoing proceedings with the rights enjoyed by the prosecutor,
- demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted ex officio,

[84] Klich (1996), p. 41.
[85] Swora (1997), p. 11.
[86] Bińkowska et al. (2010), p. XVII.

- ask for instituting administration proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor,
- move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanor, under rules and procedures set forth elsewhere,
- lodge cassation or extraordinary appeal against each final and valid sentence, under rules and procedures set forth elsewhere.

Participating in the courts' procedure, the HRD may present his/her point of view on law and human rights issues in individual cases. Adopting the point of view of the Ombudsman, the Court in such case often makes it a part of his reasoning.

In the area of international protection of human rights and fundamental freedoms, the role of the HRD regards supervision of the execution of judgments of ECHR. The HRD monitors also implementation of European law. The HRD, in practice, issues statements to competent bodies asking about the measures taken to implement a judgment or act that influences the sphere of human rights and fundamental freedoms.

Finally, some data may be of relevance for understanding the effectiveness of the institution. The Polish Ombudsman deals with a relatively high number of cases every year, what is explained by a wide area of competence and absence of formal and financial barriers of applications.[87] In 2011, the HRD received 58,277, of which 27,491 applications concerned new cases (in 2010: 56,641 [total] and 26,575 [new]; 2009: 65,208 [total] and 31,406 [new]; 2008: 61,522 [total] and 27,872 [new]; 2007: 57,507 [total] and 29,286 [new]). Acting on his/her initiative, the HRD took up 596 cases in 2011 (2010—735, 2009—1,203). In 2011, 32,343 cases were examined (2010—34,248, 2009—37,069, 2008—35,043, 2007—341,99), of which 9,572 (in 2010—11,810, 2009—12,966, 2008—13,567, 2007—13,194) were undertaken under the procedure established by the Act on the Human Rights Defender as they concerned possible infringements of civil rights and freedoms. In 20,875 (in 2010—20,360, 2009—22,223, 2008—19,637, 2007—19,506) cases, the applicants were advised on the measures they could take; in 497 (in 2010—550, 2009—667, 2008—622, 2007—559) cases, the applicants were requested to supplement their applications, whereas 477 (2010—545, 2009—502, 2008—533, 2007—361) cases were referred to the relevant competent authorities. Such a high number of cases where the HRD issues an explanation, refers to competent authorities, or merely finds himself incompetent is explained by the fact that "the universal system of legal support and information, which is an important aspect of the democratic rule of law, does not function well in Poland after the 20 years of independence."[88] According to the yearly reports, compliance with recommendations of the HRD is estimated as follows: 2011 (17.3 %), 2010 (17.4 %), 2009 (19.3 %), 2008 (22.7 %).

[87] Following data will be analyzed on the basis of yearly reports of the Ombudsman presented at http://www.rpo.gov.pl/index.php?md=7508&s=3.

[88] Report on the Activity of the Human Rights Defender—Summary in 2011 (Ombudsman of the Republic of Poland), http://www.rpo.gov.pl/index.php?md=7508&s=3.

Not holding adjudicative powers in enforcement of administrative law, the HRD is active in administrative proceedings, as well as in signaling possible violations of law to public bodies in charge. The principles of good administration can be found mostly in the sphere of promotion and general estimations of legality of public bodies issued by the Ombudsman.

11.8 Europeanization of Administrative Remedies?

When considering the European dimension of the administrative appeal procedure in Poland, it needs to be emphasized that the Polish legal system does not violate the principle of equivalence, understood as securing the party's rights provided by community law to the same extent as in the case of similar national procedures.

In the context of the competence to ask prejudicial questions (as referred to in Article 234 of the TEC) by appeal bodies, one needs to answer the question of whether Poland has special administrative appeal bodies that can be considered as courts (tribunals) pursuant to European laws. In this context, it needs to be emphasized that the admissibility criteria for asking the prejudicial question are specified in Article 234 of the TEC. Firstly, the question must be related to the interpretation and/or applicability of community law; secondly, the question has already been raised before any court or tribunal of a member state; and, thirdly, the question must be adjudicated so that a court or tribunal can give judgment. In accordance with the interpretation of the ECJ, national courts within the meaning of Article 234 of the TEC include bodies issuing judgments on a permanent basis, acting by virtue of law, settling disputes between parties, and being independent in their judgments.[89] The foregoing means that in Poland the bodies referred to in Article 234 of the TEC are common courts, Supreme Court, courts martial, Constitutional Tribunal, regional administrative courts, and Supreme Administrative Court.[90] Save for exceptional cases, the aforementioned conditions are not met by administrative bodies and professional self-government bodies.[91]

When analyzing the issue of how the Polish law on administrative procedure relates to the European principles of good administration, we can state that both general administrative procedures and tax procedures in Poland comply with the principles set out in the European Code of Good Administrative Behavior (adopted on 6 September 2001 by the European Parliament—in spite of the fact that addressed to the European Union institution, the Code of Good Administrative Behavior is playing a significant role in the development of administrative proceedings in all EU Member States).

[89] *Cf.* Biernat (2003), p. 340.
[90] *Cf.* Biernat (2001), p. 28.
[91] Mik (2000), p. 701, Biernat (2002), p. 2.

Even before these principles were developed, the Polish administrative procedure complied with all the requirements of the Code because it contained procedural guarantees exceeding European standards. This means that the Polish procedure protects one's right to be heard[92] and follows the principles regarding appeals—e.g., Article 18, stipulating the principles of notifying the parties and other entities about the content of the decision. Polish regulations—i.e., Article 107, Clause 1, and Article 9 of the APC—similarly to the European Code of Good Administrative Behavior—require the deciding body to indicate the possibilities of appeal (including the respective time limits). Similarly, the principle of nonretroactivity is adhered to—in the Polish law, the decision takes effect once duly published (*cf.* Article 11 of the APC). Also, the principle of two instances is respected to a much greater extent than in the European Code of Good Administrative Behavior. Only the right to demand compensation for damages is provided for by the Polish Civil Code (Article 417 *ff*)[93] and not in the administrative procedure.

11.9 Final Considerations

The key traits of the Polish administrative justice system are the reliance on administrative appeal and the openness towards other forms of ADR.

The administrative appeal is an ordinary remedy, allowed, as a rule, against all administrative decisions rendered in the first instance administrative proceedings; it is a nonformalized legal remedy, which has, as a principle, devolutive effect. The authority that made the initial decision loses its decision-making power, although as a rule, in appeal proceedings, *reformatio in peius* is forbidden.

One of the major problems facing administrative bodies and administrative courts in Poland is still the duration of proceedings, in particular, appellate ones. An analysis of files of administrative courts (including decisions indicating formal defects) shows that in the practice of many administrative bodies (particularly those dealing with supervision of building investments and environmental protection), the statutory time limits are sometimes grossly exceeded and proceedings take as much as several years. This may be seen as a breach of one of the fundamental principles of a democratic state, in accordance with which one has the right to have his/her case heard without undue delay in order to have one's interests protected by a public body acting in accordance with applicable laws. However, improvements can be seen over time: in 1999, proceedings before an administrative court lasted on an average of 42 months; in 2003, it was 36 months; in 2006, it was about 11 months; and, in 2012, proceedings before first instance courts lasted for only 3–5 months.

[92] Cf. Eeckhout (2002), pp. 945 *ff*.

[93] See Bojanowski (2011), pp. 2–4, and Borkowski (2011), pp. 46–49.

Other ADR tools are used as well. On one hand, the Polish Ombudsman is active in the process of improvement of performance of public administration through promotion of rules of good administrative behavior. Unfortunately, politicization of public sphere in Poland is the main cause that his/her efforts in this area are often devalued or negated. On the other hand, the APC provides that settlements in administrative procedure are possible in cases involving at least two parties and requiring dispute solving and balancing of conflicting interests of the parties (e.g., in building permit cases) as long as they are not prohibited by law.

Nevertheless, administrative appeals remain the main tool for dispute resolution outside administrative courts. The figures gathered for this chapter show a reasonable rate of success for appeals against decisions issued by local governments, while a smaller rate of success is noticeable for central government units.

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Chapter 12
Effective Conflict Resolution in Administrative Proceedings in Slovenia: A Theoretical and Empirical Analysis

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12.1 Introduction

12.1.1 Scope of the Chapter

This paper attempts to assess—theoretically and empirically—whether and to what extent effective resolution of administrative disputes is emerging from existing regulations and from the administrative practice in Slovenian administrative law, forecasting also its future development.

Republic of Slovenia is considered one of the most successful postsocialist states among Central and South European countries in terms of administrative reforms. Since the newly achieved independence in 1991, the former Yugoslav republic has obtained full EU membership in 2004. In this context, administrative reforms—legal protection of individuals in administrative matters included—have been planned and carried out on the basis of holistic reform strategies under the impact of internal and external driving forces, particularly the process of Europeanization and the New Public Management movement to strive for effective administrative decision making.

The aim of proceedings in administrative matters is an overall balance of public and private interests and, more specifically, of the appeal both in terms of protecting the rights of the parties as a uniform, legitimate, and effective dispute resolution between authorities and private parties. Yet if only technical rationality is taken into account, as in most of the empirical part of this paper, the main indicator of effectiveness of administration and administrative proceedings is a high rate and a speedy resolution of disputes between authorities and the parties within administrative proceedings in order to avoid court proceedings (even if a party might not file court action although disagreeing with the administrative decision). Rationality

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and effectiveness of administrative proceedings are in fact essential for solving complex societal issues. Hence, a modern state measures the effectiveness of its administration through elements of administration accessibility (dispositiveness of legal remedies), speed of asserting the rights and legal interests (time limits), equality of the parties before the law, suspensiveness and devolution of legal remedies, etc.

The research is (initially) normative oriented just to dwell later on empirical data—annual reports of administrative bodies and courts, surveys (e.g., on citizens' perception). It also examines the findings from surveys and structured interviews with representatives of administrative bodies (public officials, administrative judges Survey (2012)). The research looks into the data gathered for the period of 2007–2011 to assess the rate of effectiveness in terms of dispute resolution in administrative proceedings. It focuses on (1) internal administrative appeals, (2) special administrative judicial review, (3) mediation in general, and (4) ombudsman's activities as main ADR forms in administrative matters in Slovenia.

12.1.2 Slovenian Administrative Law System: Available Remedies

Public administration in Slovenia is a part of the executive branch of power and operates in three parallel structures: (1) the state administration with 11 ministries (before 2012, the number of ministries was 15), which normally act as appellate bodies in relation to their approx. forty executive agencies and 58 local units; (2) 211 municipal administrations, independent and fully separated from the central government; and (3) other structures exercising public authority and thus conducting administrative proceedings based on delegated public tasks (agencies, social insurance institutes, private concessionaires, etc.).

Following the German–Austrian model, in Slovenia, administrative proceedings are understood as decision making in individual cases, as opposed to any type of procedure carried out by a public body.[1] In Slovene tradition and legal order, administrative proceedings are considered a path by which authorities establish, modify, or terminate an administrative (legal) relationship with a private party by applying general norms to a specific state of facts.

The subject matter decided in administrative proceedings are the rights and legal interests or obligations of an individual or several identified or identifiable persons relating to administrative (substantive) law. Administrative proceedings are in Slovenia thus an activity carried out by public authorities and resulting in the issuance of an individual authoritative administrative act, when general administrative decision making is understood as a type of regulatory processes.

[1] As in the case of USA, the EU, or some of its members, cf. Barnes in Rose-Ackerman and Lindseth (2011). Cf. Kovač (2010a).

The administrative act can be either a decision on the merits or a procedural ruling (e.g., on suspending the proceedings because of death of the party or withdrawal of the claim), with legal implications for the party and other participants. Since the administrative relation is by its origin unilateral, the law on administrative procedure is intended to protect the "weaker" party in proceedings. Administrative proceedings are a fundamental instrument of the rule of law (*Rechtsstaat)* and democracy, particularly in relation to the protection of the constitutional rights of individuals against possible abuse of power by administrative bodies.[2]

Administrative proceedings in Slovenia are regulated mainly by the General Administrative Procedure Act (GAPA).[3] The law was adopted in 1999 based on the legacy of former Yugoslav (1956) and Austrian laws (1925). Moreover, they are governed in more detail by several sector-specific laws. With regard to the significance and extent of administrative proceedings—considering the increase of administrative cases[4] and the scope of application of the GAPA—administrative proceedings represent one of the most important processes in the legal system of the Republic of Slovenia. According to the records of the Ministry of Justice and Public Administration (2012), in Slovenia are issued up to ten million administrative acts every year, either upon parties' request or *ex officio*.

Administrative acts issued as a result of administrative proceedings are subject to mandatory administrative appeal and then to the review of legality by the Administrative Court. In the Slovenian administrative law, we therefore strictly distinguish between internal administrative appeal[5] and further administrative judicial review before the Administrative Court. The latter is regulated by the 2006 adopted Administrative Dispute Act.[6] With special administrative court, established in 1997, Slovenia fits into the largest group of countries that follow

[2] Nehl (1999), pp. 70–100, cf. Ziller in Peters and Pierre (2005/2011), p. 261.

[3] Slovene: *Zakon o splošnem upravnem postopku* (ZUP), Official Gazette of the Republic of Slovenia No. 80/99. The law was amended several times; see Official Gazette of the Republic of Slovenia No. 70/00-ZUP-A, 52/02-ZUP-B, 73/04-ZUP-C, 119/05-ZUP-D, 24/06-UPB2, 105/06-ZUS-1, 126/07-ZUP-E, 65/08-ZUP-F, 8/10. The original text contained 325 articles. There is some further subsidiary legislation regulating the field in details, e.g., Decree on administrative operations, Rules on costs in administrative procedure, etc. More on development and comparability of GAPA in Slovenia, see in Kovač (2011/2012), pp. 39–66.

[4] Cf. Craig in Peters and Pierre (2005/2011), p. 270.

[5] Besides administrative appeal, there are some other forms of internal administrative control mechanisms. Systematically, there are (1) instance supervision (review of legality of the administrative acts by means of appeal), (2) supervisory right (by line ministries through specific extraordinary legal remedies), and (3) horizontal forms of internal administrative supervision, mainly administrative inspection according to Article 307 of the GAPA.

[6] Slovene: *Zakon o upravnem sporu* (ZUS-1), Official Gazette of the Republic of Slovenia No. 105/06. Before this law, there was previous ADA (ZUS) in force, adopted in 1996. The present law introduced in comparison to the previous one some improvements in the direction of more efficient judicial review (e.g., more accurate definition of the scope of this form of review, introduction of decisions made by individual judges as opposed to principal senates, reduction of an appeal procedures, etc.).

French model of *Conseil d'Etat*.[7] We consider that establishing an autonomous Administrative Court enables better accessibility for the parties and more specialization in administrative matters. In Slovenia, there is also special judicial review in addition to the general one before Social Court on the field of obligatory social insurance matters.[8] The right of access to court is based on Articles 23, 156, and 157 of the Slovene Constitution and on the European Convention on Human Rights (ECHR), which Slovenia has ratified in 1994. Ever since the ECHR ratification, Slovenia was accused and convicted before the ECtHR also in relation to administrative matters, mainly owing to infringement of the right to fair trial under Article 6 of ECHR and right to an effective remedy under Article 13 of ECHR. By 2006, the ECtHR thus passed 219 judgements in relation to Slovenia, starting with the Lukenda case (No. 23032/02 of 6 October 2005), concerning unreasonably long decision making also resulting from the lack of effective internal remedy. For such reason and based on the Constitutional Court decision U-I-65/05, Slovenia in 2006 adopted the Protection of Right to Trial without Undue Delay Act (ZVPSBNO).[9]

Synthesizing, based on the GAPA and ADA, the legal path in asserting administrative rights and interests in the Slovene administrative law system comprises the following stages:

1. Administrative proceedings (called "first instance" in Slovenian law) are initiated upon request by one of the parties or *ex officio* in order to protect public interest;
2. Administrative appeal proceedings (or called "second instance administrative proceedings" in Slovenian law) are conducted usually by the line ministry and at the initiative of a party or the state attorney within 15 days from the notification of the administrative act. The decision reached in administrative appeal makes the administrative act complete and enforceable.

[7] Cf. Ziller in Peters and Pierre (2005/2011).

[8] The Social Court functions as part of the joined-up Labor and Social Court with first and higher appeal instance. The courts and procedure are regulated by Labor and Social Courts Act (Slovene: *Zakon o delovnih in socialnih sodiščih* (ZDSS-1), Official Gazette of the Republic of Slovenia No. 2/04).

[9] Slovene: *Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja* (ZVPSBNO), Official Gazette of the Republic of Slovenia No. 49/06. In the event of continuing infringements (e.g., excessive duration of administrative and court proceedings), the possibility of appeal to receive compensation does not constitute an efficient legal remedy as it does not eliminate the infringement. Thus, such remedy does not need to be exhausted prior to filing an appeal before the ECtHR. The ECtHR notes that the right to fair trial pursuant to Article 6 of ECHR does not require the Member States to provide in their national procedural laws—in addition to the appeal—extraordinary legal remedies that the Slovene GAPA lays down in a rather large number. The ECtHR also develops other criteria to interpret Article 6 and other ECHR provisions (cf. Venice Commission 2011, p. 17), e.g., the number of instances in the judicial system of an MS, formalization of procedure, indication of reasons for challenging an act, assistance of a lawyer, etc. (for Slovenia, see in Šturm 2002/2011, pp. 340, 396).

3. Once the act has become complete, a court action may be initiated within 30 days from the notification of the decision in administrative appeal by any party or—in order to protect public interest—by a government representative. Under certain conditions, there is a further option of an appeal to the Supreme Court. Upon court decision, the matter becomes final.
4. After finality, should the administrative authority or the court in deciding on the constitutional rights or obligations of the party violate such rights, the party may file a constitutional appeal before the Slovene Constitutional Court.
5. If the Constitutional Court denies the appeal, the party may invoke the protection of the ECtHR.

The legal system in Slovenia provides therefore parties with access to five or even six levels and four types of procedures to protect their rights. This sometimes makes the protection of the parties' rights rather difficult—instead enabling stronger protection—since in order to have access to further level, the parties must necessarily exhaust prior remedies. The only parallel remedy is the compensation based on ZVPSBNO. Such approach is quite often ineffective due to month-long successive procedures.[10] On the other hand, this doctrine requests prior proceedings to be incorporated as burdensome when assessing possible infringements regarding access to court. We assess such approach as legitimate since it is stimulating the whole administrative judicial system in relation to individual person to act effectively. Additionally, as empirical data show (see the following chapters), administrative appeal affects the celerity of dispute resolutions positively by reaching faster finality of acts within internal administration and reducing court burden. Namely, an administrative appeal is filed in Slovenia on average of merely up to approximately 1–3 % of all the ten million cases. And not more than one-fifth to one-third of rejected administrative appeals are referred further to the Administrative Court.

12.2 Administrative Proceedings (Internal Administrative Review)

12.2.1 Theoretical and Normative Foundations of Administrative Proceedings in Slovenia

The scope of administrative proceedings is to confront public and private interests in accordance with a previously defined regulation and to recognize the rights or legal interests of parties or impose obligations to parties in their relationship with public authorities. The purpose of administrative procedural law is to ensure the protection of public interest in a proportionate, nonarbitrary manner, so that even before a decision is issued the parties have had the right to defend their own

[10] Cf. Constitutional Court case U-I-221/00 and others, Constitutional Court (2012), Androjna and Kerševan (2006), p. 454; p. 639, Kovač (2010a), p. 6, 8, 21.

interests, for instance, through the right to be heard (Article 9 of GAPA). In administrative relations, public benefit means that administrative proceedings are unavoidable in an average person's life.[11] Public interest is therefore the cardinal value of the public sector, guaranteeing the legitimacy of the outcomes of its activity.[12] Thus, substantive truth is, in Slovene, legal order of particular significance in administrative proceedings, and the parties are obliged to tell the truth even to their own detriment, while the body must establish such on the basis of probable facts (Articles 8 and 11 of the GAPA). Negotiations regarding legitimate public interest are limited, and the administrative proceedings offer very few possibilities for a dispositive approach towards the subject matter of proceedings.

Pursuant to Articles 25, 157, and 158 of the Slovene Constitution, the legal remedies provided by law (the GAPA or a sector-specific law), namely administrative appeal, extraordinary remedies, and judicial review, are the only way to modify, annul *ab initio*, or annul an administrative act. They are primarily an instrument to ensure the legality of such acts.[13] The appeal is the only legal remedy applied prior to the act becoming final (completeness, Articles 229–259 of the GAPA). The administrative appeal procedure thus refers to the same matter that was subject to procedure at first instance. Hence, the subject matter of appeal and then of the judicial review is the legality of individual administrative acts.

The right to exercise administrative appeal is provided by Article 13 of the GAPA and—together with judicial review—puts into operation the constitutional and international right to effective remedy (Article 25 of the Slovene Constitution, Article 13 of ECHR, Article 47 of the EU Charter of Fundamental Rights, and Council of Europe recommendation Rec(2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies (12 May 2004)), which all highlight the importance of the effectiveness of legal provisions in practice in order to enable legal remedy for the elimination of the infringement stated by the party. Thus, the effectiveness of legal remedies is part of the principle of the rule of law (Article 2 of the Slovene Constitution) and is directly related to equality before the law, protection of personality and human dignity, equal protection of rights, right to judicial protection, legality, administrative dispute, and finality.[14]

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[11] Harlow and Rawlings (1997), p. 406; Künnecke (2007), p. 149.

[12] Bevir (2011), p. 371; Pavčnik (2007), p. 128.

[13] A legal remedy is a specific procedural action that involves, in particular, the right of defense of the parties in the proceedings (Šturm 2002/2011, p. 393). The Slovene Constitution and the GAPA (or sector-specific laws) however restrict the application of legal remedies already at the principle level; otherwise, such institution would serve to cover the possibly incorrect work of administrative bodies, which could issue administrative acts with "unbearable ease," without establishing the relevant facts and correctly applying the norms to the actual state of affairs. Unrestricted legal remedies could lead to irresponsible authoritative administrative acts, bringing the degree of trust in the law (and the state or authority) to level zero, which could result in the decay of the rule of law. This means that anyone is to be guaranteed the right to challenge an authoritative administrative act, yet upon finality (or completeness in administrative proceedings) such constitutional right is exhausted, i.e., restricted so as to allow predictability. Legal certainty has priority over legal correctness (Pavčnik 2007, p. 456).

[14] Šturm (2002/2011), p. 394. Cf. Constitutional Court (2012), Council of Europe (2012).

In the Slovene legal order, appeal thus has a threefold purpose.[15] First, due to its dispositiveness and devolutive and suspensive effects, the appeal is an instrument of protection of the rights of the parties (as well as of accessory participants and persons with legal interest who have not been given the opportunity to participate in the proceedings); the appeal procedure may only be launched by a party, while the appeal body examines the administrative act in the limits of the assertions stated in the appeal. In addition to the parties, the right of appeal is granted to persons with legal interest (accessory participants, Articles 43 and 142 of the GAPA), who can assert their legal interest even after the administrative act has been issued at first instance if they previously have not had such possibility. A party's right of appeal must be interpreted broadly, in the sense of the constitutional provision stating that such right is guaranteed to anyone. Second, since the right of appeal is also guaranteed to representatives of public interest (i.e., state attorney, state prosecutor, and associations operating in public interest as a hybrid between a representative of public interest and an accessory participant), the appeal also protects legality, which reconfirms the body's power to modify—within the appeal procedure—the administrative act to the detriment of the appellant since the prohibition of *reformatio in peius* is only partially applied. Pursuant to the GAPA, the reformatio in peius for the appellant is restricted, as it applies only in the event of reasons justifying certain extraordinary legal remedies or in the event of most severe violations.[16] Thus, the appeal body may, in order to protect public interest or the rights of third parties, interfere with the legal status of the appellant to the detriment of the first-instance administrative act, if in the procedure at first instance or in the issued administrative act particularly severe errors have been established, defined by the GAPA as reasons for the application of three extraordinary legal remedies (Articles 274, 278, and 279). The appeal body examines *ex officio*—irrespective of the reason invoked by the appellant—only violations of substantive law and seven absolute significant procedural errors (Article 247 of the GAPA). Third, particularly with the appeal body's power to assess *ex officio* absolute and significant procedural errors and the misapplication of substantive law (in addition to errors in establishing facts and administrative silence as reasons for appeal, Article 237 of the GAPA), the appeal aims at coherence of the administrative system in a specific field and at equality of the parties.

Pursuant to the GAPA, the appeal is the only regular legal remedy in Slovenia with a devolutive nature and belongs to the group of hierarchical appeals (*recours hiérarchique, widerspruch*). Yet the notion of effective remedy implies several other elements, as demonstrated by ECtHR rulings, as well as by Constitutional Court case law and other court and administrative acts in the Slovene legal system.[17] These elements include the admissibility and the devolutive and suspensive effects of the appeal. The appeal is a basic GAPA principle for all

[15] Jerovšek and Kovač (2010), p. 209; Androjna and Kerševan (2006), pp. 121–125.

[16] Androjna and Kerševan (2006), p. 493.

[17] Šturm (2002/2011), pp. 395–399.

administrative matters but can be excluded by law since, from the viewpoint of constitutionality, the appeal is not necessary if the law provides a different possibility to challenge an administrative act, particularly when administrative act making is not aimed at uniformity of legal practice. In such case, direct judicial review (court action) is an admissible alternative to the administrative appeal. In this context, the Constitutional Court has already developed constitutionally acceptable exceptions as to when an appeal in administrative proceedings can be fully excluded, in addition to the need for speed in decision making in order to ensure early completeness and enforceability for the protection of public interest or the rights of the parties or the fact the body deciding at first instance is an otherwise appeal body.

The Constitutional Court thus provides that in a public law procedure, the appeal against a first-instance administrative act is not necessary to satisfy Article 25 of the Constitution and can be replaced by other legal remedy prior to the final administrative act, necessarily (also) judicial review as an instrument of checks and balances, i.e. of the principle of the separation of powers, and the core of development of a democratic state and administration. Nevertheless, the exclusion of appeal is only an exception and should be introduced in the law according to the principle of proportionality (e.g., prior to the exclusion, nonsuspensiveness or a special (if not general) appeal body should be determined).

The Slovene GAPA lists three groups of procedural errors (*errores in procedendo*) considered to be severe violations infringing upon formal legality[18]: (1) unlawfulness (illegality) linked to the administrative body (jurisdiction, impartiality of officials), (2) the party (legitimacy, proper representation, the right to be heard, communication in official language), and (3) the form of an administrative act (has to be written and should contain the prescribed elements).[19] The party must state in the appeal the reason for the appeal, under the sanction of being regarded as incomplete or incomprehensible (Article 67 of the GAPA). However, not every procedural error guarantees success to the appellant—the appeal is rejected if the error is not significant, i.e., if the decision would still be the same even without such error (the principle *in dubio pro actione*).[20] This applies even in the event of incorrect reasoning, if the operative part is correct—the appeal body then adopts an administrative act whereby it rejects the appeal and corrects the reasoning. Since 2008 (adoption of amendments to the GAPA, Article 224a and related provisions), legitimate persons have had the right to renounce the appeal to ensure greater efficiency of the administrative proceedings. Such possibility is admissible at the request of the party in order to achieve the execution of the administrative act

[18] Article 237(2) of the GAPA; Jerovšek and Kovač (2010), p. 211; Androjna and Kerševan (2006), p. 472.

[19] In Slovenia, there is no systemic effort to increase efficiency of procedures, such as the transfer of certain fair procedure safeguards among nonessential procedural errors in Germany in 1996 despite a possible breach of constitutional and EU safeguards (cf. Künnecke 2007, pp. 152, 167).

[20] Kovač (2011/2012), p. 57.

sooner. It needs to be underlined, however, that the good intention of the legislature can have adverse effects, since the party can achieve finality and irrevocability on account of public interest or third parties, if the representatives of public interest or third parties do not request to enter the proceedings prior to such renunciation.

An appeal may be filed pursuant to the GAPA (Articles 222 and 255) also if the administrative body fails to act, i.e., if the administrative act concerning the party's request has not been issued in the prescribed time limit. Failure to act means that the competent administrative body does not issue an administrative act within 1 month (in the event of shortened declaratory proceeding) or within 2 months (in the event of special declaratory proceeding and appellate procedure), unless a shorter or longer deadline is provided by field law. Thereby, the law defined failure to act as a fictitious negative administrative act, granting the right of appeal. At the same time, it prevented the party from entering into an impossible situation in which it could not establish a new legal relation if it had no right to appeal against failure to act. It needs to be underlined that the right of appeal in the event of failure to act is not bound by the default/preclusive deadline that otherwise applies from the day of the serving of the administrative act. According to the ADA (Article 28/3) in force since 2007, also failure to act at appeal level may constitute grounds for an appeal in administrative dispute or even a special appeal if within 3 years from the beginning of administrative proceedings the administrative act on the merits has not been made complete (referring to the right to an administrative act within a reasonable time enshrined in the ECHR, Article 6).

An appeal has devolutive effect without exception, even though some appellate bodies are *sui generis* councils (e.g., in regulatory agencies or schools) within the same authority that issued the first-instance administrative act. Given the constitutionally provided responsibility of ministers and ministries for the state of affairs in their respective areas of work, the appeal body according to the GAPA and nearly all sector-specific laws, as well as the body supervising the powers of local government, is otherwise the line ministry.[21] The justification of the appeal is decided by a body other than the one that issued the contested act, or the appellant would have little possibility to succeed. There are also some cases of what is known as *de facto* nondevolution (or quasi-hierarchical or improper appeal), owing to the internal organization, vertical and centralized decision making of the competent authorities like municipalities or social insurance institutes, and personal links

[21] Occasionally, the appeal body within the administration is a *sui generis* body, such as the Information Commissioner in Slovenia, which is independent (from the Government) and comparable with ombudsmen or tribunals in the UK or tax supervision bodies in Austria but not with a court in the sense of Article 6 of the ECHR, for which it should be part of the Judiciary. The organization of the appeal following a judicial model can lead to the formation of an administrative body with quasi-judicial nature, a hybrid that aims at dealing with administrative disputes outside courts of law but still assuring a proper and balanced protection of the rights of parties. Their main function is to adjudicate disputes between citizens and governmental agencies as "dispensers of administrative justice" (Dragos 2011). But in Slovenia, such tribunals have no tradition and their effectiveness cannot be assessed except for some measures taken by the Ombudsman and the Information Commissioner.

because of poor staffing capacities (e.g., in municipalities with approximately 80–90 % of rejected appeals compared to the national average of up to 60 %). Thus, the appeal is losing its efficiency.

According to the GAPA, for most parties the purpose of (effective) appeal is in delaying the execution of the contested act. The suspensive effect is given in principle *de iure* (Article 236 of the GAPA) to all administrative appeals in order to temporary delay the execution of the administrative act as a consequence of the administrative appeal to avoid irreparable damage resulting from the execution of the contested administrative act if the decision is to be amended afterwards as illegal. Exceptions are possible directly pursuant to the GAPA and ADA in individual cases if public interest could be jeopardized or if the field law provides otherwise. The latter is set generally with the objective of public interest yet still proportionately (reasonably) since nonsuspensiveness, particularly in terms of obligations, implies a lower degree of protection of the parties' interests.[22] The suspensive effect pursuant to the GAPA is therefore a blend of models, depending on the decision of the public authority itself or the court or *a priori de jure*. If nonsuspensiveness has been established, such unique effect should be determined also in the specific administrative act. In the event of nonsuspensiveness, the execution of an administrative act challenged by legal remedies (by means of enforcement under the GAPA (Article 292) and, similarly, by means of temporary orders under the ADA) is stayed through the discretionary right if the probability of success of the legal remedy or the risk of impossibility of restitution can be demonstrated. Otherwise, the damage liability of the state could be incured (Article 26 of Slovene Constitution). Thus, there are several safeguard mechanisms for the nonsuspensiveness of appeal to be effective.[23] On the other hand, it should not be neglected that the establishment of nonsuspensiveness sometimes has a positive effect for the party—as it increases the social, if not legal, security of the parties[24] mainly in relation to substantive rights of socially deprived persons, where nonsuspensiveness guarantees some minimum cash benefit although the parties have filed an appeal.

As a general rule, an appeal is filed with the body of first instance within 15 days from the serving of the administrative act (which, comparatively, is a rather short time[25]). The body of first instance is obliged to examine the appeal (whether it is allowed and filed in due time and by an entitled person) and, if it establishes that the appellant is right, issue a new administrative act (Articles 240–243 of the GAPA).

[22] The nonsuspensiveness of a legal remedy is incompatible with the request for the effectiveness of a remedy, as derived from the provisions of the Constitutional Court in cases U-I-297/95 and U-I- 339/98. The exclusion of the suspensory effect of appeal must be reasonably grounded, or it implies a violation of the equal protection of parties' rights (Article 22 of the Constitution). Upon demonstrating the specifics of a certain area of regulation, e.g. tax proceedings, such provisions mean that the law is in compliance with the Constitution and comparable with foreign legal orders.

[23] Šturm (2002/2011), p. 398.

[24] Jerovšek and Kovač (2010), pp. 61, 210.

[25] Cf. Statskontoret (2005), p. 32.

If the appeal is formally suitable, it must be immediately (within 15 days from receipt) sent to the appeal body to examine the justification of appeal in terms of subject matter.[26] If the appeal is justified, the appeal body issues within 2 months a new administrative act, whereby it declares the first administrative act null or *ex tunc* replaces the contested administrative act or annuls the contested administrative act *ab initio* and remands the case to the body of first instance for renewed proceedings, with the deadline of an additional month (Article 251 of the GAPA). In order for an appeal to be effective, the appeal body must decide in 2 months at the latest, or a court action can be filed pursuant to the ADA (negative fiction). In practice, some appeal bodies take a very long time to decide.[27] With the serving of the appeal administrative act dismissing, rejecting, or granting the appeal, the administrative act becomes complete; the parties have 30 days at maximum to file a court action.

In the event of certain errors in proceedings, the Slovene Constitution (Article 26) guarantees damage compensation on grounds of objective liability of the State.[28] This option is in addition to prior-mentioned compensation due to unreasonably long proceedings (law adopted in 2006 following ECtHR Lukenda case). The purpose of the said Act is to speed up the proceedings by means of a request for supervision or a motion for a deadline and ensure just satisfaction.[29] But there is no legal ground to grant compensation within appeal or judicial review proceedings.

To sum up, the regulation of (internal) administrative appeal in Slovenia by the Constitution, the GAPA, and the ADA is in compliance with comparatively applied principles in EU,[30] although rather traditional. It is fairly strict, with only one appeal instance and further court action, which can be applied in over 90 % of

[26] Androjna and Kerševan (2006), pp. 462–476.

[27] In such regard, the court—e.g. in tax-related matters—consistently (in cassation) grants the appeal if the defendant party (i.e., the Republic of Slovenia represented by the issuer of the complete administrative act, namely the Ministry of Finance) fails to provide to the court the relevant administrative files, as without them the court cannot assess the legality of the contested administrative act (cf. Supreme Court ruling U1018/92-10). Some experts believe that in order to reach faster and more specialized solutions, the Slovene system of appeal and court action in administrative dispute should rather follow the example of the Austrian or German systems of independent financial senates. Therefore, efforts should be directed towards establishing specialized courts rather than specialized administrative instances.

[28] The unlawfulness must be clear and evident or sufficiently severe and without any reasons, i.e. arbitrary, as stated in case III Ips 65/98 of 17 June 1998 (Supreme Court (2012)), where an example of clear and evident unlawfulness was provided by the amendment of the final administrative act adopted without having carried out a legal procedure. Another important ruling in such regard is the Supreme Court ruling II Ips 120/2002 of 11 December 2002: "... If in the appeal procedure the administrative acts of the administrative body of first instance were annulled ab initio based on the appeal..., this is not yet a proof of incorrect or unlawful conduct of administrative bodies ...." Thus, there are no grounds for the damage liability of the state and material satisfaction of the party. Cf. more Supreme Court (2012).

[29] E.g., monetary compensation from EUR 300–5000 or publication of judgement, Vintar et al. (2012), p. 123.

[30] Cf. Statskontoret (2005), pp. 49–50, Kovač (2010a), p. 22.

cases before the Administrative Court (adding challenging social administrative acts before the Social Court). Slovene law does not allow public contracts and is very limited upon contracting out and public–private partnerships. There is no external form of an appeal and no tribunals. Such regulation is indeed (over) detailed and lacking the stimulating elements of modern participative and consensual definition of administrative relations in terms of good administration. There are no ADR techniques developed to solve the disputes, neither within the law principles nor at implementation level.

12.2.2 Empirical Analysis of Administrative Appeals

In order to assess the effectiveness of appeal in practice, hitherto mentioned, theoretical and prescribed grounds were examined also empirically. The effectiveness of appeal was understood as resolution of the dispute between the administration and the party without the need for any further court proceedings (administrative dispute) and provided that the principles of good administration have been met, in particular, democratic and nonarbitrary decision making on the rights and legal interests of individuals in their relations with the authorities, as well as effective implementation of public policies in public interest.

Several statistical sources have been used (from annual reports of administrative bodies, courts administrative inspection, etc., to additionally gathered data for specific issues not covered by statistics). These were combined with client perceptions (e.g., annual satisfaction surveys or analyses of trust in public opinion surveys) and experience of the competent decision makers. A special research was carried out combining surveys and structured interviews with representatives of institutions that permitted to obtain subjective perceptions of officials and functionaries, thus supplementing objective statistical data on the scope and effectiveness of appeals, court actions, and other forms of dispute resolution between authorities and the parties.

The survey among administrative bodies involved four ministries (out of 11), 23 administrative units (out of 58), and 13 municipalities (out of 211). Other sources include the 2011 survey on the efficiency of decision making in relation to building permits and data retrieved from the Tax Administration, the Ministry of Finance, the Pension and Disability Insurance Institute, the Ombudsman, the courts, and the State Attorney (Surveys (2012)).

In Slovenia, a few million administrative acts are issued every year, of which five to ten million are at first instance. Appeal is filed in approximately 3 % of all cases. Yet this is only an estimate since certain indicators are not measured or they are measured on specific occasions only or the classification has changed. One of the basic problems in estimating the workload and effectiveness of administrative bodies is the categorization of matters and proceedings, which is rather inconsistent despite the Rules on the keeping of records of administrative proceedings adopted

Table 2.1 Number of administrative cases solved by administrative units

Year	Total no. of adm. cases	No. and % of appeals filed	No. and % of appeals rejected at first instance	No. and % of replacement decisions at first instance	No. and % of appeals referred to second instance	No. and % of appeals pending examination
2011	989,688	1,782 = 0.18	107 = 6.00	116 = 6.51	1,517 = 85.13	177 = 9.93
2010	886,243	1,946 = 0.22	120 = 6.17	95 = 4.88	1,646 = 84.58	328 = 16.86
2009	812,884	2,038 = 0.25	148 = 7.26	102 = 5.01	1,710 = 83.91	349 = 17.12
2008	811,800	2,171 = 0.27	133 = 6.13	103 = 4.74	1,774 = 81.71	946 = 43.57
2007	897,493	2,580 = 0.39	27 = 1.05	11 = 0.43	623 = 24.15	80 = 6.98

Sources: Ministry of Justice and Public Administration (2012), Survey (2012)

in 2003 based on the GAPA.[31] Despite such restrictions, the data for specific types of bodies (particularly administrative units that keep the most consistent records) and the annual trends nevertheless serve for analyses and evaluations of the effectiveness of administrative proceedings in general, as well as of appeals (and court actions). The administrative units are local administrative bodies (their total number is 58 and employ about 3,000 people) acting as a general administrative district (taxes and inspection excluded) and conducting about a hundred administrative proceedings mainly on request of the parties, building permits (one of the most contested issues) included. They use a uniform software application (Spis [Files]) that allows objective comparability and traceability.

Data presented in Table 2.1 show an explicit twofold trend: although the number of cases by year is growing with almost no exception, the number and, above all, the share of appeals is decreasing, accounting in total for only 0.2 % of appeals per one million cases solved, which is very low. Out of approximately 2,000 appeals filed with 58 administrative units, the units themselves solve 10–12 % of the cases either by rejecting or granting the appeal, while about 85 % of the cases are solved by the competent ministries. According to the survey (Survey (2012)) conducted among the heads of administrative units, ministries, and municipalities (2012), the reasons for appeal are seldom justified but are rather a result of unclear legislation in certain administrative areas or merely filed "on stock" since no charges apply. In general, there is an evident gap between the expectations of the parties and legal requirements (the parties are "convinced they are right"), which is testified by less than 20 % appeals granted and about 20 % further court actions per year. Additionally, a systemic approach to reduce backlogs has been applied since 2006, resulting in only

[31] Likewise, administrative bodies do not have a uniform information support for record keeping and, despite a single legal basis, interpret the basic notions in different ways, thus reporting workload in (at least partially) a subjective manner. In addition, field law is often amended that alters the status of certain acts (e.g., unless an objection is presented, the estimate of income tax due is deemed as personal tax assessment and—upon expiry of the objection deadline—as a final administrative act) and makes uniform interpretation and data monitoring quite difficult. The central record of administrative statistics is based on reports by the bodies, many of which only provide partial data.

1,500–2,000 cases unresolved at first instance within 1–2 months, which accounts for about 0.2 %, considering the downward trend between 2008 and 2010.

A more detailed analysis by administrative areas reveals that the situation is not fully uniform, with deviations in (1) home affairs, where the largest number of administrative acts is issued (up to 90 %), and (2) spatial planning, with the highest number of appeals (e.g., in 2010, 3.2 %, which is far above the average 0.2 %). The Slovene system presents a general problem of overregulation, which leads to different interpretations and procedures to challenge the administrative acts and their effectiveness. Thus, a higher rate of appeals and court actions filed and granted is observed in areas where regulations are more numerous and amended more frequently, such as construction (e.g., 36–50 % of successful court actions in 2007–2011 are a consequence of a nonuniform use of substantive regulations). To focus on building permits area, we can establish that administrative units receive from 380 to 880 appeals per year between 2007 and 2011, accounting for 3–5 % of all issued administrative acts. The share of appeals solved by the administrative unit on its own is relatively low (approximately 17 %), and most appeals are referred to the appeal body. Out of 716 appeals filed in 2008 and 2009 at 40 administrative units,[32] 120 were solved at first instance (94 rejected and 26 granted with replacement administrative act). At appeal level, 38 % of appeals were rejected and 43 % granted, whereby the overall shares of appeals denied and granted in all administrative areas are 60 and 20 %, respectively. Sixty-eight percent of cases were returned to first instance, which points to a large number of errors committed by first-instance bodies. Likewise, the parties are more explicitly caught between levels of decision making (yo-yo effect) compared to the overall rate of 10 %. Further, court actions amounted to 90, meaning that approximately 3 % of first-instance administrative acts were challenged by an appeal in such area, 12 % of which were further challenged before the court. However, court actions were rejected in 87 % of the cases. In general, it may be concluded that over the years appeal has proven to be a very effective filter of court accessibility in construction issues, since 88 % of disputes are resolved in appeal procedures and in 67 % of the cases the parties don't even file court action although they have not been successful with the appeal—if they do, they only have a good 10 % of possibilities to be successful.

Yet despite the above differences and deviations, data reveal that administrative units work in a unified and legal manner, meaning that regulations are interpreted in the same manner as they have been adopted and interpreted by the hierarchically higher ministry. The effectiveness of appeal does not depend on the appellant, regardless of whether it is a state body or a private party and whether the party is represented by a qualified representative or attorney. The latter only reflects in the formal completeness of the complaint, which statistically is rather irrelevant and

[32] Gruden (2011).

has little impact on the success of the appeal.[33] A similarly low level of illegality and other malfunctions is noted by the Administrative Inspection.[34] Problems reported to the Administrative Inspection mainly refer to long times for decision and lack of response or action (approximately 15 % of reports out of 600–1,000 per year), particularly in environment and spatial planning issues.

To conclude, the number of appeals and court actions seems to depend more on the awareness of the right to legal remedies than on mistrust in the administration.[35] Viewing the situation in Slovenia in terms of six principles governing an effective complaint system,[36] the entire administration can be assessed in qualitative terms as follows: (1) easily accessible and well-publicized: high; (2) simple to understand and use: high; (3) speedy, with established time limits for action, and keeping people informed of progress: problematic in certain parts and in a system as a whole but progressing; (4) fair with full and impartial investigation: moderate to high; (5) effective, addressing all the points at issue, and providing appropriate redress: moderate to high; (6) informative, providing information to management so that service can be improved: moderate.

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[33] Cf. Veny et al. (2011), p. 17, on the significant and empirically confirmed although not linear connection of the attorney with the formal completeness of the application, and Dragos (2011), reporting a higher success of appeals lodged by the prefect in Romania. According to the Survey (2012) among administrative bodies of Slovenia, respondents note that "an appeal might be more successful if the party is represented by an attorney," due to better knowledge of field legislation and procedural rules (deadlines, the required elements of application, etc.). Others explicitly state that they are "unable to say whether appeal is more successful if filed through an attorney" or that they "don't notice any difference." About two-thirds of the respondent bodies (40 in total) are of the first opinion, and one-third are of the second opinion. One body even stated: "Attorneys have no interest in closing the case early. Thus, filing appeals by the parties themselves normally reduced the duration of proceedings and led to faster closure of the case than if attorneys were involved."

[34] The Administrative Inspection has been operating since 2010 under the Inspectorate for Public Administration at the Ministry of Justice and Public Administration (Jerovšek and Kovač 2010, p. 246, cf. Ministry of Justice and Public Administration (2012)). Pursuant to Article 307 of the GAPA, the Inspection exercises control and has some classic inspection powers but can only impose certain measures.

[35] According to the Survey (2012), having been informed by the staff why their application cannot be positively resolved, the clients do not persist in their request—the administrative body does not need to issue a negative administrative act, and consequently there are no complaints. An important feature is the "credibility" of staff: knowledge of regulations and capacity to analyze the actual state of affairs, giving the client the feeling that they are in complete command of the situation. Direct experience reveals: "Clients are particularly upset if we cannot give them at least a partial guarantee as to how long will it take for the administrative act: for example, if the administrative body depends on other bodies (for consents, opinions)." One of the bodies distinguishes: "... three aspects of appeal: first, the clients are informed about legal dilemmas concerning their request owing to unclear legislation; second is the subjective perception of the clients (they perceive a rejection exclusively from their own viewpoint and are incapable of realitic judgement), and third, appeals where the administrative body simply makes a mistake in the procedure. Clients' expectations vary and depend on what were the motives for filing legal remedies."

[36] Harlow and Rawlings (1997), p. 405.

12.2.3 Empirical Analysis of Appeals in Tax Matters

Between 2007 and 2011, about 2.5 million tax-related administrative acts were issued every year and 16,000–32,000 appeals were filed, 5,000–8,000 of which were solved at appeal level. This accounts for only 1 % of the appeals filed, yet considering other legal remedies (e.g., objections to income tax assessment) their share rises up to 5 % in individual areas and to 17 % in inspection procedures. Appeals are more frequent in certain types of taxes (income tax, VAT, and in execution procedures). As regards the successfulness of appeals, experience (Survey (2012)) showed positive impacts of representation by attorney or tax adviser since a qualified representative saves the necessary assessment of formal check of the appeal to both the party and the body.[37]

According to data presented in Table 2.2, tax matters record an explicit and above-average share of appeals solved by the body of first instance, normally by a new administrative act (in 66 % of the cases). It seems that in this area a new (i.e., replacement) administrative act has become a regular institution of dispute solving. At appeal level, appeals are granted in one-third of the cases on average, with a constant decline as to the success of appeals, which points to an increasing legality at first instance and in the entire system. On the other hand, there is a major problem in this area regarding the long duration of appeal procedures.

The table indicates that the number of appeals solved by the ministry every year exceeds the number of appeals received. Yet according to the Survey (2012), periods for decision longer than 2 months cannot be avoided due to restrictions in employment and in the number of employees at the ministry, considering the relatively constant number of appeals, so appeals may be reported to the next year. Moreover, appeal procedures, in particular, are becoming increasingly complex (e.g., new relations, apparent and concealed legal transactions, tax evasion, transactions with tax havens and foreign entities, etc.) and the relevant legislation is subject to frequent amending and extensive EU case law. Thus, it would be *de lege ferenda* advisable to introduce in the relevant law at least a longer deadline, together with a relativization of suspensiveness. Actions for compensation are nevertheless rare and normally rejected. But the share of appeals is larger than the administrative average, while the share of court actions is smaller, meaning that the appeal definitely plays its role as a filter for judicial review. In administrative dispute, the rate of plaintiffs' success is significantly lower (approximately 15 %) than in the general court statistics for all administrative matters (22 %) or at the Ministry of Finance (18 % in 2010 and 2011, yet somewhat higher in inspections, i. e., 25 % in 2010). In terms of type of the party, legal entities file more court actions (40 %) than appeals (18 %).

[37] Veny et al. (2011), p. 20, argue that attorneys participate in more complex cases, namely: "... the assistance of professional legal counsel seems to be indispensable to cope with the increasing complexities of administrative and judicial appeal procedures."

Table 2.2 Administrative acts and appeals in tax matters

Year	No. of cases solved at first instance/share (%) of cases solved on time	No. of appeals filed	No. and % of replacement decisions at first instance	No. of appeals filed at second instance	No. of appeals granted at second instance	Share (%) of cases solved not on time/Avg. time in months	No. and % of appeals denied and rejected
2011	2,419,144/99	16,051	10,554 = 66	4,094	6,121	98/8	45 + 4,969 = 82
2010	2,546,464/97	23,625	11,399 = 48	10,385	8,356	98/6	19 + 6,820 = 82
2009	2,604,401/97	31,717	24,045 = 76	4,389	4,939	96/10	22 + 3,276 = 67
2008	2,419,631/96	21,214	13,597 = 64	5,408	6,448	94/13	29 + 3,971 = 62
2007	2,323,176/97	28,066	21,335 = 76	4,611	5,910	98/17	29 + 3,272 = 56
Total			Avg. share = 66 %	28,887, 16 % legal entities	31,774, 18 % legal entities	97/11	Avg. share of success = 30 %

Sources: Survey (2012), Žlender (2008)

Table 2.3 Indicators of PDII work 2007–2011

Year	PDII requests solved at first instance	International insurance requests solved	No. of appeals filed	Share (%) of appeals relating to first-instance administrative acts	No. of PDII appeals solved at second instance	Duration (in days)
2011	113,847	23,957	8,049	5.93	7,402	63 (111)
2010	120,600	20,953	8,725	6.25	7,590	63 (128)
2009	114,299	19,512	8,198	6.13	6,803	63 (99)
2008	121,458	17,849	8,433	6.05	8,799	66 (117)
2007	122,141	20,643	9,315	6.52	9,624	85 (178)

Sources: PDII, Survey (2012)

12.2.4 Empirical Analysis of Appeals in Mandatory Pension and Disability Insurance

The area of social insurance is a very sensitive area, given the existential significance for the parties. Special judicial protection is therefore available, with proceedings being conducted by a specialized social court if the appeal within the Pension and Disability Insurance Institute (PDII) is denied. The rate of appeals is also higher than in administrative units yet lower than in tax inspection since the share of issued administrative acts at appeal level equals about 6 % of all requests tabled. A detailed analysis reveals that the success rate is below the average, with an upward deviation of 25 % only in the case of modified administrative acts concerning the degree of disability, which the PDII attributes to additional findings at appeal level (see Table 2.3).

Similarly to tax matters, greater effort should be devoted to procedures preceding the administrative act in order to avoid subsequent appeal procedure. Most appeals are filed in relation to disability rights (2011: 4,493 out of 7,402; in 2007: 4,972 out of a total of 9,624). An obvious problem is the excessive duration of proceedings (up to 12 months instead of 2). Therefore, a combination of regulatory and organizational measures is needed to at least maintain effectiveness. The latter also applies in substantive terms since annually about 2,000 issues are considered, which is exceeding other areas by share of a quarter of all appeals, in which afterwards the court rules to the benefit of the parties in more than a half of the cases.

12.3 Empirical Analysis of Slovene General Judicial Review (Administrative Disputes)

Court proceedings run similarly to the appeal proceedings.[38] However, the ADA defines limited full jurisdiction of the court, owing to the constitutional separation of powers, e.g., in issuing a court act if the administration has violated the

[38] Breznik and Kerševan (2008).

constitutional rights of the party or failed to issue an administrative act within 3 years (which prevents the yo-yo effect). If the court establishes that an administrative act is illegal, it normally annuls it *ab initio*; in the new proceedings, the administration is bound by the interpretation of substantive law and procedural guidelines given by the court (Article 64 of the ADA). In administrative dispute, appeal before the Supreme Court is, in compliance with ADA from 2006, only exceptionally possible since the administrative act becomes final upon the serving of the court act and the party can lodge a constitutional complaint if he claims that his constitutional rights has been violated.

The appeal as a procedural precondition for judicial protection thus plays its role in most of the cases as it forces the control (appeal) bodies to carry out legal and uniform actions. For such reason, it may well be considered an effective tool for balancing public and private interests and an admissible filter of accessibility to the court according to the ECHR. In terms of ex post administrative dispute upon completeness in administrative proceedings, data relevant to assess the effectiveness of appeal are provided by court statistics of the Administrative and Supreme Courts of Slovenia. Every year, 3,800 appeals are filed on average in relation to administrative matters (2011: 3,635; 2010: 3,339; 2009: 3,607; 2008: 4,299; 2007: 4,154).[39] Measuring the effectiveness of appeal in terms of the number of disputes at court it prevents (about a half), the situation in Slovenia is traditionally adequate: appeal undoubtedly reduces courts' caseload, while access to court provided by the ECHR is good. Annual average of court actions rejected is 12 % (from 11 in 2011 to 15 in 2007), and further 58 % of actions are denied. Therefore, (just) 22 % of actions are found grounded and granted. Neither administrative proceedings nor administrative disputes show a direct interrelation between, e.g., the type of appellant (legal or natural person, an entity under public or private law) and its representation by attorney in terms of the outcome. Another proof of the stability of the situation is the reason for succeeding with a court action: every year, above a third of administrative acts are annulled *ab initio* on grounds of substantive reasons, less than a third on grounds of the actual state of affairs, and another third, i.e., (only!) 8 % of all cases on grounds of procedural errors by administrative bodies. Disputes of full jurisdiction, e.g., in case of administrative silence of an appeal body or violation of the constitutional rights, are very rare, accounting to only 0.1–0.3 % of all cases or 5–12 in absolute terms (of a total of 3,300–4,300 filed).

However, the occurrence of actions and disputes varies significantly per individual administrative areas. The trend of appeals and court actions largely depends on the changing legislation that shrinks and reduces the possibilities to obtain rights and legal protection. A typical example is free legal assistance that underwent a major change in 2008, increasing the share of cases to 20 % in 2011 compared to

[39] The Administrative Court of Slovenia not only is competent for administrative matters (cf. Breznik et al. 2008) but in administrative dispute also solves election-related issues, disputes between entities under public law, etc.; nevertheless, administrative matters account for about 60–65 % of all proceedings.

only 5 % in 2007. Quite similar is the situation in cofinancing from public funds, which gradually rose from 0.7 % in 2007 to 6.4 % in 2011. There are also issues typical for the transition period, such as restitution of property (denationalization), which in 2007 accounted for 17 % of all cases at the Administrative Court (the process had been initiated as early as 1991) but in the past 5 years recorded a decline, with 3.5 % in 2011. A similar trend was observed also in cases related to the acquisition of citizenship, decreasing from 5 % in 2007 to 0.44 % in 2011. As classic issues of dispute, certain areas maintained a more or less similar share throughout the entire 5-year period: 12 % on average in taxes, 8 % in customs duties, 8 % in inspections, and 6 % in construction. Other areas recorded minimum shares (e.g., competition protection, agriculture, education, social affairs, concessions, building land, public information, etc.).

In defining court accessibility, attention was paid to the duration of proceedings. Here, evident progress had been made in eliminating backlogs, resulting in the number of cases solved exceeding the number of court actions filed (with the exception of 2011) and in an evident decrease in the duration of proceedings and share of cases with delay. More than a half of the cases is solved in less than a year, revealing a constant acceleration in solving the cases with the same staffing structure, namely just above 30 judges in the entire country. In the past 5 years, a quarter of the cases was solved in less than 3 months; in 2011, a third (2010: 24 %, 2009: 21 %); the proceedings last more than 2 years only in 7 % of the cases on average in the 5-year period and only 1 % in 2011 (2010: 6, 2009: 9). The average duration of the cases in 2011 was 272 days or 9 months, thus guaranteeing the right to decision within a reasonable time.[40] A special role in this filed is played by the State Attorney, particularly when it comes to actions seeking compensation from the state. The number of court actions due to unreasonably long delays is not insignificant since it represents half of all between 120 and 400 per year. Approximately, 55 % claim incorrect work of the courts and other cases claim incorrect work of mainly administrative inspection bodies. In 2009, for example, 191 (not only administrative) cases were closed at courts in a total value of approx. EUR 27 million in about 10 % of the matters, but in average only every tenth complaint is successful or even less than 1 % in court actions against the state on grounds of incorrect work by administrative bodies.

By analogy, the Supreme Court—namely its Administrative Section—considers about 1,000–1,600 administrative cases every year, which is between a quarter and a third of all cases at the Supreme Court (2012). The duration of proceedings has been decreasing from the average 17 months in 2007 to 3 months in 2011.[41] The share of successful court actions is (only) 7–14 % per year, and the share of reviews

[40] According to the Supreme Court (2012), Annual Report of the court: "Since on 1 January 2009 the court had 4285 outstanding cases and received another 3607 during the year (totalling 7892 cases), it tried to solve as many old cases as possible since long proceedings reduce the legal certainty of the parties and increase mistrust in the rule of law and judicial bodies." In 2011, the court could eventually address new issues since in 74 % of the cases the proceedings lasted less than 12 months.

[41] Supreme Court (2011), Annual Report 2011.

is 3–7 %, which testifies to the legality of work of both administrative bodies as a first-instance Administrative Court and the Supreme Court of the country as the final sieve of control of legality, which in certain cases also plays the role of national judiciary or an element of the system of checks and balances in relation to the Executive. This conclusion is further sustained by the fact that courts themselves present proactive proposals for further optimization of work, e.g., reregulation of procedures in terms of legal remedies and a two-stage review procedure, first assessment of admissibility, and only later a possible decision on the merits.

12.4 Dispute Settlements by the Ombudsman

In Slovenia, the work of the Human Rights Ombudsman is based on the Constitution[42] and the law. In addition, there is also a special information ombudsman, i.e., the Information Commissioner. The principal role of an ombudsman is to defend the weak against the authorities.[43] Considering the specifics of administrative relations with public interest, the ombudsman can well serve as an ADR approach between administrative bodies (and courts) and individuals. This can, on the other hand, be used to its advantage as it can more easily exploit its potential of being a mediator with the authority of a person and participative communication. The institution of Ombudsman in Slovenia is designed based on the classic model of a national parliamentary ombudsman for the entire state in the relations with the public sector (as a fourth branch of power or the antiauthority) and has therefore little executive powers. The Ombudsman was established and began to operate on 1 January 1995 based on the legacy of the Civil Council for Human Rights Protection of 1988 and the model of the Danish Ombudsman.[44]

[42] Article 129, more in Šturm (2002/2011).

[43] According to Harlow and Rawlings (1997), pp. 398–401, the ombudsman is a "complaints man."

[44] More in Rovšek (2002), p. 130. According to the Constitution, special ombudsmen may be set up by law but have not been set up so far, although there has been a public debate on establishing a children's ombudsman. Additionally, some municipalities set up bodies known as representatives of the rights of the patients or, within the government sector, the equal rights advocate, but these are only hybrid and partial phenomena. But of great importance is the Information Commissioner (2012) as parallel to ombudsman office, who began to operate upon the enforcement of the Access to Public Information Act in 2003 and has been dealing with personal data protection since 2005. The Information Commissioner has a more formalized procedure (based on the GAPA) and more powers than the Ombudsman. The Information Commissioner formally acts as an appellate body, e.g., in relation to access to public information. The appeals on grounds of administrative silence account for over 60 % from 2009 to 2011. About three-quarters of the appellants succeed, which allows the Commissioner to reduce court caseload to a considerable extent. Against the administrative acts of the Commissioner, (only) 13–16 % suits are filed in court (Information Commissioner 2012)).

However, the work of the Ombudsman as an ADR approach in administrative matters in Slovenia is, according to Survey (2012), only partly efficient; data and the experience of respondents reveal that the ombudsman never prevents an appeal or court action as measures are allowed only—except in case of undue delay or abuse of authority—upon finality, which is why the ombudsman merely advises the parties on available legal remedies. The Ombudsman is most efficient in the relation towards state bodies at the local level, which take most account of its opinions and recommendations, and the least in the relations with the municipalities. It seems that the Ombudsman's measures are more effective where individuals are traditionally reluctant to have recourse to legal proceedings, e.g., in education. The problem of the Ombudsman's effectiveness is that the bodies are too much aware of the fact that the Ombudsman has no executive powers. Hence, they disregard its opinions. Bodies under supervision are more likely to follow the recommendations when they relate to illegal actions and less when they concern unethical conduct, even though the ombudsman often recalls the principles of good administration.[45]

The empirical analysis of the Ombudsman's work is rather difficult since motions and measures have been classified in different ways over the years, with some infringements concerning administration falling under constitutional rights and others under environment and spatial planning or public services and the disabled, despite a separate chapter on "Administrative matters." Nevertheless, caseload in total, as well as in administrative matters, is constant throughout the entire period (administrative matters ranking third out of 12 area chapters). The most contested administrative matters in 2007 and in 2008 were denationalization and citizenship. In recent years, most motions were tabled in taxes, social activities, and environment and spatial planning, mainly due to the economic and general social crisis resulting in an increasing share of justified cases. The work of the Ombudsman in administrative matters is thus in many aspects a reflection of the work of the administration, and a shift in the sense of ADR is difficult to occur in Slovenia. Yet none of the 2007–2011 reports mention infringements due to substantive errors by the bodies in the area of administrative matters, which imply that the bodies take legal decisions or those formal appellate procedures are effective, at least, in substantive terms. Table 4.1 below summarizes the work of the Human Rights Ombudsman.

[45] For duration of procedures, see Article 21 of the European Code of Good Administrative Behaviour. Moreover, Article 3 of the Slovene law provides: "In performing his function he shall act according to the provisions of the Constitution and international legal acts on human rights and fundamental freedoms. While intervening he may invoke the principles of equity and good administration." Such approach is useful, particularly when bodies act incorrectly or unjustifiably make the assertion of individual rights difficult without necessarily acting contrary to the law, which serves as basis for the Ombudsman to propose solutions when regulations provide for no intervention (Rovšek 2002, p. 143). The Ombudsman's standards of good administration thus imply stricter requirements for work of the bodies than the prescribed legal norms. In invoking or developing such standards, the Ombudsman increasingly relies on ethics (Human Rights Ombudsman 2012, Annual Report 2008, p. 18).

Table 4.1 Work of the human rights Ombudsman

Year	Total cases	Cases solved—all areas	Share of (at least partly) justified cases (%)	Administrative matters	Administrative matters solved as a % of the total
2011	3,077	2,512	26	379	291 (11.2)
2010	3,082	2,620	26	385	308 (11.9)
2009	3,151	2,636	24	387	321 (11.6)
2008	3,386	2,878	15	388	319 (10.9)
2007	3,085	2,769	21	353	310 (11.2)

Source: Human Rights Ombudsman (2012), Survey (2012)

On the other hand, in the event of administrative silence, administrative bodies seem to act more quickly upon intervention by the Ombudsman, and no appeal or court action is necessary—the effect is, however, only partial and refers to specific cases only. The Ombudsman thus draws attention to major backlogs in general and specific areas (like environmental inspection, social benefits, foreigners' licenses, citizenship, or education) in its annual reports, which are discussed by Parliament, while the Government must state the reasons thereof and the envisaged corrective measures.

12.5 Mediation and Other ADR Techniques in Slovene Administrative Proceedings

ADR is understood as a series of approaches aiming at consensual resolution of the collision of interests of several participants based on the adversarial principle as opposed to inquisitive formal procedures and leading to cooperative public governance.[46] Yet specific restrictions need to be taken into account, particularly in the administrative field, in order to protect public interest, which is why quite often ADR[47] is in Slovenia considered an institution between effectiveness and legality

[46] Pitschas and Walther (2008), pp. 89, 167; Nehl (1999), p. 25; Harlow and Rawlings (1997), p. 391.

[47] The leading method of ADR is definitely mediation, as arising also from *Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties*, adopted by the Council of Europe in 2001 and encouraging member states to start using ADR in administrative matters, even to the point of a mandatory mediation procedure as a procedural condition in civil litigation. Important for Slovenia is the 2008 Mediation in Civil and Commercial Matters Act with about 50 % successful cases resolved if parties have consented to the mediation process, which in the period 2009–2011 occurred in about 20 % of all cases in litigations (more in Kovač 2011/2012). According to data (Survey (2012)), Chamber of Commerce and Industry), there are about 2,000 experts in Slovenia, of which 10 % are attorneys who underwent special training programmes for various ADR forms in market disputes. Attorneys also seem to be the most effective; according to the statistics of the Ljubljana District Court, 80 % of settlements were achieved by a mediator who was an attorney.

or even constitutionality. In fact, administrative proceedings, unlike court proceedings, aim at reaching a certain end rather than asserting the law as the end in its own right. If an administrative act does not result in the realization of public interest, it has lost its *raison d'être*.[48]

In Slovenia, an increasing number of experts are engaged in the argumentation *pro et contra*, whereby a vast majority expresses concerns over the impossibility of negotiation between legally provided public interest and the interests of the parties, the collision of which is the very essence of administrative proceedings. Most find settlement between two private parties if no influence to public interest, as allowed under the Article 137 of GAPA, is satisfactory. Therefore, mediation—and in particular settlement—in an administrative matter is much easier to achieve in Slovenia during court proceedings than administrative proceedings based on the GAPA. Tax authorities in particular, covering about one-third of all administrative cases in Slovenia, systematically inform their clients and provide explanations of legal provisions in order to avoid appeals. Yet when tax liability and the terms of its assessment and payment are defined, the law needs to be strictly observed, stresses the Ministry of Finance as the competent policy maker. For such reason, in specific tax procedures, mediation is "practically unfeasible" due to nondispositiveness of the relevant subject matter. Legality and boundness to substantive truth (except in assessing tax basis by comparable parties) are even more strictly specified in the Tax Procedure Act than in the GAPA.[49]

Currently, the requirement for settlement in administrative proceedings is the substantively determined freedom of the clients to freely dispose of the claim that is the object of proceedings. Within the entire scope of administrative proceedings, this is only possible in the case that a formally defined (in a sector-specific law[50] administrative matter is the procedural framework for the resolution of a substantive law dispute. Mediation is, in this respect, usually seen to lead to fewer backlogs in the conduct of proceedings and to more tolerant and correct interpersonal relations. In the Slovene setting, which is traditionally oriented and rather strict, the advantages of mediation would be theoretically and practically achieved only in administrative proceedings where emphasis is on balancing opposing interests (e.g.,

[48] Kovač (2010b), p. 745.

[49] Jerovšek et al. (2004), p. 57, Šturm (2002/2011), p. 872. The importance of legality in tax procedures is stressed also by German authors (e.g., Isensee/Kirchof), who explain the administration's boundness in tax law with the special nature of taxes as duties that serve to cover public finance needs in general (not special needs or specific purposes); thus, any level of tax burden is adequate and necessary until the satisfaction of government needs.

[50] In such respect, the Market Inspectorate (particularly considering the regulation and directive on online purchases and ADR in the EU to come into effect in 2014) has been drawing attention since 2008 to the necessity of adopting a regulation on ADR among consumers, with the aim of reducing complaints and appeals against decisions by a half. The Market Inspectorate receives over 1,000 complaints concerning defects that are solved merely by Inspectorate intervention. The establishment of a special ADR body would ensure effective solution of consumer disputes and provide for a higher level of consumer protection, also resulting in less workload for the Market Inspectorate and the courts, which could devote more attention to more problematic issues.

in denationalization issues between beneficiaries and liable persons and in construction issues between investors and affected neighbors) rather than on the protection of public interest. It may be concluded that mediation with settlement is possible in Slovenia within the rigid legal and mental boundaries of the substantively specified public interest in some, but not all or most, administrative matters.[51] Namely, administrative bodies in Slovenia are rather reserved since research indicates some risks for which mediation is not carried out already today, as "there is no legal basis," although the GAPA provides for a series of alternative intermediate approaches both under explicit procedural discretion and according to the principle of restriction of power.[52] The praxis of individual bodies reveals that mediation (with some restrictions) is indeed possible at present but is not encouraged or widely accepted. A typical response in the survey among 40 Slovene bodies (2012) is "Mediation is non-effective formalism, a fake support to officials, and a delay of proceedings." About a quarter of respondents estimates that mediation would be suitable at a principle level or in individual administrative areas, while the majority believes that possible abuses exceed the benefits for public interest and equality of the parties before the law. Mediation would make sense outside the GAPA in specific administrative proceedings yet with minimum formality, e.g., through self-regulation as demonstrated (cf. Pitschas and Walther 2008, p. 93) by the positive practice of the arbitral tribunal at the Slovene Chamber of Commerce and Industry.

12.6 Europeanization of Administrative Remedies?

Europeanization reflects in Slovene administrative practice in several aspects, starting with increasing delegation of public tasks outside the state administration and the convergence of regulations.[53] As regards regulation, there is most evident trend to reduce administrative obstacles, especially for entrepreneurs acquiring different licenses. For instance, in 2010, adopted field law on services in internal market, following Directive 2006/123/EC, amended GAPA by presumption of positive administrative act in case of administrative silence. But, in general, there is still a rather legalistic approach, as Slovene authorities passively respond to European legislation and court rulings.

In the light of good administration, as provided by Article 41 European Charter of Fundamental Rights, the regulation of administrative procedure law and the functioning of administrative bodies in Slovenia seem to be adequate. This directly applies (also) in law and administrative relations, comprising classic procedural entitlements or rights of defense in the relations with or even directly towards the

[51] Kovač (2010b), p. 766.

[52] More in Pavčnik (2007), p. 53.

[53] Cf. Statskontoret (2005), pp. 9, 34; Nehl (1999), pp. 11, 80.

party. However, in the Slovene legal system, the right to good administration as such is not specifically defined, although it is directly applicable based on the European Charter or individual provisions of the Constitution and GAPA.[54] Therefore, in terms of legal protection, the regulation of dispute resolution in administrative matters in Slovenia formally complies with European standards of good administration in many aspects (interrelatedness between administrative legal remedies and judicial control, devolutive and suspensive effects, deadlines, compensations, etc.) despite some obvious diversities in individual administrative areas and deviations in some (types of) bodies. This means that courts are called to rule in less than a half of the cases where appeal has previously been lodged in administrative proceedings. Nevertheless, a comprehensive approach to further development of good administration is needed, including the development of ethical principles and competences for the solution of social problems with parallel increase of discretion in legislation to develop a more citizen-oriented administration.

12.7 Conclusions

Pursuant to Slovene legislation, appeal is, as a general rule, admissible in principle, devolutive and almost always suspensive, which makes it an effective legal remedy also under the criteria of the ECHR. According to data collected and applying to selected areas (taxes, building permits, social insurance), appeal is an effective institution for the parties in the procedure. On average, a few million administrative acts are issued in Slovenia at first instance (e.g., 2.5 million in taxes, one million at administrative units), with an overall appeal rate of only 1–3 % even in most disputable segments (e.g., up to 15 % in tax inspection, around 6 % in disability rights). The rate of success is about 20 %. About 4,000 unsuccessful appellants decide to bring their case further to court, but only a fifth of them succeed with the court action. Based on the analysis in the theoretical and empirical sections, Slovenia can serve as an example of a system having a mandatory administrative appeal before lodging court action, since in such way the parties have the opportunity to settle the contested act in dialogue with the issuing or hierarchical public authority. It may be assessed that for Slovenia it is traditionally and *de lege ferenda* wiser to retain the existing regulation on mandatory administrative appeal and it as a prerequisite for judicial review.

However, in some parts of the system it would be necessary to consider other tools—mediation or nondevolutive objection—although existing data reveal that already first-instance bodies, e.g., in administrative units solve an appeal themselves, if possible (in almost 10–12 % of the cases). The present system empirically proves to be efficient with an exception of rather delayed proceedings in certain areas, such as tax appeals. Nevertheless, considerable progress in Slovenia has been

[54] Cf. Statskontoret (2005), p. 15; Venice Commission (2011), p. 15.

recorded in eliminating backlogs, both in the administration and at courts. The main problem of effective dispute resolution in administrative matters in Slovenia is therefore the sometimes nonoptimal, overdetailed, rapidly changing, and thus nonuniformly implemented regulation, as well as the partial attitude of the competent bodies that do not perceive individual administrative matters, bodies, and courts as an authoritative whole in relation to the parties. The latter is to be exceeded by means of ethical tools if the Slovene administration is to pursue good governance.

Although administrative proceedings are an instrument of authority, public governance is changing over time and new methods of (a more) participative regulation of administrative relations should be introduced. The ombudsman is an established institution in the Slovene administrative law, but except for informal notifications about the importance of deadlines the potential that it could have as a mediator between the administration and individual persons is not fully exploited.

In such respect, it is indispensable to consider the effectiveness of appeals or potential mediation and ombudsman's interventions in administrative matters. These and other ADR approaches should not be understood in a narrow sense and intended only to prevent excessive workload of courts. The appeal—as in the case of Slovenia (following the Austrian model)—should serve as a procedural precondition for court proceedings or an alternative, together with mediation and other procedures for solving disputes, among participants in the case. In the future, Slovenia should consider how to optimize individual administrative areas and institutions both in terms of regulation and implementation, yet radical changes to the GAPA do not seem appropriate. On the other hand, it is necessary to develop sector-specific regulations. There are numerous opportunities for further development, yet a systemic approach is needed with long-term measures involving the administrative system as a whole.

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Chapter 13
Administrative Appeals, Ombudsman, and Other ADR Tools in the Czech Administrative Law

Soňa Skulová, Lukáš Potěšil, and David Hejč

13.1 Administrative Law and the Review of Administrative Decisions

In the Czech Republic, administrative law is composed of an intricate labyrinth of hierarchically stratified legal regulations, i.e. constitutional regulations, a multitude of laws, implementing regulations and decrees under the strong influence of EC/EU law, as well as by the effects of the soft law of the Council of Europe. Under the influence of constitutional regulations, European law, and the gradually developing practice of the courts, the principle of legality has been gradually extended since the early 1990s in light of general principles or, more precisely, principles of good administration.

Public administration reforms have not been implemented systematically and conceptually (except for the late 1990s and the start of the new millennium), and this situation has been affecting the development of legal regulations. This process has been marked by frequent changes, and thus the quality of the legal regulations developed suffers. Due to this situation, the role and influence of case law are logically rising.

The Code of Administrative Procedure[1] is the common basis for decision making and for the procedures of public administration, including review measures. This general regulation of the administrative process is subsidiary to many procedures applicable within various branches of public administration.

There are no specialized tribunals as part of the public administration system. The regular remedial measure against an administrative decision is the appeal to the superior administrative body. The same body is competent to deal with informal

[1] Act No. 500/2004 Coll., Code of Administrative Procedure, as amended.

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complaints, as well as with inactivity. A fully separate procedural regulation[2] applies in tax matters; decisions of the tax administration bodies are subject to judicial review within the framework of the administrative justice.

Judicial review, which despite its relative newness has been widely used, is divided between two sets of courts: administrative courts are competent to check violations of public rights of interested persons,[3] while matters of private nature decided by administrative bodies are subject to protection by civil courts.[4]

Courts in the general civil law regime are competent, if need be, to subsequently deal with compensation for loss caused by public administration.[5] In cases of violation of constitutionally or internationally protected rights and freedoms, one may in the final stage turn to the Constitutional Court of the Czech Republic[6] with a constitutional complaint.

13.2 The Traditional and the Advanced System of Administrative Remedies: Incipient Elements of Administrative Dispute Resolution Tools

13.2.1 Categorization of Available Remedies: Administrative Appeal and Other Review Measures Within the Competence of Administrative Bodies

The possibility for a decision issued by an administrative body to be submitted for review within public administration has had a relatively long tradition in the Czech Republic.[7] It has been passing through different stages and taking specific forms.

The most frequently used review measure against a decision of an administrative body is the *administrative appeal*. It is a regular remedial measure that is available only for a party to the procedure. The superior administrative body (the directly higher instance) is competent to decide on appeals and render decisions on appeal. This model is applied both in matters of state administration and in matters of the decision-making process of self-government bodies. In case of a decision issued by supreme administrative instances (such as a Ministry), the appeal takes a specific form, the remonstrance.[8]

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[2] Act No. 280/2009, Code of Tax Procedure, as amended.

[3] Act No. 150/2002 Coll., Code of Administrative Justice, as amended.

[4] Part V of the Act No. 99/1963 Coll., The Rules of Civil Procedure, as amended.

[5] Act No. 82/1998 Coll., on Liability for Damage Caused by Decision or Incorrect Official Procedure while Executing Public Authority, as amended.

[6] According to Act No. 182/1993 Coll., on the Constitutional Court, as amended.

[7] For more information about the tradition of "appeal," see Mikule (2005), pp. 151–152.

[8] Cf. Section 152 of CAP.

If the decision is already in legal force, the so called *extraordinary remedial measures* come into play. The parties have no legal right to these extraordinary remedial measures, and the period from when the decision enters into legal force and until the initiation of this process is limited. These remedies include the *renewal of procedure*,[9] which is designed especially for defects or changes of factual nature, and the *review procedure*,[10] which may result in a change or revocation of the decisions due to conflict with law. The superior administrative body (the higher instance) is competent with regard to both of these procedures, and this body considers the question of initiation of the remedies based on request or, more precisely, instigation.

In addition to these remedies, there is also the possibility to turn to the superior administrative body with a request in cases of breach of a statutory time limit by the administrative body issuing decisions or dealing with delays in the procedure (measures against inactivity).[11]

The Code of Administrative Procedure provides also for the possibility of an *informal complaint*. It is designed for the inappropriate behavior of officials, as well as for incorrectness in the procedure of an administrative body. However, the complaint does not result necessarily in a review of the decision. Although the action is brought before the administrative court, the administrative body can still fully *satisfy the plaintiff*—the party to the procedure. This leads to suspension of the court procedure.[12]

13.2.2 The Administrative Appeal

Under the current rules, the system of judicial review of administrative decisions is established relatively broadly. The question is whether the administrative appeal is (still) a really effective instrument in the hands of the participants in the procedure, as presumed by its long-term application.

13.2.2.1 Legal Foundations of the Administrative Appeal

The legal foundations of the administrative appeal are to be retrieved in the second part of the Code of Administrative Procedure (Sections 81–93). Only in exceptional cases and only with regard to specific aspects is this thorough general regulation complemented by some special statutes. This general regulation reflects the constitutionally based general right to judicial and other legal protection.[13]

[9] Cf. Sections 100–102 of CAP.

[10] Cf. Sections 94–99 of CAP.

[11] Cf. Section 80 of CAP.

[12] Cf. Section 153 of CAP, Section 62 of CAJ.

[13] "Everyone may assert, through the prescribed procedure, his/her rights before an independent and impartial court or, in specified cases, before another body." Cf. Article 36 Section 1 of the

13.2.2.2 The Traditional Remedial Measures Within Public Administration: Administrative Appeal's Adjustment as a Procedural Measure for the Protection of Rights

The current regulation of the administrative appeal has a long tradition. From a historical perspective, many aspects are regulated similar to the initial/original approach, while in other aspects this continuity was intentionally disrupted.

The current administrative procedure has been in place since 1928, through successive regulations. The administrative procedure took the form of an Act as early as 1967 (Act No. 71/1967 Coll.). This Act was effective until the end of 2005.

It should be noted that, traditionally, the administrative appeal institution fulfills the role of protecting the rights of the parties[14]; the protection of the public interest or of the legality remains in the shadow of the former, but in other cases it becomes a factor of primary importance.[15] In complicated cases, the public interest has to be measured against eventual harm to the rights acquired in good faith (*bona fide*).

The legislation adopted in mid-1960s established the administrative appeal as the main remedial measure.[16] The powers of the appellate administrative body were laid down broadly in this Act—the appellate body "reviews the contested decision to its whole extent."[17] There was no limitation to the *reformatio in peius* in the general legislation of the administrative procedure; it was provided only for a specific type of procedure.[18]

Charter of Fundamental Rights and Freedoms (Constitutional Act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as a part of the constitutional order of the Czech Republic); at the same time, the right to judicial review of the legality of administrative decisions, as well as the right to compensation for damages caused by public authority or by maladministration.

[14] Cf. Section 2 of Act No. 36/1876 Reich code from 22nd October 1875 on the Supreme Administrative Court (as amended by Acts No. 53/1894 R. c., No. 149/1905 R. c., Act No. 3/1818 Coll., on the Supreme Administrative Court and Solution of Conflicts of Jurisdiction, and Act No. 164/1937 Coll.). The current Act No. 150/2002 Coll., Code of Administrative Justice, in its Section 2 provides for the judicial protection of "public rights" of natural persons and legal entities. The effective Code of Administrative Procedure states in this context that the administrative body "...saves the rights acquired in good faith and the legitimate interests of persons affected by activity of the administrative body in individual case..."—cf. Section 2(3) of Act No. 500/2004 Coll., as amended.

[15] Cf. Section 2(4) of the last cited Act. According to the current regulation of administrative courts, the Supreme Attorney General can bring an action in the public interest too. This action can be brought also by a person determined by special legislation (there is still no such legislation). Most recently, the Ombudsman is also entitled to bring this action (cf. Section 66 of Act No. 150/2002 Coll., Code of Administrative Justice, as amended).

[16] The term "regular remedial measure" is not used in this previous regulation of administrative proceedings and in the current regulation.

[17] Cf. Section 59(1) of Act No. 71/1967 Coll., Code of Administrative Procedure, as amended.

[18] Cf. Section 82 of Act No 200/1990 Coll., on Administrative Offenses, as amended, which is still in force.

The current legal rules of the administrative appeal are set in the Code of Administrative Procedure (CAP), effective from 01/01/2006 (Act No. 500/2004 Coll.).

13.2.2.3 The Right to Appeal: Requirement of Compulsory Exhaustion of Administrative Remedies

Before resorting to administrative courts, there is a mandatory requirement to exhaust available administrative remedies.[19] The participant's right to appeal[20] may be denied only by law, which happens only in extraordinary cases.[21]

Lodging an appeal has automatically a *suspension effect*.[22] The suspension effect is exceptionally excluded by law for some types of decisions (i.e., decisions of preliminary nature), or it can be excluded by the administrative body due to serious reasons concerning protection of someone's interests, as well as protection of the public interest. These reasons of protection have to be stated and justified in the decision.

13.2.2.4 Instances of Administrative Appeal: The Devolutive Effect

A traditional two-instance model of decision is applied within administrative procedure, and it entails a *devolutive effect*, in the sense that the higher body has the power to reconsider the decision *de novo*, not only regarding the issues invoked in appeal.[23] In certain rare cases, an *internal appeal* is decided by another unit of the same administrative body having supervisory powers. The *appellate body* is generally an administrative body directly superior to the administrative body of first instance (the administrative body that issued the contested decision).[24]

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[19] Cf. Section 68 lit. a) of CAJ.

[20] Cf. Section 81(1) of CAP.

[21] Legislation does not allow the regular remedial measure only in extraordinary cases, e.g. Sections 31a–33 of Act No. 325/1999 Coll., on Asylum, as amended, Section 5(4) of Act No. 265/1992 Coll., on Registration of Owner's Rights with the Land Register, Section 66 of Act No. 231/2001 Coll., on Radio and Television Broadcasting, as amended, and legislation of some professional associations such as Act No. 85/1996 Coll., on the Bar, as amended, and Act No. 120/2001 Coll., Code of Distraining, as amended. This exemption can be also found in Act No. 166/1993 Coll., on the Supreme Audit Office, as amended. This solution does not reduce the general level of rights protection; on the contrary, it is often a "shorter" route directly to the judicial review.

[22] Cf. Section 85(1) of CAP. This means that a challenged decision cannot acquire legal force and enforceability untill the end of appeal procedure. Cf. e.g. Skulová et al. (2012), p. 244.

[23] According to Section 95(6) of the Energy Act (Act No. 458/2000 Coll.), the General Director of the State Energy Inspectorate decides on appeals against decisions of the State Energy Inspectorate.

[24] Cf. Section 89(1) of CAP. Definition of the superior body and determination of the superior body for atypical administrative bodies (e.g., self-governing municipalities and regions) is provided by Section 178 of CAP.

There are two *exceptions* from the devolutive effect. The first one is the already mentioned *error coram nobis* (the first instance administrative body remedies its own erroneous decision, while the possibility of administrative appeal is maintained; this represents an emphasis on the principle of two-instance procedure).

The second exception is *remonstrance*, which is applied against decisions against which no hierarchic appeal is possible (the case of a Minister or a Head of a central administrative body), in which case the decisions are reviewed by the same body.

13.2.2.5 Limitations of the Appellate Principle

The appellate administrative body does not generally and obligatorily review errors of the contested decision to the whole extent; thus, the full appellate principle does not apply. The burden is placed on the participant to the procedure. Largely, it depends on the participant to raise questions regarding the illegality or incorrectness of the contested decision.[25]

The possibility to bring new evidence and new facts to consideration in appellate procedure is limited.[26]

Two other limitations apply here. One is the prohibition of the *reformatio in peius*, unless rights of the other appellants, with contrary interests, are balanced or unless the decision is illegal.[27] The second one is the "threat of injury due to loss of the possibility of appeal"—in cases with more participants, it can be invoked by those participants who have not lodged an appeal because the appeal was lodged by other participants in order to obtain the modification of the decision in their own favor.[28]

13.2.2.6 Scope and Criteria of Review Within the Appellate Procedure: General Principles and the Influence of Europeanization

Traditionally (in the Code of Administrative Procedure of 1967), the legal rules of administrative procedure have explicitly stated that the only criterion for review was legal correctness. For a long time, it has been understood as a requirement of due process. Recently, the requirement of "legality" has taken the leading position

[25] Cf. Section 82(2) of CAP. If the participant fails to state the extent of the decision that he/she challenges, it is considered that he/she is claiming the annulment of the whole decision.

[26] Cf. Section 82(4) of CAP. Practice of courts, with an emphasis on the rights of defense, finds an exception in this regard in the proceedings concerning an offense to which the limitation does not apply. Cf. judgment of the Supreme Administrative Court of 22/01/2009, file number 1 As 96/2008.

[27] Cf. Section 90(3) of CAP.

[28] Cf. Section 90(1) c) of CAP.

among the procedural principles.[29] But everything was realized within the former powerful and legal fundament, under specific conditions of the former strictly centralized public (state) administration. Above all, this in principle state that administration was not subject to the control of independent courts. In the early 1990s, the traditional narrow interpretation of legality had become legally inadequate. Judicial decisions of the Constitutional Court were pointing out that change was needed.[30] Thus, the general (European) principles of administrative law have become legally binding, and the doctrine has tried to cope with them.[31]

Legality remains a review criterion within the administrative appeal procedure. The Administrative Procedure Act says "conformity with legislation," but it is a legislative abbreviation, and its full meaning is "laws and other legal regulations as well as treaties which form a part of the legal order."[32] This also established the binding character of EC/EU law. The fundamental principles of the administrative body's activity are expressly laid down in the Code of Administrative Procedure. The administration is also bound by principles that are not stated among those principles (*principle of due reasoning*) but are largely expressed in the particular provisions of the Act.[33] Some are not stated in the provisions of the Act at all (e.g., the *principle of transparency*[34]), but they are still important. Other unwritten principles cannot be forgotten either: e.g., the principle *ne bis in idem* from the area of administrative sanctions or the principle of prohibition of retroactivity for general normative acts.[35] However, it is relatively difficult for the participants to use these principles as an argument within the procedure.

The requirement of "correctness" (*fairness*) of decisions reflects the factual, material reasoning of administrative body in the process of decision making. In the

[29] Cf. Section 39(1) of CAP: "Administrative bodies proceed in the proceedings in accordance with laws and other legal regulations."

[30] Pl. ÚS 33/97 Coll. of Judgments of the Constitutional Court, Vol. 9, Prague, C.H. Beck, 1998.

[31] Cf. e.g. the compilation of Boguszak et al. (1999), p. 999, or Pomahač (1996), pp. 425–429; Skulová (2003), pp. 110–152.

[32] Cf. Section 2(1) of CAP.

[33] The principle of due reasoning can be found in the regulation of the requirements of reasoning content, including the necessity to respond to objections raised by participants (Section 68(3) of CAP).

[34] The constitutional principle of transparency is based on Article 17, Section 5 of the Charter and established the statutory form within general regulation of the right for information or rather the informational duties of administrative bodies in Act No. 106/1999 Coll., on the Right for Information, as amended. Its expression can be found in CAP in the adjustment of accessibility and clarity for aggrieved persons, as it is regulated by, e.g., Section 4(2) and (3) (the duty to "instruct" and to "give notice"), Section 36(2) (provision in information on proceedings), Section 38 (access to the file), Section 49 (regulation of hearing), Section 51(2) (notification of production of evidence outside the hearing), etc.

[35] The Supreme Administrative Court: "The protection of widely recognized and constitutionally conformal fundamental principles of law of the democratic state respecting the rule of law is provided by court regardless of whether these principles are positively expressed by law"—from the judgment of 21/08/2008, file number 7 As 16/2008-80, No. 1719 Coll. of SAC.

current legal framework, correctness represents the necessity to meet three requirements at once: firstly, the requirement as regards sufficient *finding of the facts of a case*; secondly, the correct *evaluation* of facts; and, finally, the *correctness of content* (both on merits and procedural). In case of administrative discretion, the Act anticipates those requirements to be reflected particularly within *the principle of proportionality* requiring the administrative body to find a solution that "is *appropriate under the circumstances of the case*."[36]

Therefore, in addition to the requirement of sufficient fact finding and its correct evaluation, the criterion of correctness involves also the need to seek a *just decision*; this pertains to other related concepts such as *suitability*, *reasonableness*, and *legitimate expectations* or, rather, general *foreseeability*, respect of the rights acquired in good faith, and respect of the public interest.[37]

Within the review of legality, the appellate body has to ascertain whether the general principles were not infringed. This is examined in a twofold manner: infringement against the participant and infringement against the public interest.

13.2.2.7 Review of Acts Issued at Central Level: The Remonstrance

In the Czech legal context, the institution of remonstrance is another standard remedial measure in addition to the administrative appeal. Remonstrance can be applied when the first instance decision is not contestable to a superior body because it was issued by central administrative bodies.

Pursuant to Section 152(2) CAP, the head (minister) of this central administrative body decides on remonstrance. Remonstrance represents an exception to the principle of two instances, as the decision made by the central body is final at administrative level. The proposals or recommendations on how to decide are submitted to the minister by the remonstrance committee. The remonstrance committee has the nature of an advisory body, and the head of the central administrative body is not bound by the proposal in any way despite the fact that the minister or the head establishes the remonstrance committee and appoints its members. Despite this, or perhaps because of this, the available statistics show that in the majority of cases the head of the central administrative body accepts the recommendations of the remonstrance committee. Out of more than 11,800 decisions issued by some central administrative authorities between 2007 and 2012, the head decided only in 33 cases differently from the recommendation of the remonstrance committee.

[36] Cf. Section 2(4) of the Code of Administrative Procedure. In the traditional positivist conception of legality, no legal factors of decision making and review were left out. The area of administrative discretion, most closely connected to reality, could not be subject to judicial review based on the criterion of conformity with legislation in this logic. Development of judicial review of the administrative discretion in the Czech conditions in more detail in Mazanec (1996), pp. 90–93, or Skulová (2003), pp. 196–204.

[37] Similarly Vopálka (2009), p. 408. According to Z. Kühn the correct decision fulfills the value of legality, as well as the value of rationality (Kühn 2002).

There are also cases where the administrative body makes decisions in first and last instances, with no further remedy available. The principle of two instances is thus completely excluded.[38] In this case, the review of administrative decisions is then transferred to the court. However, the downside is an even greater overload of courts than when the principle of two instances of administrative proceedings works as a filter of cases.

13.2.2.8 Deadlines for Exercising and Answering to Administrative Appeals

There is a general 15-day time limit for filing an appeal, and it runs from the notification of the administrative decision[39] (usually delivery of its written version). The deadline has a long tradition, and there are no objections/critiques regarding its adequacy. In practice, problems are caused by the rather complex and demanding regime of delivering the decisions as the decision has to be delivered into the addressee's hands. In case of any doubts concerning proper notification, the time limit is extended up to a maximum of 90 days.

The administrative body that issued the decision has 30 more days to solve the case and transfer it to the appellate body (unless the error *coram nobis* is applied—the administrative body that issued the decision grants the appeal). The appellate body is subject to the same deadlines for rendering its decision as the first instance body (the time limit of 30 days applies, with an option of extension with other 30 days, provided that the procedure is deemed to be complex).

We assess the above procedure as fairly workable provided that administrative bodies observe reasonability of the total time of procedure in the sense of Article 6 (1) of the European Convention. Nevertheless, delays or obstructions, justified as well as unjustified, occur both on the side of party in the procedure and on the side of the administrative body. There are generally no deadlines for rendering a decision by the court.

The Code of Administrative Procedure provides a special appeal procedure for dealing with the so-called *inactivity of the administrative body*—the administrative silence. This procedure shall be used by participants in the procedure as a pre-condition for an action against inactivity in front of an administrative court.[40] Measures against inactivity are taken within the competence of the superior body.[41]

The Czech legal order (including constitutional regulations) provide for rules on compensation *for loss incurred by incorrect official procedure* (which may, inter

[38] For example, no standard remedial measure is allowed against the judgment of the Ministry of Interior on the merits of international protection (asylum), and against such first instance judgment one can file an action with administrative courts (cf. Section 32 of the Act No. 325/1999 Coll., on asylum, as amended).

[39] Cf. Section 83 of CAP.

[40] Cf. Section 79(1) of CAJ.

[41] Cf. Section 80 of CAP.

alia, include inactivity—including unjustified delays in the procedure).[42] Where no deadline is provided by law, the decision or another act shall be issued in a reasonable period of time[43] (in the sense of Article 6(1) of the ECHR). Courts competent to hear these cases are the general civil courts.

13.3 Ombudsman in the Czech Republic

13.3.1 Background

In the Czech Republic, the Ombudsman institution has no tradition, and this is probably the reason why it has not been established for a long time even after 1990, when the political regime and nature of the state (which did not allow the creation of similar institution) were changed. There was no legally binding legislation regulating the resolution of complaints, which would guarantee sufficient investigation of matters. Therefore, in the case of the establishment of the Ombudsman institution, the main objective would be to ensure independent and qualified investigation of such complaints.

An important role was played by the Council of Europe, which recommended the establishment of this institution.[44] The institution was eventually established by Act No. 349/1999 Coll. on the Public Defender of Rights. The Act was preceded by a number of similar initiatives, e.g. parliamentary bills of Acts on the Ombudsman from 1995[45] and 1996.[46] Particularly, legal regulations of Great Britain, France, Germany, Portugal, Denmark, the Netherlands, and Poland had served as sources of inspiration for the Act on the Public Defender of Rights. However, the foreign experience was possible to be applied only to limited extent due to a relatively different legal and social environment in the Czech Republic. Thus, although the Act preserves the fundamental (international) principles regarding the organization and functioning of the institution, it also departs from them in certain areas.[47]

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[42] Cf. Article 36 Section 3 of the Charter of Fundamental Rights and Freedoms (Constitutional Act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as a part of the constitutional order of the Czech Republic), Act No. 82/1998 Coll., on Liability for Damage Caused by Decision or Incorrect Official Procedure while Executing Public Authority, as amended.

[43] Cf. Section 13(1) and Section 22(1) of the cited Act.

[44] Recommendation No. R (85) 13 on the institution of the Ombudsman.

[45] Principles of the Act on the Ombudsman: Chamber of Deputies, Parliament of the Czech Republic, 1995, Document of the Chamber No. 1789/0. In: *Joint Czech-Slovak Digital Parliamentary Library* [online]. Available from: http://www.psp.cz/eknih/1993ps/tisky/t1789_00.htm.

[46] Bill of the Act on the Ombudsman: Chamber of Deputies, Parliament of the Czech Republic, 1996, Document of the Chamber No. 25/0. In: *Joint Czech-Slovak Digital Parliamentary Library* [online]. Available from: http://www.psp.cz/eknih/1996ps/tisky/t002500.htm.

[47] The government bill No. 199/0, Act on the Public Defender of Rights, from 26th April 1999.

13.3.2 Effectiveness of the Ombudsman Functions

In the Czech Republic, the Ombudsman institution is based on a statute, as mentioned above. It is an independent and impartial state control authority (*sui generis*), which is situated outside public administration. This means, it is not a standard public authority because it has no power to decide authoritatively on the rights and duties of natural or legal persons. The Ombudsman institution is not based on the Constitution; thus, it cannot be considered a constitutional body.

The Ombudsman institution's powers derive from Parliament (the legislative body), for which it acts as an advisory body. Following the report of the Ombudsman, only the Parliament (Lower House) is empowered to impose sanctions, i.e. authoritatively exercise its powers toward the executive power.

In contrast to judges, the Ombudsman does not only scrutinize the legality but also deals with errors and correctness of the procedure, for which an administrative activity cannot be challenged in courts. Therefore, the reason for a complaint before the Ombudsman can also be the arrogant, rude, or insensitive behavior of public employees or otherwise maladministration, e.g. requiring the filing of various excessive forms. As opposed to judicial protection, which is usually more effective (enforceability of decisions) but in the same time more time consuming and expensive (costs of the proceedings), the procedure of the Ombudsman attracts, with its broad scope and informality, low costs and rapidity.

Although the Ombudsman himself cannot directly and actively intervene in the sense of settling of individual matters that are challenged, the authority of his opinions and his recommendations are usually respected. Thus, in relation to the judiciary, the Ombudsman has not a competitive but rather a complementary position. Therefore, in the case when a matter is pending before the court, the Ombudsman has discretionary power over whether to postpone his investigation relating to this matter or to proceed anyway[48]; but he has no power to intervene in the court proceedings on this matter (thus, his investigation does not suspend the court proceedings).

In connection with the Ombudsman's protection of individuals against maladministration, the scope of his control covers legality, principle of rule of law, and principle of good administration. The Ombudsman does not deal only with conduct that is in conflict with the law but deals also with less severe deficiencies in public administration that are below the intensity of law infringement.

The Ombudsman also conducts systematic visits to places where there are or may be persons deprived of their liberty by public administration or due to dependence on the care. In these cases, the subject of control is also the protection of such persons from torture, cruel, inhuman, degrading treatment or punishment and other ill-treatment.

The Ombudsman acts on the initiative of any informal (private) natural and legal persons. The complaint is not subject to any charges, and requirements are only

[48] Sládeček (2009), pp. 376–377.

very basic, relating to the description of the matter and the identification of the complainant. The complaint shall be filed within 1 year from the issuance of the act that is challenged by the complaint.

The Ombudsman can also initiate proceedings on its own motion, particularly in serious cases or if the Ombudsman considers that there is sufficient evidence to initiate proceedings.[49] The Ombudsman's work in this field may also consist of long-term planned activities, which focus primarily on the inspection of administrative bodies' premises. A specific feature of the Czech Ombudsman is that he can also act on the initiative of the members of the Parliament. However, the own motion investigation can be classified as a smaller part of the activities of the Ombudsman.[50]

13.3.3 Ombudsman and the Development of Norms for Government: Citizen Relations

Dissemination and educational activities can be considered among the important activities of the Ombudsman. These activities take the form of methodology and recommendations meant to assist both public authorities and citizens. Although these are not legally binding documents, the authority of the Ombudsman's opinions and recommendations contained in these documents is respected.

As part of other Ombudsman's activities, a *Catalog of principles of good administration* was compiled.[51] These principles were inspired particularly by his own experience while holding the office and by the already existing European Code of Good Administrative Behavior of the European Union and also by the Council of Europe recommendations on good administration and other international documents. In the Czech legal system, the concept of the principles of good administration was first used in the Act on the Public Defender of Rights. In some cases, the principles of good administration are identical (or close) in content with relevant constitutional regulations or with principles contained in the Code of Administrative Procedure. However, the competence based on the principles of good administration allows the Ombudsman to deal with the correctness of procedures in public administration from another perspective than the purely legal one (the procedure may be inappropriate, ineffective, inadequate, factually incorrect).[52]

Furthermore, the Ombudsman publishes its recommendations within book series Edition of good administrative behavior, which is focused on the issues of state

[49] Ibid., p. 113.

[50] Ibid., p. 137.

[51] In this catalog, the principles of good administration include compliance with the law, impartiality, timeliness, predictability, persuasiveness, adequacy, efficiency, accountability, openness, friendliness.

[52] Sládeček (2011), p. 59.

activity and local governments. Its purpose is to assist municipalities in solving specific problems in the form of practical manuals on various topics. Thus, the Ombudsman makes effort towards the enhancement of good administrative practices.

13.3.4 Cross-Fertilization Between the Ombudsman and the Courts?

The participation of the Ombudsman in some specific court proceedings can lead to the reflection of the Ombudsman's opinion in court decisions. This can be looked at as a direct influence of the Ombudsman upon court decision making, particularly in cases when the Ombudsman holds a position of intervening party within judicial review of municipal legal regulations. Municipalities may, within the limits of their self-government jurisdiction, issue generally binding ordinances, which can be reviewed by the Constitutional Court. The Ombudsman tries to argue, before the Constitutional Court, in favor of these reviewed normative powers of municipalities and thus also in favor of their right to territorial self-government. In this way, the Ombudsman is contributing to the change of practice of the Constitutional Court, e.g., in the area of municipal generally binding ordinance of public order.[53]

Courts are also inspired by the Ombudsman's principles of good administration. This can also be deemed as an indirect instrument of the Ombudsman's influence on court decision making. An example is the decision of the Supreme Administrative Court[54] that interpreted the principle of good administration by explicitly referring to Ombudsman's definition.

On the other hand, the Ombudsman in his recommendations always refers back to the most fundamental court judgments that are relevant for the issue. The first of the ten Ombudsman's principles of good administration relates to the principle of compliance with the law, which is including (inter alia) the requirement to respect the constant practice of the courts.

13.3.5 The Activity of the Ombudsman in Data

From the data collected for the purpose of this study (a summary is presented in Table 3.1), we can conclude that the Ombudsman dealt with six to seven thousand cases per year in the period from 2007 to 2011. However, approximately 40 % of these cases were outside the Ombudsman's competence. In terms of the trend for the last 3 years, it seems that a growing percentage of complainants can correctly

[53] Judgment of the Constitutional Court of 2/11/2010, file. no. US 28/09.

[54] Judgment of the Supreme Administrative Court of 11/09/2008, file. no. 1 As 30/2008.

Table 3.1 Summary of the ombudsman's activity in the Czech Republic (2007–2011)

	2011	2010	2009	2008	2007
Number of issues dealt with by the ombudsman (per year)	6,987	6,309	7,321	7,051	6,062
Number of cases out of the ombudsman's competence (per year)	2,655	2,713	3,441	3,103	2,546
Number of cases within the ombudsman's competence (per year)	4,332	3,596	3,880	3,948	3,516
Number of cases that led to a report (per year)	695	481	461	481	420
Number of cases solved differently[a] (per year)	–	–	–	–	–
Number of special reports (if applicable) (per year)	97	69	66	74	51
Use of special powers by the ombudsman (if any) (per year)	13	17	17	6	12
Own motion investigation (if applicable) (per year)	49	40	29	29	33
Compliance with ombudsman's recommendations (per year) in %	84 %	82 %	82 %	83 %	85 %
Number of judicial reviews of the ombudsman decisions (if applicable) (per year)	–	–	–	–	–

Source: Data from *Summary Reports on Ombudsman's Activities in 2007–2011* [online] available at http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu

[a]For instance mediation, conciliation, by informal methods (telephone, etc.) if the answer can be found

assess the competence of the Ombudsman, which may indicate a higher legal awareness of the population about the Ombudsman institute.

Only a relatively small proportion of cases are finished with an investigation. Error correction by the administrative bodies themselves took place before the Ombudsman issued the final statement and only in a very small proportion of cases the Ombudsman had to inform the superior administrative authority about the administrative body's misconduct.[55]

As it is evident from these statistics, the Ombudsman institution is a relatively effective instrument to settle disputes in public administration. The main reason is the simplicity and the informality of the proceedings and speediness, flexibility, and accessibility "for the ordinary people" (legal laymen).[56] Therefore, the Ombudsman institution is frequently used by the public, which also corresponds with its good public evaluation (best evaluation among the surveyed public institutions, including the Senate, the Chamber of Deputies, or the Government).[57]

[55] Data came from the summary reports on the activities of the Ombudsman for the period 2007–2011 [online]. Available at http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu.

[56] Sládeček (2009), p. 376.

[57] Data came from *The public opinion survey*, *carried out by the Center for Public Opinion Research—Institute of Sociology*, *Academy of Sciences the Czech Republic*.

13.4 ADR Techniques in Administrative Procedure

13.4.1 ADR in the Czech Legal System: An Unfamiliar Concept

The Czech administrative law does not pay much attention to the issues of mediation or alternative dispute resolution (ADR). This is due to the traditional conceptual features of public administration and administrative activity. Conceptually, public administration has to be able to render a decision that is in conflict with the interests of the participant in the procedure but that fully conforms to the public interest. It is the very requirement of public interest protection that is the cornerstone in public administration.[58]

For the above-mentioned reasons, the area of administrative law is less open to such methods of possible conflict solution. Nevertheless, this does not mean that the Czech administrative law is absolutely free of developments concerning ADR. Administrative law is designed according to the principles of proportionality and subsidiarity. Public administration is authorized (as well as obliged) to intervene when there is a public interest in such an intervention. Such intervention has to be adequate. The Code of Administrative Procedure that regulates the execution of the administrative activity stipulates an express requirement to minimize the public administration's interventions in conflicts between the participants in the procedure.[59]

The Czech administrative law does not contain any typical example of ADR. The forthcoming considerations may be therefore considered debatable. However, we are of the opinion that the institutions discussed do contain aspects of ADR.

13.4.2 Possible Examples of ADR

13.4.2.1 Dispute Resolution During Court Proceedings

An example of ADR is regulated under Section 153 of the Code of Administrative Procedure. It is the so-called *satisfaction of a participant* after a court action has been filed. An identical regulation is contained also in Section 62 of the Code of

[58] Cf. Section 2(4) of the Code of Administrative Procedure stating that the administrative body makes sure that the adopted solution conforms to the public interest.

[59] Cf. Section 5 of the Code of Administrative Procedure stating that "as long as it is possible with regard to the nature of the case the administrative body should make an attempt to amicably remove conflicts preventing proper hearing and deciding of the case." Therefore, the Code of Administrative Procedure does not rule out the administrative body's applying various methods and forms, leading to an objective that is conforming to the public interest, but the administrative body should always select only the less invasive ones towards the participants.

Administrative Justice concerning the so-called *satisfaction of the petitioner*. According to those provisions, it is possible to satisfy a participant after an action has been filed within the administrative justice system. The administrative body that issued the contested decision has the opportunity to reach an agreement with the participant in the procedure (now the plaintiff) and to decide the case so that the participant is satisfied. If the administrative body reaches an agreement with the participant in the procedure (the plaintiff), the court does not need to judge the merits of the case and the subject of the judicial proceedings disappears.

Nevertheless, this is a limited method of dispute resolution because it depends on the will of the public authority, which voluntarily agrees to apply this method. Oftentimes these are cases where the administrative body did not accept the objections contained in the appellate procedure, so there is a slight chance that once the action has been filed the same objections will be accepted. However, the administrative body may accept other objections. This option can speed up the whole process in many cases. Nevertheless, it requires a great amount of reflection and realization of its own mistakes and their possible correction on the side of the administrative body, which has not been frequent.

13.4.2.2 Dispute Resolution in Competition Cases

Depending on the nature of the cases, certain programs implemented by the Office for the Protection of Competition may represent a form of alternative dispute resolution, i.e., depending on the specific situations of the violation of the competition rules.

The Office for the Protection of Competition holds the opinion that cooperation between the Office and competitors whom the Office suspects of committing a delict in the field of competition may under certain conditions lead to a fast and effective remedy of competition disruption or endangering. When competitors are ready, on their own initiative, to remedy their actions, the Office for the Protection of Competition is prepared to offer them cooperation. If the situation conflicting with the competition is remedied, the Office is prepared not to initiate an administrative procedure or to discontinue the already initiated administrative procedure without having decided that an administrative delict was committed by the concerned actions. The partnership approach can, in many cases, lead to a faster and more certain achievement of the competition policy purpose, i.e. the protection, as well as the restoration, of competitive conditions on the market. Therefore, the Office for the Protection of Competition issued the *Notice of Alternative Resolution of Certain Competition Problems*.[60] Therein, it describes cases and conditions under which, depending on the seriousness of the actions conflicting with competition, on whether and how long the situation conflicting with the competition

[60] Details are available at http://www.uohs.cz/cs/hospodarska-soutez/zakazane-dohody-a-zneuziti-dominance/pravidla-pro-alternativni-reseni-souteznich-problemu.html.

lasted, and on the degree of the competitors' cooperation, it will not initiate an administrative procedure or discontinue an already initiated one.

The other option of alternative resolution offered by the Office for the Protection of Competition is the so-called *leniency program*. It can be used in case of cartel agreements. Within the program, the Office for the Protection of Competition offers leniency to cartel members or even a possibility that no penalty will be imposed. If a competitor reports a cartel and provides all information and evidence about the cartel at his disposal, he may completely avoid any sanction or achieve at least a substantial reduction of the penalty. Nevertheless, in order to be granted full immunity, it is necessary for the cartel member to be the first one to turn to the Office.[61] This is not a national specific of the Czech Republic but a Europe-wide issue addressed also at the levels of the European Union and European Commission.

13.4.2.3 Conclusions

Czech administrative law contains many tools resembling mediation that may be used as an alternative technique of resolving disputes between participants in the procedure and the administrative body. However, given the specific nature of administrative law, these measures are not commonly used. Legal regulation still counts on them. These measures are not designed as mandatory ones. They may be an effective alternative in relation to complex, expensive, and lengthy administrative procedures. And they may also replace administrative decisions.

It is evident that public administration is developing other forms and methods of implementing public administration that are brought by societal and legal transformations. These very new methods and forms may contribute to the more effective implementation of administrative activity. Nevertheless, despite their ever more extensive application, in our opinion, the public administration must maintain its unilateral nature. These alternative measures can successfully supplement the range of methods and options entrusted to public administration for the purpose of the fulfillment of its tasks. But they cannot entirely replace them.

13.5 Conditionality Between ADR Tools and the Judicial Review

The relation between the judicial review and the administrative review is based on the division of powers in a state. Public administration forms a part of the executive. On the other hand, judicial review is exercised by the independent judiciary. This

[61] Details are available at http://www.uohs.cz/cs/hospodarska-soutez/zakazane-dohody-a-zneuziti-dominance/leniency-program.html.

implies certain facts predetermining the relation between the administrative review and the judicial review.

The right to judicial protection of rights and freedoms via the review of the public administration's activity is one of the manifestations of the mutual checks and balances system. In this system, the specific results/outcomes of the activity (as well as inactivity) of the executive (public administration) are subject to review by the independent judiciary. At the same time, the courts cannot replace the activities of the administrative bodies, not even when the system of the so-called full jurisdiction is used.[62] The task of judicial review is not to decide in place of the public administration. It is rather a check of correctness and legality of its actions by the independent judiciary.

13.5.1 The Procedure of Judicial Review

In addition to the above-mentioned basic conditions of admissibility of the action, which is based on the prior exhaustion of regular remedial measures within the public administration, the procedural regulations also require the plaintiff to file the action within a determined time limit of two months from the date when the contested decision was delivered. Exceeding the time limit leads to the inadmissibility of the complaint, so the court will dismiss it without dealing with the facts thereof.

It is not possible to obtain a waiver of the expiration of the time limit for filing an action.[63] Based on the Supreme Court's rulings on similar matters,[64] we argue that the time limit for filing an action is sufficient and therefore not restricting in any way the access to court. At the given time, the participant can consider whether he/she will contest the decision by an action and which objections he/she will include in the action. The time limit is also sufficient in order for the plaintiff to find

[62] Cf. judgment of the Supreme Administrative Court of 28/04/2005, file No. 5 Afs 147/2004, published under No. 618/2005 Coll. of the Supreme Administrative Court. According to this judgment, "provisions of Section 77 of the Code of Administrative Justice establishes not only the power of the court to specify, by means of evidence, the facts on which the administrative body based its decision but also the power to discover new facts, by means of other evidence presented and assessed beyond the former extent, as a basis for a judicial decision within full jurisdiction. Doing this the court considers the scope of additional evidence so that it does not substitute the activity of the administrative body".

[63] Cf. Section 72(4) of the Code of Administrative Justice. As added by the judgment of the Supreme Administrative Court of 23/06/2011, file No. 5 Afs 11/2011, published under No. 240/2011 Coll. of the Supreme Administrative Court, "no change of the practice of courts, even if it concerned the issue of admissibility of an action against an administrative body decision, may result in a situation when an action filed after expiration of the statutory time-limit would be considered a timely one [*Section 72* (*1*) *and* (*4*)]."

[64] Judgment of 23/05/2012, file No. 6 Ads 10/2012. The basic amount of the court fee of CZK 3,000 (EUR 125) cannot be considered a restriction of access to the court.

an attorney at law who will represent him/her in the proceedings.[65] Nevertheless, it is not impossible that other laws may determine a time limit for filing an action different from the 2-month one.[66]

Once the action has been filed, the plaintiff may narrow his/her action objections any time during the proceedings. On the other hand, the plaintiff may extend the action's objections only provided that the time limit for filing an action has not expired. Hence, the plaintiff can change the scope of the judicial review, but he/she is bound by a time limit for filing an action. The court is, in principle, bound by the action's objections. Nevertheless, it is entitled to ascertain a specific scope of defects even without a plaintiff's motion. In most cases, these are exceptions preventing judicial review altogether.[67]

Legal proceedings do not have to take place at all cost: it is permitted that administrative body can reach an extrajudicial agreement with the plaintiff and that the whole dispute be resolved without the court's intervention. These issues are described in detail above.

These days, the length of the proceedings before the courts is subject to great criticism in the Czech Republic. The lawmaker reacted to this situation by an amendment in 2011.[68] For many court proceedings, time limits were provided.[69] However, the general rule that the court hears and decides cases in the order of their receipt still applies. Despite determining many time limits for specific cases, administrative legal proceedings are not governed by general time limits for rendering a decision. On the other hand, the procedure before administrative bodies is subject to a general time limit for rendering a decision. This time limit is specified in Section 71 of the Code of Administrative Procedure. According to this Section, administrative bodies should decide the case without undue delay, and should this be impossible, in no more than 30 days. This applies both to the first instance and the second instance procedures. No such general rule applies to the courts.

[65] In contrast to the proceedings concerning a cassation complaint before the Supreme Administrative Court, in the first instance proceedings before a regional court, no mandatory representation by an attorney at law is a condition of those proceedings (cf. Section 105(2) of the Code of Administrative Justice).

[66] Cf. Section 2(5) of Act No. 416/2009 Coll., on Accelerating the Construction of Transportation, Water and Energy Infrastructure, under which "time-limits for filing a legal action to review or substitute administrative decisions issued within procedure under Section 1 shall be reduced to a half. The court shall render a decision on the action within 90 days".

[67] Under Section 76(1) and (2) of the Code of Administrative Justice, defects taken into consideration by court ex officio are nonreviewability of an administrative body decision, insufficiently ascertained facts, serious violation of procedural regulations, or nullity of an administrative decision.

[68] Cf. the amendment of the Code of Administrative Justice implemented by Act No. 303/2011 Coll.

[69] E.g., under Section 101d(2) of the Code of Administrative Justice, the regional court is obliged to review a measure of general nature within 90 days from the motion filing. Under Section 73(3), the court must decide on the motion to grant suspensive effect without undue delay but no later than 30 days from the motion filing date.

Therefore, the first instance legal proceedings can, in exceptional cases, take as long as 3 years. According to the authors' own experience, proceedings before first instance administrative courts take approximately 1.5–2 years on average. Proceedings before the Supreme Administrative Court take less than 1 year on average. Still it is an obvious disproportion. The courts decide within months or years, while the public administration is supposed to decide within days or weeks. But, in fact, the essence of the case remains the same.

13.5.2 Scope of Judicial Review

Administrative justice that represents a large part of judicial review in the Czech Republic is built up on the cassation principle. That is, the courts may either annul the decision challenged by the action and return the case to the administrative bodies for rehearing or dismiss the action as an unjustified one if they come to the conclusion that administrative bodies made a correct decision.

The decisions of the administrative courts do not substitute or change the decisions of the public administration. They can only annul the decisions. By exception, a relatively rarely exercised discretionary power of a court regards reducing a penalty imposed by an administrative body due to an administrative delict. Unfortunately, this power is set in such a way that the courts rather annul the administrative decision, stating that the penalty was imposed in a clearly inadequate amount, than reduce the penalty themselves and thereby decide on the merits of the case instead of the administrative bodies. From the perspective of the separation of the judiciary and the executive, this restraint of the courts is rather appropriate, and therefore we look favorably thereupon.

When the courts review contested decisions of the administrative bodies, their conclusions are binding on the administrative bodies. If a court annuls their decision, administrative bodies are bound by the legal opinion expressed by the court in their new dealing with and deciding the case. With rare exceptions, the administrative bodies fully respect the conclusions of the courts, and the practice of the courts has frequently contributed to a successful change of the administrative practice or even to a subsequent amendment of the very legal regulation that proved to be unsuitable. These days, the administrative courts are rather active and they make an ever greater portion of the activities of the public administration bodies subject to their assessment.

13.5.3 The Subsidiary Character of the Judicial Review

In the Czech Republic, the typical feature of the administrative justice is that judicial review is available only after the complainant has exhausted in vain remedial measures at the level of public administration. If there are no remedial

measures provided for in the administrative procedure, the direct court action becomes possible. Such direct actions to the court are however rather rare. It is more frequent that administrative law provides the participant in the procedure with a system of regular remedial measures. Admissibility of a legal action is conditioned upon the prior unsuccessful application of those regular remedial measures. These conclusions follow from Section 5, in connection with Section 68, clause a) of the Code of Administrative Justice. In the same time, the courts uphold the prior exhaustion of the remedial measures at the public administration level as a condition for approaching courts follows based on the Council of Europe's Recommendation (2004) 20 on Judicial Review of Administrative Acts and Recommendation (2007) 7 on Good Public Administration.[70]

The supervision exercised by the Public Defender of Rights (the Ombudsman) does not change much in this respect as the conclusions of the Ombudsman's investigations are not legally enforceable. Both the courts and the Public Defender of Rights should take into account whether the solution adopted by the administrative bodies not only is legal but also complies with the good administration principle. Nevertheless, in 2012, the Public Defender of Rights was granted the right to file a court action against a decision of an administrative body.[71] Hence, under certain circumstances, the Ombudsman may become a plaintiff and may challenge an administrative decision—the legality and the correctness of which are doubtful in his opinion. So far, these have been only isolated cases. They concern situations when the Public Defender of Rights finds out that an unlawful decision was rendered but none of the affected persons, perhaps colluding with the public authority, filed an action against such a decision with the court. This tool can be useful when fighting against corruption. It is an instrument for the defense of public interest. The Ombudsman does not act in the name of affected persons but in the name and defense of public interest.

An administrative appeal serves as a safeguard against overloading the courts but at the same time as a remedial tool. It allows for reviewing the case, before it reaches the court, by public administration on the basis of an easy-to-use remedial procedure. An appeal alone does not prevent the judicial review of public administration. The domestic legal regulation is based on the fact that public administration itself should remedy its faults in most cases, i.e. both *ex officio* and on the

[70] According to the judgment of the Supreme Administrative Court of 12/05/2005, file No. 2 Afs 98/2004, published under No. 672/2005 Coll. of the Supreme Administrative Court, "condition of exhausting remedial measures within administrative procedure before filing a legal action [Section 5, Section 68 a) of the Code of Administrative Justice] must be seen as implementation of the principle of judicial review subsidiarity and minimization of court interventions in the administrative procedure. This means that the participant the administrative procedure must on principle exhaust all measures for protection of his rights at his procedural disposal and only after unsuccessful exhausting thereof he may demand judicial protection. This is due to the fact that judicial review of administrative decisions is designed only as a subsequent measure of subjective public rights protection which cannot replace measures within the public administration."

[71] Under Section 66(3) of the Code of Administrative Justice, the public defender of rights is authorized to file an action provided that he proves a serious public interest in the filing thereof.

initiative/at the request of the participant. Only when this way does not seem to be sufficiently effective does the time for judicial review of public administration come. Judicial review is only a subsequent issue when the public administration has said its last word in the case, even though certain exceptions are possible in this respect.

13.5.4 The Interplay Between Administrative Appeals and the Judicial Review

There is a relatively high standard of public awareness regarding regular remedial measures in the sphere of public administration in the Czech Republic. This is due to the fact that the administrative bodies are obliged to instruct[72] participants in the procedure of their procedural rights, as well as of the option to file for remedial measures. According to our experience, the participants in the procedure make use of remedial measures partly because they know of their existence and partly also because the possibility of their filing is not limited. Participants in the procedure file appeals in order to achieve rectification and very often they do not take into account that they can claim their rights subsequently in the legal proceedings. The public in the Czech Republic has not sufficiently learned that (to a limited extent since 1991, to a greater extent since 2003) there is an option to have the case reviewed by independent courts. Therefore, it is frequent that participants in the procedure file for remedial measures with administrative bodies even when the case should be already decided by courts. In this situation, administrative bodies absolutely correctly refer the matter to the courts, and the participants in the procedure are often very (unpleasantly) surprised to find themselves in proceedings before a court, unless there is no possibility of administrative appeal. If there is possibility of remedy in the sphere of public administration, the administrative bodies have to act and there is no place for the court proceeding.

This is not a matter of trust or distrust in the judiciary but rather a result of limited legal knowledge. The legal regulation of these overlaps is insufficient, and it does not contribute to increasing legal awareness. The practice of the courts also came to the conclusion that the instructions in a decision of an administrative body do not need to contain information on the option to file for extraordinary remedial measures in administrative procedure[73] or to the possible action to court.[74] Noteworthy, the Council of Europe Committee of Ministers' Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities states

[72] Cf. Section 4(2) of the Code of Administrative Procedure.

[73] Cf. judgment of the Supreme Administrative Court of 22/10/2003, file No. 7 Ads 42/2003, published under No. 297/2004 Coll. of the Supreme Administrative Court.

[74] Cf. judgment of the Supreme Administrative Court of 27/06/2005, file No. 5 As 10/2004, or of 26/06/2008, file No. 8 Afs 47/2007.

in its Article 5 that a decision given in written form should indicate *only normal remedies* against it, as well as the time limits for their utilization. Administrative bodies are therefore obliged, when fulfilling their obligation to give instructions, to indicate only the option to use *regular remedial measures in public administration*. In the Czech system, these are administrative appeals. They are not obliged to indicate the option to file a motion to the court for the purpose of judicial review. Due to this fact, the number of cases presented to the courts is much smaller than the number of cases dealt with by the public administration. The insufficient public awareness about court proceedings plays a significant role in this respect.

As it results from the information collected for the purpose of this study, the number of administrative appeals is far larger compared to the number of filed court actions. For example, in the branch administered by the Ministry of Health, a total of 2,584 appeals were filed in the period from 2007 to the beginning of 2012. In 1,045 cases, it was decided to annul and return the case to the first instance administrative body, and the appeal was rejected in the remaining cases. One might expect that an action would have been filed against the 1,500 remaining decisions. In reality, an action was filed only in 29 cases. The available data indicate that the situation is similar also in other areas and in relation to other administrative bodies. We can conclude that approximately 1–5 % of all cases dealt with by the public administration get to the stage of judicial review. The rest of them, i.e. absolute majority, are dealt with finally at the public administration level, with no court involvement.

The issues regarding the effectiveness of the administrative appeal, as well as issues concerning the whole system of rights protection, have never been subject to any analysis in the Czech Republic, even though this should be a duty of the state administration. This situation caused difficulties in obtaining statistical data about decisions on appeals and subsequent legal actions that were not available at the level of the central administration generally. On the contrary, the self-governing regions were able to provide more easily the statistical data required.

The findings below presented in Table 5.1 show that the Regional Offices fully or partially admitted almost a third of the appeals filed. Only a relatively small portion of the regions' appellate decisions was contested by actions before the administrative courts. However, the courts fully or partially admitted the actions in every two-and-a-half cases.

The statistical data include answers from ten regions as the higher territorial self-governing units, from a total of 14. When speaking of the administrative procedure, the relations between the two administrative instances are ones of superiority and inferiority, and they form part of the broader relations between the regions and the municipalities, which are the fundamental territorial self-governing units. This means that the Regional Office is a second instance administrative body for municipal decisions issued in accordance with the Code of Administrative Procedure, unless this competence is delegated to a special body or unless provided otherwise by law. In addition to the decisions issued within the separate powers of a municipality, the municipality administering its own matters autonomously, the municipalities issue decisions also within their delegated powers, i.e. within

Table 5.1 Decisions of regions as appellate bodies compared to decisions of municipalities concerning selected administrative duties within the state administration (delegated powers), including subsequent actions to administrative courts

Period: 2007—1st quarter of 2012	Total number	Percentage (%)
Number of appeals	39,625	
Decisions were annulled, and the procedure was discontinued[a]	1,371	3.5
Decisions were annulled, and cases were referred back for re-hearing[b]	4,727	11.9
Decisions were modified[c]	6,243	15.7
Applications for appeals were dismissed, and decisions were affirmed[d]	26,229	66.2
Applications for appeals were dismissed as inadmissible[e]	1,055	2.7
Number of administrative actions against decisions of regions	602	1.5
Actions were admitted	225	37.4
Actions were dismissed	377	62.6

Source: data compiled by the authors based on their empirical research
[a]Section 90(1) a) of the Code of Administrative Procedure
[b]Section 90(1) b) of the Code of Administrative Procedure
[c]Section 90(1) c) of the Code of Administrative Procedure
[d]Section 90(5) of the Code of Administrative Procedure
[e]Section 92 of the Code of Administrative Procedure

execution of state administration that is not realized directly by the state (by its bodies) but indirectly by municipal bodies.[75] Decisions issued within the delegated powers of municipalities, or rather the appeals against them, are covered by statistics drawn up by superior appellate bodies.

On the basis of the answers provided by the regions and concerning almost 40,000 municipal decisions contested by an appeal in the period from 2007 to Quarter 1 of 2012 and the form of their settling (the decisions concern only selected administrative duties, i.e. social matters, contraventions, environment, agriculture, air quality protection, waste management, protection of nature and landscape, forest management, hunting, protection of animals against cruelty, land-use planning and building regulations, financial department, trade license department, registry office, education, youth and sports, culture and heritage protection, transport and road management, and health care), including data on the percentage of judicial review of regions' appellate decisions, we reached the following conclusions: Regions confirmed more than a half of the decisions in the appellate procedure, i.e. 66.2 % of applications for appeals were dismissed. A total of 2.7 % of applications for appeals were dismissed due to formal reasons, specifically due to the fact that the appeal was not filed on time or was inadmissible. In relation to 31.1 % of all other appeals against municipal decisions, the Regional Offices decided that the municipal decisions were illegal or incorrect. A half of them (50.5 %) were modified; 38.4 % of those defective decisions were annulled, and the cases were referred

[75] Cf. Průcha (2011), p. 178.

Table 5.2 Court cases

Period 2007—Q1 of 2012	Total number	Percentage (%)
Number of administrative actions against region's decisions	602	1.5
Actions were admitted	225	37.4
Actions were dismissed	377	62.6

Source: Data compiled by the authors based on their empirical research

back for rehearing to the municipalities that had issued them; and in relation to the remaining 11.1 %, decisions or their parts were annulled and the procedure was discontinued. In light of these percentages, the administrative appeal seems to live up to its role of keeping at least a substantial number of cases out of court.

Actions against appellate decisions of the regions were brought to administrative courts only in 1.5 % of all cases; only 2.2 % of the cases in which the regions dismissed applications for appeals were contested in court. Courts admitted 37.4 % of these actions. These data presented in Table 5.2 show the preeminence of administrative appeals among the remedial tools at the disposal of parties in administrative procedures.

13.5.5 Is There Room for Administrative Tribunals?

In the Czech Republic, the judicial review of administrative activities is carried out exclusively by courts. As a result, courts are considerably overloaded with administrative law cases. This load has negative effects, e.g. extended time of legal proceedings, a lot of outstanding cases, higher costs for the participants, etc. In many cases, as if it was not provided at all. Due to the unreasonable length of the legal proceedings, sometimes the late provision of judicial protection has no effect or just an academic importance. The legislator has been showing considerable reticence toward the establishment of independent administrative tribunals. We consider that there are many areas of public administration where administrative tribunals could be established.

The establishment of administrative tribunals might combine the elements of independency and expertise, as public administration has the expertise but is not independent, and courts are independent but sometimes lack the expertise. Thus, administrative bodies are specialized *in rem* by individual areas, but it is difficult to find such specialization within the courts. An exception is the judicial review of decisions of the Office for the Protection of Competition. Thanks to the rules for determining local jurisdiction[76] of administrative courts, only one of the eight regional courts has local jurisdiction (the Regional Court in Brno). The situation

[76] Under Section 7(2) of the Code of Administrative Justice, the court with local competence for proceedings is the regional court in the district of which there is the seat of the administrative body that issued a first instance decision in the case.

is similar in the case of the Industrial Property Office. In relation thereto, another court is competent for judicial review of its decisions (the Municipal Court in Prague). Nevertheless, the said partial specialization is rather a coincidence than a proof of conceptual approach. But it definitely does not mean that the judges of those courts do not deal also with other cases.

There is not enough specialization for administrative law matters among judges. Based on the personal experience of one of the authors of this chapter, who had been working at the Supreme Administrative Court for many years, a certain weakness of the judicial review of public administration can be the fact that it is executed exclusively by judges. Judicial review is focused exclusively on legal aspects, i.e. formal or procedural ones.

In our opinion, the establishment of administrative tribunals might remove the above-mentioned deficiencies. Administrative tribunals should be independent from the administrative bodies. They should take the expert element from the public administration level and the independence and legal knowledge elements from the judicial review level. As concerns their members, the tribunals should concentrate both experts (specialists) in the given specific areas of public administration, experienced officials and respected lawyers. It might be a suitable combination of administrative and judicial review followed by judicial review.

The only area in which the legislator got closer to a certain extent to the establishment of an administrative tribunal is the area of the immigration law. A specialized Commission Deciding in Matters of Aliens Residence has been working within the Ministry of the Interior.[77]

In the area of asylum law, many lawsuits in 2005 were solved by exception because the access to the Supreme Administrative Court was restricted via the inadmissibility of the cassation complaint.[78] Nevertheless, this restriction did not apply to the first instance of judicial review exercised by the regional courts. The above-mentioned restriction applied exclusively to the cassation complaint procedure before the Supreme Administrative Court (in second instance). Thanks to the restriction, the factual review does not cover all matters from this area but only those with "importance significantly exceeding complainant's own interests."[79] This construction allows for deciding easier and faster in matters that are frequent and characteristic for more than one case at a time.

Another area in which the establishment of administrative tribunals might be considered is the sphere of social security and many social benefits contingent upon

[77] Cf. Section 170a of Act No. 326/1999 Coll., on Residence of Aliens in the Czech Republic.

[78] Cf. Act No. 350/2005 Coll. and the new Section 104a of the Code of Administrative Justice "If the cassation complaint in the matters of international protection in its significance substantially does not exceed own interests complainant, Supreme Administrative Court refuses cassation complaint for unacceptability."

[79] For a detailed definition of the institution of cassation complaint inadmissibility in asylum (international protection) cases, we can refer to the resolution of the Supreme Administrative Court of 26/04/2006, file No. 1 Azs 13/2006, published under No. 933/2006 Coll. of the Supreme Administrative Court.

the applicant's bad health condition. In case of legal proceedings, the court lacking the necessary medical knowledge has to rely exclusively on the conclusions and knowledge of doctors working for administrative bodies.[80] For the time being, the lawmaker has reacted by the amending of the legal regulation—in 2009, it created a special administrative appeal procedure—the objection.[81] The objections represent a remedial tool that needs to be exhausted before filing a legal action. We argue that establishing a new body that might have combined the expert (medical) and the legal reasoning would have been a better course of action than this objection, which is solved again by the same public authorities.

The Remonstrance committees regulated by Section 152(3) of the Code of Administrative Procedure could also be used as a possible inspirational basis for the creation of Administrative Tribunals in the Czech Republic. However, these committees would have to be more independent, and they would have to decide directly.

13.6 Final Considerations

The administrative appeal has proved itself a guarantee against overloading courts with administrative law cases. A qualitative administrative appeal procedure can indeed deal with and remedy many errors. Moreover, it can be done relatively quickly. Damage and injury can be eliminated, or the duration of this negative situation can be minimized. Participants in the procedure can generally benefit from the main features of the administrative appeal compared to the judicial review. They include statutory conditions that are not demanding, speedy settlement (the appellate bodies are subject to time limits) and affordability, a relatively extensive scope of the review performed by the appellate body, which is not limited only to the reasons stated in an appeal, as well as extensive room for appellant's legal and factual arguments.

The Ombudsman has a strong influence both on the practice of public authorities and in the courts' proceedings; his codes of good governance practices, modeled after the European examples, are in themselves examples of good administrative practice.

ADR tools are developed in different fields of law. They are not generalized due to the traditional view that administrative law is accommodating mainly public

[80] Cf. Section 4(2) of Act No. 582/1991 Coll., on Organization and Implementation of Social Security, as amended, according to which the Ministry of Labor and Social Affairs "evaluates health condition and working ability of citizens for the purposes of judicial review procedure in cases of retirement pension insurance and for the purposes of appellate administrative procedure as long as the contested decision was issued on the basis of an opinion issued by the county administration of social security; to this end it establishes advisory committees as its bodies."

[81] Cf. Section 88 of Act No. 582/1991 Coll., on Organization and Implementation of Social Security, as amended.

authorities using their unilateral powers. However, there is room for development in this area.

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Chapter 14
The Dynamic of Administrative Appeals and Other ADR Tools in Romania

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14.1 The Administrative Law System: An Overview

The collapse of the communist regime in 1989 has generated dramatic changes with respect to the legal regime in place and has brought significant changes with regard to administrative justice. Following the adoption of a new Constitution in 1991, the architecture of the administrative justice system was designed to include courts with specialized panels of administrative law judges, complemented by quasi-judicial bodies for certain matters (fiscal ones, for example). Generally speaking, judicial power in Romania is exercised by courts—courts of first instance, tribunals, courts of appeal, and the High Court of Cassation and Justice. From tribunals upwards, all courts have specialized sections (units of judges) for administrative and fiscal matters. In some cases, for reasons of internal organization, these sections are combined with the civil or commercial sections. Based on special regulations, first instance courts also hear administrative law cases, but such cases are judged together with the rest of the cases, not separately, as it happens at the upper levels.

From a historical perspective, the judicial review of administrative decisions has had a long-standing tradition in Romania before the communist regime.[1] The Romanian legislator at that time, as well as the doctrine, looked at different foreign models for institutional solutions. Between 1864 and 1866, an institution modeled after the French *Conseil d'Etat*, having both consultative and jurisdictional powers, was established, followed by the adoption of the Anglo-Saxon model of ordinary courts, competent in all subject matters. Special jurisdictions for fiscal matters and pensions have been established over time, thus reducing the burden on the ordinary

[1] See generally Iorgovan (2002), Vedinaş (1999), Drăganu (1992), Petrescu (2001), Iovănaş (1997), and in a nutshell, Dragoş et al. (2011a), pp. 189–236.

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courts. Between 1948 and 1965, the judicial review of administrative decisions was abolished due to the communist theory that "the state can do no wrong as it represents the expression of the will of the working class" and that "the administrative organs are subordinated to the Great National Assembly, which oversees their activity, so there is no need for judicial review." Finally, from 1965 to 1990, judicial review was reinstated, but few cases were brought before the courts.

After the 1989 regime change, the new Romanian Parliament adopted among the first laws Law no. 29/1990 on the judicial review of administrative acts.[2] The adoption of the 1991 Constitution brought changes in the application of Law no. 29/1990, which has since been interpreted according to the principles stated in the Constitution. For instance, judicial review was extended to cover the administrative acts issued by any public authority, not only by administrative authorities, following Decision no. 97/1997 of the Constitutional Court. The competence for review remained at the level of the ordinary courts, within which sections (units of judges) were established to deal with administrative law cases. During the 2003 constitutional revision, the provisions regarding judicial review were amended—the law created the possibility to have an action based on legitimate interest (art. 52 of the Constitution). Despite these amendments, both practitioners and scholars agreed that the 1990 law was outdated and therefore in need of serious revisions. In 2004, a new law came into force, Law no. 554/2004. Further amendments were adopted in 2005, 2007, 2008, 2010, and 2012 as a result of the decisions of the Constitutional Court, but also based on EU principles. Recent changes have been the result of entry into force of the New Civil Code for Procedure.

14.2 Available Remedies Against Unlawful Administrative Actions

There are two categories of remedies available against unlawful administrative actions: administrative appeals and judicial review.

Administrative appeal can be an internal review conducted by the issuing authority, an external review performed by a higher authority, or a specialized review conducted by control administrative bodies. A special place is given to the Ombudsman, which has mixed powers regarding administrative action. Finally, a process of *tribunalization* of administrative appeals has led to the setting out of quasi-judicial bodies (some of them similar with tribunals).

The judicial review[3] performed by regular courts working in specialized units can be a subjective review or an objective review. Subjective review is intended to protect the individual rights of citizens and legal entities and has a broad scope,

[2] The first law on the review of administrative acts was adopted before the Constitution and had been seen at that time as a priority.

[3] Dragoş et al. (2011a), pp. 189–236.

as the judge can decide upon annulment, order the fulfillment of duties, and grant compensation. Objective review seeks to protect the overall legality of administrative actions, the public interest of having a public administration functioning according to law. It can be triggered by any person (*actio popularis*) or by public authorities charged with control over other public authorities. With regard to this distinction, it must also be noted that the doctrine assimilates objective review with a review for annulment and subjective review with a review of full jurisdiction (resembling the *contentieux de l'annulation* and *contentieux de pleine juridiction* in French law).[4]

14.2.1 Administrative Appeals

14.2.1.1 The Background of the Institution in the Romanian Law System

Traditionally, in the Romanian law, the exhaustion of administrative appeals before going to court has always been a prerequisite for access to justice. Thus, since 1864, when the judicial review was set up, the prior exhaustion of administrative remedies was mandatory before going to court. Administrative appeal became optional in 1925 and again mandatory from 1967 onwards. The postcommunist Law on judicial review (1990) maintained the mandatory nature of administrative appeal.[5] The source of administrative appeals has always been a law enacted by Parliament and not the Constitution.

The 2004 Law on judicial review maintains the mandatory nature of administrative appeals, but additional provisions alter its effectiveness, as we will show later on in the chapter. However, in the organization of the administrative justice in Romania the emphasis is on courts and not on administrative appeals. This should have led to the development of highly specialized administrative courts, able to tackle the complex issues arising from the application of administrative law. Unfortunately, such specialization has not occurred due to multiple factors. One is the reluctance of judges to specialize on administrative law issues, followed by a tendency of the legislator to allocate to the civil and the commercial courts the competence to hear more and more administrative law cases. This development has neither triggered the setting up of more specialized tribunals nor led to the refinement of the administrative appeal system. The prevalence of the judicial review or of the administrative appeal system is decided based on decision makers' perceptions and not on solid empirical evidence. Another influencing factor is the delay in

[4] Rarincescu (1936), p. 36; Petrescu (2001), p. 331; Prisăcaru (1998); Laferriere (1887–1888); Debbasch and Ricci (1999), p. 428; Peiser (2000), p. 238; Chapus (2008), p. 329; and Auby and Auby (1996), p. 314.

[5] Dragoş (2001).

the reform of the judicial system, which should envisage, among other things, the creation of specialized tribunals.

14.2.1.2 Mandatory and Optional Regimes

Based on the provisions of the Law on judicial review, administrative appeal is mandatory for explicit administrative decisions. It does not have any legal effect if exercised for *implicit* or *explicit* refusal to act, apart from being an alternative dispute resolution tool. Regarding the solution not to impose an appeal against the refusal to act, it was argued that in this case the petitioner should not be exposed again to a negative response from the public authority that refused once to accommodate his/her request.[6] When a third party is affected by the solution given in the administrative appeal, this party has no obligation to lodge again an administrative appeal. A direct court action is admissible in this case.[7]

The appeal is mandatory only for individuals and legal persons challenging administrative decisions, not for public authorities acting in the public interest (the Prefect, the Public Prosecutors, the National Agency for Public Servants, and the Ombudsman). It is not clear why these public bodies are exempted from the mandatory administrative appeal, if we consider the possibility that the administrative appeal could prevent them from going to court. Moreover, as we will show in the last section of the paper, the procedure for administrative appeal has proved to be effective at least in the case of the Prefect.

14.2.1.3 Types of Administrative Appeal

In Romanian law, administrative appeal can be found in all of its forms: objection (internal appeal), hierarchical appeal,[8] and external appeal to the control bodies. Objection and hierarchical appeals are expressly regulated by the 2004 general law on judicial review. They can be lodged together or separately, within 30 days from the communication of the decision. They are considered similar remedies, thus the law does not establish a different deadline if they are exercised successively.[9] For third parties, the deadline counts from the date they find out about the decision. If both authorities (issuer body and superior body) are approached at the same time or consecutively and they do not coordinate the answer, the solution most beneficial to the applicant shall have priority. The deadline for court action will start, however,

[6] Iorgovan (2002), p. 505.

[7] Dragoş (2005), p. 95.

[8] Art. 7 of Law no. 554/2004 on judicial review published in the Official Monitor of Romania no. 1154 from 07/12/2004.

[9] Law no. 554/2004 (footnote 8).

from the moment when the applicant receives the first answer or when the first deadline for answering the appeal has passed.

The higher body cannot refuse to deal with the hierarchical appeal on the ground that the issuer has also been notified. The explanation lies in the fact that hierarchical appeal has a rather different scope and chances of success than objection. The first one is meant to trigger a form of external control over the issuer, while the second one is the self-control of the issuer. Apart from the objectivity of these forms of control, which can prove to be relevant, those who conduct the procedure have also a different perspective over the administrative decision.

There are also specialized administrative appeals, in a large degree jurisdictionalized: the appeal to the National Council for Solving Disputes dealing with public procurement issues, the appeal to the National Council against Discrimination, the appeal to the Appeals Department of the Office for Trademarks and Patents, etc. They are all part of the process of "tribunalization" of the administrative appeal procedures, releasing the courts from the burden of dealing with highly specialized issues.

An external appeal can also be addressed to an authority with power of control (the Prefect, for instance, or the Prime minister), but this appeal is not regulated by legal provisions. The Prefect assesses the legality of the decisions issued by autonomous local authorities (mayors, local and county councils, presidents of county councils). The Prefect can then lodge a court action in order to annul such decision. The same attributions have been granted to the Romanian National Agency for Civil Servants, which can lodge a court action against public bodies that infringe the legal provisions regarding civil service (recruitment, disciplinary measures, etc.).[10] Another example is the Romanian Court of Auditors, which controls the execution of the public budgets and the legality of expenses made by public authorities. It can refuse public authorities the discharge of their expenses. All these forms of control can be exercised at the request of private or public persons upon an administrative appeal. This appeal is not a typical hierarchical one but a quasi-hierarchical appeal.

There is also a national Romanian Ombudsman, who can act upon an administrative appeal from individuals (complaint), and also exercise an administrative appeal to the issuer or to the hierarchical body, in order to deal with the complaint.[11]

In general, administrative contracts are benefiting from the same treatment as administrative decisions regarding administrative appeals. In the Romanian law, though, in the case of administrative contracts, the administrative appeal is taking the form of conciliation, which is specific to commercial contracts (art. 7 of the Law on judicial review), regulated until recently by the Code of Civil Procedure. The conciliation had to be conducted, however, taking into consideration the position of

[10] Law no. 188/1999 on civil service republished in the Official Monitor of Romania no. 365 from 29.05.2007.

[11] Law no. 35/1997 on the functioning of the Ombudsman institution republished in the Official Monitor of Romania no. 844 from 15.09.2004.

the parties in administrative contracts, which are governed by the public law and by the priority of the public interest over the private interest. Currently, due to the adoption of a New Code for Civil Procedure, which eliminated conciliation from commercial contracts, without considering the effect on administrative contracts, it seems that the regular administrative appeal applies to administrative contracts as well.

14.2.1.4 Deadlines for Exercising Administrative Appeals

There is the fixed time limit within which the applicant should lodge the appeal against an individual act (general acts can be challenged at any time). Romania has a 30-day time limit, which seems to have the legal nature of a recommendation,[12] since it is complemented by a deadline of 6 months, calculated from the date when the decision was issued. The appeal lodged within the longer term is to be validated by the public authority, upon assessment of the motivation/grounds invoked by the claimant, so public authorities have a large margin of discretion over this matter. Needless to say, the public authorities in Romania are not too keen on considering the grounds as justified when this claim occurs. The alleged abuse in assessing the grounds for extension of the term can be reviewed by the court when the case is brought before it.

In a previous study,[13] it was argued that the concept of "reasoned grounds" should be interpreted in light of the criteria used by judges in reactivating the time frames for filing acts in court proceedings[14]: circumstances that are "beyond the control of the claimant." This opinion is in line with the case law of the Romanian highest court.[15] Thus, the simple fact that the public clerk was on medical leave is not a circumstance relevant enough to justify the reactivation of the term for the claimant when the appeal could be registered at the institution or sent by post, fax, etc.[16] On the other hand, the absence from the country of the addressee of an administrative decision communicated by posting it on the door, or by post, could be considered as a sufficient ground for exceeding the shorter term. Also, the fact that another judicial proceeding is pending, and the resolution might influence the outcome in the current proceeding, was considered in one case a reasoned ground.[17]

[12] Iorgovan (2002), p. 314.

[13] Dragoş (2005), p. 90.

[14] Art. 103 of the Code for Civil Procedure.

[15] Supreme Court of Justice, Administrative Law Section, Decision no. 3441/2002.

[16] Supreme Court of Justice, Administrative Law Section, Decision no. 2689/2002.

[17] Bucharest Appellate Court, Commercial, Administrative and Fiscal Law Section, Decision no. 1401/2006.

The moment when the administrative appeal is considered lodged is when it is sent by mail,[18] or by electronic mail,[19] when it is registered directly at the public authority's premises, respectively when the verbal complaint is registered.

The questions posed by the deadlines relate to their compatibility with the art. 6, par. 1 of ECHR. It can be argued that short deadlines for exercising the administrative appeal can impair the access to justice, and thus they have to be assessed as part of the "reasonable time limit" criterion for resolution of a dispute. In this context, our opinion is that short fixed deadlines for exercising administrative appeals (30 days) are not contributing to the reasonableness of the procedure, and they should be replaced by a provision that links the administrative appeal to the court action. Thus, there should be only one deadline, for going to court, calculated from the communication/publishing of the act. During this time limit, the party needs to exercise the administrative appeal, which would extend the time limit for going to court with the time necessary for answering the administrative appeal (30 days).

General administrative acts (addressed to undetermined addressees) are usually published in official sources, and only exceptionally are they communicated directly to those interested. The court action can be filed at any time, not before exercising the administrative appeal though. The Romanian law has no provisions regarding the time limit for exercising the administrative appeal in case of general acts, so it should be exercised any time before going to court against the act.

The administrative appeal has to be answered, according to the Romanian law, within a 30 days' time limit, which can be extended with 15 days in case the request is complex, but only after the claimant is informed about the extension.[20,21]

An interesting debate occurs regarding the duty to redirect wrongly addressed administrative appeals. There are several options: the public authority rejects the appeal because it does not fall within its competence, the public authority rejects the appeal because it is not competent but informs the claimant about the public body that has the competence to deal with the complaint; the public authority redirects a wrongly addressed appeal to the competent authority. The last one comes with two suboptions: (a) the redirecting duty applies only when the competent body is under its supervision/subordination, or (b) it applies in all cases. The Romanian approach, to impose in all cases a duty to redirect all petitions to the competent authority (art. 61 of Governmental Ordinance no. 27/2002 on the procedure for solving petitions), is the most accommodating for petitioners, in our opinion. It demands a proper expertise from the public authority while exempting the petitioner from browsing

[18] Supreme Court of Justice, Administrative Law Section, Decision no. 1434/2000.

[19] Art. 2 of the Governmental Ordinance no. 27/2003 on the procedure for solving petitions; Bucharest Appellate Court, Commercial, Administrative and Fiscal Law Section, Decision no. 307/2006.

[20] Art. 7 of the Law no. 554/2004.

[21] Interpreted in view of articles 8–9 of the Governmental Ordinance no. 27/2002 on the procedure for answering to petitions.

the public bodies in search for the competent one. The time frame for redirecting the wrongfully addressed petitions is 5 days. The time frame for answering the administrative appeal by the competent authority starts to run again after it is registered there.

In the case of a person aggrieved by the decision addressed to another person, the deadline is 30 days since the third party has learned about the existence of the decision (Law no. 554/2004 on judicial review). The jurisprudence of the courts has conflicted here with that of the Constitutional Court. Thus, the High Court[22] and courts of appeal[23] have considered that third parties can lodge the administrative appeal within 6 months from the issuance of the decision, while the Constitutional Court has argued that such an interpretation is preventing third parties to access the courts.[24]

14.2.1.5 Scope of the Administrative Appeal

The scope of the administrative appeal is first and foremost the revocation of the decision. It could also refer to the altering of a decision or to the issuance of a new decision. When is the administrative appeal to be considered resolved—at the time of the positive answer or at the time of the issuance of a new decision? The last solution is more appropriate, taking into consideration the interest of the claimant, although in practice a simple answer to the appeal, in the sense that the request will be resolved, is taken for granted by applicants.

The outcome of the appeal can be assessed both ways: for the claimant, it is intended to provide revocation or amendment of the decision, but a clarifying response of the public authority explaining that the decision is legal can also deter the claimant to challenge the decision in court. There are cases when the claimant renounces the court action even if the decision is unlawful and the administrative appeal was rejected. In this case, the decision not to go to court is only partially a result of the administrative appeal, because the aggrieved person did not intend to go to court anyway due to the cost and length of litigation.

Romanian legislation comprises some atypical provisions regarding revocation of administrative decisions. The Law on judicial review no. 554/2004, with an aim to introduce an exception to the principle of revocation, has severely limited the application of the principle of revocation in Romanian law. It took creative doctrine and jurisprudence to make the principle still applicable in the national law, as we will further illustrate.

The 2004 law on judicial review keeps the traditional mandatory nature of internal administrative appeals (appeals to the issuer) but renders them ineffective

[22] High Court of Cassation and Justice, Administrative and Fiscal Law Section, Decision no. 146/2007.

[23] Bucharest Appellate Court, Decision no. 1445/2006.

[24] Constitutional Court, Decision no. 797/2007.

by imposing additional provisions. Thus, according to article 1, last paragraph of Law no. 554/2004, in case an administrative decision could not be revoked anymore by the public authority because it "entered the civil circuit," the public authority wishing to revoke that decision only has one option—to resort to the court itself, seeking an annulment of its own decision. Oddly enough, this provision was justified by the fact that public authorities should not be trusted with regard to the revocation of their own decisions in the "transition era." Apart from the reasoning, which is circumstantial and cannot endorse a provision that is stable over time, the major problem of the text is that it makes any revocation of administrative decisions virtually impossible, as they "enter the civil circuit" in the sense that they produce legal effects right after notification or publication.[25] From this moment on, according to the law, they would become irrevocable. In this way, an important institution of the administrative law, the revocation of administrative decisions, the essence and scope of the internal administrative appeal procedure, is ruined.

In a previous commentary of the law,[26] we tried to interpret the law in a creative manner, in the sense that irrevocability is triggered only at a later moment in time, namely when another decision or contract is issued or concluded on the basis of the decision at issue. This opinion has been embraced then by Highest Court of Cassation and Justice in its case law.[27] There is little interest for public authorities to lodge court actions against their own decisions. Instead, the aggrieved persons are directed by the public authority towards lodging the action themselves.

However, based on empirical research conducted for this chapter, we found that in practice that there is little reverence to the limitations provided by the law and public authorities revoke their acts when they feel necessary without paying much attention to the moment when they entered into the civil circuit. On the other hand, in cases when the public authority has an interest in maintaining the effects of the administrative act, the impossibility to revoke the act is invoked in court.

Another issue relates to the possibility to grant compensation in administrative appeals. If following an administrative appeal the decision was revoked by the issuer, or annulled by the higher body, the claimant has the possibility to file a court action for compensations. Here, the question is whether public bodies can decide upon compensations themselves, if asked by the claimant through administrative appeal. The Romanian administrative practice is reluctant in this respect, favoring a court action instead. The reluctance of the public bodies to grant compensations for damages resulting from unlawful decisions is fueled by the manner in which public authorities are controlled afterwards by the Court of Auditors. The Court of Auditors generally refuses to approve such public expenses, so public authorities "guide" claimants to lodge a court action in damages on the basis of the revoked administrative decision, so they will be "endorsed" by a court decision when

[25] Costin et al. (1980), p. 86; Pasăre (2006), p. 29; and Popescu (2005), pp. 130.

[26] Dragoş (2009), p. 42.

[27] Highest Court of Cassation and Justice, Administrative Law Section, Decision no. 3070/2006; Rîciu (2008), p. 127.

granting compensation. Moreover, special legislation indirectly prevents public authorities to "move freely" with regard to this matter: when trying to recover damages from the public official or public servant responsible for breaching the law, Law on civil servants no. 188/1999 requires a court decision as the base for recovery (art. 72). Consequently, it cannot be done on the basis of an administrative decision issued as a result of an administrative appeal.

14.2.1.6 The Suspensive Effect of the Administrative Appeal

In Romania, the suspension of the challenged act is granted by the court, in all cases. The request to suspend a decision can be filed at the same time with the administrative appeal, after lodging the administrative appeal, along with the court action or anytime during the court proceedings (art. 14 of the Law on judicial review).

The suspensive effect is triggered depending on whether the administrative appeal is followed or not (within a reasonable time) by a court action. Thus, in Romanian law, failure to lodge a court action within 60 days from the date when the suspension was granted ends the suspension and puts the decision back into force (art. 14 of the judicial review law).

It is also important to consider the object of the decision challenged by administrative appeal, as the suspensive effect could be far more useful for negative (nonbeneficial) decisions.

14.2.1.7 The Devolutive Effect of the Administrative Appeal

In the comparative doctrine, there are debates whether the public authority can worsen the situation of the applicant in its own administrative appeal. In other words, the appeal should allow a decision against the interests of the applicant (*reformatio in pejus*). The question is, therefore, whether the appeal should be dealt with in a bound competence manner by the public body, meaning that it is held to answer the claimant only within the limits of his requests, or whether the authority can consider itself notified for an objective analysis *de novo* of the decision, which implies the power to modify the decision in a way that may not be in the advantage of the applicant.

As for the first assumption, it is obvious that the complainant does not want that an appeal initiated with a view to defend his/her rights to turn against him/her, making the situation worse. So an interdiction of the *reformatio in pejus* should serve the individuals seeking an easy dispute resolution. The argument for the second hypothesis is that the appeal only initiates the control and cannot establish its limits.

Romania has no legal prescriptions for this issue; so, theoretically, the *reformatio in pejus* is possible. Exceptions can be found in the special legislation.

Thus, the Code for Fiscal Procedure[28] clearly states that by solving the contestation the fiscal organ cannot worsen the situation of the complainant (art. 213, par. 3).

The appeal body can decide without restrictions *ultra petita*, that is, to give the claimant more than it was requested (for example, granting an increased amount of money than the applicant asks for but to which the applicant is rightfully entitled).

14.2.1.8 Empirical Evidence Regarding the Effectiveness of Administrative Appeals

Research Question: Methodology of the Research

The main expected result of the research was to determine empirically if administrative appeals are efficient in keeping administrative litigation out of the courts. This objective is important in light of the fact that this book looks at administrative appeals as a potential ADR tool. For the purpose of this research, effectiveness was defined in a rather uncomplicated manner: the appeal is efficient if it prevents cases to get to court. However, in the case of the appeal lodged by citizens, different from the situation of the appeal lodged by the Prefect (see below), this definition may have some limits. Private parties, after the administrative appeal is exhausted, may decide not to go to court because there are costs involved, litigation is tedious, and usually there is mistrust in the Romanian court system.

The empirical data were gathered using two main research methods, one quantitative and the other one qualitative:

A) During the first stage of the research (October 2009–May 2010), a short survey was mailed to a national sample of local public authorities. We asked them to offer us some statistical data for the time interval 2004–2009 regarding the following items: the total number of administrative acts issued, the number of acts reviewed as part of an internal administrative appeal lodged by legal or natural persons, the number of acts revoked/modified, and the number of acts against which a court action was lodged. The sample was developed in the following manner: for each of the 41 counties of Romania (plus the capital city of Bucharest), we included all the municipalities, all the towns, and ten rural communes. For the rural communes, we built a stratified sample based on size, expressed in terms of population, and based on distance from an urban center. The two criteria were selected because we hypothesized that communes that are bigger and/or near an urban area tend to follow closely the dynamic of litigation of the main urban center, especially in fields such as building permits. In all the communities of the sample, the local public authorities considered were the mayor, the Local Council, the president of the County Council, and the County Council.

The same items were requested from the Prefects in all the 41 counties—the number of acts reviewed by the Prefect, the number of acts against which the

[28] Governmental Ordinance no. 92/2003.

Prefect lodged an internal administrative appeal, the number of acts revoked/modified, and the number of acts against which a court action was lodged by the Prefect. In this latter case, we had an exhaustive sample since all the Prefects were surveyed.

Besides the administrative appeal concerning all the administrative acts issued by the authorities mentioned below, we were also interested to see if the administrative appeal has specific characteristics in several fields of activity. We looked at those areas in which the interaction between the citizens and public authorities is the greatest—for example, building permits, fiscal matters, and access to public information. For building permits and fiscal matters, our sample comprised of the first 20 biggest cities in Romania in terms of population, and the scrutinized interval was 2004–2009. For appeals concerning free access requests, the sample was composed of the same public authorities as in the case of general administrative, acts and the scrutinized interval was 2004–2009.

B) During the second stage of the research (2012), a semistructured interview guide was developed in order to gather more qualitative input from the representatives of the local public authorities regarding the outcomes of the statistical analysis. We interviewed a number of 40 secretaries throughout the country (in the Romanian administrative system, each local public authority has a secretary or a legal counselor whose position is extremely important since he/she countersigns for legality purposes all the acts issued by that body, thus providing a warranty for their legality). These secretaries, because of their role and also of their judicial background, were considered the best candidates for providing additional information with regard to our research topic and questions. They were asked if the findings of our research match their perception of the reality in their institution's activity and which are their explanations for the outcomes of the research.

Main Findings

Statistical Data (First Stage of the Research)

The General Administrative Appeal Procedure When the administrative appeal is lodged by natural/legal persons based on their rights or interests, the public authority has the opportunity to revoke its decision provided it "did not enter the civil circuit," an ambiguous concept still to be developed by the courts through the case law (as explained above). The resort to a court action (by the public authority itself or by the interested party) is the only solution for this standoff; thus, the advantages of an alternative dispute resolution system are fading off. In spite of the discouraging environment created by the law, the administrative appeals still play a crucial role in administrative disputes. Where general administrative appeals are concerned, data were harder to collect because public authorities do not have a system of reporting on such issues, as in the case of the Prefect.

With regard to the number of administrative acts against which an internal appeal was lodged with either the issuing authority or the hierarchical one, the

number is quite low, below 1 % of the total number of acts issued, with a slight difference between urban and rural subsamples—0.07 % for the urban sample and 0.04 % for the rural one. With regard to the number of acts revoked/modified by the public authorities, there is an important difference between public authorities in urban and rural settings. In rural settings, there were more acts revoked—this situation is obvious especially with regard to the acts issued by mayors and presidents of the county councils, as they typically issue decisions that execute regulations enacted by the councils. From the number of administrative acts challenged via an administrative appeal, a subsequent court action was lodged in 36 % of the cases. This is a somewhat lower rate of success than in the case of the action exercised by the Prefect (see below) but still a positive indication of the success of the administrative internal appeal. This means that in the rest of the cases (64 %) no action was pursued (the petition was favorably solved, or the citizens dropped the petition due to other reasons).

Administrative Appeals Initiated by Public Bodies with Control Duties To begin with, the evolution of the administrative appeal exercised by the Prefect is worth mentioning. Thus, during a first stage, from 1991 to 2004, the Prefect had the obligation to exercise an administrative appeal before lodging a court action against decisions of local public authorities. In most cases (over 80 % of them), as a result of the administrative appeal, the decision was revoked and no court action was initiated.[29] Against all the arguments for keeping a procedure that has proved effective, when the new Law on judicial review was adopted in 2004, the legislator tried to get rid of the administrative appeal when the Prefect is lodging the action. Lack of correlation with the special legislation regulating the institution of the Prefect has kept the appeal mandatory for another 3 years (the second stage), but this "omission" was repaired in 2007, when the amended Law on judicial review expressly stated the exemption for the Prefect with regard to the mandatory exercise of the administrative appeal. This means that a direct court action is currently admissible (the third stage).

Nevertheless, this provision has proved to be unnecessary and unwanted in the case of the Prefects, as they are still using the administrative appeal procedure, only now in an informal way, in order to avoid court actions. Our research showed that all Prefects (42) have still been exercising the administrative appeal after 2007. The percentage of success regarding administrative appeals is quite good (87 % in average). No significant changes were noticed between the first two stages and the last stage with regard to the number of administrative appeals lodged by the Prefects. In this case, we are witnessing a struggle of good administration principles against written regulations, which is worth noticing.

Administrative Appeals in Fiscal Matters The pretrial administrative procedure in fiscal matters is based on the Code of Fiscal Procedure (Governmental Ordinance no. 92/2003). The chapter dealing with administrative appeals is regulated in detail,

[29] Dragoş (2005) and Dragos and Neamtu (2013).

as opposed to the general administrative appeal procedure, which is minimal. Chapter I (Articles 205–208) of the aforementioned ordinance refers to the right of contestation, namely to the possibility of contestation (art. 205), the form and content of the contestation (art. 206), the deadline for submitting the contestation (art. 207), and the conditions for renouncing the contestation (art. 208).

The administrative appeal regards administrative fiscal acts issued by a public authority, and it precludes the complainant to go to court as an alternative. The court action can be initiated only against the act issued as a solution to the administrative appeal. The appeal is resolved by the dispute resolution specialized units within territorial units of the Finance Ministry and then by the General Directorate for Appeals within the National Agency for Fiscal Administration (NAFA) for appeals against fees, taxes, contributions, customs duties, accessories, and diminishments of tax losses amounting to more than three million lei or pertaining to major fiscal contributors or against similar act issued by central authorities with fiscal inspection attributions (regardless of the amount). The appeals against other fiscal administrative acts will be settled by the fiscal authorities that issued the act. Appeals against the refusal to issue a fiscal administrative act will be settled by the hierarchically superior body of the authority/institution competent to issue the act.

The debated issue here is whether the appeal procedure is constitutional in terms of precluding the access to courts unless a final decision is issued by the fiscal appeal authorities. In our opinion, this is clearly against the Constitution, as administrative jurisdictional procedures should be optional and free of charge. The fact that the complainant has to wait until the review body issues a solution to the appeal and only then can he go to court makes the deadline for answering administrative appeals (30 days) useless. Previous legislation imposing a similar condition was declared unconstitutional (in 2003), so it is likely that as soon as the Constitutional Court has the opportunity to address this issue, it will decide again in the same vein.

Based on the research conducted for the purpose of this chapter, the administrative appeals were solved favorably for the applicant in 18.35 % of cases. In the same period, the courts decided in favor of the claimant with respect to 27.18 % of the amounts disputed in courts (NAFA activity reports).

Administrative Appeals in the Procedure of Issuing Building Permits With respect to building authorization procedures, the law institutes a complex procedure where the final decision is based on intermediary certificates, opinions, and legal notices. During this lengthy process, the dynamic of the decision making leaves few possible instances where the applicants can challenge intermediate decisions by administrative appeal and then before a court. The final decision is based on all these intermediate internal decisions, so challenging the final decision means also discussing the legality of internal intermediate decisions. Third parties can challenge final decisions if they are aggrieved in their rights or interests, following the general judicial review procedure.

Our research looked at the number of building permits issued yearly in the 20 cities from our sample (between 20,000 and 40,000) and at the rate of administrative appeals exercised against them (less than 0.5 %). The interviews conducted for assessing the low rate of challenges showed that the urban planning departments are actively involved in guiding the applicants through the decision-making process, even before filing an official building permit request. Most of the possible illegalities are avoided during the procedure. The participation of experienced architects in the process is also an explanation for the low rate of mistakes falling through the cracks. We were told that staff members are instructed to give all the necessary information to the citizens and to try to avoid the situations when somebody is requesting an authorization without complying with all the legal requirements, which could lead to rejection and then to administrative appeals.

In this context, administrative appeals and then court actions are reserved for situations where the public body refuses to grant the authorization because the law is interpretable or in cases where the applicants insist on suing the public body for its administrative silence. In these cases, the administrative appeal dose not play a concluding role, so the litigation ends in court.

Administrative Appeals in Freedom of Information Cases The 2001 FOIA provides that persons whose access to public information is refused can challenge that refusal before the competent body (not mandatory) and then before the court. Despite numerous situations described in the media and reports by NGOs that refer to incomplete answers, breaking of deadlines, etc., the administrative appeals in this field are rare (at the level of our sample at least)—less that 1 % of cases, and they regard usually information that should have been made public. It is even less likely to have citizens go directly to court. At the level of the whole sample, for all years, we had 14 cases when aggrieved citizens went directly to court. The rate of success before a court, following the administrative appeal, is 28 %.

Qualitative Data from Interviews

Internal administrative appeals were scrutinized within the framework of our research in the broader context of the activity of issuing administrative acts by the local public authorities. *Does the total number of acts adopted bear any relevance for the internal administrative appeals?* There are two different aspects that can be challenged with regard to administrative acts, namely procedural requirements and the content of the act itself. During the interviews, we were told that in almost all cases citizens, as well as the Prefects, challenge the legality of the acts itself (the content), and only in a limited number of cases they challenge the failure to meet procedural requirements. We hypothesized that those local public authorities that issue acts more frequently are more familiar with the procedural requirements of the law and thus are less prone to errors than those that issue administrative acts less frequently. This hypothesis was triggered by a prior research conducted by the authors on the issue of compliance with procedural transparency norms in rural area, which proved that those communities that adopt

administrative acts more frequently have a better compliance score.[30] Most of our interviewees agreed that our hypothesis is valid; however, in light of the fact that procedural requirements are challenged only rarely, this finding is of somewhat limited relevance in the context of our research. However, during the first stage of the research, it became obvious that there is a difference between urban and rural communities in terms of administrative acts revoked. Our interviewees told us that the errors that occur during the issuance of administrative acts are not related to the number of acts adopted per se but to the fact that small rural communities tend to lack legally trained personnel. One interviewee told us that the institutional context in urban and rural communities differs dramatically: "... in rural areas there are usually very few people who do not work in a specialized field. In urban communities public institutions have a large body of specialized public servants who can interact among themselves and provide better input into the issuance of an act ... also they can always go to a colleague or into another department and ask for further advice... this is not available in small rural communities." This brings us to the issue of administrative capacity, which is further discussed in this section. In conclusion, the number of acts adopted does bear relevance to the matter of internal administrative appeals. It is expected that local public authorities in large urban communities generate less errors during the process of issuing administrative acts. Though not all of our interviewees agreed that the number of acts per se related to how local public authorities perform in this regard, they all cited other factors that are somewhat related to the number of acts issued: size, lack of trained personnel, limited administrative capacity, etc.

Why is the percentage of challenged administrative acts so low? In the absence of comparative national researches, it is hard to discuss the percentage itself, although there are explanations in the literature.[31] There are two possible explanations for this situation in the Romanian context: either the public sector has undergone a significant transformation in the last years in the sense of its professionalization or the citizens are afraid to challenge public authorities. Our opinion is that the public sector is prone to error in numerous circumstances, but the legal and natural persons choose, for various reasons, not to challenge public authorities. The distrust in a favorable outcome of the administrative appeal combined with the lengthy and risky court proceedings that would follow contribute also to this result. The authors believe that this explanation fits the Romanian political and administrative context, as we cannot consider the professionalization of the public sector as a possible explanation (the lack of professionalization seems to be also supported by the fact that the data show no significant evolution from 1 year to the other—basically, the percentages of challenged acts from 2004 to 2009 have stayed virtually the same). There are numerous studies that indicate that the Romanian public administration is unprofessional, highly politicized, and lacking proper implementation capacity despite the existence of a relatively adequate legislative

[30] Dragoș et al. (2012), pp. 134–157.

[31] Lens (2007), pp. 382–408.

framework.[32] During the communist regime, public administration had been perceived as a main actor within the state and party machinery. Following the collapse of the communist regime, the citizens' perception of the public institutions have started to change gradually; however, most Romanians do not perceive themselves as *clients* of the public authorities but rather as subjects that need to be administered by a higher order. Another concept that can be used to explain this situation is the concept of demand on behalf of the citizens. The concept has been used in studies regarding public participation, civism, transparency in the decision-making process, etc. It refers to the pressure exercised by the citizens by means of a proactive behavior.[33] It usually implies that citizens organize themselves and determine public authorities first to comply with the already existing regulations that facilitate public participation and, second, to go beyond the legal provisions and to design their own mechanisms for civic participation and consultation. It is said in this context that the citizens' demand triggers a proactive approach on behalf of public authorities that feel compelled to do more and to meet the citizens' demand. This "fear" or "shyness" of the citizens when it comes to challenging administrative acts needs to be also discussed in light of the nature of the internal administrative appeal, namely optional or compulsory. One of the main arguments against mandatory administrative appeals states that it is unfair to require the citizen to go in front of the public administration for a second time since the first decision is against his/hers rights or interests.[34] In light of the relatively high rate of success of the internal administrative appeals (when used), of the fact that the contested act is often only perceived to be illegal by those interested, which may be proved wrong, and also of the fact that the administrative appeal is intended precisely to make the public body reconsider its decision, the authors object to such assertions.

Another question raised by the research is why local public authorities in rural areas are more prone to revoking/modifying their administrative acts. Foremost, for both urban and rural settings, the inability of local public institutions to issue acts that stand the test of legality can be explained from the perspective of a limited *administrative capacity*. At the level of rural communities, public authorities face additional challenges: for the Romanian context, perhaps the biggest challenge refers, in the context of issuing administrative acts, to the lack of properly trained human resources and especially of legal support staff who should assist political decision makers in issuing legal decisions.

The interviewees also offered additional explanations that are imbedded in the functioning of the Romanian local public administration—contextual factors. Often we were told, local elected officials in rural areas (the mayor and the local counselors) perceive themselves as "above" the position of the secretary who acts as their legal adviser. Sometimes these officials decide to ignore the legal advice of

[32] Tudorel et al. (2006), pp. 58–59; Ioniţă (2007), pp. 164–168; Dragoş and Neamţu (2007), pp. 632–636; and Trauner (2009), p. 6.

[33] Piotrowski and Van Ryzin (2007), pp. 309–310.

[34] Iorgovan (2002), p. 256.

the secretary and issue illegal administrative acts. Another explanation refers to the human and financial resources that public authorities are willing to commit to defend their acts. During interviews, we were told that very often the public authorities from urban areas decide to go to court even if they know that their acts might be illegal. Confronted with such a situation, when there is the slightest indication of illegality, authorities from rural areas are more willing to reconsider their acts. Secretaries from rural areas stated that they waste precious resources by going to court since they have no other lawyers or legal counselors who could go to court. Finally, the interviewees claimed that some of the errors that occur, both in urban and rural areas, have to do with a legislation that is constantly changing. If the secretary is in charge of a large number of issues, in addition to the supervision of legality, then it is possible not to be able to follow this evolution as it occurs.

Why is there a higher rate of success for the internal appeals lodged by the Prefect compared to the ones initiated by legal or natural persons? The answer rests in the construction of the administrative system and, more specifically, in the relationships that exist between the local public authorities and the Prefect. From a legal standpoint, there is no hierarchical or subordination relationship between the Prefect and the local public authorities. With regard to the monitoring of the legality of the acts issued by the local public authorities, the Prefect acts as "watch dog" acting on the behalf of the public interest. The lack of any subordination relationship is proven by the fact that the Prefect cannot revoke the act considered illegal; rather, the Prefect can initiate a dialogue with the issuing authority, and if this fails he can lodge a court action. The court is the instance that decides in the end with regard to the legality of the act. Despite this legal construction, in practice things are quite different. Public authorities perceive the Prefect as a "superior" body, whose power emanates directly from the central government. Therefore, in the tradition of a centralized state, the Prefect's opinion is something to be taken into consideration. During a previous research on transparency in the decision-making process, we were told by representatives of local public authorities that they fear the reaction of the Prefect if they do not comply with some of the procedural requirements of the law. They were less fearful however of the reaction of the citizens. This needs to be understood in relation to the fact that the transparency law does not establish any kind of reporting duties in front of the Prefect for the local public authorities. However, because the Prefects require this type of reporting, local public authorities strive to offer them the required information.[35]

A final question raised by the research regards the justification for a rather straightforward use of administrative appeals despite explicit provisions of the law that restricts revocation of acts that have "entered the civil circuit." In order words, how can the administrative appeal still be effective when administrative acts cannot be revoked after they "entered the civil circuit," understood as the moment when the act is communicated or published? Shouldn't be this prohibition an impediment to revocation by the issuer?

[35] Cobârzan et al. (2008), p. 61.

To begin, we asked legal secretaries from the sample how they interpret the legal concept of "entering the civil circuit," and the unanimous response was that is equivalent with "communication or publication of the act." In this context, a striking response (also unanimous) was that, although there were acts revoked by their institution, there were no cases of revocation after the act has "entered the civil circuit." In other words, there is a mismatch between the declared interpretation of the concept of "entering the civil circuit" and the actual application of it. Upon further investigation, based on their responses, we discovered that in fact revocation of administrative acts takes place regardless of the interdiction from art. 1, par. 7 of the Law on judicial review, even after the act has "entered the civil circuit." Basically, respondents unveiled a "creative practice" of considering the acts that have not created legal effects in other fields of law or have not been followed by other legal acts or contracts still revocable, in spite of their "entrance into the civil circuit." The practice was not sanctioned until now because there were no third persons affected by the revocation of the act. Only in such cases a conflict between the "unrestricted" revocation and the interdiction stemming from the law can appear. A different way of dealing with cases where the issuer is not sure whether the revocation is possible or not is to direct the appellant to the court instead. There are no cases of public authorities challenging themselves for the unlawful act in court, as the law states.

14.2.2 Subjective Versus Objective Review

Individuals and legal entities are entitled to a subjective review when they invoke their rights and interests protected by law. In such cases, the judge can annul the act and order replacement, order the public authority to act (when the authority has failed to do so), and order compensation for damages. The case law is not in favor of administrative law judges replacing an annulled decision with their own judgment or ordering an "injunction" due to the interpretation of the separation of powers principle in the Romanian legal system.[36] Sometimes, the court confines itself to ordering an answer to the petition of the plaintiff, whatever that would be, as this is considered to be in line with the separation of powers principle.[37] There are, on the other hand, instances when the court leaves the legal solution to be taken by the public authority; however, it specifies what the legal solution is in that particular case.[38]

Substantive review of administrative decisions in Romania confines itself to matters regarding the subjective rights and the interests of persons aggrieved by an

[36] Vedinaş (1999), p. 124; Popescu (2005), p. 70.

[37] Supreme Court of Justice, Administrative and Fiscal Law Section, Decision no. 3094/2000.

[38] Cluj Appellate Court, Commercial, Administrative and Fiscal Law Section, Decision no. 3012/2008.

administrative decision. The courts are, in general, reluctant to apply law principles when assessing the substantive part of the claim when written rules applicable to that situation exist. Even when the discretionary power is analyzed by the court, the tendency is to hold on to a safe ground, which is the written law, and not to venture into the not-yet-mapped territory of legal principles. For instance, there is no case law promoting a proportionality review.

The possibilities of redress in subjective review contrast sharply with the possibilities that exist in the presence of an objective review. When the action is brought before the court by private parties on the basis of public interest (general interest), the review can be only objective, so the judge can only annul the act, without granting compensation or ordering the replacement of the act. No such review is possible for failure to act (the refusal, explicit or implicit, to act).

Until 2004, public interest litigation was not possible, unless expressly provided by law. One of the few cases where such an action was admissible was the one exercised by the Prefect, who could challenge in court unlawful decisions of the local autonomous public bodies. Though not clearly stated, the provision of article 1 of the Law on judicial review from 2004 introduced an *actio popularis*, in the sense that every individual or legal person, either private or public, could go to court and challenge a decision based on public interest. Recently, under an amendment introduced in 2007, this provision was complemented with a specification, according to which *private* persons (individuals or legal entities) can invoke the violation of the public interest only when it is a consequence of the violation of their private interest (subjective right).

There are cases when the objective recourse is exercised by public authorities, which are responsible for observing the legality of administrative action. For example, the Prefect, a representative of the Government at the county level, has the responsibility of bringing local autonomous authorities to court when they issue illegal decisions. Another example is that of the National Agency for Civil Servants, which can also bring to court public authorities when they disregard the provisions found in the public function legislation (recruitment procedures for public service positions, disciplinary measures, etc.). It is a public interest (objective) action, based on the general need for the public administration to act lawfully. The type of action that these plaintiffs have standing for is also different. While individuals and legal persons can lodge an action of full jurisdiction, asking for the annulment/modification of the decision or compensation for damages, the public body, the Prefect, and the National Agency of Public Servants can lodge only annulment actions (similar with the *recours pour excès de pouvoir* in the French law).

The Romanian law provides for special standing in the case of some distinct public authorities. According to the Law on judicial review no. 554/2004, the Romanian Ombudsman, upon exhausting its own mediation procedure, has the power to go to court in the name of the applicant (petitioner) if the Ombudsman feels that the rights of the petitioner can be defended better in this way. Upon filing the action, the petitioner is asked by the judge if he/she wants to assume the legal action and continue the process; if the petitioner does not wish to continue the litigation, the action is considered dropped (see Sect. 14.7 for more details). In the

same fashion, the law empowers the prosecutor's office, which can also act in the name of the plaintiff and challenge a public decision. The criticism here lies in the fact that public prosecutors should not be free-of-charge lawyers for private parties when those parties are able to pursue litigation by themselves.[39] They should act only on behalf of parties that are not able to stand in court by themselves (disabled persons, minors, etc.).

14.2.3 Conditionality Between Administrative Appeals and the Judicial Review

The administrative appeal is generally a prerequisite for exercising the court action. The legal consequence of not exercising the mandatory administrative appeal is the inadmissibility of the court action.[40] That is, when the deadline for exercising the administrative appeal has expired. When the court action is lodged within the deadline for administrative appeal, the action will be dismissed as premature. The same solution applies when the administrative appeal was exercised but the deadline for answering has not expired.

The attempt of the party to solve the dispute within the court proceedings cannot be considered as an administrative appeal, but it can be treated as mediation or judicial agreement (settlement). Also, the significance of the answer to the administrative appeal, received after court proceedings have been initiated, is the same—an attempt from the public authority to mediate within court proceedings.

The New Civil Procedure Code from 2012 brings about major changes regarding court procedure by increasing the dispositive role of the parties. Thus, although the administrative appeal is a mandatory pretrial procedure, its absence can be invoked only by the defendant. Until now, the judge has an active role in asking for proof of exhaustion of pretrial remedies.

The scope of the administrative appeal should coincide with the scope of the court action. In other words, in principle, the plaintiff cannot modify the scope of the review when reaching the court, although this is not provided expressly in the law. Consequently, perfect identity is not required by courts. Minimum requirements are that administrative appeals should regard the same decision that is contested in court, and third parties cannot benefit from administrative appeals exercised by the addressee of the act.[41] Challenging the unlawful act can be supplemented in court by a plea for compensation, or the initial request for

[39] Dragoş (2005), p. 38.

[40] Supreme Court of Justice, Administrative and Fiscal Law Section, Decision no. 416/1995; Supreme Court of Justice, Administrative and Fiscal Law Section, Decision no. 134/1991; Piteşti Appellate Court, Administrative and Fiscal Law Section, Decision no.79/1998.

[41] Bucharest Appellate Court, Decision no. 1445/2006.

annulment can be supplemented by a request to oblige the public authority to issue a new act.

There is also a debate over the admissibility of administrative appeals exercised by other interested parties. The Romanian courts argued that in the case when the administrative appeal was already exercised by another addressee of the same administrative decision, the party in court proceedings could benefit from it.[42] This solution is not all together acceptable, as the reasons for annulment can be different, and the administrative appeal could have a different outcome if exercised by that person. However, if the object of the court action and the action is the same, the court should proceed and include the new plaintiff into its judgment. Moreover, the solution is debatable when the two parties have conflicting interests.

When a third party is affected by the solution given in the administrative appeal, this party has no obligation to lodge again an administrative appeal. A direct court action is admissible in this case.[43] The German law provides for the same solution, although in the administrative procedure the third party has had the opportunity to be heard when the decision looked like it could have adverse effects.[44] The ECHR has stated repeatedly that national mandatory administrative appeals are not in breach of art. 6, par. 1 of the Convention.[45] Nevertheless, there are voices that oppose such interpretation and thus any similar interpretation of the national constitutional courts in cases when the administrative appeals are mandatory and restrict in any way the direct access of citizens to justice.[46] These scholars argue that any mandatory hierarchical appeals are to be considered as jurisdictions, and thus should be optional and free of charge, as the Romanian Constitution states for administrative jurisdictions. Any other solution, it is argued, would make them an obstacle to the access to justice. The appeal to the issuer is considered to be in line with art. 6 of the ECHR because it is not litigation between two parties, solved by a third entity, but mediation between the same parties that will access afterwards the justice system.[47]

The Constitutional Court of Romania has expressed the same opinion as the ECHR regarding the national provisions instituting administrative appeals. They are constitutional in view of art. 21 of the Constitution on access to justice because they are intended "to assure a climate of order, to avoid abusive procedures and to guarantee the rights of third persons."[48] In an earlier decision, the Court stated that "it is at the exclusive discretion of the legislative to institute such procedures,

[42] Supreme Court of Justice, Administrative and Fiscal Law Section, Decision no. 1934/1999.

[43] Dragoş (2005), p. 95.

[44] Autexier (1997), p. 303; Auby and Fromont (1971), p. 44.

[45] Decision Le Compte and others v. Belgium (1) from June 23, 1981, par. 51; Decision Ötzurk v. Germany from February 21, 1984, par. 58; Decision Lutz v. Germany from June 25, 1987, par. 57.

[46] Deleanu (2003), p. 15; Chiriță (2007), p. 312.

[47] Chiriță (2007), p. 312.

[48] Decision no. 441/2005.

in order to speed up the court proceedings, reduce the expenses of the parties and keep irrelevant matters off courts, as long as the decision on administrative appeal is challengeable in court."[49]

The conclusion is that, in all cases, the use of administrative appeals should allow for appropriate judicial review, which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration. This approach, doubled by the establishment of guarantees intended to make the use of administrative appeals effective (generous deadlines, thorough reasoning of the decisions, and incentives for public bodies to keep matters off courts, etc.) shall always be in line with art. 6, par. 1 of the Convention.

14.3 Tribunals or Quasi-Judicial Bodies

The organization of the appeal following a judicial model can lead to the establishment of administrative bodies with quasi-judicial nature. They are hybrid entities whose purpose is to deal with administrative disputes outside the courts of law but to assure at the same time a proper and balanced protection of the rights of the parties. Their main function is to adjudicate disputes between citizens and governmental agencies. Although tribunals in certain national jurisdictions adjudicate many more administrative disputes than courts, their role as "dispensers of administrative justice"[50] receives relatively little scholarly attention. An effective administrative tribunal addresses in the same time the shortcomings of an administrative appeal procedure (lack of independence) and those of a court proceeding (length, associated costs, and, in some cases, lack of specialization), providing for an independent review and quick redress in (sometimes) less complex matters, which do not need the intervention of a court. In this section, the role of these bodies is examined in relation to their function of keeping certain legal disputes outside the courts of law.

In Romania, there is only one review body that resembles a tribunal—it is called the National Council for Solving Legal Disputes—and it deals with public procurement cases. The Council is an administrative jurisdictional (or quasi-judicial) review body, independent from other structures with regard to its decisions. In 2010, the independence of the Council was further strengthened: if previously the Council functioned within the institutional framework of the General Secretariat of the Government, currently all references to such dependence are eliminated from the law. The law also makes currently a more clear distinction between the administrative activity of the Council and its ruling as an administrative jurisdictional body. The members of the Council are civil servants with a special status, appointed by the prime minister, based on a competitive selection process, and upon

[49] Decision in plenary session no. 1/1994.

[50] Cane (2009), p. 5.

the fulfillment of several mandatory requirements regarding previous experience/educational background. They are evaluated (with regard to the administrative and organizational activity of the Council) by a mixed Committee that comprises representatives of the National Authority for Regulating and Monitoring Public Procurement in Romania, of the Romanian Parliament, of the National Agency for Civil Servants, and of the Competition Council.

The role of the review bodies in the public procurement field has suffered many changes in the last years. The preeminence of pretrial procedures (administrative appeals) over the procedures conducted by courts seems to be the underlying feature of this legislative dynamic. Before 2011, the claimant was free to choose between the Council and the court of law. If an action was lodged in the same time with both the Council and the court of law, the procedure before the Council would automatically be suspended. Statistics show that from 2008 and till the end of 2010 the number of complaints before the Council had increased significantly (National Council for Solving Legal Disputes, Statistics); incentives for going first before the Council include speediness and flexibility of the procedure (legal obligation to solve the complaint within 20 days, possibility given to the complainant to specify the object of the complaint after lodging it), presumably lower costs (no need to hire a lawyer, no fees, at least until mid-2010), a general distrust in the judicial system and perception of major delays associated with court litigations (not necessarily in public procurement but in general), and, finally but very importantly, the effect of automatic suspension, associated until 2010 only with the proceedings before the Council (now abrogated).

In 2011, a mandatory and exclusive action before the Council was introduced. Against the decision of the Council, the tenderer could lodge a complaint with the Appellate Court in whose jurisdiction the premises of the contracting authority are located in.

In 2012, the constitutionality of this mandatory and exclusive review was questioned. The Constitution states that administrative jurisdictions have to be elective (optional) and free of charge. The constitutionality of the review by the Council was assessed against these two main criteria. The law establishes that in the cases when the tenderer chooses to lodge his initial complaint with the Council, the Appellate Court is the recourse instance. A first constitutionality issue is related to the mandatory character of the review before the Council introduced as of 31.12.2010. This provision clearly violates the provision of the Constitution that states that administrative jurisdictions have to be elective. Consequently, in 2012, the Constitutional Court stated that the law should be interpreted in the sense that it does not impede the alternative access to courts.

The law introduced penalties for lodging a complaint with the Council that is then rejected—the complainant will lose a portion of the deposit made with the contracting authority. This contradicts the constitutional principle of having free-of-charge access to administrative jurisdictions. This is the second constitutionality issue, still untouched upon by the Constitutional Court.

Another debated issue refers to the legal status of the Council—although according to the law it is an administrative jurisdictional (quasi-judicial) body; in

practice, it tends to behave more like a court of law. Some aspects that lead to this conclusion are analyzed below:

– In situations when it received a complaint that was not within the boundaries of its competence, the Council has declined its competence in favor of the court. Such an action is considered incompatible with the legal nature of the Council, which should have rejected the complaint as inadmissible. The decline of competence is a procedure reserved for courts of law.
– The Council has no standing in court actions brought against its decisions, a feature similar to that of a court.[51] This is a unique situation in the Romanian legislation, as other administrative jurisdictions are part of the legal action brought against their decisions. This provision establishes an exceptional status for the Council. We believe that there were practical considerations justifying this measure—if granted standing, the Council would have had a part in court proceedings all over the country since the recourse against its decisions is filled with the Court of Appeal in whose jurisdiction the contracting authority is located. Nevertheless, the legal fundament for this approach is missing.
– There is debate over the competence of the Council to ask preliminary questions to the CJUE. The literature is divided between those who overlook the subordination of the Council to the Government and treat the institution as a tribunal[52] and those who define the institution as an administrative body with jurisdictional powers.[53]

In the context of a larger research on the effectiveness of ADR tools in administrative law, this case study illustrates the ever-growing role played by alternative review mechanisms in relation to the well-established court system, overloaded with cases and ineffective in providing justice, especially in new democracies.

It should not be overlooked, though, that the background against which these administrative appeal procedures thrive is the current need to access structural funds as quickly as possible. The courts are considered a menace for this process, impeding the absorption process and offering abusive tenderers a chance to delay necessary projects. However, walking on the edge of constitutionality may prove an erroneous policy choice if the Constitutional Court does not change its jurisprudence on this matter, with effects that are difficult to assess as of yet. And an assessment of the role of ADR tools in administrative matters in other fields than public procurement, not subjected in such a way to the pressure of accessing structural funds, may lead to different conclusions.

From the annual reports of the Council, we found out that in very few cases the 20-day deadline for solving a complaint was overpassed; therefore, one can talk about speedy procedures. The institution deals with a significant workload—it heard 6,300 cases in 2011 and 6,000 cases in 2012, whereas in its entire activity

[51] Şerban (2008).
[52] Serban (2012), p. 309.
[53] Clipa (2012), p. 186.

(since 2007) it has heard over 40,000 cases. In recent years (2011, 2012) in around 30 % of the cases, the solution was favorable to complainants; the rest of the complaints (70 % of the total number) were rejected. In only 6 % of cases the procedure was annulled *ex tunc*. Only 12 % of the decisions are challenged before the court every year, with just 10 % of them being overturned by courts. The overall percentage of decisions overturned by courts during the entire period of the functioning of the Council is only around 2 %. A 98 % rate of final decisions (either maintained by courts or not challenged before courts) speak volumes about the effectiveness of the Council and its increased expertise over the time.

14.4 Other ADR Tools: Mediation and Judicial Agreements

In 2006, a special law on mediation was adopted,[54] which allows any court proceedings to be ended as a result of an agreement between parties. After the amendments brought in 2010, courts and arbitration bodies, as well as other jurisdictional authorities, have the obligation to inform parties about the possibility of mediating the dispute and to recommend them to resort to it. Recently, in 2012, the New Code of Civil Procedure forces judges to organize a pretrial session to inform parties about the benefits of mediation and to allow them to resort to mediation for dispute resolution. The court proceedings can go on only after the parties have refused mediation and the judge takes notice in writing of this refusal. The provision was criticized by judges as burdening for courts and for adding a new useless document to the file of the case, as most of the parties would want to pass quickly through the mediation session and engage in court proceedings. Mediators, on the other hand, appreciate the opportunity given by the law to try to convince parties of the advantages of mediation and are confident that mediation procedures will increase, thus decreasing the caseload for courts. It remains to be seen how effective mediation can be in terms of an alternative mechanism to court proceedings and whether it will be employed in administrative law cases as well. There is some skepticism among administrative judges that mediation should apply to disputes in administrative matters.

According to art. 1 of the Law on mediation, mediation is described as "a method of amiable resolution of conflicts, with the help of a specialized mediator, in a setting of neutrality, impartiality, confidentiality and with the free participation of the parties." Thus, mediation may commence at the initiative of the parties or at the recommendation of the judge with the consent of the parties (art. 61). It can be carried out only regarding rights that can be disposed of by the parties, a provision that has its importance in the context of administrative law, where public authorities should accept mediation only in cases when the object of the mediation is not

[54] Law no. 192/2006.

against the provisions of the law. The mediation can be also partial. During the mediation, the prescription of the court action is suspended.[55]

In order for the mediation procedure to take place, the court proceedings shall be suspended, at the request of the parties. The maximum deadline for reaching an agreement is 3 months from the suspension. After that, the term limits for initiating court proceedings start running again. The mediation will be acknowledged by a court decision, and the party who paid judicial taxes shall be reimbursed.

In family law cases and in criminal law cases, there are special provisions, of a restrictive nature, regarding the scope of mediation. The mediation can be conducted for issues of consumer protection, with the observance of the European and national regulations. The mediation has taken speed in family matters (divorce), in commercial disputes, in criminal cases (compensation), in labor law,[56] but there is no data regarding case law on mediation in administrative disputes.

The question is the admissibility of mediation in administrative law cases. No case law and no in-depth analysis surfaced on this issue up to now. The question here is whether public authorities can conclude an agreement with a private party when the public interest is at issue and thus legally self-bind its public power. Can the administration bind itself regarding the future use of public law powers it exercises? Can public authorities "negotiate" the public interest, taking into account that they pursue it all the time?

The law only states that the mediation agreement cannot include clauses that are "against the law or against the public order" (art. 46 of the Law on mediation). In this context, the answer to the above questions seems to be affirmative, as no legal provision forbids it expressly (art. 46 of the Law on mediation). We argue, though, that such agreements have to be very carefully concluded because the line between legality and illegality is very thin in this regard. Several issues are raised by the very idea of welcoming mediation in administrative matters.

First and foremost, it is hard to imagine the legality of an administrative decision being the object of negotiation with private parties. In other words, public authorities should not accept that they have issued an illegal decision when this is not the case, only to prevent a court action or to put an end to court proceedings.

Second, an illegal decision can be "covered" as a result of mediation or negotiation, bearing effects only for those involved in mediation or negotiation. The result of the negotiation is that the interested party renounces to the intended action in court. This is possible only in extrajudicial proceedings, as the court has to decide upon legality of the decision *ex officio*, as a matter of public interest.

The mediation can be about the compensations derived from the illegal act. Upon admittance that it has issued an illegal act, the public authority can agree to compensate the interested person, and the latter renounces to the right to go to court.

In all cases, we argue that the weighting test should be the public interest, in the sense that the mediation agreement has to be conditioned upon a real gain for the

[55] Păncescu (2010).

[56] Ignat et al. (2009), p. 25.

public interest. The plaintiff can renounce the compensation claim in court, for instance, in exchange for the public authority revoking the decision. Under no circumstances should the agreement accommodate the private party and be detrimental to the public interest or unlawful. Where opposition by interested third parties has been expressed, no agreement excluding that party should take place. For this to happen, transparency of the mediation procedure has to be assured, and the hearing of the interested parties is absolutely necessary.

By the same token, we argue that it is admissible to have an agreement between the beneficiary of the administrative decision and a third party aggrieved by the act. The aggrieved person renounces the legal action, and the agreement enters into force, in exchange for compensation from the private party who is the beneficiary of the agreement. There are opinions that this transaction can be concluded even without the formal consent of the issuer of the decision, namely the public authority.[57] This may be true when no legal proceedings have commenced. If no administrative appeal was lodged, the public authority can be left outside the procedure. If, on the other hand, the aggrieved person has already filed an administrative appeal, the public authority that issued the decision should take notice of the agreement by a formal decision that puts an end to the legal dispute between it and the private party. When the public authority does not acknowledge the agreement, it will be held to answer to the administrative appeal and solve the dispute between it and the aggrieved party. When the agreement is concluded during court proceedings, different rules apply, as the court has to acknowledge the agreement by a court decision.

There are instances when it is difficult to decide what the best way to defend the public interest is. Thus, if a decision is contested by a third party but its revocation would trigger the action for compensation by the beneficiary of the decision, the public authority is in a "lose–lose" situation. In this case, the best approach for the public authority is to try mediating the two interested parties in order to put an end to the dispute. The argument is that a court action is risky for all those interested, and mediation could solve the problem faster. If that does not work, the public authority has to weigh very well the outcomes of its actions, performing a cost-benefit test. Based on this assessment, revoking the decision appears to be the best solution, as in this case the compensation would be paid only to the beneficiary of the act, while in the opposite situation, the court can anyway annul the act and decide compensations for both the beneficiary and the third party.

By interviewing several mediators for the purpose of this chapter, we found that public authorities are reluctant to go into a mediation that regards compensations, directing the person to get a court decision in this sense. This comes from the fact that the Court of Auditors refuses to approve such compensation unless the public authority was "forced" by a court decision to grant it—a narrow interpretation of the public interest imperative but very much applied in practice. Apparently, this practice is a major deterrent for mediation in administrative disputes,

[57] Costin and Costin (2006), p. 110.

as compensation is usually what the claimant is after in these types of disputes. *Per a contrario*, mediation should be easily accepted when the claimant requests only annulment of the unlawful decision. No cases occurred until now, according to the data available on the Mediation Council's website[58] and from the interviews conducted by the authors of this chapter with registered mediators.

Mediation is possible in administrative contracts when the termination of the contract is in the best interest of the public authority (in the public interest), and there is no fault of the private contractor. On the contrary, it is debatable if the public body can negotiate the termination of the contract when there is a breach of the contract on the part of the private contractor. In this case, the solution of dropping the claim for compensation should not be considered because it is not in the public interest.

An instance when the admissibility of such mediation is debatable is when the plaintiff agrees to drop the contestation against the public procurement procedure, which is blocking the conclusion of the contract, in exchange for compensation. Is the public interest served well by the agreement? Is the imperative of executing the contract more important than the legality principle? Should the public budget suffer the grievances caused by an unlawful procedure in order to make in the end and overall better use of public funds? The questions rose by this example show that the solution is not simple at all. We argue that such an agreement can be concluded only if the cost-benefit test gives a clear indication in the direction of dropping the action. Again, no written law or case law exists on this matter.

Judicial agreements include mediation, but they are not confined to it. There are other types of judicial agreements, slightly different from mediation in procedure and effects. For instance, the transaction is similar in many ways to mediation but has also specific features: it does not imply the existence of a mediator (third party); it is not structured in the law, as mediation is; and it can lead to the adoption of a document with legal effects between parties (transaction) without the need to resort to the court or to a notary in order to be enforceable. In other words, the parties can invoke the "exception of transaction" when going to court, while there is no "exception of mediation."[59]

An instance where we consider that a judicial agreement can be concluded as part of administrative law proceedings is when the public authority does not answer to the administrative appeal lodged by the complainant, court proceedings commence and then the public authority agrees that it has issued an illegal decision and revokes the act. The revocation of the decision during the proceedings is to be enclosed in a judicial agreement, which takes notice of the revocation and states other measures that have to be taken—issuance of a new act, performing an administrative operation, etc. The courts in Romania usually either continue the procedure in order to decide upon other claims or dismiss the procedure as lacking object.[60]

[58] www.meedierea.ro; www.cmediere.ro.

[59] Deleanu (2006), p. 276.

[60] Piteşti Appellate Court, Decision no. 528/R /16.05.2008.

There are also administrative bodies that can be included in the mediation paradigm. One such public body is the *National Council Against Discrimination* (NCAD). This administrative agency is the autonomous agency, under Parliamentary supervision, responsible for the protection against discrimination.[61] Its tasks relate to guaranteeing the application of the principle of nondiscrimination in accordance with national and international legislation.

First and foremost, the Council acts for prevention of discrimination by information campaigns, studies, reports, assistance for those discriminated, etc. The second major task is interesting with regard to the opposing models (traditional and dialogue) because it concerns *mediation* between parties involved in discrimination conflicts, with a view to reducing such conflicts from occurring. Thus, although the Council can apply *sanctions* in case of infringement of regulations against discrimination, in the body's mission is explicitly stated that this is not an objective *per se* of the agency, and the mediation takes priority. Finally, after an occurrence of discrimination has been determined, the Council will monitor those involved, to prevent future infringements. Analyzing the agency at issue, it can be observed that it has no regulatory powers, but its powers of review are preceded by duties to mediate the conflicts through dialogue.

14.5 The Ombudsman

14.5.1 Background and Evolution of the Ombudsman Institution in Romania

In Romania, the institution of the Ombudsman is called the People's Advocate and was established in 1991 when the new democratic Constitution was adopted. Romania was the first of the former communist countries to adopt such an institution and from the beginning its role was more or less of a defender of human rights (in the Constitution's text, reference to the Ombudsman is placed under the chapter "Fundamental rights, liberties and duties"). Even though the institution was created at the beginning of the 1990s, its activity began only in 1997, when the functioning law (Law no. 35/1997), in fact the statute of the Ombudsman institution, was adopted by the Parliament. This law was repeatedly amended in 1998, 2002, 2004, and 2010.[62] With each amendment, the Ombudsman was given more competences, adding new mechanisms for pursuing the duty of defending citizens' rights and liberties from breaches by the public authorities. In 2003, when the Constitution was amended, the Ombudsman was given the possibility to challenge laws and ordinances before the Constitutional Court via the pleas of

[61] Governmental Ordinance no. 137/2000.

[62] Balica (2011), pp. 334–358.

unconstitutionality. Moreover, in 2004, when rewriting the General Act for Administrative Review (Law no. 554/2004), the Ombudsman was vested with the power to file a court action in the plaintiff's name if he/she believed that this was the only manner to reestablish the rule of law.

Based on the typologies of the Ombudsman institutions throughout the world,[63] the Romanian Ombudsman corresponds to the "hybrid model," being a National Human Rights Institution and having extensive powers to investigate the public authorities' activities. The Romanian Ombudsman has also powers to protect the right to information, and within the period 2001–2005 the institution was responsible for the protection of personal data until a special authority was created in this area—the National Authority for the Protection of Personal Data. Ion Muraru, a former Ombudsman for two consecutive terms, considers in this respect that the institution meets the requirements of a classical Ombudsman or of the European Ombudsman, having also "a few extra features regarding the control of constitutionality and the relation with the constitutional judges."[64] Other scholars[65] define the Romanian Ombudsman both as an administrative one, focused on mediating the relationship between the administration and the people, and a parliamentary one, mandated to observe the lawfulness of the administrative action between the sessions of the Parliament.

It must be said from the very beginning that in the Romanian literature, the mission or main task of the Ombudsman institution was described in a variety of ways. Brânzan and Oosting[66] argues that the task of the institution in the Romanian context was to protect people's rights and freedoms, as well as to ensure fair and transparent governance, that is, guaranteeing that the governmental institutions do their job according to the law and to discourage corruption and abuse of power. According to Săbăreanu,[67] the Ombudsman, in the posttotalitarian states, must ensure respect for human rights and engage in the structural problems of the country, especially where the independent judicial system is passing through different stages of reconstruction. Brânzan and Oosting,[68] as well as Vlad,[69] talk about the role of educator of the Ombudsman—that is, informing people about their rights in relation to the government, especially through its annual activity reports or other publicity means.

The effectiveness of the Ombudsman institution needs to be understood in the context of the transition from the communist regime to a democratic one. The Ombudsman institution, alongside other "ideals" of democracy such as openness and transparency in government, protection of personal data, freedom of speech,

[63] See Kucsko-Stadlmayer (2008) and Reif (2004).

[64] Rădulescu (2009).

[65] Drăganu (1998), Muraru (2004), and Vlad (1998).

[66] Brânzan and Oosting (1997), p. 5.

[67] Săbăreanu (2001), p. 20.

[68] Brânzan and Oosting (1997), p. 5.

[69] Vlad (1998), p. 164.

etc., was perceived more as a value associated with democracy than an instrument for achieving good administration. Nodia[70] describes the resentment against the communist bureaucracy and its perks as the mobilizing factor for popular action in the former communist countries. In this context, the institution of the Ombudsman was regarded as the perfect tool to fight the bureaucracy. The challenges encountered in the functioning of the institution have proven however that the former communist countries required more learning by doing than the earlier mass democracies of the West.[71] The mere existence of the Ombudsman institution, regulated through the Constitution and its statute, has not automatically improved the level of legal protection enjoyed by the citizens in their relation with the public institutions. As Deleanu[72] states, implementing the Ombudsman institution requires time, democratic environment, legal and political culture, kindness and solicitude. This was hardly the case for 1991 Romania, the year when the institution was firstly introduced in the Constitution.[73]

14.5.2 Competences

The competences attributed to the People's Advocate according to art. 13 of Law no. 35/1997 are

- To receive and coordinate the complaints that were made by persons who were aggrieved by a violation of their rights or freedoms by the public administration authorities and to decide upon these requests;
- To supervise the legal settlement of the received complaints and ask the public authorities or the public servants to stop the abuse and to remedy the damages;
- To draft opinions at the request of the Constitutional Court;
- To directly challenge a law before the Constitutional Court before its promulgation;
- To raise pleas of unconstitutionality with respect to laws and governmental ordinances;
- In addition, according to art. 60 of the Romanian Constitution, to present reports to the two Chambers of the Parliament, annually or upon request; the reports may contain recommendations regarding legislation or any other measures for protecting citizens' rights and liberties.

The People's Advocate can exercise his/her functions either *ex officio* or on his/her own motion or can be informed of a violation of human rights through petitions sent by citizens whose rights were breached by documents or actions of

[70] Nodia (1996), p. 26.
[71] Balcerowicz (1994), pp. 75–89.
[72] Deleanu (2006), p. 276.
[73] Hossu and Carp (2011), p. 96.

the public administration institutions. Petitions can be submitted in person at the institution or sent by post or e-mail; they can also be communicated via telephone or during audiences. The petition needs to clearly state the plaintiff's name, his address, the authority accused of violating his rights, and the rights disrespected. The plaintiff also has to show a delay or refusal of the administration to legally solve his/her demand. These are all needed in order to allow the Ombudsman to decide if the petition falls under its competence. Based on these data, the Ombudsman decides if it can act or not because in a case when, for example, the plaintiff alleges a violation of his/her rights by a governmental ordinance, no ordinary investigation can be initiated.

Despite numerous powers and tools given to the Romanian Ombudsman, there seems to be a general dissatisfaction of the Ombudsman with the interaction of the other institutions (Parliament, Government, and the authorities of public administration). Ion Muraru states with respect to the special reports issued by the Ombudsman, for example, on social security or forced labor that the Parliament and the MPs completely disregard them. The same situation occurs if the Ombudsman, dissatisfied with the lack of action of a public authority that was found guilty of breaching the rights of a citizen, notifies the Government or the Prefect (the representative of the Government in the territory).[74]

These situations lead us to a very interesting question, namely the effectiveness of the Ombudsman institution in relation to public administration. As observed in the literature, the Ombudsman lacks the power to impose sanctions; his/her action depends upon the authority he/she enjoys, the power to criticize, the moral support of the public opinion, and the responsiveness of all the public authorities.[75] If these elements are missing, the Ombudsman's effectiveness decreases. It is also worth investigating the nature of the recommendations issued by the Ombudsman. These recommendations are not legal norms, but in some systems they are considered to be norms/principles of good administration. In Romania, there is currently no debate regarding the nature of the Ombudsman recommendations. A study from 2011[76] inquired if judges ever consider the recommendations of the Ombudsman as a source of law (even soft law), but the answer was negative. On the same token, the interaction between the courts and the Ombudsmen is limited, and most judges are unaware of the institution's activity.

[74] Hossu and Carp (2011), p. 96.

[75] Deleanu (2006), p. 547.

[76] Dragoş et al. (2011b), pp. 384–399.

14.5.3 Relation to the Administrative Appeal and the Judicial Review

The petition sent to the Ombudsman has no prorogation effect on the deadlines applicable for filing either an administrative appeal or a court action against a violation of a right by a public institution. From the reports of the Ombudsman, it is clear that in most cases the petition to the Ombudsman is filed after the administrative authority is approached by the aggrieved citizen. In theory, the Ombudsman can be approached in the same time that an action is lodged before a court of law—there is no explicit mention in the law that a court investigation suspends the action before the Ombudsman.

Starting with 2004, when the General Law on Administrative Review was amended, the Ombudsman can lodge a court action in the plaintiff's name, challenging the public administration for its illegal acts or activities or for its silence (no action or response). In theory, such a provision can be justified as offering an instrument of compensation for the complainant's lack of opportunity to become a proper plaintiff (for example, expiration of time limits or other barriers regarding access to justice) and also to preserve the observance of the legal order and of human rights.[77] Ion Muraru, a former Ombudsman for 10 years, argued against this power put at the disposal of the Ombudsman. He stated that the mediation role of the institution is altered in this case, the Ombudsman becoming nothing less than a pro bono lawyer for the aggrieved citizen. No Ombudsman has made so far use of this power, and there are authors in the doctrine who describe the legal provision consecrating this power as obsolete. Previous researches show that there is some confusion among the citizens with regard to the mission/role of the Ombudsman institution. The name of the institution in Romania (People's Advocate or, more precisely, Lawyer) is misleading, many citizens declaring that they see the Ombudsman as a lawyer who can act on their behalf, a last resort instance when other options have been either exhausted or missed.

14.5.4 Recent Developments

With the appointment of a new Ombudsman in 2012, several changes have occurred with regard to the activity of the Ombudsman as mediator between the citizens and the public authorities. The active role of the Ombudsman, the implication of the institution, and its aggressive attitude in cases where the citizens' rights and liberties are breached have become more prominent in the last months. This is proven by an increasing number of situations when the Ombudsman has been acting on his own motion, conducting investigations or inquiries. The

[77] Gregory and Giddings (2000), p. 406.

Table 1 Empirical issues (annual activity reports of the Ombudsman 2007–2012)

	2012	2011	2010	2009	2008	2007
1. Volume of the Ombudsman's activity						
Number of written petitions received	9,910	7,559	8,895	8,295	8,030	6,919
Phone calls received	7,643	6,498	6,928	5,978	5,820	5,616
Audiences	18,170	16,282	17,470	16,561	17,783	15,517
2. No. of cases out of the competence of the Ombudsman						
There is no such information available in the annual reports. We asked the institution to provide us with the data, but no favorable answer was obtained.						
3. No. of cases within the competence of the Ombudsman						
There is no such information available in the annual reports. We asked the institution to provide us with the data, but no favorable answer was obtained.						
4. No. of cases that led to a report (recommendations)	49	9	1	6	12	12
4*. No. of investigations conducted	86	26	18	30	42	18
5. No. of cases solved differently						
6. Number of special reports	11	2	–	–	–	–
7. Use of special powers by the Ombudsman						
8. Own motion investigation	91	20				
8*. Pleas of unconstitutionality raised directly	13	2	7	4	6	–
9. Compliance with recommendations of the Ombudsman						
There are no quantitative data available. In each annual report, the Ombudsman presents several cases in which the recommendations were positively received by the public authorities—they acknowledged the error/illegality/silence and agreed with the proposed solution of the Ombudsman. However, in all annual reports, the Ombudsman mentions as a problem the lack of cooperation/limited responsiveness of the public administration (especially at the local level, city halls).						
10. No. of judicial reviews of Ombudsman's decisions						
Not applicable. The Ombudsman issues recommendations that are not mandatory for public bodies. In Romania, we can mostly talk about the "moral" authority of the Ombudsman, which over the years has proved to be more important than any legal instrument at his disposal.						

institution has also started to show less tolerance with regard to those public authorities that have breached certain legal provisions, thus violating the rights or liberties of the citizens. This is proven by an increase in the number of recommendations issued (for more details, please see Table 1).

14.5.5 Significance of the Statistical Data Presented Below

By examining the data presented below, it is clear that the there is a growing number of petitions and complaints made to the Ombudsman. This is showing that the institution is more and more accessible to the citizens and better known. This can be owed also to the increasing media visibility the institution had, both because of its campaigns focused on making itself better known and because of its activity in the area of constitutional protection, which put the institution at the center of some

sensitive debates (such as budgetary cuts in 2008 or political crisis from 2011). Unfortunately, the reports do not mention how many petitions are ungrounded and/or outside the competence of the Ombudsman. In fact, the annual reports do not mention how many cases are solved annually by the Ombudsman; they only state the total number of complaints received. Such data would tell us to better evaluate the demand of the citizens for the services of the Ombudsman, as well as the way in which the institution responds.

14.6 Final Considerations

The importance of alternative means of solving administrative disputes has been stressed repeatedly due to their role in reducing the caseload of the courts while still securing a fair access to justice. Additional reasons for the use of ADR mechanisms in administrative matters include the fact that the courts' procedures in practice may not always be the most appropriate to resolve administrative disputes and that the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public. While the importance of administrative appeals is widely stressed in theoretical studies, there are very few studies that try to discuss this issue based on empirical evidence. The chapter strived to offer both a comprehensive theoretical perspective on the issue of administrative appeals in Romania, as well as to empirically investigate if they are effective—effectiveness was defined rather simply, referring to the percentage of cases that do not get in court due to the existence of the administrative appeal. The conclusion is that effectiveness is relevant and should not be ignored. In cases when public bodies with control duties exercise the appeal, the rate of success is very good. Other ADR tools have also been investigated, including mediation, but in this case the authors have some doubts regarding how and whether it will be effectively implemented (not a lot of empirical evidence available to draw conclusions from). The research should be continued in order to evaluate at regular intervals if changing political and administrative conditions, as well as the gradual education of the citizenry with regard to administrative matters, increases the effectiveness of ADR tools in administrative matters.

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Chapter 15
Serbia as a Part of the European Administrative Space: ADR Tools Applied to Administrative Law

Vuk Cucić

15.1 Introduction

15.1.1 An Overview of the Serbian Administrative Law System

The two pillars of procedural administrative law in Serbia are the General Administrative Proceeding Act (**GAPA**),[1] codifying general rules of the administrative proceeding, and the Administrative Disputes Act (**ADA**),[2] regulating proceeding of judicial review of individual administrative acts (commonly known as administrative dispute).

Legal remedies prescribed by GAPA and ADA can be used only for challenging individual administrative acts.[3] General administrative acts are not rendered in the administrative proceeding, and their constitutionality and legality can be challenged only before the Constitutional Court.[4] Administrative acts can reach two procedural points, significant for the possibility of using legal remedies against them. They can become nonappealable, a point where they cannot be challenged by

[1] Official Gazette of the Federal Republic of Yugoslavia, no. 33/1997 and 31/2001, Official Gazette of the Republic of Serbia, no. 30/2010, enacted on 11 July 1997.

[2] Official Gazette of the Republic of Serbia, no. 11/2009, enacted on 29 December 2009.

[3] Administrative act in Serbian legal doctrine is defined as a legal (normative), individual, unilateral, binding act of administrative authority deciding on administrative matter (see Krbek 1957, p. 16; Milkov 1983, p. 349). Factual (real) acts of the administration cannot be challenged in the administrative proceeding or judicial review proceeding. Only damages can be sought in the civil proceeding. Administrative contracts as such do not exist in Serbian legal system.

[4] General administrative acts are not going to be subject of this paper. Hence, any further reference to administrative act will mean individual administrative act, unless otherwise designated.

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the administrative appeal [*zalba*],[5] and finally, a point where they cannot be challenged in the administrative dispute as well.[6]

There is only one Administrative Court in the Republic of Serbia. It is part of the judiciary, not part of the special administrative court system. It is one of the courts with special competence.[7] The Administrative Court is competent to adjudicate administrative disputes in the first instance for the entire territory of the Republic of Serbia.[8] The administrative court proceeding (judicial review proceeding) is initiated by a suit in the Administrative Court. The suit can be submitted only against nonappealable administrative acts. Administrative appeal is mandatory in Serbian legal system, given that, provided it is not excluded, it has to be exhausted prior to the initiation of judicial review proceeding. As a rule, administrative court proceeding has only one instance, i.e. there is no regular legal remedy in it. Therefore, after the Administrative Court decides on it, the administrative act becomes final (provided it was not annulled by the Court). However, ADA prescribes an extraordinary legal remedy, Request for Reassessment of Decision of the Court.[9] Competent to decide on this legal remedy is the Supreme Court of Cassation of the Republic of Serbia, as the highest court in the country.

There are no administrative tribunals, i.e. quasi-judicial administrative bodies, in the Serbian legal system.[10]

[5] At this procedural moment, an administrative act was either (1) rendered by a first instance administrative authority and appealed against to the second instance (higher) administrative authority that rendered its own administrative act upholding (appeal was dismissed or rejected) or changing the first instance administrative act; (2) rendered by an administrative authority whose acts cannot be appealed to a higher administrative authority; or (3) not appealed in the prescribed period of time.

[6] At this procedural moment, nonappealable administrative act was (1) challenged before the Administrative Court, which rendered its judgment upholding such an act (the suit was dismissed or rejected), or (2) not challenged before the Administrative Court in the prescribed period of time.

[7] Art. 11 of the Courts' Organization Act, Official Gazette of the Republic of Serbia, no. 116/2008 and 104/2009, also art. 8 ADA.

[8] Art. 29 of the Courts' Organization Act and art. 8 ADA.

[9] ADA contains another extraordinary legal remedy—Repetition of (Administrative-Court) Proceeding (arts. 56–65 ADA). Unlike Request for Reassessment of Decision of the Court, it has no link with administrative proceeding. It can be used only for repetition of administrative court proceeding for those reasons that appeared in that proceeding only. For this reason, it is not analyzed in this paper.

[10] The only exception is the State Commission for Protection of Rights and Public Interest in the Public Procurement Procedure, having certain quasi-judicial nature; see Public Procurement Act, Official Gazette of the Republic of Serbia, no. 116/2008.

15.1.2 An Outline of Legal Remedies Against Administrative Acts

The two most important legal remedies against administrative acts are the administrative appeal and the suit to the Administrative Court (judicial review). Besides them, there is a set of extraordinary legal remedies and legal remedies in special policy domains.

GAPA prescribes a set of six extraordinary[11] legal remedies. These remedies can be used in all administrative domains, but only for challenging administrative acts on the basis of strictly enumerated, more serious forms of illegality. On the other hand, in some policy domains (public procurement, education, and broadcasting), instead of administrative appeal, there are special legal remedies provided. They are not extraordinary legal remedies but regular administrative remedies replacing the administrative appeal in these policy domains. Just like the administrative appeal, their status of ordinary (regular) remedies derives from the fact that they can be used for challenging any first instance administrative act on the basis of any form of illegality or inopportunity, i.e. misuse of discretionary power (there is no *numerus clausus* of the reasons for challenging an act, like with the extraordinary administrative legal remedies prescribed by GAPA). Deeper analysis of extraordinary legal remedies under GAPA and special policy domains remedies shall not be a part of this paper.[12]

15.2 Administrative Appeal

15.2.1 Normative Regulation[13]

15.2.1.1 Legal Foundation

The right of appeal is a constitutionally recognized right. Article 36, paragraph 2 of the Constitution of the Republic of Serbia[14] provides that everyone has the right to appeal or other legal remedy against a decision determining his rights, duties, or legally based interests. Moreover, one of the fundamental principles of administrative proceeding is the principle of two-tier proceeding (principle of deciding in two instances), prescribing the right of a party to an administrative proceeding to

[11] Literal translation of Serbian term [*vanredni pravni lekovi*].

[12] For detailed description and analysis of these two sets of remedies in English, see Cucić (2011b), pp. 63–79; Cucić (2011c), pp. 74–84.

[13] For more information on normative regulation of administrative appeal in Serbian law, see V. Cucić (2011a), pp. 50–73.

[14] Official Gazette of the Republic of Serbia, no. 98/2006.

appeal against an administrative act rendered by an administrative authority in the first instance. Also, this principle explicitly prohibits a three-tier proceeding by excluding the possibility of filing an administrative appeal against the administrative act rendered by the second instance (higher) administrative authority (appellate authority). The principle of two-tier proceeding is, however, not a universal one. It allows exclusion of administrative appeal in certain administrative matters, provided that it is prescribed by a law (act of Parliament) that offers another means for protection of rights and legal interests of parties and protection of legality. Therefore, the possibility to file administrative appeal is a rule, but both GAPA and laws regulating special administrative domains (usually referred to as "special laws") can and do contain exceptions (*infra* Sect. 15.2.1.5).

Besides the principle of two-tier proceeding, GAPA contains a special chapter dedicated to administrative appeal (Chapter XIV). It contains provisions dealing with who has the right to appeal, when, against which and whose (in)actions and to which extent, to whom, in what time, on what grounds, what should it contain, what are its effects, what are the powers of appellate authorities, etc.

The Kingdom of Yugoslavia (including Serbia as a part thereof) was among the first countries in the world to codify the rules of administrative proceeding by adopting the General Administrative Proceeding Act in 1930 (entered into force in 1931). Before Yugoslavia, this was done by Austria in 1925 and Czechoslovakia and Poland in 1928.[15] Yugoslavian law was mainly based on its Austrian predecessor but was almost two times bigger because the legislator included numerous provisions of civil proceeding in it.[16] While several laws regulating the general administrative proceeding have been enacted since (all having the same title), the regulation thereof has not changed in its essence. Therefore, the origins of the concept of administrative legal remedies in Serbian law, including the administrative appeal, can be tracked to its Austrian role model.

Finally, except the Constitution and GAPA, administrative appeal is also regulated by special laws. They can change the general regime prescribed by GAPA in their respective domains. The most common changes are changes of deadlines for submitting appeal or deciding upon it, exclusion of its suspensive effect (*infra* Sect. 15.2.1.6), and overall exclusion of the right of appeal (*infra* Sect. 15.2.1.4).

15.2.1.2 Notion of Administrative Appeal

Administrative appeal, as prescribed by GAPA, is a regular (ordinary) legal remedy in administrative proceeding. In order to file the suit with the court, a party first has to exhaust administrative appeal (mandatory model). There are no exceptions to this rule—if the administrative appeal is allowed against an administrative act, it has to be used prior to the initiation of the judicial review. As mentioned before,

[15] Tomić (2009), p. 248.

[16] Milkov (2003), p. 67.

when administrative appeal can no more (or cannot at all) be used, an administrative act becomes nonappealable.

The "regularity" of the administrative appeal derives from its main features. First, the administrative appeal does not allow for an administrative act to become nonappealable. The administrative act will not become nonappealable until the time period for filing the administrative appeal has lapsed and, if the administrative appeal was filed within this time period, until a decision on it was rendered. Second, administrative appeal is the regular legal remedy because it is, as a rule, permitted against all first instance administrative acts (though the exceptions exist). Third, second instance administrative proceeding, i.e. regular administrative control proceeding, is being initiated by the submission of an administrative appeal. Forth, administrative appeal is a legal remedy, which can be used to challenge both legality and opportunity (merits, misuse of discretionary power) of administrative acts. Therefore, it is regular in the sense that it is a remedy initiating regular administrative control of all administrative acts on all the possible grounds.

15.2.1.3 Externality and Internality of the Administrative Appeal

Administrative appeal in Serbian law is external. It is filed with a higher administrative authority, appellate authority, competent to decide upon it.

Remonstrative administrative appeal, i.e. administrative appeal as a self-control legal remedy, does not exist. It is not possible to submit administrative appeal to the authority that rendered the challenged administrative act. Citizens can file a complaint with the authority rendering the challenged administrative act, but such complaint does not oblige said authority to decide upon it. Even if the authority would want to endorse the complainant's reasoning and change the act, it would have to use one of the remonstrative (self-control) extraordinary legal remedies prescribed by GAPA.[17]

However, there is, within the administrative appeal itself, an exception, giving it remonstrative, self-control character. Namely, the administrative appeal is physically handed in to the first instance authority, which had, *inter alia*, the authorization to replace its challenged administrative act. This is the case in which the first instance authority, upon receiving the administrative appeal, realizes that the appeal is well founded, i.e. it made an error when it issued the appealed act. In that case, the first instance authority is authorized to replace its previous act with a new one in order to correct itself. First instance authority can do this, under prescribed conditions, with or without prior completion of the conducted first instance proceeding. In any case, a new appeal can be filed against new (replacing) resolution. This is an additional guarantee, necessary because the first instance authority might repeat the previous mistake or make another one. These provisions provide for a self-control mechanism, which could benefit both the discontented party, as it can get its

[17] See Cucić (2011a), pp. 50–73.

satisfaction sooner, and the first instance authority, which can safeguard its reputation by correcting its own erroneous work. This mechanism can be compared to internal review, as a remonstrative, self-controlling remedy. It can be said that their content is the same, i.e. the authority is given a second chance. Additionally, it can be said that this mechanism has a slight advantage over separate internal review, given that the appellant does not have to wait for the same authority to declare itself the second time on the same matter before it can initiate another form of (true, outer) control, i.e. administrative appeal.

Hence, it might be said that administrative appeal in Serbia law encompasses features of both internal and external control mechanism.

15.2.1.4 The Right of Appeal

Administrative appeal can be submitted by a party[18] who participated in the first instance proceeding and who is not satisfied with the administrative act issued in it. According to case law, same applies to the persons or entities that did not participate in the first instance administrative proceeding as parties, even though they had the right to do so.[19] In addition, the administrative appeal can be submitted by the Public Prosecutor, the Public Defense Attorney, and other state authority if (1) they are entitled by a law to do so and (2) they believe that the law was breached by an administrative act in favor of an individual or an organization and to the expense of public interest.

15.2.1.5 Exclusion of the Right of Appeal

Administrative appeal, being a regular legal remedy, as a rule, can be submitted against all administrative acts issued in the first instance administrative proceeding. However, there are two types of exceptions.

First, it is generally not allowed to appeal against the administrative acts of certain state authorities when they are deciding in the first instance. These are the highest state authorities, such as the Parliament, the President of the State, and the Government. Administrative appeal is not allowed here for the simple reason that there is no higher state (administrative) authority in hierarchy.[20] If it is prescribed

[18] The following can be parties to an administrative proceeding: (1) natural persons; (2) legal persons; (3) state authorities, organizations, inhabitance, group of persons, etc. not having legal capacity, if they can be holders of rights and duties decided in the administrative proceeding; (4) trade unions, when proceeding relates to rights or duties of their members; and (5) the Public Prosecutor, the Public Defense Attorney, and other state authorities, when they are entitled by a law to defend public interest in the proceeding (arts. 40–42 GAPA).

[19] Tomić and Bačić (2007), p. 305

[20] There are other reasons for exclusion of the right to appeal their decisions. These are the highest state authorities, with high political reputation, making political decisions, which could not be

by law, the individual acts of these authorities can be challenged before the judiciary or the Constitutional Court. Furthermore, the administrative appeal cannot be submitted against first instance administrative acts of ministries, unless otherwise prescribed by a special law.

The second type of exceptions had already been mentioned. Right to administrative appeal can be excluded by a special law, offering another means for protection of rights and legal interests of parties and protection of legality. This exception is often used when reasons of legal policy require public authorities or organizations to be independent from the executive. Administrative acts of such authorities and organizations are nonappealable at the moment they are rendered and are subject only to judicial review, e.g. the National Bank of Serbia[21] and independent regulatory agencies such as the Commission for Securities,[22] the Commission for the Protection of Competition,[23] the Republic Radio-Diffusion Agency,[24] and the Republic Agency for Telecommunications.[25]

Nevertheless, in many administrative areas, highest administrative authorities (ministries, nonsupervised special administrative organization, independent regulatory agencies), given the nature of request and the position of the party submitting the request or for reasons of legal policy, are those deciding in the first instance proceeding. This impairs the principle of two-tier proceeding, leaving the party with the possibility to directly seek judicial protection. With the aim of ameliorating party's position in such cases, and with the idea of integrality of administrative and judicial legal review of administrative acts, ADA set down a possibility of filing an extraordinary legal remedy in the administrative court proceeding—Request for Reassessment of a Decision of the Court. This legal remedy can be used against judgments of the Administrative Court. Among other reasons, it can be used when administrative appeal is excluded in the administrative proceeding. Consequently, combined administrative and judicial control of administrative acts gets potential third instance (first instance administrative proceeding, proceeding before the Administrative Court upon submitted suit, and proceeding before the Supreme Court of Cassation upon the Request for Reassessment of Decision of the Court), as it would normally have, had not the administrative appeal been excluded (first instance administrative proceeding, appellate proceeding, proceeding before the

subject to review or control of administrative authorities that are subordinated to them. In addition, they rarely decide in administrative matters, Tomić (2009), p. 309,

[21] Article 9 of the Banks Act, Official Gazette of the Republic of Serbia, no. 107/2005.

[22] Article 225 of the Securities and Other Financial Instruments Market Act, Official Gazette of the Republic of Serbia, no. 47/2006.

[23] Article 38 of the Protection of Competition Act, Official Gazette of the Republic of Serbia, no. 51/2009.

[24] Article 54 of the Radio-Diffusion Act, Official Gazette of the Republic of Serbia, no. 42/2002, 97/2004, 76/2005, 62/2006, 79/2005, 85/2006, 86/2006, 41/2009.

[25] Article 23 of the Telecommunications Act, Official Gazette of the Republic of Serbia, no. 44/2003.

Administrative Court upon submitted suit). As a result "integral legal protection in administrative matters is more balanced and more complete."[26]

Only when administrative appeal is excluded and, thus, an administrative act is nonappealable as of the moment it is rendered may a party go straight to judicial review proceeding.

15.2.1.6 Effects of Administrative Appeal

Administrative appeal has two legal effects, suspensive and devolutive effects. *Non reformation in peius* principle, as a rule, applies to administrative appeal.

The administrative appeal has a suspensive effect. Time period for filing an administrative appeal has the same effect. This is to say that the first instance administrative act cannot be executed (enforced) before a time period for filing the administrative appeal, as prescribed by the law, has lapsed. If the appeal has been filed within this time period, then the act cannot be executed before the decision on the appeal has been made.

Consequently, the rule is that the appeal suspends execution of first instance acts. This rule undergoes exceptions as well. Administrative appeal, as well as the time period for its filing, shall not suspend, i.e. delay, execution of first instance act provided that (1) this is explicitly stipulated in a law; (2) the conditions for undertaking emergency measures, as provided in GAPA, are met; or (3) delay of execution could result in a party incurring damage that would be hard to repair.

As to the first exception, it must be mentioned that ADA has a provision enabling appellant to request the Administrative Court to postpone execution of an act if the following conditions are met: (1) due to its execution, appellant would incur damage that would be hard to repair; (2) execution is not opposed to public interest; and (3) the opposite party or third interested person would not incur bigger or nonrepairable damage due to the postponement. The Administrative Court has to decide on this issue within 5 days as of the day of the filing of the request. This provision reinforced suspensive effect of the administrative appeal. It also balanced positions of parties in multiparty administrative proceedings by giving similar opportunities to both parties, i.e. the party whose interest is execution of a resolution can invoke exception made by GAPA, while the other party, whose interest is opposite, can call upon the Administrative Court to decide otherwise.[27]

Therefore, the administrative appeal has *de jure* suspensive effect, which can be eliminated in certain cases, either by a law (GAPA or a special law) or by an administrative authority, under the conditions set down by the law. However, when

[26] Tomić (2010), p. 41.

[27] Old Administrative Disputes Act did not contain such a provision. This was not in accordance with provisions of the Council of Europe's Recommendation No. R (89) 8 of the Committee of Ministers to Member States on Provisional Court Protection in Administrative Matters, adopted on 13 September 1989 (Cucić 2009, pp. 247–272).

the administrative appeal does not have suspensive effect pursuant to a certain law, the Administrative Court can grant it such an effect upon a request of the party submitting the appeal.

The administrative appeal also has a devolutive effect. This means that it transfers jurisdiction for deciding on a certain matter from the first instance authority to the second instance (higher, appellate) authority. This is to say that the same authority cannot be competent to decide both in the first instance and in the appeal. The appellate authority is put in the position of the authority that rendered the appealed administrative act. It can reanalyze *de novo* challenged administrative act and has the authority to remove or change it.[28]

When an administrative act is appealed by a private person, the principle of *non reformation in peius* applies. Moreover, the law allows the second instance authority to change the appealed resolution for the benefit of the appellant, even outside the appeal request but within the request made in the first instance proceeding, provided this does not impair the rights of third persons. Hence, the second instance authority can put a party in a better position than the one it requested by virtue of the appeal but not better than the one requested in the first instance proceeding.

There is an exception to this rule. GAPA authorizes the second instance authority, when seized by an appeal, to change the first instance administrative act to the detriment of the appellant but only when there are grounds for using one of the extraordinary legal remedies regulated by GAPA. Nonetheless, this exception does not worsen the position of the appellant, given that the second instance authority is authorized to, on an *ex officio* basis, check whether these legal remedies can be used and apply them to the detriment of a party even if the appeal was not submitted. Accordingly, the administrative appeal itself is no more than a means for the authority to discover that there is a reason for applying these legal remedies.

If the administrative appeal is submitted by the Public Prosecutor (or another authorized state authority), then the situation is different. The Public Prosecutor defends general legality. It can, thus, submit administrative appeal if it considers that an administrative act is illegal and that the law has been breached to the benefit of a private party and to the expense of the public interest. Obviously, the aim of this appeal is set towards aggravating the private party's legal position.

[28] This legal effect of administrative appeal endures one exception. Administrative acts rendered by a dislocated unit of a state administration authority are being appealed before the head (chief) of that authority. Nevertheless, it has to be said that this kind of derogation of transferring effect is not complete. Formally, the same authority appears twice in a row in the same case. Still, substantively, different persons are deciding. First, we have "local" staff making the decision and then afterwards the people from the "center" controlling their work. Z. Tomić calls this "quasi-two-tier proceeding" (Tomić 2007, p. 541).

15.2.1.7 Authorizations of the Appellate Authority

An administrative act can be challenged for any form of illegality, lack of jurisdiction of the issuing authority, breach of the rules of procedure, mistakes in establishing facts of the case, and misapplication of the rules of a substantive law. Furthermore, an act can be appealed on the ground of inopportunity, i.e. misuse of discretionary power. Administrative appeal can also be submitted against administrative silence, i.e. omission of the competent authority to issue an act upon authorized party's request.

The administrative authority deciding on the appeal has all the powers of the authority that rendered the appealed act. It can decide both on the issues of facts and legal issues. If it finds the appeal to be well grounded, the appellate authority can annul (quash) or change the appealed act. If it annuls the act, it can order the first instance authority to render a new act in accordance with its decision or it can issue an act replacing the annulled act, i.e. it can decide on the merits of the case. In the case of administrative silence, it can order the first instance authority to issue an act.

We will end appellate authorities' powers with the possibility of granting compensations to aggravated parties. Administrative authorities have no such authorization under the general administrative legal regime. Their powers are limited to examination of legality and opportunity of the first instance administrative act and, potentially, their annulment or change. On the other hand, the Administrative Court has this power. Provided it annuls or declares the challenged administrative act to be null and void, the Administrative Court is allowed to compensate the aggrieved party, either by ordering the return of the object taken away from the party or by providing damages. The same provision leaves to the discretion of the Administrative Court to either do this itself or to direct the applicant to seek relief in civil litigation. There is no reported case law indicating that the Administrative Court ever did this itself. Therefore, an aggrieved party is forced to deal with the disputed administrative act in one proceeding (appeal and/or administrative court proceeding) and with the compensation for the damage it caused in another (civil litigation). This practice of the Administrative Court is not necessarily a bad one. Specifically, as the only first instance administrative court for the entire territory of Serbia, it does not have enough judges[29] to deal with all the challenged administrative acts, and this would additionally slow down its work. Moreover, given that administrative judges are specialized in administrative and not civil laws, compensation requests would be better decided in civil litigations.

[29] It has only 38 judges (art. 6 of the Decision on the Number of Judges in Courts, Official Gazette of the Republic of Serbia, no. 43/2009, 91/2009, 35/2010).

15.2.2 Relation Between Administrative Appeal and Judicial Review

The relation between administrative appeal and judicial review of administrative acts can be examined with regard to four different aspects.

First aspect concerns the conditionality between administrative appeal and the suit to the Administrative Court. Administrative appeal in Serbian law is mandatory. Unless administrative appeal is excluded in a certain administrative domain, it has to be utilized against a first instance administrative act before such an act, as nonappealable, can be challenged by suit before the Administrative Court. As for the conditionality between the two, it exists when it comes to the scope of challenging an act, while the legal reasoning can be changed. Namely, if an administrative act is not challenged by administrative appeal (when it is not excluded) within the prescribed time period, it becomes nonappealable and final at the same moment. If, in such a case, a party would submit a suit without submitting the administrative appeal first, the suit would be dismissed by the court. If a first instance resolution would be only partially appealed (e.g., only one of the requests resolved by the administrative authority is appealed), the part that was not appealed would become nonappealable and final, i.e. only the appealed part could be challenged by the suit after the end of the appellate proceeding. Hence, the scope of the suit cannot be wider than that of administrative appeal that preceded it. As for the legal reasoning, the regulation is set differently. Appellant is not obliged to legally reason its administrative appeal, and it suffices if it indicates in which way it is unsatisfied with the issued act. Consequently, the appellant could change its legal argumentation once it gets to the court. Furthermore, even the court itself is bound only by the request contained in the suit. It must examine legality of the challenged act within the limits of that request, but it is not bound by the legal reasons set down in the suit. This is to say that the court can find an act disputed, for instance, on the basis of misapplication of substantial law to be illegal for other reason than that put forward in the suit (e.g., that it breaches another substantial law and not the one mentioned in the suit). Additionally, both the appellate authority on the appeal and the Administrative Court on the suit must, *ex officio*, even without the request of a party, examine whether the challenged act is null and void, and if it is, to declare it as such.

Second connection in this relationship relates to the application of one extraordinary legal remedy in administrative court proceeding. As we explained, the Request for Reassessment of a Decision of the Court, as an extraordinary judicial legal remedy, can be used against judgments of the Administrative Court. Among other reasons, it can be used when the administrative appeal is excluded in the administrative proceeding. Therefore, legal protection mechanism gains another instance in administrative court proceeding, in place of the one lost in the administrative proceeding (excluded administrative appeal).

Third link is the impact of an action of the appellate authority undertaken after the initiation of the judicial review proceeding to that proceeding. There are two

different situations here. First is when the appellate authority issued the second instance resolution, which was later challenged before the administrative court. In such instance, the appellate authority can use the Change and Annulment of the Resolution in Relations to Administrative Dispute, as an extraordinary legal remedy, to fulfill a party's requests put forward in the suit by changing or annulling the challenged resolution. Second, if the suit was submitted against the silence of the administrative authority, then the authority can issue the requested administrative act during the judicial proceeding. Both actions should be considered as attempts of amiable resolution of administrative dispute. Should any of these happen, the court shall call the applicant to declare whether it is satisfied with the defendant's action, in which case the judicial proceeding shall end or not, in which case the court proceeding shall continue and the suit shall be extended to the new act as well.

The fourth link concerns the relation between the time period for submitting and deciding on the administrative appeal and the right to access to the court. Time limit for submitting the suit to the Administrative Court is 30 days as of the day of delivery of the nonappealable administrative act to the party or the public authority authorized to submit the suit against it. A shorter time limit may be prescribed by another law. If an act was not delivered to a public authority or a third interested person, who can submit the suit, the time limit is 60 days as of the day of delivery of the act to the party. If the suit is submitted against the silence of the administrative authority that should have rendered a nonappealable act, the suit can be submitted after the lapse of two consecutive time periods. First time period is 60 days as of the day of submission of the administrative appeal to the appellate authority, or if the suit is submitted against a first instance nonappealable administrative act, then it is the time period for issuance of the resolution prescribed by GAPA. After this time period lapses, the party has to submit another, so called hurrying notice, requesting once again the administrative authority to render a resolution. When 7 days lapse as of the day of submission of this subsequent request, a party may submit the suit to the court.

These time limits do not prevent party's access to the court in the sense that they allow appropriate preparation for the case. On the other side, given the conditionality between the administrative appeal and the suit, time limits for filing administrative appeal could preclude party's access to the court if they are too short. However, this is not the case with the general time limit under GAPA.

Finally, the administrative appeal and the suit have one similar function. While administrative appeal makes the practice of first instance authorities more constant and equal, the suit does the same to the practice of both first instance and appellate authorities. Probably even more so, given that there is only one Administrative Court.

15.2.3 Efficiency of Administrative Appeal[30]

15.2.3.1 Research Goal and Methodology

The goal of this empirical research is to establish whether the administrative appeal, i.e. specific set of features it encompasses, is efficient. It shall be considered efficient if it reduces the workload of courts. Therefore, a quantitative criterion is going to be used for determination of efficiency. The administrative appeal shall be considered efficient if it diverts at least one half of appellants from seeking judicial review of administrative acts, i.e. from submitting suits to the Administrative Court.[31] It has been observed that such approach could raise some issues. Notably, appellant could pass on judicial review due to decision reached in the appellate proceeding (whether the appeal was successful or rejected but led to a subsequent understanding of the appellant that the first instance authority did resolve the case right). However, this can be, as well, a consequence of lengthy judicial proceeding or expectation of the appellant that the court cannot help him (for instance, if the administrative act was appealed for misuse of discretionary powers, this can be appealed only before a second instance administrative authority, while only illegality on an act can be disputed before the Administrative Court) (*Idem.*). Anyhow, reasons that led the appellant not to initiate judicial control are subjective and thus cannot be quantified. Accordingly, in spite of stated deficiency, research can be conducted only on the basis of the number of submitted administrative appeals and suits.

The efficiency of the administrative appeal in the research is determined on the basis of submitted administrative appeals before certain administrative authorities and the number of suits subsequently raised before the Administrative Court against decisions reached on the appeal. Necessary data were collected in two ways. A part of them is contained in publicly available reports on activities of the observed administrative authorities. Where such data were used, a note to that extent was given. The other part of data was gathered on the basis of questionnaires sent to administrative authorities, which failed to publish the data we needed. Questionnaire contained the following questions: (1) How many appeals to first instance administrative acts were submitted in a certain time period (most often the data requested and received pertain to 2010[32])? (2) How many out of those appeals were dismissed (on formal grounds), rejected (on the merits), and accepted? (3) How many suits were submitted to the Administrative Court against decisions reached on the appeal in the observed time period? Finally, a part of data, concerning number of suits submitted against decisions on the appeal of certain administrative authorities, was obtained from the Administrative Court.

[30] This research is a part of previously published article—Milovanovic et al. (2012).

[31] Willemsen et al. (2010), p. 7.

[32] Research was conducted for 2 years. Therefore, data gathered are from different years, but mainly from 2010.

The conducted research contains several limitations. First, it did not include every authority deciding on the administrative appeal. Such an undertaking was not feasible, given that there are administrative authorities not possessing the required data, as well as taking into account the inability of the author to perform research of that scale with respect to time, territory, and content. Nonetheless, collected data relate to those administrative domains, which are more susceptible to administrative litigation, such as customs, taxes, real estate registers, social security, public access to information, public servants employment, eviction of illegal tenants, personal status record, etc. Furthermore, appellate authorities can, in accordance with specific subject matter, be on the level of the state (republic authority), province, or local government unit. Besides the already mentioned authorities on the central state level, we managed to gather data on all the appeals submitted to all provincial administrative authorities, as well as data on all the appeals submitted to the administrative authorities of three largest cities in Serbia, Belgrade, Novi Sad, and Nis, for the relevant time period. Despite inexistence of information on the total number of appeals submitted to all administrative authorities on all levels of government, taking into account the number of authorities included and domains in which they operate, as well as different subject matters encompassed by the research, gathered sample can be considered representative and, hence, enable reaching of sound conclusion on efficiency of administrative appeal in Serbia. Another argument to support this assumption is the total number of processed appeals—57,103.

The second lack of the research concerns the fact that some of the administrative authorities whose work was examined keep statistic data on annual level. This means that collected data on the administrative appeals and the suits for a certain year do not relate to identical cases. In concrete, suits submitted against decisions on appeals in 1 year do not completely pertain to the decision on appeals submitted to the same authority in the same year, i.e. some of the suits are submitted against decisions on appeals rendered in the previous year, while upon certain appeal decisions will be made in the following year, and only then can a suit be submitted against them. Hence, the collected data do not provide a chance for an absolutely accurate determination of the number of persons who submitted an administrative appeal in 1 year and later submitted suit to the Administrative Court against the decisions reached on the appeal in the same cases. Notwithstanding this, having in mind that majority of administrative authorities, especially those receiving a large number of appeals, get approximately the same number of appeals each year, gathered data offer approximately accurate results on efficiency of the administrative appeal. Particularly, the suits raised against the decisions on appeals submitted in the year preceding the year for which the data were gathered are compensated by the number of appeals that are yet to be decided upon and against which the suit to the Administrative Court can be submitted in the year following the year for which the data are gathered. Moreover, some of the authorities we contacted gave us the data on the appeals and suits submitted in identical cases.

The third and the last remark, data collected from different authorities, are not from the same time period, i.e. same calendar year. This is due to the fact that this

empirical research was conducted for 2 years. Still, for the reasons previously elaborated, concerning assumption of approximately the same number of the administrative appeals received each year, we find this not to diminish the representativeness of the administered sample.

In conclusion, we consider cited defects not to have such nature and magnitude to jeopardize overall results of the research and reached conclusions. We did, however, find it necessary to depict and elaborate upon them for academic reasons.

As a final point, aside from reports and questionnaires, the research included interviews with public servants from respective administrative authorities who clarified to us the causes of some of the research results.

15.2.3.2 Research Results

The main part of the research results includes data on the number of submitted administrative appeals and number of suits submitted to the Administrative Court for a certain period of time. Gathered data concerned the work of the following authorities: the Republic Fund for Pension and Disability Insurance (i.e. social security fund);[33] the Tax Administration; the Appellate Commission of the Government (decides on appeals of public servants against administrative acts deciding on their rights and duties);[34] the Customs Administration; the Ministry of Environment, Mining and Spatial Planning; the Data Protection Commissioner;[35] the Ministry of Human and Minority Rights, State Administration and Local Government; all provincial authorities of the Autonomous Province of Vojvodina;[36] the City Council of the City of Belgrade; the Department for Municipal and Residence Affairs of the City of Belgrade; the City Council of Novi Sad;[37] the City Council of Nis.[38] Results are presented in Table 1.[39]

[33] Informator o radu Republičkog fonda za penzijsko i invalidsko osiguranje (2007–2011) [Information on the work of the Republic Fund for Pension and Disability Insurance (2007–2011)].

[34] Izveštaj o radu Žalbene komisije Vlade (za period od 1. septembra 2006. godine do 1. septembra 2007. godine) [Report on the work of the Appellate Commission of the Government (for period between 1 September 2006 and 1 September 2007)].

[35] Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti za 2010. godinu (Report on the implementation of the Law on Free Access to Information of Public Significance and the Law on the Protection of Personal Data for 2010), p. 88.

[36] Izveštaju o kretanju prvostepenih i drugostepenih upravnih predmeta u organima pokrajinske uprave za 2010. godinu (Report on movement of first instance and second instance administrative cases within the authorities of provincial administration for 2010), p. 23.

[37] Informator o radu Gradonačelnika grada Novog Sada i Gradskog veća grada Novog Sada (Information on the work of the Mayor of the city of Novi Sad and the City Council of the city of Novi Sad), p. 58.

[38] Izveštaj o radu Gradskog veća grada Niša za 2011. godinu (Report on the work of the City Council of the city of Nis for 2011), p. 23.

[39] For detailed results of the research, see Milovanovic et al. (2012), pp. 95–111.

Table 1 Overview of the data on efficiency of the administrative appeal

Authority	Number of appeals	Number of suits	Efficiency (%)
Social Security Fund	24,730[a]	2,398	90.23
Tax Administration	10,462	1,450	86.14
Appellate Commission of the Government	8,231	293	96.44
Customs Administration	2,759	990	64.12
Ministry of Environment	2,034	264	87.02
Data Protection Commissioner	1,466	18	98.77
Ministry of Human Rights, State Administration and Local Government	26	4	96.15
Autonomous Province of Vojvodina	5,267	140	97.34
City Council of Belgrade	1,918	616	67.88
Department of the City of Belgrade	194	88	54.64
City Council of Nis	16	3	81.25
Total	57,103	6,264	89.03

[a]This is the number of all the decision of the Social Security Fund that could have been challenged before the Administrative Court in the respective period. It includes 24,387 decisions on administrative appeals and 343 decisions rendered in the process of revision of the first instance administrative acts

Finally, when all the data are added, there were 57,103 decisions on administrative appeals. They were challenged before the Administrative Court in 6,264 cases. As a result, the administrative appeal displayed a remarkable efficiency of 89.03 %.

15.2.3.3 Research Conclusions

The first conclusion to be reached is the fact that the administrative appeal, quantitatively speaking, appeared to be more than efficient. In each of the analyzed administrative domains and before each mentioned administrative authority, the administrative appeal managed to avert at least half of appellants to proceed before the Administrative Court. Even when all the submitted appeals and suits are combined, the result remains the same. Efficiency of the administrative appeal varies in different policy areas, managing to reduce potential number of judicial workload for at least 54.64 % and at most for 98.77 %. Variations in the percentage of efficiency in diverse areas might be explained by several factors: normative regulation of an area, existence or absence of discretionary powers, significance of the subject matter for the appellants (e.g., eviction of illegal tenants), level of authority deciding on the appeal (central, provincial, local), unilateral or bipartisan nature of the administrative proceeding, etc. The public servants interviewed mentioned the sort of parties in the proceeding as one of the elements in this equation. For instance, where the Attorney General has standing in the proceeding for protection of property rights of the state, province, or local government units, public servants working in his office tend to submit appeals more often in order to

fulfill set norms. This results in increasing number of unfounded appeals, which in turn augments the overall efficiency of the administrative appeal.

It is not easy to consider the reasons for which the administrative appeal is efficient when the criteria for determination of such efficiency are set quantitatively. Nevertheless, we could try to elucidate at least some of them. To begin with, the features of the administrative appeal, as prescribed in GAPA, must be one of the reasons, especially its mandatory usage prior to judicial review, devolutive effect, and possibility of challenging administrative acts for any form of illegality, as well as inopportunity. Another reason might be the centralization of competence for deciding on administrative appeals. Competent for deciding in second instance in the Serbian legal system, as a rule, are central state authorities. Noncentral, either provincial or local administrative authorities, seldom appear as appellate authorities. This can be inferred from the number of administrative appeals submitted to administrative authorities of the Autonomous Province of Vojvodina and three largest cities in Serbia, as well as from the Serbian legislation. Even then, we have large and urban centers in which the decision is made. This increases the chance of appellate authorities having adequate human and material resources to assure quality of their work. Correspondingly, comparative research on this topic might indicate such an inference. The research on efficiency of the administrative appeal in Romania revealed that the quality of decisions is lower in rural and smaller areas than in larger and urban areas.[40] Given that mainly administrative authorities in urban centers decide on the administrative appeal in Serbia, a higher quality of appellate work can be expected. After all, high quality of appellate decisions might be one of the explanations for high percentage of unsuccessful appellants who did not subsequently file a suit with the Administrative Court. Furthermore, competence for deciding on appeals in certain domain in Serbia is given to a single second instance authority. This in turn enhances the chance for uniform and consistent practice in deciding. Uniform administrative practice can assure appellants in correctness of appellate decisions and discourage them from further disputing such administrative acts. Finally, another explanation for high percentage of unsuccessful appellants who did not subsequently file a suit, and therefore high efficiency of the administrative appeal, might lie in the fact that they do not expect judicial intervention to improve their legal situation. Despite the fact that costs of judicial review proceeding are relatively low,[41] there are other reasons that could dissuade appellants from pursuing it. Namely, there is only one Administrative Court in Serbia with insufficient number of judges, which receives thousands of cases each year (more than 12,000 in 2011) in more than 30 different policy areas.[42] Aside from lacking staff, the Administrative Court lacks necessary

[40] Dragos et al. (2010), p. 9.

[41] Fees payable for submission of suit and decision of the court are less than 30 euros.

[42] In January 2010, the Administrative Court was established and started to operate. Currently, the number of judges in the Administrative Court is 34, including the Court President. Each judge has his/her assistant. This staffing level is an important improvement compared to the previous

specialization for certain administrative domains. As a consequence, judicial review proceedings are lengthy. Another discouragement derives from the fact that, in spite of having such power, the Administrative Court almost never decides in full jurisdiction (*pleine juridiction*), i.e. on the merits of the case.[43] Hence, even if appellant is successful before the court, the act will be annulled but the case itself will still not be resolved but only sent back for reconsideration to the authority that issued the annulled act. This additionally prolongs the process of legal protection. In addition, inopportunity of an administrative act, i.e. misuse of discretionary powers, cannot be challenged before the Administrative Court, but only the legality of such an act. Thus, those appellants who challenged the opportunity of an act are now left with no further recourse, and they have to stop their legal battle.

15.3 Ombudsman

15.3.1 Normative Regulation

The Ombudsman (The Protector of Citizens of the Republic of Serbia) is an institution recently introduced into the Serbian legal system. Its establishment and competence are regulated by the Constitution and the Law on the Protector of Citizens—LPC.[44] The first Ombudsman was elected by the National Parliament in 2007 for a 5-year term.

The Ombudsman is established as an independent body that protects the rights of citizens and controls the work of administration. The Ombudsman also ensures that human and minority freedoms and rights are protected and promoted (Art. 138 of the Constitution, Art. 1 LPC).

The Ombudsman has the power to control the legality and regularity of the work of administrative authorities. In comparison to the administrative appeal, it exercises a wider scope of control that includes but goes beyond the concept of legality. Perhaps better put, the principle of good administration requires from administration not just compliance with legal rules "but also to be service-minded

situation, where the administrative section of the Supreme Court had only 15 judges with a smaller number of assistants. Overall, the number of judges envisaged by the Court's Rulebook on Internal Organization and Systematization is 36 judges, including the Court President. The Court has taken over a large number of cases from the administrative section of the former Supreme Court and from administrative sections of former county courts, which totaled 18,000 cases. In the course of 2010, the inflow of cases was also very high, amounting to 16,048. The Court managed to resolve 13,843 cases in 2010 (SIGMA 2011, p. 9).

[43] We were informed in the Administrative Court that since the current Law on Administrative Disputes (Official Gazette of the Republic of Serbia, no. 111/2009) was enacted at the end of 2009, despite legislators' attempt to make deciding in full jurisdiction more frequent, there was not a single case of it.

[44] Official Gazette of the Republic of Serbia, no. 79/2005 and 54/2007.

and to ensure that members of the public are properly treated and enjoy their rights fully" (European Ombudsman Annual Report 2010, p. 15). In addition to the legality and expediency of an act (which are the object of an appeal), the Ombudsman may deal with the issue of fairness. Furthermore, his/her control is not limited to the administrative acts but can be spread to all activities of administrative authorities.

The Ombudsman initiates proceedings following the complaint of a citizen or on its own initiative. Any person who considers that his/her rights have been violated by an act, action, or failure to act of an administrative authority may file a complaint with the Ombudsman. The complaint to the Ombudsman can be submitted within 1 year as of the day the violation was committed or the day of last action or inaction of an administrative authority concerning respective violation.

Prior to submitting a complaint, a citizen is required to endeavor to protect his/her rights in appropriate legal proceedings (before higher administrative authority or before the Administrative Court). The Ombudsman shall not instigate investigation until all legal remedies have been exhausted. In practice, the Ombudsman considers this precondition to be met if only an administrative appeal is exhausted. Exceptionally, the Ombudsman may initiate proceedings even before all legal remedies have been exhausted if the complainant would sustain irreparable damage or if the complaint is related to violation of good administration principle, particularly incorrect attitude of administrative authorities towards the complainant or other violations of rules of ethical behavior of public servants.

15.3.2 Statistics

Probably the best way to get the right impression of the significance and quality of the work of the Ombudsman is to see the statistical data on its work. These data are displayed in Table 2.

In addition to these activities, it should be mentioned that the Ombudsman has the right to propose the enactment of a new law or other regulation, the right to propose amendments to legislative proposals of the Government and MPs, as well as the right to initiate the proceeding of control of constitutionality and legality of laws and other general legal acts in the Constitutional Court. The Ombudsman used these special powers in 34 instances.[45]

[45] Available at http://www.ombudsman.rs/index.php/lang-sr/zakonske-i-druge-inicijative, accessed 30.09.2012.

Table 2 Overview of the data on work of the Ombudsman[a]

	2011	2010	2009	2008
No. of resolved cases	2,203	1,929	1,040	485
No. of cases out of the competence	1,319	952	653	409
No. of cases within the competence	884	977	393	76
No. of unfounded complaints	502	574	178	40
No. of withdrawn complaints	65	39	51	9
No. of cases that led to a recommendation to respective authority	187	229	44	19
No. of cases solved differently[b]	127	135	114	27
No. of special reports	4	2	/	/
Own motion investigation	184	81	/	/
Compliance with recommendations (%)	53 % (116/217)	49 % (69/140)	64 % (28/44)	/

[a]Data provided in the annual reports of the Ombudsman (2008–2011), available at http://www.ombudsman.rs/index.php/lang-sr/izvestaji/godisnji-izvestaji, accessed 30.09.2012. Annual report for 2007 exists, but there are no relevant data since the Ombudsman office started operating in the very end of 2007

[b]Authority rectified its error during the proceeding before the Ombudsman or the issues were resolved by mediation or conciliation

15.3.3 Relation Between the Ombudsman and the Administrative Appeal

One of the aspects of the empirical research on efficiency of the administrative appeal was its relation with the work of the Ombudsman. We tried to examine whether the Ombudsman was successful in resolving the problems of those persons who previously unsuccessfully used administrative appeal.

Information as to how many complainants exhausted the administrative appeal before applying to the Ombudsman is not provided in its annual report. Accordingly, we could not have known in how many cases a complainant was not successful on the administrative appeal but was successful before the Ombudsman. In order to obtain these data, we conducted an interview in the office of the Ombudsman with the Secretary General of this institution. Due to the lack of pertinent statistics, we were not provided with the information on the number of cases in which complainants previously exhausted administrative appeal. We were, however, given an estimation that in cases in which complainants had previously exhausted the administrative appeal, there were not more than 1 % of founded complaints.

The main reason for such an outcome is the fact that the Ombudsman is mostly dealing with issues of formal (not material) irregularities because of the small number of people in the office and a large number and complexity of substantive laws in special administrative domains. The Ombudsman largely deals with issues that go beyond the concept of legality and that cannot be dealt with by other

institutions. Practically, the only intersection between these two remedial path comes in the area of formal irregularities and the silence of administration. Although in case of silence of administration administrative appeal and later suit can be used, the Ombudsman took the stand that in these situations it will not insist on the rule of exhaustion of remedies. The reason for this lies in the fact that the reasonable time limit for taking the decision is important part of good administrative principles, which are the main focus of Ombudsman activities.

Based on the available facts and consideration of the relatively short period since the establishment of the Ombudsman, we can conclude that the complaint to Ombudsman is a parallel means of control in relation to the appeal due to the demand that the party must first exhaust the legal remedies and the fact that the Ombudsman deals largely with issues that cannot be subject to appeal. This approach is common and understandable for a relatively new institution that wants to build good relations with the administrative authorities. However, over time, with capacity building and with greater recognition in the society more active role of the Ombudsman is to be expected, even in purely legal cases that had been subject of appeal.

In its practice, the Ombudsman sets itself on a parallel course with the administrative appeal. There is very little or no intersection between these two remedial paths. One mainly focuses on rectification of substantive legal errors, while other concentrates on the respect of the principles of good administration. Since the Ombudsman has solved problems of unsuccessful appellants in a negligible number of cases, we had no opportunity to make any conclusions or recommendation as to the improvement of the efficiency of the administrative appeal on this basis.

15.4 Mediation

The mediation procedure is regulated in a general manner in the Mediation Act.[46] Defining its scope of application, article 1 of this act states that it sets rules of procedure for the mediation of disputes arising from, *inter alia*, administrative legal relations, so long as parties to these relations are at liberty to dispose with their stakes therein, unless a law prescribes exclusive jurisdiction of a court or other public authority.

However, mediation between the administration and private parties does not exist in practice, and this act is not applicable in Serbian administrative law for at least three reasons. To begin with, the administrative proceeding is, in theory and practice, considered to be noncontentious in its nature. Regulation of the administrative matter is the main aim of the administrative proceeding, and the administrative matter itself is an individual *noncontentious* situation of *public interest* in which the need for authoritative legal determination of future party's behavior

[46] Official Gazette of the Republic of Serbia, no. 18/2005.

derives directly from legal regulations (Art. 5 ADA). Hence, mediating relation between the administration and private persons in the administrative proceeding, including the appellate proceeding, is not possible under this law. The second reason lies with the fact that, as can be seen from the cited provision of ADA, regulation of the administrative matter entails public interest. The administrative authorities are entities in charge of realization and protection of public interest in the administrative proceeding and, thus, are not at liberty to dispose with their stake therein as they see fit. They are bound by the public interest as defined in the law and obliged to achieve and maintain it as it is prescribed, even in the case of discretionary power. Finally, ADA prescribes exclusive jurisdiction of the Administrative Court for resolution of administrative disputes.

Although it does not exist in general, mediation between the administration and a private party might occur in one special policy domain. The Public–Private Partnership and Concessions Act[47] allows the parties to stipulate arbitration as a means of resolution of the disputes that arise from public–private partnership contracts. As many arbitration institutions and rules permit a dispute between the parties to be resolved amiably during the arbitration procedure, either by directing parties to the mediation or by settlement, it appears that this could be a situation in which the administration and a private party may resolve their dispute by mediation.

As a final point, while administrative authorities are not free to submit their disputes to be resolved by a mediator, they can serve as mediators themselves. Namely, GAPA prescribes that in an administrative proceeding in which two or more parties with conflicting interests appear, those parties may reach a settlement on the matter(s) that are subject of the proceeding. In this process, the authorized person acting in the administrative proceeding appears as a mediator who is, under GAPA, obliged to endeavor so that the parties settle and who must make sure that the reached settlement is not contrary to the public interest, public morals, and the legal interest of third parties.

To sum up, mediation does exist in the administrative proceeding, except between the private parties. The position and competence of administrative authorities give them the opportunity to mediate but not to submit themselves to someone else's mediation.

15.5 Europeanization of Serbian Administrative Law System

Although contemporary process of European integration did not influence the normative regulation of the general regime of administrative appeal, Europe had its part in its creation. As we already mentioned, the first law regulating general

[47] Official Gazette of the Republic of Serbia, no. 88/2011.

administrative proceeding in Serbia (1930), predecessor of GAPA, was based on its slightly senior Austrian counterpart. Thus, we can say that European legal tradition found its way into Serbian system of administrative legal remedies (this goes for extraordinary legal remedies under GAPA as well). Most of legal institutes present in the European Administrative Space, such as legal certainty, proportionality, giving reasons, right to a hearing, right of appeal, and so on, have been a part of Serbian law ever since. Nonetheless, a new law regulating general administrative proceeding in Serbia is currently being drafted in cooperation with SIGMA. This might lead to the adoption of a few European legal solutions in this field, which might be missing, such as principle of legitimate expectations.

On the other hand, almost all significant changes made to the Serbian administrative law system in the past decade have been a consequence of the process of European integration (Council of Europe, EU) and/or have been, in its essence, taken from different European countries. Hence, introduction of Ombudsman, mediation (albeit still not used in practice), control of the Data Protection Commissioner, as well as some other legal institutions have been endorsed under a strong influence of European law. Another good example is the adoption of ADA in 2009, where Article 6 of the European Convention on Human Rights and pertinent recommendations of the Council of Europe played a key role in the amendments of the proceeding of judicial review of administrative acts.

It can thus be inferred that European legal tradition always had an impact on Serbian administrative law and that its influence has and will continue to grow in the process of European integration of Serbia.

15.6 Concluding Remarks

To start with, two general conclusions concerning ADR means in Serbian administrative law can be made. First, when observed all together, analyzed ADR tools are efficient in reducing court workload, and second, they are not of equal importance. While the administrative appeal is comprehensively regulated and highly efficient in said regard, the Ombudsman found its place in the overall system of protection of the rights and interests of private parties in their relations with the administration, but both in quantitative and qualitative respect falls short in comparison to the protection the administrative appeal provides. On the other hand, the mediation is only theoretically present in this legal field.

The administrative appeal proved to be the most comprehensive administrative legal remedy. It can be used, as a rule, against all administrative acts, on the grounds of any form of illegality or inopportunity. In theory, it offers the widest, deepest, and fastest way of control of administrative acts. Additionally, its efficiency was empirically confirmed. It sensibly relieves the courts from extra workload. Very little adjustments, if any, could be made to its legal regime.

The Ombudsman (The Protector of Citizens of the Republic of Serbia) completed the system of control of the work of the administration by concentrating on

the respect of the principles of good administration. Accordingly, instead of competing with the appellate administrative authorities, the Ombudsman enhanced the protection of parties' rights and interests by filling any potential gaps therein.

The mediation procedures represent the space for further improvement of the mechanisms of control of the administration. Potentials of this ADR tool are yet to be discovered and shaped.

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Part II
Alternative Dispute Resolution in the European Union Law

Chapter 16
Alternative Dispute Resolution Mechanisms in the European Union Law

Siegfried Magiera and Wolfgang Weiß

16.1 A Union Based on the Rule of Law

16.1.1 Values and Objectives of the European Union

The European Union is a Union (formerly called a Community) based on the rule of law, meaning that its institutions, bodies, offices, and agencies are subject to judicial review of the compatibility of their acts or their failure to act with the law of the Union exercised by the Court of Justice of the EU.[1] Its existence and its effectiveness as a government of law depend on the competences conferred upon it by the Member States, which have kept a decisive role in the creation, as well as in the implementation, of Union law. According to the German Federal Constitutional Court, they are still the "Masters of the [EU] Treaties."[2] Both, the Union and the Member States, derive the necessary legitimation for exercising their competences from values that the Union is founded on and that are common to the Member States; in particular and in addition to the rule of law, they comprise freedom,

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[1] ECJ Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, para 23; ECJ Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, para 45; ECJ Case C-550/09 *E and F* [2010] ECR I-6213, para 44; ECJ Case C-533/10 *CIVAD* 14 June 2012, para 30; ECJ Case C-336/09 P *Poland* v *Commission* 26 June 2012, para 19, 36.

[2] Judgment—2 BvE 2/08 et al.—of 30 June 2009, para 271, 334 (BVerfGE 123, 267 [368, 398]).

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democracy, equality, and respect for human dignity and human rights.[3] To promote these values, as well as peace and the well-being of its people, is an essential part of the objectives that the Union is to pursue with the assistance of the Member States according to the principle of sincere cooperation.[4]

The protection of these principles is entrusted to the Court of Justice of the EU, which has to ensure that neither the Member States nor the institutions of the Union can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty,[5] and thus with the Union law in general.[6] Corollary to the rule of law principle is the obligation of the Union institutions and of the Member States to observe the principle of sincere or loyal cooperation,[7] particularly including the national courts that have to ensure the application and implementation of the Union law in the Member States.[8]

16.1.2 Competences of the European Union

The European Union being based on the rule of law and established by international treaties constitutes a new legal order of international law separate and distinct from the legal orders of the Member States, although integrated into their systems and intertwined with them in various ways concerning provisions of organizational, substantive, and procedural laws.[9] Imperative requirements for the functioning of the European and any other legal order that is genuinely committed to the principles of democracy and the rule of law are the substantive unity and effectiveness of its provisions.[10] Individuals affected by these provisions must be subject to the same rules and observe them in the same way in all Member States.[11] A further essential requirement for the functioning of the European legal order is the principle of supranationality,[12] which is characterized by the possibility of decisions that are taken by a majority of the Member States and are nevertheless binding on all Member

[3] Article 2 TEU.

[4] Articles 3, 4 (3) TEU; for further details cf. Magiera (2012), pp. 94–99.

[5] ECJ Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, para 23.

[6] Cf. Article 19 (1) TEU.

[7] Article 4 (3) TEU.

[8] ECJ Case C-2/88 Imm. *Zwartfeld et al*. [1990] ECR I-3365, para 16 ff.

[9] ECJ Case 26/62 *van Gend & Loos* [1963] ECR 1, 12; ECJ Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 593; ECJ Case 14/68 *Wilhelm et al*. [1969] ECR 1, para 6.

[10] ECJ Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 594; ECJ Case 14/68 *Wilhelm et al*. [1969] ECR 1, para 6; ECJ Case 44/79 *Hauer* [1979] ECR 3727, para 14.

[11] ECJ Case 14/68 *Wilhelm et al*. [1969] ECR 1, para 6; ECJ Case 44/79 *Hauer* [1979] ECR 3727, para 14; ECJ Case 61/79 *Denkavit* [1980] ECR 1205, para 14 f.

[12] In Treaty law, the term "supranational" was originally used in Article 9 of the Treaty establishing the European Coal and Steel Community to describe the character of the duties of the members of the High Authority, the later Commission.

States,[13] the direct effect of Union law upon individuals in the Member States,[14] and the primacy or precedence of Union law over the law of the Member States.[15]

The competences of the Union are subject to the principles of conferral, of subsidiarity, and of proportionality.[16] The principle of conferral governs the limits of Union competences in relation to the Member States and restricts the Union to the competences conferred upon it by the Member States in the Treaties. The principles of subsidiarity and of proportionality govern the exercise of Union competences and require that the Union, in areas that do not fall within its exclusive competences, shall act only insofar as the objectives of an action cannot be sufficiently achieved by the Member States and that the Union's actions in general do not exceed what is necessary to achieve the objectives of the Treaties.

Administrative activities at Union level cover internal affairs, such as organization, personnel, and budget,[17] as well as external affairs in various areas, such as competition law, state aids, and Structural Funds.[18] Generally, the relevant functions are carried out by the Commission,[19] partially also by other entities provided for in the Treaties or established by secondary law, recently in particular by agencies with special missions.[20]

However, it should be noted that in performing their external functions, the Union institutions are in many ways dependent on the cooperation and assistance of the Member States.[21]

As a result of the principle of conferral, all competences not conferred upon the Union in the Treaties remain with the Member States, a consequence that seems to be obvious but has expressly been laid down twice in the EU Treaty of Lisbon.[22] Administrative action of the Member States can relate directly to Union law, as in the case of regulations, or indirectly after transformation of Union law into national law, as in the case of directives.[23] In addition, Union law must generally be observed by the Member States when performing their administrative activities.[24]

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[13] Article 16 TEU.

[14] Article 288 TFEU; ECJ Case 26/62 *van Gend & Loos* [1963] ECR 1, 13; ECJ Case 61/79 *Denkavit* [1980] ECR 1205, para 15.

[15] Declaration 17 annexed to the Treaties of Lisbon concerning primacy, OJ 2012 C 326/346; ECJ Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 594; ECJ Case 14/68 *Wilhelm et al.* [1969] ECR 1, para 6.

[16] Article 5 TEU.

[17] Cf., e.g., Articles 298, 317, 336 TFEU.

[18] Cf., e.g., Articles 105, 106, 108, 174 ff. TFEU.

[19] Cf. Articles 17 TEU, 244 ff. TFEU.

[20] Cf. below, Sect. 16.5.

[21] Cf. Articles 4 (3) TEU, 197 TFEU, and below in this section.

[22] Articles 4 (1) and 5 (2) TEU; cf. also ECJ Joined Cases 205–215/82 *Deutsche Milchkontor et al.* [1983] ECR 2633, para 17; ECJ Case 210/87 *Padovani et al.* [1988] ECR 6177, para 16.

[23] Article 288 TFEU.

[24] ECJ Case 14/68 *Wilhelm et al.* [1969] ECR 1, para 6; ECJ Case C-60/91 *Morais* [1992] ECR I-2085, para 11; ECJ Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029, para 27 f.

In principle, Union law only requires the Member States to fulfill their Treaty obligations but leaves the regulation of the necessary organizational and procedural details to their discretion.[25] The autonomy thus left to the Member States by this general rule has the consequence that the Member States alone are responsible for the fulfillment of their Treaty obligations. They can, therefore, not plead provisions, practices, or circumstances in their internal legal order to justify a failure to observe obligations arising under Union law.[26]

However, the autonomy of the Member States is limited insofar as Union law, including its general principles, provides common rules of its own to govern its implementation.[27] Special organizational and procedural common provisions exist, e.g., in the areas of customs, agricultural, competition, and environmental law.[28] General principles of Union law include, e.g., the principles of legal certainty, of legitimate expectation, and of proportionality, as well as procedural guarantees such as the right to be heard and the obligation to give reasons for a decision.[29] In addition, the European Court of Justice has developed two overarching principles in its case law. The principle of equivalence (or nondiscrimination) requires that rules of the Member States for implementing Union law are not less favorable than those governing similar domestic actions, while the principle of effectiveness requires that such rules do not render virtually impossible or excessively difficult the implementation of Union law.[30]

16.2 Judicial Protection in the European Union

16.2.1 Jurisdiction of the European Union Courts

Administrative activities at the Union level, that is, administrative activities of the Union institutions, are subject to the jurisdiction of the Court of Justice of the EU,

[25] ECJ Case 39/70 *Norddeutsches Vieh- und Fleischkontor* [1971] ECR 49, para 5; ECJ Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, para 12; ECJ Case C-30/02 *Recheio* [2004] ECR I-6051, para 17.

[26] ECJ Joined Cases 227–230/85 *Commission* v *Belgium* [1988] ECR 1, para 10; ECJ Case C-388/02 *Commission* v *Ireland* [2003] ECR I-12173, para 8; ECJ Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, para 45.

[27] ECJ Joined Cases 205–215/82 *Deutsche Milchkontor et al*. [1983] ECR 2633, para 17; ECJ Case C-63/01 *Evans* [2003] ECR I-14447, para 45; ECJ Case C-218/10 *ADV Allround Vermittlungs AG* 26 January 2012, para 35.

[28] Cf., e.g., ECJ Case C-359/88 *Zanetti* [1990] ECR I-1509, para 15 ff.; ECJ Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, para 13 ff.

[29] For details, cf. below, Sect. 16.4.1.

[30] ECJ Joined Cases 205–215/82 *Deutsche Milchkontor et al*. [1983] ECR 2633, para 19; ECJ Case C-30/02 *Recheio* [2004] ECR I-6051, para 17; ECJ Case C-218/10 *ADV Allround Vermittlungs AG* 26 January 2012, para 35.

that is, the Court of Justice and the General Court,[31] in matters of Union servants, also the EU Civil Service Court.[32] Administrative activities of the Member States can also be subject to the jurisdiction of the Union courts, that is, in cases of alleged infringements of Union law by a Member State.[33]

The legality of legislative acts and of other acts of Union institutions or the failure to act by Union institutions can be brought directly before the Court of Justice of the EU by other Union institutions, by Member States, and by individuals according to particular requirements laid down in the Treaty law.[34] Natural or legal persons may institute proceedings against all measures adopted by the institutions that have or are intended to have legal effects capable of affecting the applicants' interests by altering their legal position.[35] Furthermore, the act must be addressed to them or of direct and individual concern to them or a regulatory act that is of direct concern to them and does not entail implementing measures.[36] The latter possibility was added by the Treaty of Lisbon in order to extend the right to an effective remedy in view of a controversial case law of the EU courts.[37] However, it is still controversial whether a "regulatory act" also covers regulations adopted by legislative procedure.[38] An indirect way to the Court of Justice is opened by requests of national courts for a preliminary ruling in cases before them on questions of interpretation and validity of Union law.[39]

16.2.2 Jurisdiction of the National Courts

Administrative activities at the national level, that is, administrative activities of all government and other public sector institutions of the Member States, are subject to the jurisdiction of the national courts of the respective Member State. Illegality of administrative activities can result from a violation of the national or of the Union law by the national institutions or from the fact that these institutions implement acts of Union institutions that violate Union law.

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[31] Articles 19 TEU, 251 ff. TFEU.

[32] Cf. below, Sect. 16.3.4.

[33] Articles 258 ff. TFEU; for details, cf. below, Sect. 16.3.1.

[34] Articles 263, 265 TFEU.

[35] ECJ Case 60/81 *IBM* v *Commission* [1981] ECR 2639, para 9; ECJ Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, para 24 f.; ECJ Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, para 12; ECJ Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, para 52.

[36] Article 263 (4) TFEU.

[37] Cf. CFI Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, para 41 ff.; ECJ Case C-50/00 P *UPA* v *Council* [2002] ECR I-6677, para 41 ff.; ECJ Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, para 31 ff.

[38] Cf. below, Sect. 16.2.2.

[39] Article 267 TFEU.

The clear division of judicial competences regarding administrative activities—review of Union institutions by Union courts, review of national institutions by national courts—can lead to a gap in the legal protection by the courts. Such a gap, which had opened under the EC Treaty,[40] would be upheld under the Treaty of Lisbon by a narrow understanding of the term "regulatory act,"[41] that is, by excluding regulatory acts adopted by legislative procedure and thus preventing individuals from directly challenging these general acts before the Union courts.[42]

However, the Union being based on the rule of law entitles individuals to effective judicial protection as a general principle of law stemming from the constitutional traditions of the Member States and as a right enshrined in the European Convention on Human Rights.[43] The Union Treaties have established a complete system of legal remedies and procedures to ensure judicial review of the legality of Union acts by the Union courts; if individuals cannot directly challenge a Union measure, they can try to do so indirectly before the Union courts[44] or before the national courts by way of a preliminary ruling.[45] In that context, the national courts are required, as far as possible, to enable individuals to challenge the legality of any national measure related to the application of a Union general (regulatory) act.[46] This difficult situation that the Court of Justice had to deal with under the former EC Treaty and that led the Court to remind that it is for the Member States to establish a system of legal remedies and procedures that ensure respect for the right to effective judicial protection[47] will continue if the term "regulatory act" introduced by the Lisbon Treaty in order to remedy the situation is interpreted narrowly.

16.3 Administrative Appeals: Areas, Procedures, and Consequences

At the Union level, individuals who want to challenge the legality of an act or a failure to act of Union institutions may regularly do so by instituting proceedings before the EU courts directly in order to have the act declared void[48] or the failure to

[40] Article 230 (4) TEC; cf. also above, Sect. 16.2.1.

[41] Article 263 (4) TFEU.

[42] For a narrow interpretation, GC Case T-18/10 *Inuit Tapiriit Kanatami* v *Parliament and Council* 6 September 2011, para 56; ECJ Case C-583/11 P *Inuit Tapiriit Kanatami v Parliament and Council* 3 October 2013, para 50 ff.

[43] ECJ Case C-50/00 P *UPA* v *Council* [2002] ECR I-6677, para 38 f.; cf. also Article 47 EU Charter of Fundamental Rights.

[44] Article 277 TFEU.

[45] Article 267 TFEU; ECJ Case C-50/00 P *UPA* v *Council* [2002] ECR I-6677, para 40.

[46] ECJ Case C-50/00 P *UPA* v *Council* [2002] ECR I-6677, para 42.

[47] This reminder was expressly included in the Treaty law by Article 19 (1) subpara 2 TEU.

[48] Articles 263 (4), 264 TFEU.

act declared contrary to the Treaties[49] or, indirectly—in proceedings concerning an act of general application—in order to have the act declared inapplicable.[50] In certain areas, however, individuals may or must—before or instead of seeking protection by the courts—avail themselves of alternative or preliminary dispute-resolving procedures. Administrative appeals in this sense are still limited at Union level; examples can be found in procedures of the Commission regarding infringements of Union law by Member States, aids granted by Member States, access to Union documents, appeals of servants within the Union civil service, and procedures of EU agencies.[51]

16.3.1 Infringements of European Union Law by Member States

It is for the Member States to ensure fulfillment of their obligations arising from the Union Treaties and from the acts of the Union institutions.[52] In particular, they are responsible to implement and apply Union law effectively within their legal system.[53] The Commission—as guardian of the Treaty[54]—has to ensure the application of the Treaties and of measures adopted by the Union institutions pursuant to them, as well as to oversee the application of Union law under the control of the Court of Justice of the EU.[55] The Court is to ensure that in the interpretation and application of the Treaties the law is observed.[56]

If the Court finds that a Member State has failed to fulfill an obligation under Union law, the State is required to take the necessary measures to comply with the judgment of the Court.[57] In case the Court finds the Member State has not complied with its judgment, it may impose a lump sum or penalty payment on it.[58] According to a new provision added by the Treaty of Lisbon, both actions can be combined in cases where the Member State has disregarded its obligation to notify measures transposing a directive adopted under a legislative procedure.[59]

[49] Article 266 TFEU.

[50] Article 277 TFEU.

[51] Cf. below, Sects. 16.3.1–16.3.4 and 16.5.

[52] Article 4 (3) TEU.

[53] Declaration (no. 19) on the implementation of Community (now Union) law, attached to the Maastricht Treaty on EU, OJ 1992 C 191/102.

[54] ECJ Case C-431/92 *Germany* v *Commission* ECR [1995] ECR I-2211, para 22.

[55] Article 17 (1) TEU.

[56] Article 19 (1) TEU.

[57] Article 260 (1) TFEU.

[58] Article 260 (2) TFEU.

[59] Article 260 (3) TFEU.

An infringement action for noncompliance with Union law may be brought before the Court against a Member State by the Commission[60] or by another Member State.[61] In the latter case, the Member State must initially bring the matter before the Commission. In both cases, the judicial procedure before the Court is preceded by an administrative procedure before the Commission.[62]

If an action against a Member State is brought before the Commission by another Member State, the Commission is to deliver a reasoned opinion after having given the States an opportunity to submit their observations; if it has not delivered an opinion within 3 months after the matter was brought before it, the matter can be brought before the Court by the Member State.[63] This procedure has rarely been used by the Member States and only in a few cases led to an encounter by two States before the Court.[64] The major reasons seem to be that the Member States prefer to settle the matter by political means or to leave legal proceedings before the Court to the Commission.

If the Commission considers that a Member State has failed to fulfill an obligation under Union law, it may bring the matter before the Court only after giving the State an opportunity to submit its observations and thereupon delivering a reasoned opinion and only if the State has not complied with the opinion within the period determined by the Commission.[65] Thus, the procedure laid down by this Treaty provision comprises two consecutive stages, the prelitigation or administrative stage before the Commission and the contentious judicial stage before the Court.[66] The purpose of the judicial action is to obtain a judgment of the Court with a declaration that the Member State has failed to fulfill an obligation under Union law and to terminate that conduct.[67] Once the infringement of the Member State has been stated by the judgment of the Court an amicable settlement of the dispute between the Member State and the Commission is no longer possible.[68] The dual purpose of the prelitigation administrative procedure is to give the Member State an opportunity to correct its position and comply with its obligation under Union law,

[60] Article 258 TFEU.

[61] Article 259 TFEU.

[62] Exceptions are provided for in Articles 108 (2), 114 (9), 126 (10), 271, 348 (2) TFEU.

[63] Article 259 (3) (4) TFEU.

[64] ECJ Case 141/78 *France* v *UK* [1979] ECR 2923; ECJ Case C-388/95 *Belgium* v *Spain* ECR [2000] ECR I-3123; ECJ Case C-145/04 *Spain* v *UK* [2006] ECR I-7917; ECJ Case C-364/10 *Hungary v Slovakia* 16 October 2012.

[65] Article 258 TFEU; ECJ Case 7/61 *Commission* v *Italy* [1961] ECR 317, 326; ECJ Case 274/83 *Commission* v *Italy* [1985] ECR 1085, para 18.

[66] ECJ Case C-266/94 *Commission* v *Spain* ECR [1995] ECR I-1977, para 15; ECJ Case C-3/96 *Commission* v *Netherlands* ECR [1998] ECR I-3054, para 14.

[67] ECJ Case 7/61 *Commission* v *Italy* [1961] ECR 317, 326; ECJ Joined Cases C-514/07 P et al. *Sweden* v *Commission* [2010] ECR I-8533, para 119.

[68] ECJ Joined Cases C-514/07 P et al. *Sweden* v *Commission* [2010] ECR I-8533, para 121.

on one hand, and, on the other, to avail itself of its right to a proper defense against the objections formulated by the Commission.[69]

The prelitigation administrative procedure begins—after possible and regularly practiced informal contacts between the Commission and the Member State—with an initial letter of formal notice containing a brief summary of the complaints intended to define the subject matter of the dispute and to give the Member State an opportunity to submit its observations for its defense.[70] This opportunity of being heard is an essential guarantee and requirement in the procedure, but the Member State is free in using it.[71] The first phase is followed by a reasoned opinion, if the Commission still considers the Member State to be violating Union law. The necessary statement of reasons is sufficient when it contains a coherent and detailed account of the reasons which led the Commission to conclude that the Member State has failed to fulfill an obligation under Union law.[72] The Commission is not prevented from setting out its considerations in more detail compared to the initial letter, especially as the reply to its letter may have given rise to a fresh look at the complaints and as long as the subject matter of the procedure remains the same.[73] However, the Commission is not required to indicate the measures to be taken by the Member State in order to remedy the illegal conduct.[74]

If the Member State does not comply with the reasoned opinion within the period laid down in it, the Commission may bring the matter before the Court. The proper conduct of the prelitigation administrative procedure is essential in order to protect the rights of the Member State and to ensure that the contentious judicial procedure has a clearly defined dispute as its subject matter.[75]

Although the Commission is obliged to ensure the application of Union law[76] and has the power to bring the Member States before the Court for failing to observe

[69] ECJ Case 48/62 *Lütticke* v *Commission* [1966] ECR 19, 26; ECJ Case 74/82 *Commission* v *Ireland* ECR [1984] ECR 317, para 13; ECJ Case 293/85 *Commission* v *Belgium* [1988] ECR 347, para 12 f.; ECJ Case C-266/94 *Commission* v *Spain* [1995] ECR I-1977, para 16; ECJ Case C-159/94 *Commission* v *France* [1997] ECR I-5819, para 15; ECJ Case C-522/09 *Commission* v *Romania* 14 April 2011, para 15; ECJ Case C-508/10 *Commission* v *Netherlands* 26 April 2012, para 33.

[70] ECJ Case 51/83 *Commission* v *Italy* ECR [1984] ECR 2793, para 4; ECJ Case 274/83 *Commission* v *Italy* [1985] ECR 1085, para 19, 21; ECJ Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, para 15 f.

[71] ECJ Case 31/69 *Commission* v *Italy* [1970] ECR 25, para 13; ECJ Case 51/83 *Commission* v *Italy* [1984] ECR 2793, para 5.

[72] ECJ Case 7/61 *Commission* v *Italy* [1961] ECR 317, 327; ECJ Case 274/83 *Commission* v *Italy* [1985] ECR 1085, para 19, 21; ECJ Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3683, para 22; ECJ Case C-508/10 *Commission* v *Netherlands* 26 April 2012, para 36.

[73] ECJ Case 74/82 *Commission* v *Ireland* [1984] ECR 317, para 20.

[74] ECJ Case C-247/89 *Commission* v *Portugal* [1991] ECR I-3683, para 22.

[75] ECJ Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3054, para 18; ECJ Case C-266/94 *Commission* v *Spain* [1995] ECR I-1977, para 17; ECJ Case C-212/09 *Commission* v *Portugal* 10 November 2011, para 26 f.; ECJ Case C-508/10 *Commission* v *Netherlands* 26 April 2012, para 34.

[76] Article 17 (1) TEU.

Union law,[77] it is not bound to initiate proceedings[78] or to act within a specified period,[79] except in cases of excessive duration infringing the right of defense.[80] However, the Commission must allow a Member State a reasonable time to reply to the letter of formal notice and comply with the reasoned opinion.[81] The question whether the Member State has failed its obligations is to be determined on the basis of the situation at the end of the period laid down in the reasoned opinion of the Commission.[82] Since its function to ensure that the Member States fulfill their obligations under Union law is in the general interest of the Union, the Commission does not have to show a specific legal interest of its own when it exercises its powers under Union law.[83] The measures of the Commission taken in the proceedings are not binding[84] and addressed only to the Member State concerned.[85]

Individuals requesting the Commission to take such measures are actually seeking the adoption of acts that are not of direct and individual concern to them, and therefore they are not entitled to bring proceedings before the courts.[86] However, complaints by individuals are of great importance for the Commission in order to find out whether Member States observe Union law. In response to an initiative by the European Ombudsman, the Commission has developed a—recommended—standard form[87] and detailed rules of procedure for such complaints.[88] The rules cover, inter alia, the submitting and recording of complaints, the protection of the

[77] Articles 258, 259 TFEU.

[78] ECJ Case 7/68 *Commission* v *Italy* [1968] ECR 423, 428; ECJ Case 247/87 *Star Fruit* v *Commission* [1989] ECR 298, para 11; ECJ Case C-196/97 P *Intertronic* v *Commission* [1998] ECR I-199, para 12.

[79] ECJ Case C-422/92 *Commission* v *Germany* [1995] ECR I-1124, para 17 f.

[80] ECJ Case C-546/07 *Commission* v Germany [2010] ECR I-439, para 22.

[81] ECJ Case 29/81 *Commission* v *Italy* [1981] ECR 2586, para 6; ECJ Case 74/82 *Commission* v *Ireland* [1984] ECR 317, para 11 f.; ECJ Case 293/85 *Commission* v *Belgium* [1988] ECR 347, para 14.

[82] ECJ Case 7/61 *Commission* v *Italy* [1961] ECR 317, 326; ECJ Case C-200/88 *Commission* v *Greece* [1990] ECR I-4307, para 13; ECJ Case C-60/96 *Commission* v *France* [1997] ECR I-3836, para 15.

[83] Articles 17 TEU, 258 TFEU; ECJ Case 167/73 *Commission* v *France* [1974] ECR 359, para 15; ECJ Case C-422/92 *Commission* v *Germany* [1995] ECR I-1124, para 16; ECJ Case C-431/92 *Commission* v *Germany* [1995] ECR I-2211, para 21.

[84] ECJ Case 48/65 *Lütticke* v *Commission* [1966] ECR 19, 27.

[85] CFI Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1561, para 42.

[86] Articles 265 (3), 263 (4) TFEU; ECJ Case 247/87 *Star Fruit* v *Commission* [1989] ECR 298, para 13; ECJ Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2182, para 11; CFI Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1561, para 41; ECJ Case C-196/97 P *Intertronic* v *Commission* [1998] ECR I-199, para 12; CFI Case T-443/03 *Retecal et al.* v *Commission* [2005] ECR, II-1803, para 44; CFI Case T-247/04 *Aseprofar and Edifa* v *Commission* [2005] ECR II-3451, para 40.

[87] *Commission,* Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission, OJ 1999 C 111/5.

[88] *Commission*, Updating the handling of relations with the complainant in respect of the application of Union law, COM (2012) 154; originally *Commission*, Communication on relations with the complainant in respect of infringements of Community law, OJ 2002 C 244/5.

complainant and personal data, the communication with the complainant, the closure of the case, the publication of infringement decisions, and the possibility of a complaint to the European Ombudsman.

In practice, the preliminary administrative procedure is of essential importance in securing the observance of Union law by the Member States. In recent years, more than 70 % of complaints were closed before the first formal step, that is, the letter of formal notice, more than 80 % before the reasoned opinion and more than 90 % before a ruling of the Court.[89] In order to improve the correct application of Union law, the Commission has initiated a closer cooperation with the Member States, including better prevention mechanisms and handling procedures.[90] Major new features in infringement management are CHAP and EU Pilot. CHAP or "Complaints Handling – Accueil des Plaignants" is a new information technology instrument for the registration and management of complaints by European citizens regarding the application of EU law by the Member States; in 2010 of 4,035 complaints lodged, 53 % could be closed by a comprehensive response of the Commission and 14 % on the ground of lack of Union competence; 17 % were examined further via EU Pilot, and 9 % transferred into infringement proceedings.[91] EU Pilot is an instrument aimed at improving answers to questions of citizens, as well as cooperation between the Commission and the Member States regarding application of Union law.[92] Between 2008 and 2011 of 2,121 files submitted, 49 % were complaints and 7 % enquiries by individuals, while 44 % were created by the Commission on its own initiative; sectors mainly concerned were the environment (33 %), the internal market (15 %), and taxation (11 %); 80 % of the responses provided by the Member States were acceptable so that the files could be closed, while the remaining 20 % went on to infringement proceedings.[93]

16.3.2 Aids Granted by Member States

Union law declares State aids generally incompatible with the internal market.[94] Save as otherwise provided in the Treaties,[95] any aid granted by a Member State or through State resources in any form whatsoever that distorts or threatens to distort

[89] *Commission*, 26th, 27th and 28th annual report on monitoring the application of community law (2008) and of EU law (2009) and (2010), COM (2009) 675, p. 2, COM (2010) 538, p. 3 and COM (2011) 588, p. 2.

[90] *Commission*, A Europe of results—Applying Community law, COM (2007) 502.

[91] *Commission*, 28th annual report on monitoring the application of community law (2010), COM (2011) 588, pp. 2 and 7 f.

[92] *Commission*, 28th annual report on monitoring the application of community law (2010), COM (2011) 588, pp. 2 and 8.

[93] *Commission*, Second evaluation report of EU Pilot, COM (2011) 930, pp. 5 f.; for a further discussion, cf. Andersen (2012), pp. 9 ff.

[94] Article 107 TFEU.

[95] Cf. Articles 42, 93, 96, 106 (2) TFEU.

competition by favoring certain undertakings or the production of certain goods are, insofar as it affects trade between Member States, prohibited.[96] This prohibition, however, is neither absolute nor unconditional.[97] On certain conditions, State aid can be compatible or considered to be compatible with the internal market.[98] The concept of aid from State, i.e. public,[99] resources in any form—which are attributable to the Member State[100]—can comprise positive benefits (subsidies in the strict sense) as well as exemptions from charges normally included in the budget of the beneficiary.[101]

The competence to decide whether a public benefit constitutes State aid and whether it is compatible with the internal market is entrusted to the Commission—exceptionally to the Council[102]—acting under the control of the Court of Justice of the EU.[103] The decisions are taken according to a specific and detailed supervisory procedure provided for in the Treaty law, as well as in implementing regulations by the Union institutions.[104] The applicable rules distinguish between reviewing existing and new or altered aid; of special importance, in practice, is the recovery of aid not compatible with Union law.

As to existing aid, the Commission, in cooperation with Member States, is to keep under constant review all systems of such aid in those States.[105] Existing aid

[96] Article 107 (1) TFEU.

[97] ECJ Case 78/76 *Steinike and Weinlig* [1977] ECR 595, para 8; ECJ Case C-301/87 *France* v *Commission* [1990] ECR 307, para 15; ECJ Case C-39/94 *SFEI et al.* [1996] ECR I-3547, para 36; ECJ Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para 30.

[98] Articles 107 (2) (3), 108 (2) TFEU.

[99] ECJ Case 248/84 *Germany* v *Commission* [1987] ECR 4013, para 17.

[100] ECJ Joined Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, para 38; ECJ Case C-303/88 *Spain* v *Commission* [1991] ECR I-1433, para 11; ECJ Case C-83/98 P *France* v *Commission* [2000] ECR I-3273, para 50.

[101] ECJ Case C-387/92 *Banco Exterior* [1994] ECR I-877, para 13; ECJ Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, para 25; ECJ Joined Cases C-106/09 P and C-107/09 P *Commission* v *Gibraltar and United Kingdom* 15 November 2011, para 71.

[102] Cf., e.g., ECJ Case C-110/02 *Commission* v *Council* [2004] ECR I-6333.

[103] Article 108 TFEU.

[104] Articles 108, 109 TFEU; Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community [now: Articles 107 and 108 TFEU] to certain categories of horizontal State aid, OJ 1998 L 142/1; Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC Treaty [now: Article 108 TFEU], OJ 1999 L 83/1; Commission, Proposal for a Council regulation amending regulation (EC) No 659/1999 . . . , COM (2012) 725; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999, OJ 2004 L 140/1; for other acts cf. European Commission, EU Competition Law—Rules applicable to State aid, Competition Handbooks, Brussels 2012 (available at http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html); for further details, cf. Magiera (2003), pp. 1296–1334; Sinnaeve (2010), pp. 573–705; Schütte (2011), pp. 336–353.

[105] Article 108 (1) TFEU.

comprises, in particular, aid schemes and individual aid[106] put into effect by the Member States before the entry into force of the original EEC Treaty or the respective accession Treaty, as well as aid schemes and individual aid introduced later according to the requirements of Union law.[107]

On account of its review, the Commission is to propose to the Member States any appropriate measures required by the progressive development or by the functioning of the internal market.[108] If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market according to Article 107 TFEU or that such aid is—in the light of Union law—being misused, it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.[109] Parties concerned or interested parties are the Member States and any person, undertaking, or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.[110] On application by a Member State and if justified by exceptional circumstances, the Council, acting unanimously, may permit derogation from the provisions of Article 107 TFEU.[111] The decision of the Commission must be sufficiently detailed and indicate precisely the obligation imposed on the Member State,[112] even if the Commission allows the Member State some latitude in taking the necessary measures.[113] The obligation to abolish or alter the aid applies only for the future but may comprise the prohibition to grant further aid from the date of entering into force, that is, before the aid scheme has been abolished or altered.[114]

If the Member State concerned does not comply with the decision to abolish or alter its aid practice within the prescribed time, the Commission or any other interested Member State may, in derogation from the provisions of Articles 258 and

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[106] For a definition of these terms, cf. Article 1 (d) and (e) Regulation 659/1999; for the relationship between a general scheme and implementing measures, cf. ECJ Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, para 21 ff.

[107] Article 1 (b) Regulation 659/1999; ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 5; ECJ Case 78/76 *Steinike and Weinlig* [1977] ECR 595, para 9; ECJ Case C-387/92 *Banco Exterior* [1994] ECR I-877, para 19.

[108] Article 108 (1) 2 TFEU.

[109] Article 108 (2) TFEU.

[110] Articles 108 (2) subpara 1 TFEU, 1 (h) Regulation 659/1999; ECJ Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, para 16; GC T-304/08 *Smurfit Kappa* v *Commission* 10 July 2012, para 47.

[111] Article 108 (2) subpara 3 TFEU; cf. for details, e.g., ECJ Case C-110/02 *Commission* v *Council* [2004] ECR I-6333.

[112] ECJ Case 70/72 *Commission* v *Germany* [1973] ECR 813, para 20, 23.

[113] ECJ Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, para 29.

[114] ECJ Case 52/83 *Commission* v *France* [1983] ECR 3707, para 8 ff.; ECJ Case 213/85 *Commission* v *Netherlands* [1988] ECR 295, para 19 ff.

259 TFEU, that is, without preliminary administrative procedure,[115] refer the matter to the Court of Justice of the EU directly.[116]

The system of supervision extends also to new aid,[117] that is, to aid schemes and individual aid that do not fulfill the requirements of existing aid, including alterations of existing aid.[118] This prior and preventive control[119] can be initiated by the Commission having information from whatever source, including individuals concerned who, although they cannot rely on the rights of defense for that procedure, have the right to be adequately associated with it.[120] In addition, the Commission is to be informed, in sufficient time, by the Member State to enable it to submit its comments of any plans to grant or alter aid.[121] The obligation to notify the Commission applies to all planned (new or altered) aid, even if the Member State considers it compatible with the internal market.[122] For reasons of simplifying administration, the Commission may, however, declare by means of regulations—in areas where it has sufficient experience to define general compatibility criteria—that certain categories of aid are compatible with the internal market and exempted from the notification procedure.[123] Save for such exemptions, the Member State concerned may not put its proposed measure into effect until the Commission has come to a final decision.[124] The objective is to prevent implementation of aid not compatible with Union law.[125] The Commission may, therefore, require the Member State by injunction to suspend or provisionally recover unlawful aid until it has

[115] Cf. above, Sect. 16.3.1.

[116] Articles 108 (2) subpara 2 TFEU, 25 Regulation 659/1999; ECJ Case 70/72 *Commission* v *Germany* [1973] ECR 813, para 11 ff.; ECJ Case 213/85 *Commission* v *Netherlands* [1988] ECR 295, para 6 ff.

[117] Article 108 (3) TFEU.

[118] Article 1 (c) Regulation 659/1999; cf. also ECJ Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, para 25 f.; ECJ Case C-295/97 *Piaggio* [1999] ECR I-3735, para 47 f.; ECJ Case C-400/99 *Italy* v *Commission* [2001] ECR I-3657, para 56 ff.; GC Joined Cases T-80/06 and T-182/09 *Budapesti Erőmű* 13 February 2012, para 37 f.

[119] ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 2; ECJ Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, para 24; ECJ Case C-199/06 *CELF* [2008] ECR I-469, para 37.

[120] Articles 10 (1) and 20 Regulation 659/1999; ECJ Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, para 37 ff.

[121] Article 108 (3) 1 TFEU.

[122] For details of the procedure to be followed, cf. Article 2 Regulation 659/1999 and Articles 2 ff. Regulation 794/2004.

[123] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community (now: Articles 107 and 108 TFEU) to certain categories of horizontal State aid, OJ 1998 L 142/1; for a particular example cf. Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ 2013 L 352/1.

[124] Article 108 (3) 3 TFEU, Article 3 Regulation 659/1999.

[125] ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 4; ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 11; ECJ Case C-199/06 *CELF* [2008] ECR I-469, para 36.

decided on the compatibility of the aid with the internal market.[126] The Commission's final decision, even when it declares the aid compatible with the internal market, does not regularize, retrospectively, aid that was implemented by the Member State before that decision.[127] The prohibition of implementation has a direct effect and gives rise to rights of individuals that national courts must safeguard without, however, deciding on the compatibility of the aid with the internal market that is to be determined by the Commission subject to the supervision of the Court of Justice of the EU.[128] If in doubt as to whether the measure constitutes aid, the national court may seek clarification from the Commission.[129]

The requirement of sufficient time for submitting its comments is to enable the Commission to form a prima facie opinion on the partial or complete conformity with Union law of the aid plans notified.[130] If at the end of this initial review, which—following the provisions for comparable situations in Articles 263 and 265 TFEU[131]—is limited to a period of 2 months,[132] the Commission concludes that the notified measure does not constitute aid or that the aid is compatible with the internal market, it must—in the interest of good administration—inform the Member State concerned and at its request any interested party.[133] A formal decision[134] or a hearing of complainants opposing the planned aid[135] is not required. However, the Commission is bound to conduct a diligent and impartial examination of the complaints in the interest of sound administration of the fundamental Treaty rules relating to State aid.[136] If the aid is implemented, it becomes an existing

[126] Article 11 Regulation 659/1999; ECJ Case C-301/87 *France* v *Commission* [1990] ECR 307, para 18 ff.; ECJ Case C-39/94 *SFEI et al.* [1996] ECR I-3547, para 43.

[127] ECJ Case C-199/06 *CELF* [2008] ECR I-469, para 40.

[128] ECJ Case 6/64 *Costa* v *ENEL* [1964] ECR 585, 596; ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 8; ECJ Case C354/90 FNCE [1991] ECR I-5505, para 14; ECJ Case C-39/94 *SFEI et al.* [1996] ECR I-3547, para 39 f.; ECJ Case C-199/06 *CELF* [2008] ECR I-469, para 38; ECJ Case C-275/10 *Residex Capital IV CV* 8 December 2011, para 24 ff.

[129] Cf. for details Commission notice on the enforcement of State aid law, OJ 2009 C 85/1; ECJ Case C-39/94 *SFEI et al.* [1996] ECR I-3547, para 50.

[130] ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 3; ECJ Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, para 57; GC T-304/08 *Smurfit Kappa* v *Commission* 10 July 2012, para 45.

[131] ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 4; ECJ Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, para 72 ff.

[132] Article 4 (5) Regulation 659/1999; for a possible extension of the period cf. Article 5 Regulation 659/1999; ECJ Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, para 52 ff.

[133] Articles 4 (2) (3), 20, 25, 26 Regulation 659/1999; ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 5; ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 12.

[134] Article 288 (4) TFEU; ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 5; ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 11.

[135] ECJ Case C-367/95 P *Sytraval and Brink's France* [1998] ECR I-1719, para 59.

[136] ECJ Case C-367/95 P *Sytraval and Brink's France* [1998] ECR I-1719, para 62; CFI Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, para 105.

aid.[137] The same is true, that is, the aid is deemed to be authorized if the Commission has not taken a decision within the time limit of 2 months; however, the Member State may implement the measure only after giving the Commission prior notice thereof and only, if the Commission—without having a right of objection[138]—does not take a decision within the following 15 working days.[139]

If the Commission considers the planned aid not compatible with the internal market according to Article 107 TFEU, it must without delay initiate the procedure provided for in Article 108 (2) TFEU.[140] This formal investigation procedure differs from the preliminary examination stage in requiring the Commission to give the parties concerned notice to submit their comments,[141] in order to enable it to become fully informed of all the facts of the case before taking its decision.[142] Therefore, the initiation of the contentious procedure replacing the consultative procedure becomes indispensable whenever the Commission has serious difficulties or doubts[143] in determining whether a measure constitutes aid or a plan to grant aid is compatible with the internal market.[144] In its decision to initiate the formal investigation procedure, the Commission is to summarize the relevant issues of fact and law, give a preliminary assessment regarding the aid character of the proposed measure, and set out the doubts regarding the compatibility with the internal market.[145]

As the administrative procedure relating to State aid is addressed only to the Member State concerned, other interested parties, in particular beneficiaries of the aid or competing undertakings, have the right to be involved to the extent appropriate in the light of the circumstances of the case but not the same rights to a fair hearing as individuals against whom a procedure is directed, that is, the sole aim of

[137] ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 12; ECJ Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, para 84 ff.; ECJ Case C-301/87 *France* v *Commission* [1990] ECR 307, para 17.

[138] ECJ Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, para 33.

[139] Article 4 (6) Regulation 659/1999; ECJ Case 120/73 *Lorenz* [1973] ECR 1471, para 6; ECJ Case C-39/94 *SFEI et al.* [1996] ECR I-3547, para 38.

[140] Article 108 (3) 2 TFEU.

[141] As the parties concerned are an indeterminate group, it is sufficient to publish a summary notice in the Official Journal of the EU: Article 26 (1) Regulation 659/1999; ECJ Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, para 16 f.

[142] ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 1; ECJ Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, para 33; GC T-304/08 *Smurfit Kappa* v *Commission* 10 July 2012, para 45.

[143] ECJ Case C-431/07 P *Bouygues* v *Commission* [2009] ECR I-2665, para 61 ff.; ECJ Case C-148/09 *Belgium* v *Commission* 22 September 2011, para 79; ECJ Case C-47/10 *Austria* v *Commission* 27 October 2011, para 71.

[144] Article 4 (4) Regulation 659/1999; ECJ Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para 13; CFI Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, para 72; ECJ case C-400/99 *Italy* v *Commission* [2001] ECR I-3657, para 47; ECJ Case C-431/07 P *Bouygues* v *Commission* [2009] ECR I-2665, para 61.

[145] Article 6 (1) Regulation 659/1999; CFI Joined Cases T-195/01 and T-207/01 *Gibraltar* v *Commission* [2002] ECR II-2309, para 74.

the communication is for the Commission to obtain the necessary information for its decision.[146]

The formal investigation procedure is closed by a decision of the Commission with the result, as the case may be, that the measure does not constitute aid, that the aid is compatible—as such or under certain conditions—or not compatible with the internal market.[147] In the latter case of a negative decision, that is, of unlawful aid paid out, the Commission is to take all necessary measures—within a period of 10 years[148]—in order to recover the aid from the beneficiary, except if this would be contrary to a general principle of Union law, such as the principle of limitation or of legitimate expectation.[149]

16.3.3 Access to Documents

According to Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the EU, which has the same legal value as the EU Treaties,[150] any citizen of the EU, that is, every national of an EU Member State,[151] as well as any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of EU institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with these provisions. As to the Court of Justice of the EU, the European Central Bank, and the European Investment Bank, the provisions only apply when these institutions exercise their administrative tasks.[152] Detailed provisions have been laid down in the general Regulation 1049/2001[153] and in various acts of the EU institutions regarding their rules of procedure.[154]

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[146] Article 25 Regulation 659/1999; ECJ Case 70/72 *Commission* v *Germany* [1973] ECR 813, para 19; CFI Case T-613/97 *Ufex* v *Commission* [2000] ECR II-4055, para 85 ff.; GC Case T-156/04 *EDF* v *Commission* [2009] ECR II-4503, para 101 ff.

[147] Article 7 Regulation 659/1999; for publication cf. Article 26 Regulation 659/1999.

[148] Article 15 Regulation 659/1999.

[149] Article 14 Regulation 659/1999; ECJ Case C-24/94 *Alcan* [1997] ECR I-1591, para 22, 25; ECJ Case C-81/10 P *France Télécom* v *Commission* 8 December 2011, para 59, 80 ff.

[150] Article 6 (1) TEU.

[151] Articles 9 TEU, 20 (1) TFEU.

[152] Article 15 (3) subpara 4 TFEU; cf. also Commission, Proposal for amending Regulation 1049/2001 (next footnote), COM (2011) 137.

[153] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

[154] Article 15 (3) subpara 3 TFEU; cf. the enumeration of the decisions in recital 17 of the preamble to Regulation 1049/2001 and, in particular, European Parliament, Rules of Procedure, Articles 103, 104, 148 with Annexes VIII and XV, OJ 2011 L 116/1; Council, Rules of Procedure, Annex II, OJ 2009 L 325/35; Commission, Rules of Procedure, Annex, OJ 2001 L 345/94, and

The term "document" is to be understood in a broad sense and covers any content, whatever its medium (in form of writing, of sound or visual recording etc.), concerning a matter relating to the policies, activities, and decisions within the competences and responsibilities of the institutions.[155] Regulation 1049/2001 applies to documents held by an institution, that is, to documents drawn up by the institution or received by it from other sources and being in its possession.[156] It also provides for limitations and exceptions on grounds of public or private interest.[157] Access to a document is to be refused without exception where disclosure would undermine the protection of certain public interests[158] or the privacy and integrity of the individual, especially regarding the protection of personal data.[159] Access to a document is generally to be refused, that is, unless there is an overriding public interest in disclosure, where disclosure would undermine the protection of certain other interests such as commercial interests of a natural or legal person, court proceedings or legal advice, the purpose of inspections, investigations, and audits.[160] Further, general exceptions concern the internal decision process of institutions, third party documents, documents originating from a Member State, and the possibility of a partial disclosure of a document.[161] Particular provisions regulate the disclosure by Member States of documents originating from EU institutions and the disclosure of sensitive documents.[162]

As to the procedure for access to documents, the purpose of Regulation 1049/2001 is to promote good administrative practice, especially to ensure the widest possible access to documents and the easiest possible exercise of this right.[163] Documents that are not subject to access limitations are to be made accessible to the public either following a written application or—in particular, documents drawn up or received in the course of a legislative procedure—directly in electronic form, through a register or in the Official Journal of the EU.[164] Applications for access to a document can be made—without giving reasons—in any written form, including electronic form, in one of the official Treaty languages[165] in a manner to enable the institution concerned to identify the document; if necessary, the

Decision 2006/291/EC, Euratom of 7 April 2006 on the re-use of Commission information, OJ 2006 L 107/38; for further details, cf. Magiera (2014a), pp. 601–609.

[155] Articles 15 (3) subpara 1 TFEU, 3 (a) Regulation 1049/2001.

[156] Article 2 (3) Regulation 1049/2001.

[157] Articles 15 (3) subpara 2 TFEU, 4 Regulation 1049/2001.

[158] Public security, defense and military matters, international relations, the financial, monetary, or economic policy of the Union and the Member States.

[159] Article 4 (1) Regulation 1049/2001.

[160] Article 4 (2) Regulation 1049/2001.

[161] Article 4 (3)–(7) Regulation 1049/2001.

[162] Articles 5, 9 Regulation 1049/2001.

[163] Articles 1, 15 Regulation 1049/2001.

[164] Articles 2 (4), 11, 12, 13 Regulation 1049/2001.

[165] Article 55 TEU.

institution shall assist the applicant and may ask him for clarification of his request.[166] The administrative procedure provides for a two-stage approach by differentiating between initial and confirmatory applications that, in the event of a partial or total refusal, can be followed by court proceedings or complaints to the Ombudsman initiated by the applicant. It is designed to achieve a swift and straightforward processing of the applications and a friendly settlement of disputes that may arise; if a satisfactory result is not possible, two remedies—before the courts and/or the Ombudsman—are available to the applicant.[167]

As to initial applications,[168] the institution concerned is to send an acknowledgement of receipt to the applicant and—within 15 working days from registration of the application—to grant access to the document requested or, in a written reply, state the reasons for the total or partial refusal and to inform the applicant of his right to make a confirmatory application. In exceptional cases, concerning, e.g., a very long document or a very large number of documents, the time limit may be extended by 15 working days provided that the applicant is notified in advance and given detailed reasons.[169] In case of a refusal to grant access, the applicant may—within 15 working days of receiving the reply—make a confirmatory application asking the institution to reconsider its position. A confirmatory application can also be made if the institution fails to reply to the application within the prescribed time limit.

As to confirmatory applications,[170] the institution concerned is—within 15 working days—to grant access to the document requested or, in a written reply, state the reasons for the total or partial refusal. In the latter case, the institution is required to inform the applicant of his right to make a complaint to the Ombudsman and/or institute court proceedings against the institution according to Articles 228 and 263 TFEU. In exceptional cases, the time limit may be extended by 15 working days provided that the applicant is notified in advance and given detailed reasons. Failure of the institution to reply within the time limit is considered as a negative reply and entitlement to institute proceedings before the Ombudsman and/or the courts.[171]

The institutions are required to publish an annual report including the number of cases in which they refused to grant access to documents and the number of sensitive documents not recorded in the registry.[172] In 2011, the Commission, as the major institution for requests, received more than 6,000 initial applications and made decisions of substance on 144 confirmatory applications. Most applications

[166] Article 6 Regulation 1049/2001.

[167] ECJ Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, para 53 ff.

[168] Article 7 Regulation 1049/2001.

[169] GC Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission* [2010] II-5723, para 34 ff.

[170] Article 8 Regulation 1049/2001.

[171] CFI Case T-437/05 *Brink's Security* v *Commission* [2009] ECR II-3233, para 69 ff.

[172] Article 17 (1) Regulation 1049/2001.

concerned taxation and customs (8 %) followed by competition (7 %), health and consumer (7 %), environment (6 %), energy (6 %), and internal market and services (6 %). Most applicants came from academics (26 %) followed by lawyers (11 %) and interest groups (9 %). Initial applications were fully granted in 80 % and partially in 8 % of the cases. In 12 % of the cases, access was refused in the first stage of the procedure, of which 42 % were upheld in the second stage. Main reasons for a refusal were the protection of the purpose of inspections, investigations, and audits (33 %); the protection of privacy and the integrity of the individual (21 %); the protection of the Commission's decision-making process (15 %); and the protection of commercial interests (15 %).[173]

16.3.4 Civil Service of the European Union

In carrying out their missions, the institutions of the EU shall have the support of an open, efficient, and independent European administration.[174] This new provision, which was added by the Treaty of Lisbon, confirms the traditional objectives of the European civil service laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants,[175] that is, to secure a staff of the highest standard of independence, ability, efficiency, and integrity, recruited on the broadest possible geographical basis from the Member States.[176] The Staff Regulations apply to officials of the EU, that is, any person who has been appointed according to these Regulations to an established post on the staff of an EU institution, including agencies and other bodies, such as the European External Action Service, the Committee of the Regions, or the Ombudsman.[177] The Conditions of

[173] Cf. for these and more detailed data Commission, Report on the application in 2011 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM (2012) 429.

[174] Article 298 TFEU.

[175] Article 336 TFEU; Council Regulation No 31 (EEC), No 11 (EAEC) of 18 December 1961 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (now: of the European Union), OJ 1962/P 45/1385, as amended, in particular, by Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968, OJ 1968 L 56/1; Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, OJ 2004 L 124/1; Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010, OJ 2010 L 311/1; Regulation (EU, EURATOM) No 1023/2013 of the European Parliament and of the Council of 22 October 2013, OJ 2013 L 287/15; an unofficial consolidated version of the Regulation can be found under 1962R0031—EN—01.01.2014—011.001—1. For details, cf. Fuentetaja (2011), pp. 135 and 139 ff.

[176] Recital 2 of the preamble of the Regulation laying down Staff Regulations.

[177] Articles 1, 1a, 1b Staff Regulations.

Employment apply to servants engaged under contract, such as temporary or local staff; special advisers; and accredited parliamentary assistants.[178]

In any dispute between the Union and its officials or other servants within the limits and under the conditions laid down in the Staff Regulations and the Conditions of Employment, judicial control is entrusted to the Court of Justice of the EU, more particularly to the EU Civil Service Tribunal at first instance and the General Court for subsequent appeals limited to points of law.[179] Detailed provisions are laid down in Title VII of the Staff Regulations that apply directly to disputes involving staff officials and, by analogy, to disputes involving other servants of the EU.[180]

The Court has jurisdiction in disputes regarding the legality of acts affecting officials or other servants adversely and unlimited jurisdiction in disputes of a financial character.[181] An appeal to the Court is admissible only after a prelitigation administrative procedure, that is, if a complaint was previously submitted by the plaintiff to the authority that had appointed him and the complaint was rejected by an express or implicit decision of the authority.[182] However, the plaintiff may, after submitting a complaint to the authority, immediately file—together with an appeal—an application for interim measures that suspends the principal action until an express or implied decision has been taken by the authority.[183] The Civil Service Tribunal may, at all stages of the procedure, examine the possibilities of and try to facilitate an amicable settlement of the dispute.[184]

The prelitigation or preliminary administrative procedure comprises, in principle, two stages. An official or other servant may submit to the appointing authority a request to take a decision relating to him (request stage), and he may submit a complaint against an act affecting him—with binding legal effect[185]—adversely, where the authority either has taken a decision or not adopted a measure prescribed by the Staff Regulations (complaint stage).[186] A failure of the authority to reply to

[178] Article 1 Conditions of Employment.

[179] Article 270 TFEU; Articles 1, 9 Annex to the Protocol (No 3) to the EU Treaties on the Statute of the Court of Justice of the EU, OJ 2012 C 326/210; Rules of Procedure of the European Union Civil Service Tribunal, OJ 2007 L 225/1.

[180] Articles 90, 90a, 90b, 90c, 91, 91a Staff Regulations; Articles 46, 73, 117, 138 Employment Conditions.

[181] Article 91 (1) Staff Regulations.

[182] Article 91 (2) Staff Regulations.

[183] Article 91 (3) Staff Regulations.

[184] Article 7 (4) Annex to the Protocol (No 3) to the EU Treaties on the Statute of the Court of Justice of the EU, OJ 2012 C 326/210; Articles 68 ff. Rules of Procedure of the European Union Civil Service Tribunal, OJ 2007 L 225/1; Article 91 (4) Staff Regulations.

[185] CFI Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, para 39; CST Case F-50/09 *Missir Mamachi di Lusignano* v *Commission* 12 May 2011, para 82; CFI Joined Cases T-90/07 P and T-99/07 P *Belgium and Commission* v *Genette* [2008] ECR II-3859, para 87.

[186] Articles 90, 90a, 90b, 90c Staff Regulations.

the request by a reasoned opinion within a period of 4 months is deemed to constitute an implied decision against which a complaint may be lodged as in the case of a decision.[187] The complaint must be lodged within a period of 3 months, and the authority is to notify the complainant of its reasoned opinion within 4 months.[188] The complainant may appeal against the decision of the authority or, if the authority does not reply to the complaint within the period prescribed, against the implied decision to the Court of Justice of the EU within a period of 3 months.[189]

The purpose of the prelitigation administrative procedure is to permit and encourage a nonjudicial resolution or amicable settlement of differences that have arisen between officials or other servants and the administration.[190] The complaint procedure, in particular, is intended to compel the institution to reconsider its decision in the light of objections brought forward by the complainant.[191] The significance of an amicable settlement is reinforced by the possibility to reach such a solution in subsequent appeal proceedings before and with the support of the Civil Service Tribunal.[192] As the administrative procedure is informal in character and does not require the support of an advocate, the institution must interpret the complaints with an open mind and not restrictively.[193]

16.4 Administrative Appeals: Principles of Good Governance

Administrative appeals are part of European administration that has to be open, efficient, and independent in a Union founded on the values of respect for human dignity and human rights, freedom, democracy, equality and the rule law in order to promote good governance.[194] Altogether, these qualifications mean that administrative appeals must meet the requirements of administrative procedures in general, that is the principle of good administration, and adequate out-of-court dispute resolution in particular.

[187] Article 90 (1) Staff Regulations.

[188] Article 90 (2) Staff Regulations.

[189] Articles 90 (2), 91 (2) Staff Regulations.

[190] ECJ Case 142/85 *Schwiering* v *Court of Auditors* [1986] ECR 3177, para 11; CST Case F-45/07 *Mandt* v *Parliament* 1 July 2010, para 110.

[191] CFI Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, para 45.

[192] Cf. above, in this section.

[193] CST Case F-45/07 *Mandt* v *Parliament* 1 July 2010, para 111—for a critical assessment of the administrative procedure, cf. Levi (2011), pp. 1 and 18 ff.

[194] Articles 2 TEU, 15 (1), 298 TFEU.

16.4.1 Right to Good Administration

Inspired by constitutional provisions in various Member States[195] and the case law of the European courts,[196] the Charter of Fundamental Rights of the EU—having since the Treaty of Lisbon the same legal value as the EU Treaties[197]—has laid down a "Right to good administration."[198] In addition, the European Ombudsman has developed "The European Code of Good Administrative Behaviour."[199]

16.4.1.1 Charter of Fundamental Rights of the European Union

The right to good administration,[200] although laid down in the Charter title on citizens' rights, applies to every person and is to ensure that his or her affairs are handled impartially, fairly, and within a reasonable time by all Union institutions, including bodies, offices and agencies. In addition to this essential substance of the right as a general principle of law, the Charter lays down expressly, but not exclusively, various particular examples of the right to good administration.[201]

The right of every person to be heard, before any individual measure that would affect him or her adversely is taken,[202] has been recognized early in the case law of the courts as a right of the defense in all administrative procedures that may result in a measure to his disadvantage.[203] The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy,[204] is closely connected with the right to be heard and the rights of the defense.[205] This right is restricted to the interested person's own

[195] E.g., Article 97 of the Italian Constitution, Articles 266 and 268 of the Portuguese Constitution, Articles 103, 105 and 106 of the Spanish Constitution.

[196] ECJ Case 56/64 et al. *Consten and Grundig* v *Commission* [1966] ECR 347; ECJ Case 55/70 *Reinarz* v *Commission* [1971] ECR 379, para 18; ECJ Case 179/82 *Lucchini* v *Commission* [1983] ECR, 3083, para 27; ECJ Case C-265/09 P *OHIM* [2010] ECR I-8265, para 45.

[197] Article 6 (1) TEU.

[198] Cf. below, Sect. 16.4.1.1.

[199] Cf. below, Sect. 16.4.1.2.

[200] Also called principle or right of "sound administration"; cf., e.g., ECJ Case C-308/07 P *Gorostiaga Atxalandabaso* v *Parliament* [2009] ECR I-1059, para 69.

[201] Article 41 of the Charter, OJ 2007 C 303/1; for further details, cf. Magiera (2014b), pp. 588–600.

[202] Article 41 (2) (a) of the Charter.

[203] ECJ Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, para 15; ECJ Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, para 32 f.; ECJ Case C-32/95 P *Commission* v *Lisrestal* [1996] ECR I-5373, para 21; ECJ Case C-265/09 P *OHIM* [2010] ECR I-8265, para 33; ECJ Case C-327/10 *Hypoteční banka* 17 December 2011, para 49 f.

[204] Article 41 (2) (b) of the Charter.

[205] ECJ Case C-204/00 et al. *Aalborg Portland et al.* v *Commission* [2004] ECR I-123, para 68 ff.

files and thus to be distinguished from the right of access to documents in general.[206] The obligation of the administration to give reasons for its decision[207] guarantees every person the right to an adequately reasoned decision.[208] The statement of reasons must be notified to the person concerned, together with the decision adversely affecting him, and provide him with sufficient information to defend his rights and to enable the Court to review the legality of the decision.[209] Other rights to good administration which are not expressly laid down in the Charter can be found in the case law of the European courts and in the Code of Good Administrative Behaviour of the European Ombudsman.[210]

As a consequence of good administration which includes responsibility for incorrect action, the Treaty law provides that the Union—in accordance with the general principles common to the laws of the Member States—shall, in the case of noncontractual liability, make good any damage caused by its institutions or by its servants in the performance of their duties.[211] In addition, the Charter lays down a right of every person to have the Union make good such damage as provided in the Treaty.[212] Also, as provided in the Treaty, the Charter includes a right of correspondence, that is, a right of every person to write to the Union institutions and to receive an answer in the same language.[213]

16.4.1.2 The European Code of Good Administrative Behaviour

"The European Code of Good Administrative Behaviour" was drawn up by the European Ombudsman—whose tasks include the prevention of maladministration in the activities of the Union institutions[214]—and approved by the European Parliament[215] in order to promote good administration and to explain the right to good administration in more detail.[216]

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[206] To the latter right, cf. above, Sect. 16.3.3; ECJ Case C-404/10 *Commission* v *Éditions Odile Jacob* 28 June 2012, para 120.

[207] Article 41 (2) (c) of the Charter; cf. also Article 296 (2) TFEU.

[208] ECJ Case C-269/90 *Technische Unversität München* [1991] ECR I-5469, para 14; CFI Case T-183/97 R *Micheli* v *Commission* [1997] ECR II-1473, para 56; CFI Case T-151/05 *NVV* v *Commission* [2009] ECR II-1219, para 163.

[209] ECJ Joined Cases C-628/10 P and C-14/11 P *Alliance One International et al.* v *Commission* 19 July 2012, para 72 ff.

[210] Cf. below, Sect. 16.4.1.2.

[211] Article 340 (2) TFEU.

[212] Article 41 (3) of the Charter.

[213] Articles 41 (4) of the Charter, 24 (4) TFEU.

[214] Article 228 TFEU.

[215] Resolution of 6 September 2001, OJ 2002 C 77E/331.

[216] Foreword to the Code, pp. 4 ff. of the Code—the Code is available at the website of the Ombudsman: http://www.ombudsman.europa.eu/resources/code.faces.

A first group of provisions in the Code relates to rights to be respected by the administration, which are expressly laid down in the Treaty law or the Charter, such as the rights to impartiality and independence,[217] to be heard, to a reasoned decision and to correspondence,[218] to protection of personal data,[219] and of access to documents.[220] A second group refers to fundamental principles of good administration, such as lawfulness, nondiscrimination, proportionality, legitimate expectation, and prohibition of abuse of power.[221] A third group underlines requirements of civilized behavior, such as fairness and courtesy, and of technical procedures, such as acknowledgement of receipt of applications, transfer to the competent authority, notification of decisions, and indication of possibilities to appeal,[222] requirements that should be but obviously are not always properly observed.[223]

16.4.2 Principles for Out-of-Court Dispute Resolution

Similar to the Code of good administration of the European Ombudsman for administrative institutions of the EU, the Commission has adopted recommendations for the out-of-court settlement of consumer disputes.[224] Although these recommendations, as well as other Union acts,[225] are concerned with alternative dispute resolution of conflicts in civil and commercial matters, the principles of procedure for the bodies involved may also be of relevance to administrative institutions when trying to find amicable solutions in prelitigation procedures.

[217] Articles 8 of the Code, 41 (1) of the Charter, 296 (2), 298 TFEU.

[218] Articles 13, 16, 18 of the Code, 41 (2) (4) of the Charter, 24 (4) TFEU.

[219] Articles 21 of the Code, 8 of the Charter, 16 TFEU.

[220] Articles 22, 23 of the Code, 42 of the Charter, 15 TFEU.

[221] Articles 4–7, 10 of the Code.

[222] Articles 11, 12, 14, 15, 19, 20 of the Code.

[223] Cf. the Annual Report of the European Ombudsman, e.g., for the year 2011, pp. 11 ff—the Report is available at the website of the Ombudsman: http://www.ombudsman.europa.eu/activities/annualreports.faces.

[224] Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ 1998 L 115/31; Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ 2001 L 109/5.

[225] Cf., e.g., Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 2008 L 136/3; Commission, Alternative dispute resolution for consumer disputes in the Single Market, COM (2011) 791; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013 L 165/63; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ 2013 L 165/1.

They include the principles of independence and impartiality of the responsible body members, as well as the principles of transparency, effectiveness, and fairness of the procedure.

16.5 Alternative Dispute Resolution in the Administration of the Internal Market

Alternative instruments of dispute resolution have been introduced in EU law with the aim to foster the realization of the Internal Market and to provide individuals with alternatives to court proceedings in protecting their rights against infringements of EU law. In this context, two areas can be highlighted: first, the provision of appeal procedures at supranational level within EU agencies and, second, the establishment of the SOLVIT system that provides a means of informal dispute settlement in specific cases of infringement of EU law by national administrations. These two aspects of nonjudicial dispute resolution in EU law shall be analyzed in more detail here.

16.5.1 Dispute Resolution and EU Agencies

16.5.1.1 Preliminaries

Dispute resolution is a topic also for EU agencies and bodies because such agencies and bodies increasingly are entrusted with executive or regulatory, hence administrative, functions and with powers to issue decisions that address individuals or that are at least relevant for individual interests of third parties. Even though most agencies have only informational, advisory, and coordinative functions, there are a few that can take individualized decisions,[226] and with regard to them the question arose which the relevant rules governing the resolution of disputes between them and individuals concerned are.

As the EU is based on the rule of law, dispute resolution by way of judicial protection against unlawful actions of all EU institutions must be available. Efficient judicial protection is a human right also in EU law[227] (see now Article 47 of the Charter of Fundamental Rights providing that everyone whose EU rights and freedoms are violated has the right to an effective remedy before a tribunal).

[226] Craig and de Burca (2011), p. 70.

[227] CJEU Case C-279/09 *DEB/Germany* [2010] ECR I-13849, para 29 "The question referred thus concerns the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States."

Consequently, the treaty rules on judicial protection against EU acts (Article 263 TFEU about the action for annulment, Article 265 TFEU about the action against failure to act) also apply to legal actions issued by EU institutions like EU agencies or bodies that are binding on third parties or engender legal effects insofar. This has been clarified by some founding instruments,[228] later by the EU judiciary,[229] and is now, after the Lisbon Reform, explicitly provided for in the treaties [Article 263 (1) second sentence, and Article 265 (1) second sentence TFEU]: The CJEU shall also review the legality of acts of bodies, offices or agencies of the Union.[230]

The founding instruments of some of the EU agencies and bodies contain provisions about legal protection, some of which establish specific appeal procedures as a preliminary requirement for judicial proceedings before the EU Courts. This is in conformity with primary EU law as the acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. Article 263 (5) TFEU is so far codifying the relevant practice already established prior to the Lisbon Treaty[231] and allowing for flexibility in the judicial review of acts of EU agencies or bodies. As a consequence, the founding instruments of EU agencies can require initial administrative appeals to specific committees or the Commission itself, before a dispute can be brought before the EU judiciary in case of an unfavorable response, in order to shield the EU Courts from a heavy workload.[232] What is more, the founding instruments could even establish requirements for judicial protection that depart from the conditions set out in Article 263 TFEU for actions for annulment; such deviations, however, have to take into account that the right to challenge the acts of such bodies and agencies is not to be compromised.[233] By analogy, the same should apply to the actions for failure to act under Article 265 TFEU, even though a provision similar to paragraph 5 of Article 263 TFEU is lacking there.

Besides rules on legal protection and appeal procedures as a way of protecting legal rights of persons affected by binding decisions of an agency or body, a specific

[228] Cf. Article 17 Regulation 302/93 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, OJ 1993 L 36/1: "The Court of Justice shall have jurisdiction in actions brought against the Centre under the conditions provided for in Article 173 of the Treaty" [which is now Article 263 TFEU] and Article 27 (3) Regulation 168/2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 53/1 which in addition refers to Article 232 ECT which is now Article 265 TFEU on the action against failure to act.

[229] CFI Case T-411/06 *Sogelma*, [2008] ECR, II-2771, para 37: "The general principle . . . is that any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review."

[230] Cf. also recently GC Case T-1/10 *PPG and SNF SAS* v *ECHA* [2011], nyr, para 38–39.

[231] Barents (2010), pp. 709–726.

[232] Arnull (2012), pp. 34–42.

[233] See again Arnull (2012).

type of administrative appeal procedure is provided for in certain regulations as an expression of the Commission's supervisory competences over agencies and bodies. Such type of administrative appeal exists with regard to the Executive Agencies of the Commission (see *infra* Sect. 16.5.1.3) and also with regard to other bodies and centers that do not have the power to adopt legally binding decisions towards third parties but are restrained to mere coordinative, preparatory, and advisory functions. Article 18 of the European Centre for the Development of Vocational Training (CEDEFOP) Regulation[234] and Article 28 Regulation 851/2004 on the European Centre for Disease Prevention and Control (ECDC),[235] for example, lay down, in grossly identical drafting, the right of Member States, members of the Management or Governing Board, respectively, and also of third parties directly and personally involved to refer, within 15 days of the day on which the party first became aware of the act, any express or implied act of the center to the Commission for examination of its legality. The Commission then shall take a decision within 1 month. If the Commission does not take any decision within this period, the case shall be deemed to have been dismissed. The next steps after the dismissal, in particular the question whether the Commission decision may be subject to an action before the EU Courts, are not regulated in the CEDEFOP regulation. But as secondary law cannot deviate from primary law, one might expect that such Commission decisions as well are amenable to actions before the EU Courts, in conformity with the relevant rules of the TFEU. In contrast, the ECDC regulation provides in Article 28 (4) that an action for annulment of the Commission's explicit or implicit decision to reject the administrative appeal may be brought before the EU Courts in accordance with primary law. What is neither regulated in both of these regulations is the extent of the Commission's decision-making competences regarding the administrative appeal. It is not clear whether the Commission itself can annul, replace, or amend the contested act or whether it is restricted to either uphold the agency's act or to order the agency to modify it.

16.5.1.2 Judicial Protection and Alternative Dispute Resolution by Appeal Procedures in the Agencies' Founding Instruments

An analysis of the legal instruments establishing EU regulatory agencies or bodies shows that most regulations do not contain provisions on legal protection or on alternative means of dispute resolution, apart from a widespread statement that the EU Courts have jurisdiction to decide on the liability of the centers, agencies, or

[234] Regulation 337/75 establishing a European Centre for the Development of Vocational Training, OJ 1975 L 39/1, as amended.

[235] Regulation 851/2004 establishing a European center for disease prevention and control, OJ 2004 L 142/1.

bodies. Some regulations only contain a provision on legal protection regarding decisions on the public access to official documents under regulation 1049/2001[236]: Article 14a (3) Regulation establishing CEDEFOP,[237] Article 41 Regulation 178/2002 on the European Food Safety Authority,[238] Article 14 (3) Regulation 460/2004 on the European Network and Information Security Agency,[239] Article 20 (3) ECDC Regulation,[240] Article 6 Regulation 401/2009 on the European Environment Agency,[241] Article 17 Regulation 168/2007 establishing a European Union Agency for Human Rights,[242] Article 28 (5) Regulation 2007/2004 establishing FRONTEX[243] or Article 73 Regulation 726/2004 on the European Medicines Agency,[244] for example, provide that decisions taken by the agency regarding access to documents may form the subject of a complaint to the European Ombudsman or of an action for annulment before the EU Courts, in accordance with primary law. Meanwhile, following the expansion of the agency's competences and anticipating the amendments caused by the Lisbon Treaty, the Regulation on the European Medicines Agency was amended by adding Article 73a, which states that decisions taken by the agency are amenable to actions before the EU Courts.[245] No mention is made of an appeal procedure regarding these agencies.

There are some regulations, however, that do afford quite sophisticated and elaborate rules on legal protection and appeal procedures. Typically, these agencies were founded rather recently and are competent to make decisions *vis a vis* individuals; they are, e.g., agencies or bodies "empowered, inter alia, to enact legal instruments binding on third parties."[246] Until recently, there were only four

[236] Regulation 1049/2001 regarding public access to European Parliament, Council, and Commission documents, OJ 2001 L 145/43.

[237] Regulation 337/75 establishing a European Centre for the Development of Vocational Training, OJ 1975 L 39/1, as amended by Regulation 1655/2003, OJ 2003 L 245/41.

[238] Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L 31/1, as amended.

[239] Regulation 460/2004 establishing the European Network and Information Security Agency, OJ 2004 L 77/1.

[240] Regulation 851/2004 establishing a European center for disease prevention and control, OJ 2004 L 142/1.

[241] OJ 2009 L 126/13.

[242] OJ 2007 L 53/1.

[243] OJ 2004 L 349/1.

[244] Regulation 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ 2004 L 136/1.

[245] This amendment was introduced by Regulation 1901/2006, 2006 OJ L 378/1. Likewise, Article 27 of the Regulation establishing the EU Agency on Human Rights and Article 17 Regulation 302/93 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, OJ 1993 L 36/1 provide for the jurisdiction of the ECJ for actions brought against the agency/center.

[246] See, so far, Commission Communication, The Operating Framework for the European Regulatory Agencies, COM (2002) 718 final, p. 8.

agencies that had the power to enact binding legal acts: the Office of Harmonization for the Internal Market *OHIM*,[247] the Community Plant Variety Office *CPVO*,[248] the European Chemicals Agency *ECHA*,[249] and the European Aviation Safety Agency *EASA*.[250] Meanwhile, several more have been added, like the three European Supervisory Authorities for the financial market (*ESAs*): the European Banking Authority *EBA*,[251] the European Insurance and Occupational Pensions Authority *EIOPA*,[252] and the European Securities and Markets Authority *ESMA*.[253] These authorities share a common Board of Appeal that provides legal expertise for the appraisal of the legality of the authorities' decisions. Also, the newly established Agency for the Cooperation of Energy Regulators *ACER* has limited regulatory powers—besides making recommendations to national regulators or market player and providing opinions to the Commission—as it is competent to adopt individual decisions on technical issues and decides about certain regulatory and cross-border infrastructure access issues.[254] Accordingly, a board of appeal was provided for that is competent to deal with appeals by natural or legal person or the national regulatory authorities against a decision of the agency.[255] Finally, some regulations provide for unlimited jurisdiction of the EU Courts when reviewing Commission decisions on fines and periodic penalty payments enabling the Court, in conformity with Article 261 TFEU, to cancel, reduce, or increase the fine or periodic penalty payment imposed.[256]

Common Characteristics, Divergences and Unique Features

The rules on the boards of appeal and the related appeal procedure, as they stand nowadays, share many common characteristics regarding the establishment and composition of the boards, procedure, and competences and the effects of an appeal: the boards usually consist of three members whose term of office lasts for

[247] See Article 25 et seq. Council Regulation 207/2009 on the Community Trademark, OJ 2009 L 78/1, as amended.

[248] Articles 4, 30 et seq. Regulation 2100/94 on Community plant variety rights, OJ 1994 L 227/1, as amended.

[249] Article 75 et seq. Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ 2006 L 396/1.

[250] See Articles 17 et seq. Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2008 L 79/1, as amended.

[251] See Regulation 1093/2010, OJ 2010 L 331/12.

[252] Cf. Regulation 1094/2010, OJ 2010 L 331/48.

[253] Cf. Regulation 1095/2010, OJ 2010 L 331/84.

[254] As provided for in Articles 7 (1), 8, 9 (1) Regulation 713/2009 establishing an Agency for the Cooperation of Energy Regulators, OJ 2009 L 211/1.

[255] Article 19 Regulation 713/2009.

[256] Cf. Article 25 (4) Regulation 216/2008.

5 years; it is usually renewable. The only exceptions are the board of appeal of the European Supervisory Agencies (ESAs) and of the Agency for the Cooperation of Energy Regulators (ACER), which each consists of six members. The reason behind the enlarged composition of the board of appeal of the ESAs is the fact that the ESAs board of appeal is competent for appeals against the decisions of three agencies: the EBA, the ESMA, and the EIOPA. Two of the six members are appointed by each of the three agencies. The required majority for decisions of the board of appeal is at least four out of its six members, whereby the deciding majority has to include at least one of the two members appointed by the specific agency (EBA, ESMA, EIOPA), if the appealed decision falls within the scope of the specific agency.[257] The members of the boards have to be independent and impartial. Hence, there are elaborate rules on this.[258] Therefore, due to this independence, the members of the boards of appeal are not bound by a position adopted by OHIM in a dispute before the EU Courts.[259] Only final decisions are subject to appeal,[260] and the time limit for lodging the appeal usually is 2 months; sometimes there are additional 2 months for giving the reasons. The appeal procedures comprise oral presentations by the parties. And the boards usually have the competence either to replace the contested decision or to remit it to the competent body within the agency.

Despite these commonalities, nevertheless, the rules about appeals differ—sometimes considerably—in detail: the OHIM Regulation provides that specific cases are dealt with by an enlarged Grand Board of Appeal.[261] The CPVO and the EASA Regulations allow adding two further members to the composition of the board of appeal.[262] There are some EU regulations which provide for a suspensive effect of the appeal,[263] whereas others only grant the agency the right to order a

[257] Cf., e.g., Article 58 (2), (3) and (6) Regulation 1093/2010.

[258] See Articles 135–137 Regulation 207/2009, Articles 45–48 Regulation 2100/94, Articles 89–90 Regulation 1907/2006, Articles 42–43 Regulation 216/2008; Article 59 Regulation 1093/2010.

[259] GC Case T-508/08 *Bang & Olufsen* v *OHIM* [2010] nyr, para 50; Case T-402/07 *Kaul* v *OHIM* [2009] ECR II-737, para 99.

[260] In conformity with the jurisdiction of the EU Courts, see GC Case T-1/10 *PPG and SNF SAS* v *ECHA* [2011], nyr, para. 40 "In the case of acts or decisions worked out in stages, only measures definitively laying down the position of the institution, body, office or agency of the Union concerned at the end of that procedure, are, in principle, acts against which an action for annulment will lie. Consequently, measures of a preliminary or purely preparatory nature cannot be the subject of an action for annulment."

[261] Article 135 Regulation 207/2009.

[262] Article 46 (3) Regulation/Article 41 (4) Regulation 216/2008: "Where the Board of Appeal considers that the nature of the appeal so requires, it may call up to two further members from the aforesaid list for that case."

[263] Article 91 (2) Regulation 1907/2006 with regard to an appeal to the board of appeal in the ECHA or Article 58 (1) Regulation 207/2009 on the Community Trademark regarding appeals against decisions of the examiners and of the divisions of the OHIM.

suspensive effect if the circumstances so require.[264] Even more, the regulations provide for a devolutive effect, which means that the effect of an admissible appeal goes beyond a mere legality control by the body deciding about the appeal—a transfer of decision-making power is effected by virtue of the appeal. The decisions to be taken and hence the competences of the boards of appeal are different to a certain degree, though: whereas some boards of appeal can rectify the decision appealed against and directly replace it by issuing a new, corrected, or amended one, other boards can only remand the case to the original decision-making body if the appeal is well founded[265] (the original body, however, is bound by the *ratio decidendi* of the board of appeal in case of remand[266]); but in most cases boards can do both.[267] And in some instances, the prior appeal to the board of appeal is a prerequisite for taking the contested decision to the EU Courts.[268] Furthermore, in other regulations, only the decisions of the boards of appeal are amenable to actions before the EU courts.[269] Usually, the rules on the boards of appeals and the lodging of appeals are accompanied by rules about actions to the EU Courts, which by and large reflect the essence of the respective rules about the action for annulment in

[264] Article 19 (3) Regulation 713/2009 provides that an appeal does not have suspensory effect but that the board of appeal may, if it considers that circumstances so require, suspend the application of the contested decision. Similarly: Article 60 (3) ESAs Regulation 1093/2010, 1094/2010 and 1095/2010 with regard to the appeal against decisions of the European Supervisory Agencies.

[265] Cf. Article 60 (5) ESAs Regulations 1093/2010, 1094/2010 and 1095/2010 with regard to the appeal against decisions of the European Supervisory Agencies.

[266] Cf. Article 60 (5) ESAs Regulations 1093/2010, 1094/2010 and 1095/2010 with regard to the appeal against decisions of the European Supervisory Agencies: "That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned." See, similarly, in case of remit, Article 64 (2) Regulation 207/2009.

[267] The board of appeal of the ECHA can both rectify the decision or remit the case back to the competent body of the agency; see Article 93 (3) Regulation 1907/2006: "The Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action." Cf. also Article 64 (1) Regulation 207/2009, Article 19 (5) Regulation 713/2009.

[268] Clearly, Article 50 (2) Regulation 216/2008. Cf. also Article 20 (1) Regulation 713/2009: "An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty [which is now Article 263 TFEU], contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency"; Article 94 Regulation 1907/2006. Slightly different is Article 61 of ESAs Regulations 1093/2010, 1094/2010 and 1095/2010 with regard to the appeal against decisions of the ESAs: whereas paragraph (1) states—in accordance with the latter provisions—that "Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority," but paragraph (2) then continues a further individual right to judicial protection without requirement of a previous appeal procedure: "Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the CJEU against decisions of the Authority, in accordance with Article 263 TFEU."

[269] Cf. Article 65 Regulation 207/2009.

primary law and sometimes also about the action for failure to act contained in primary EU law.

Some regulations establish unique features regarding the appeal procedure: Article 93 (1) of the REACH Regulation 1907/2006 provides that the Executive Director of the agency, after consultation with the Chairman of the Board of Appeal, can rectify the contested decision within 30 days after the appeal was lodged if he/she considers the appeal to be admissible and well founded. Likewise, Article 47 (1) EASA Regulation established an interlocutory revision by the Executive Director himself who can rectify the decision if he/she considers it admissible and well founded (with no need for consultation with the board of appeal). An interlocutory revision is also provided for in Article 70 (1) CPVO Regulation, but in this case the competent body for rectification is the body of the office that has prepared the contested decision.

Another example of a unique feature is the mediation procedure on the amicable settlement of disputes established by the Presidium of the Boards of Appeals with regard to the OHIM appeal procedure: according to the Presidium's decision on mediation,[270] parties can request for mediation proceedings by a joint declaration, if the lodged appeal is opposed by another party. After such request, the board of appeal suspends the appeal proceedings pending the outcome of the amicable settlement; once the mediation fails, the appeal proceedings will be resumed. The aim of the mediation procedure is to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator within the framework of the rules established by the Presidium. However, the mediation procedure does not apply to rights and obligations the parties are not free to decide upon, such as absolute grounds for refusal of a trademark or design application. When the parties reach an amicable settlement, a settlement agreement has to be signed by them. The Board to which the case was initially allocated then will close the proceedings and take note that an agreement was reached. The background for the existence of a mediation procedure is the fact that rectification of the contested OHIM decision by the department in *inter partes* cases requires the acceptance of the revision by the other party/parties. In case the other party does not accept that the contested decision is to be rectified, the appeal cannot be rectified by the relevant department but has to be remitted to the Board of Appeal.[271] Hence, the settlement procedure allows the Boards to finally reach a settlement of the appeal by amicable agreement between the parties that resolves their dispute.

[270] Decision No. 2011-1 of the Presidium of the Boards of Appeal of 14 April 2011 on the amicable settlement of disputes.

[271] Article 62 (3) Regulation 207/2009.

The Appeal Rules in Detail

Appeals in the OHIM

Final decisions of the examiners and of the diverse OHIM divisions (Opposition Divisions, Administration of Trade Marks and Legal Divisions, and Cancelation Divisions) are subject to suspensive appeals by any party to the proceedings adversely affected by the decision.[272] The appeals must be lodged in writing (for the required content of notice see Rule 48 of 60/1995[273]) to the department within 2 months after the date of notification of the contested decision[274] and require payment of an appeal fee.[275] The appellant is obliged to give his reasons for the appeal within 2 more months.[276] The statement or reasons must indicate the factual and legal arguments that, from the appellant's point of view, require nullification or alteration of the contested decision; the appeal is inadmissible if there is no or only an insufficient statement of reasons; see Rule 49.[277] If the appellant is the sole party to the procedure, the department may rectify the appeal; if not rectified, the appeal is remitted to the board of appeal. If the appellant is not the sole party to the procedure, the department can rectify the contested decision only if the second party also agrees to it (besides, of course, the requirement that the appeal is both admissible and well founded). Otherwise, the appeal is again remitted to the board of appeals.

The board of appeal decides on the appeal by either replacing the contested decision as the board is competent to exercise any power of the Office or by remitting the case to the department that issued the contested decision for further prosecution. The board of appeal is called upon to carry out a new, full examination of the merits of the opposition, in terms of both law and fact,[278] and has to apply the provisions relating to proceedings before the department that has made the contested decision; see Rule 50. The department then is bound by the board's *ratio decidendi* insofar as the facts are the same. Before the boards of appeal, a

[272] Cf. for this and the following Articles 58–65 Regulation 207/2009.

[273] 60/1995 implementing Council Regulation 40/94 on the Community trade mark, OJ 1995 L 303/1, as amended.

[274] For suspensive effects in relation to the time limit for filing an appeal, cf. GC Case T-36/09 *dm-drogeriemarkt* v *OHIM* [2011], para. 101; Case T-419/07 *Okalux* v *OHIM – Messe Düsseldorf (OKATECH)* [2009] ECR II-2477, para. 34.

[275] For its reimbursement, cf. Rule 51.

[276] The board enjoys wide discretion to decide, and has to give reasons in that regard, whether or not to take facts or evidence into account, which were submitted or produced after expiry of the time limits, due to Article 76 (2) Regulation 207/2009; CJEU Case C-308/10 P *Union Investment Privatfonds GmbH* v *OHIM* [2011], nyr, para. 42, 49; Case C-29/05 *Kaul* v *OHIM* P [2007] ECR I-2213, para 42 et seq.

[277] CJEU Case C-406/11 P *Atlas Transport* v *OHIM* [2012] nyr, para 46–47.

[278] CJEU Case C-308/10 P *Union Investment Privatfonds GmbH* v *OHIM* [2011] nyr, para 40; Case C-29/05 *Kaul* v *OHIM* P [2007] ECR I-2213, para 57; GC Case T-523/10 *Interkobo* v *OHIM* [2012] nyr, para 109.

mediation procedure applies if the contested decision affects at least two parties and the other party cannot agree to the rectification of the contested decision (for more details so far, see already above). The oral proceedings and also the delivery of the decision of the boards of appeal are public unless there are serious and unjustified disadvantages for a party.[279]

The OHIM Regulation also provides rules on the composition, independency, and impartiality of the boards of appeal and for the establishment of a Grand board dealing with special cases.[280] Furthermore, by way of a severability clause that is actually unique, the Regulation provides that in case of lacunae in the procedural provisions in the founding rules of the OHIM and the rules of procedure of the boards of appeal, account has to be taken of the principles of procedural law generally recognized in the Member States.[281]

The decisions on appeals of the boards of appeal are amenable to actions before the EU Courts for annulment or for alteration of the contested decision. Hence, the EU Courts enjoy additional competences not provided for in Article 263 TFEU as under the rules of primary law the CJEU only can annul a contested decision; these competences, however, have been interpreted rather restrictively in light of primary law. The EU Courts opined insofar that they can only review, as usual, the legality of the decisions of the boards of appeal, i.e. the General Court can annul or alter a decision only if, at the time the decision was adopted, it was vitiated by one of the grounds for annulment or alteration[282] set out in Article 65 (2) OHIM Regulation.[283] "It follows that the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take."[284] Faced with application for alteration of the contested decision, the Courts will not exercise administrative and investigatory functions specific to OHIM as this would upset the institutional balance on which the division of jurisdiction between OHIM and the Court is based.[285] Hence, the normal result of an examination by the Courts is that if they

[279] Article 77 (3) Regulation 207/2009.

[280] Article 135 et seq. Regulation 207/2009.

[281] Article 83 Regulation 207/2009.

[282] CJEU Case C-263/09 P *Edwin* v *OHIM* [2011] para 71; Case C-16/06 P *Les Éditions Albert René* v *OHIM* [2008] ECR I-10053 para 123.

[283] Which reads: "The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power."

[284] CJEU Case C-263/09 P *Edwin* v *OHIM,* para 72.

[285] GC Case T-504/09 *Völkl GmbH & Co. KG* v *OHIM* [2011], nyr, para 121.

hold that a contested decision is vitiated by illegality, they have to annul it. They cannot dismiss the action by substituting their own reasoning for that of the author of the contested act.[286]

The action can be brought by any party to the appeal proceedings adversely affected by the appeal decision within 2 months of the issue of that decision. Once the CJEU adopts a judgment, the OHIM is required to comply with it. As the Court cannot issue directions to the OHIM, it is for the latter to give due effect to the grounds and operative part of a judgement. If that requires reexamination of the case, the Presidium of the boards of appeal decides whether the case is to be referred to the original board or to another board.[287]

Particular characteristics of the OHIM appeal procedures are their suspensory character, the requirement of the appellant to pay the fees and the fact that, at first, the appeal has to be dealt with by the competent department that issued the contested decision and that thereby gets the chance to rectify the decision, which equates to the interlocutory revision provided for in some other regulations (see above). If appeal procedures are available, a decision of the OHIM might not be referred to the EU Courts directly.[288]

Appeals Within the Community Plant Variety Office CPVO

The boards of appeal established in the CPVO are responsible for deciding on appeals against the decisions of the Office, i.e. cancelations, declarations of the community plant variety rights as null and void, refusal of applications, granting of community plant variety rights, approval of proposed denomination, decisions on objections of third parties, and decisions on fees and costs, on the entering or deletion of information in the register, and on the public inspection of documents.[289] The appeals have suspensory effect unless the office orders otherwise, if circumstances so require.[290] In case of two types of decisions, i.e. the granting of compulsory licenses or the granting of nonexclusive exploitation rights by the Office in the absence of an agreement between the parties, the parties can choose between lodging an appeal or taking a direct action to the EU Courts.[291] The appeal can be lodged either by the addressee of the decision or by any person who is directly and individually concerned (these requirements are interpreted in a way

[286] GC Case T-402/07 *Kaul* v *OHIM* [2009] ECR II-737, para 49, referring to, by analogy, CJEU Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, para 38.

[287] GC Case T-508/08 *Bang & Olufsen* v *OHIM* [2011], nyr, para 31–33.

[288] See GC Case T-36/09 *dm-drogeriemarkt* v *OHIM* [2011], para. 80.

[289] For this and the following, see Articles 67 et seq. Regulation 2100/94.

[290] Article 67 (2) Regulation 2100/94.

[291] Articles 67 (3), 74 Regulation 2100/94.

reflecting the like language used in primary EU law[292]) by a decision within 2 months after the date of notification of the contested decision. This includes any person who has raised a written objection to the grant of the plant variety right in the course of the administrative procedure.[293] The appellant has two further months for giving reasons for the appeal. Then, by way of interlocutory revision, the body of the Office that has prepared the contested decision can rectify it within 1 month[294]; otherwise, the appeal will be remitted to a board of appeal. The board then examines the appeal, and if it is admissible and well-founded, the board adopts a decision, usually after an oral hearing, either by exercising any power that lies within the competence of the Office or by remitting the case to the competent body of the Office for further action. In the latter case, the body is bound by the *ratio decidendi* of the board of appeal, insofar as the facts are the same.[295] The Regulation contains detailed rules on the establishment, composition, independence, and impartiality of the boards of appeal.[296]

The decisions on appeals of the boards of appeal are amenable before the CJEU within 2 months. The CJEU undertakes a legal assessment solely[297] and is competent then to nullify or alter the decision. In this context, the General Court has given notice that the usual limits to the scope of judicial review apply. If the Court's examination requires the legal control of a complex scientific or technical assessment, it shall be given by the competent administrative body, as is the case here regarding the appraisal of the distinctive character of a plant variety in the light of the criteria laid down in Article 7 (1) of Regulation No. 2100/94.[298] It is expectable that the EU Courts will also interpret their power to alter the decision in the same way as done under the OHIM Regulation; see above. The access to Court is open to any party to appeal proceedings that has been unsuccessful, in whole or in part, in its submissions. More generally, any person who has a right to appeal against a decision also has a right to bring the case to the Court.[299] The subject matter of the action is the same as the subject matter of the proceedings before the board of

[292] GC Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana* v *CPVO* [2008] ECR II-31, para 82 et seq., 116.

[293] GC Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana* v *CPVO* [2008] ECR II-31, para 117.

[294] This time limit in practice sometimes will be exceeded, which in itself does not justify the annulment of the contested decision but, at most, the award of damages should the applicant appear to have suffered any sort of damage; cf. GC Case T-187/06 *Ralf Schräder* v *OHIM* [2008] ECR II-3151, para 28, 141–143.

[295] Article 72 Regulation 2100/94.

[296] Articles 45–48 Regulation 2100/94.

[297] Cf. GC Case T-135/08 *Schniga* v *CPVO* [2011] ECR II-5089, para. 39; Case T-187/06 *Ralf Schräder* v *OHIM* [2008] ECR II-3151, para. 67.

[298] GC, Case T-187/06 *Ralf Schräder* v *OHIM* [2008] ECR II-3151, para. 63.

[299] GC, Case T-95/06 *Federación de Cooperativas Agrarias de la Comunidad Valenciana* v *CPVO* [2008] ECR II-31, para. 117: "an appeal before the Board of Appeal permits a further appeal to the Community Courts."

appeal.[300] The Office then again is required to take the necessary measures of compliance with the judgment.[301]

Appeals in the ECHA

Appeals can be brought against decisions of the Agency on the rejection of registrations for failure to complete the submission, on conditions of the preparation or handling of a substance, on the permission to refer to the information requested by the registrant in his registration dossier, on the specification of a certain registrant or downstream user to perform the test study, on the repetition of the test study, on testing of proposals, and on registrations.[302] Appeals have suspensive effect and may be brought by the addressee or any person directly and individually affected by the decision within 3 months of the notification of the decision or, in the absence thereof, of the day on which it became known to the appellant. A fee may be applicable. Once lodged, the Executive Director may rectify the decision within 30 days, if, after consultation with the Chairman of the Board of Appeal, he/she considers the appeal to be admissible and well founded. Otherwise, the Chairman of the Board examines the admissibility. If admissible, the board then decides about the appeal and parties are entitled to make an oral presentation. The details of the procedure of the boards of appeal are set out in Regulation 771/2008.[303] The board may either replace the contested decision as it is competent to exercise any power within the Agency's competence or remit the case to the competent body for further action.[304] The appellant finally can challenge the decision of the Board of Appeal before the EU Courts in accordance with the rules on action for annulment (Article 263 TFEU).[305] Other decisions of the Agency can be brought before the EU Courts only in cases where the appellant does not have a right of appeal before the Board. Additionally, persons concerned also have the possibility of an action for failure to act in accordance with Article 265 TFEU.[306]

Appeals in the EASA

Subject to appeal to the boards of appeal established in the EASA are the decisions on the airworthiness and environmental certification; decisions on air traffic

[300] GC Case T-135/08 *Schniga* v *CPVO* [2011] ECR II-5089, para. 34.

[301] Article 73 Regulation 2100/94.

[302] Article 91 Regulation 1907/2006 specifies the type of decision subject to appeal in detail.

[303] Regulation 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, OJ 2008 L 206/5.

[304] Article 93 Regulation 1907/2006.

[305] Actions against decisions of the ECHA hence will be subject to the requirement that the applicant who was not the addressee is directly and individually concerned within the meaning of Article 263 (4) TFEU; in this context, this precondition is interpreted in accordance with settled case law, GC Case T-346/10 [2011] *Borax Europe* v *ECHA*, nyr, para 22, 46.

[306] Article 94 Regulation 1907/2006.

controller and air operation certification; decisions on audits, inspections, and investigations; and decisions on authorization of third-country operators.[307] The appeals must either be lodged by the addressee or by a person directly and individually concerned by the decision within 2 months, together with the statement of reasons; the appeals don't have a suspensive effect, unless otherwise decided by the Agency. Once lodged, the Executive Director of the Agency shall rectify the contested decision if all parties to the appeal proceedings do not oppose. If the decision is not rectified, the Agency first has to decide about the suspensive effect of the appeal and remit the appeal to the board of appeal. The Board then has to examine the merits of the appeal and invite the parties to file observations and to make oral presentations. The Board finally adopts a decision. It can either replace the contested decision as it may exercise any power of the Agency or remit the case to the competent body, which is bound then by the decision of the board of appeal.

The acts of the Agency that are legally binding are subject to scrutiny by the CJEU. Persons concerned may either bring actions for annulment, for failure to act, or for damages caused by the Agency. Insofar, however, as appeal procedures are available, actions for annulment may be brought only after exhaustion of the appeal procedure.[308] Hence, only the decisions of the board of appeal appear open to action before the EU Courts.[309] EU Member States and the EU institutions, however, can directly lodge actions before the CJEU.[310]

Appeals Within the European Supervisory Authorities

According to Article 58 (2) Regulation 1093/2010,[311] the common board of appeal of the European Supervisory Authorities (ESAs) shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers, i.e. the task of the Board is to provide advice; it is not an instrument of direct adjudication or rectification, but its decision is binding upon the competent body. The board of appeal cannot directly annul or amend the contested decision but only the competent body can, which means that it finally is the body itself that has to meet the appeal of the appellant. The decision of the board nevertheless is decisive as the competent body is bound by the board's decision. Accordingly, the board of appeal can either confirm the contested decision taken by the competent authority or remit the case to the competent body of the responsible authority that then has to amend the decision, taking account of the decision of the board of appeal, Article 60 (5) Regulation 1093/2010. Before adopting a decision, the board will invite the parties to provide oral presentations.

[307] For this and the following, cf. Article 44 et seq. Regulation 216/2008.

[308] Article 50 (2) Regulation 216/2008.

[309] Cf. recital 26 Regulation 216/2008.

[310] Article 51 Regulation 216/2008.

[311] See also the verbatim identical rules of Article 58 Regulation 1094/2010 and 1095/2010.

A notice of appeal may be lodged within 2 months, together with a statement of grounds, either by the addressee of a decision or by any legal or natural person or authority directly and individually concerned by the decision. The board of appeal shall decide within 2 months, and has the power to suspend the application of the decision appealed, if it considers that circumstances so require. Generally, the appeal does not have a suspensive effect.

Subject to appeal are all binding decisions of the three authorities. The supervisory authorities have comprehensive powers. They are competent to adopt decisions in case of investigations of nonapplication of EU law regulating financial services, in particular to require financial market actors to take the necessary actions to comply with their obligations under relevant EU law. Furthermore, the EU supervisory authorities may coordinate the actions of national supervisory authorities in cases of emergency or settle disagreements between the national authorities in cross-border situations.[312]

Proceedings against decisions by the EU supervisory authority can be brought directly to the EU Courts if there is no right of appeal before the board of appeal. Hence, it is the decision of the board of appeal that is subject to Court proceedings, to the effect that a person may not institute proceedings to the EU Courts because of decisions of the authority without prior appeal unless there is no right to appeal [see Article 61 (1)]. Surprisingly, however, paragraph (2) grants an additional individual right to judicial protection without requirement of a previous appeal procedure: "Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the CJEU against decisions of the Authority, in accordance with Article 263 TFEU." This must be understood as a severability clause allowing for actions to the EU Courts in compliance with EU primary law in case national or legal persons are not entitled to lodge an appeal.

Appeals in ACER

Any natural or legal person, including national regulatory authorities, may appeal against a decision adopted by the Agency if the decision is addressed to it or if the decision directly and individually concerns the appellant. The appeal has to be lodged within 2 months of the day of notification of the decision or, in the absence thereof, within 2 months of the day on which the Agency published its decision. The board of appeal hence shall decide within 2 months. As is usually the case, the parties to the appeal are entitled to make oral presentations, and the board can suspend the application of the contested decision if it considers necessary. With regard to the merits, the board may either exercise any power within the competence of the agency or remit the case to the competent body, which then is bound by the decision of the board.[313] Article 20 ACER Regulation finally provides that a

[312] Cf. the identical Articles 60 of the ESAs Regulation 1093/2010, Regulation 1094/2010 and Regulation 1095/2010.

[313] Article 19 Regulation 713/2009.

decision taken by the board is subject to action for annulment in accordance with Article 263 TFEU, except in cases where there is no right of appeal. Hence, at least the decisions of the board of appeal are open to action before the EU Courts,[314] and also other binding acts may become subject to actions in conformity with EU primary law. The agency also may be subject to an action for failure to act, and is—as always—required to comply with the EU Court's judgment.

16.5.1.3 Alternative Dispute Resolution and the Executive Agencies: Administrative Appeals to the Commission

Regulation 58/2003[315] lays down the legal framework within which the EU Executive Agencies operate. Executive Agencies are entrusted with the implementation and management of EU programmes. Article 22 of the Regulation establishes an internal administrative appeal procedure against acts of Executive Agencies to the Commission. Any person who is directly and individually concerned[316] by any act of an executive agency infringing his/her rights can refer this act to the Commission within 1 month for a review of its legality, as can the Member States. This administrative appeal procedure is part of the Commission's administrative supervision over the Executive Agencies.

Once the appeal has been lodged, the Commission may suspend the implementation of the act or prescribe other interim measures. The Commission has to take a reasoned decision on the appeal within 2 months after the lodging of the appeal and after hearing the arguments of the parties. The Commission either upholds the executive agency's act or decides that the agency must modify it either in whole or in part. Failure to reply within that deadline is taken as implicit rejection of the appeal by the Commission.

If the Commission decides that the act must be amended or withdrawn, it is the executive agencies' duty to take the necessary measures within a reasonable period; they have to comply with the Commission's decision. Hence, the Commission itself cannot replace the contested act by a new one.

Article 22 (5) finally mentions the jurisdiction of the EU Courts by prescribing that the explicit or implicit decision by the Commission to reject the administrative appeal may be challenged before the EU Courts by an action for annulment, referring to Article 263 TFEU (then Article 230 ECT). Due to this reference, the primary law's prerequisites for actions apply. Hence, one might doubt whether the contested act of the agency could itself form a measure amenable to actions before the EU Courts because Article 22 (5) only mentions the Commission's decision and

[314] Cf. also recital 26 Regulation 713/2009.

[315] Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

[316] The English language version actually reads "directly *or* individually," but other language versions read "and," which corresponds to the usual wording in comparable provisions.

not the agencies' acts. In contrast, however, recital 17 of Regulation 58/2003 reads that the Commission's administrative supervision over the executive agency does not rule out the possibility of an audit by the Court of Justice. Anyway, this provision can at least be taken to clarify that the agencies' acts cannot be challenged before the EU Courts without previously filing an appeal against them with the Commission.

These rules on the administrative appeal to the Commission differ essentially in two respects from the administrative appeal procedure provided for in other regulations as an exercise of the Commission's supervisory functions mentioned above (see *supra* Sect. 16.5.1.1): first, the rules explicitly limit the Commission's competences. Second, the rules expressly address the way how to challenge the Commission's decision before the EU Courts.

16.5.2 Alternative Dispute Resolution: The SOLVIT System

In 2002, SOLVIT, an online network established by the EU and coordinated by the Commission[317] that provides the database facilities, started its work as part of the Commission's endeavor to promote the completion of the internal market. SOLVIT is created as an online problem-solving network that connects preexisting national coordination centers[318] in order to address problems resulting from infringements of EU internal market law by public authorities of EU Member States in cross-border cases. The task of the network is to solve the problems encountered by businesses or citizens resulting from the misapplication of law in Member States other than their own in informal ways, without recourse to legal proceedings, and in a rapid manner, ideally within 10 weeks, even though in practice the settlement process can take considerably longer.[319] Hence, it is a means of alternative dispute resolution at the disposal of EU citizens or businesses that face problems with administrative authorities abroad when making use of their EU freedoms. The problem-solving system is completely free of charge and usually concerned with issues like payment of foreign social benefits, recognition of foreign diplomas and certificates, calculation of retirement pensions for working periods abroad, and market access issues for goods or services. The area of application of SOLVIT,

[317] Cf. Commission, communication on effective Problem Solving in the Internal Market, Council and Commission documents, COM (2001) 702, the Commission recommendation on the principles for using the SOLVIT Network, OJ 2001 L 331/79, and the respective Council Conclusions of 1 March 2002. The Commission recently issued a new Recommendation on the Principles governing SOLVIT, C (2013) 5869 final that replaces the communication from 2001.

[318] These centers have been established in implementation of the Commission's Single Market Plan 1997, Lottini (2010), pp. 5 and 7.

[319] Two-thirds of the cases are resolved within 10 weeks; cf. Commisson, Making the Single Market deliver. Annual governance check-up 2011, p. 27.

however, goes far beyond that as SOLVIT addresses a wide range of policy areas given its broad interpretation of the terms "cross border" and "Internal Market."[320]

The network consists of national SOLVIT centers in every EU Member State, one per Member State (and in EEA states) as part of the national administration,[321] which cooperate in order to address the complaints submitted. Any EU citizen subject to the misapplication of EU law in an EU Member State can address the home SOLVIT center in his/her home EU Member State and submit his/her case, as long as the case has not been made subject to legal proceedings before. The SOLVIT center in the EU Member State where the problem has occurred (the so-called Lead SOLVIT center) will be notified the problem electronically. The Lead SOLVIT center will determine within 1 week whether the case is well founded and feasible of being resolved pragmatically, e.g., by applying correctly a domestic or EU provision. If so, the Lead SOLVIT center will confirm that it will take on the submitted case. The SOLVIT center may occasionally also take on cases whose resolution requires the repeal of a national rule that is noncompliant with EU law even though such cases of regulatory obstacles to the correct implementation of EU law (due to domestic regulation not in conformity with EU law) originally fell outside the 2001 mandate of the SOLVIT system[322]; but in practice, in such so-called "SOLVIT Plus" cases, the SOLVIT center might be able to persuade the national authorities to waive the application of the domestic rule until it is repealed. Actually, as the nonapplication of national regulations noncompliant with EU law is a legal requirement by EU law's priority,[323] the SOLVIT system then assists Member States administrations in their compliance with EU law by merely reminding them on their legal duties. Indeed, some SOLVIT cases resulted in changes not only to administrative procedures but also to legislation. Hence, the SOLVIT system has a supportive role and contributes to avoiding infringement proceedings under Article 258 TFEU; SOLVIT is even used by the Commission to facilitate the Commission's activity in the pretrial phase of infringement proceedings under Article 258 TFEU, at least in nonpriority cases.[324]

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[320] Cf. the Final evaluation report issued by the DG Internal Market and Services, November 2011, p. i. All the documents mentioned in the footnotes above are available at the SOLVIT website, http://ec.europa.eu/solvit/site/background/index_en.htm (last accessed 24 April 2014).

[321] The Member States decide about where and at which level to place their SOLVIT center. Consequently, various institutional solutions have emerged in conformity with each country's administrative culture; cf. Moldoveanu and Nastase (2009), p. 106. Usually, the SOLVIT centers are part of the national ministries for foreign affairs or economy.

[322] Lottini (2010), pp. 5, 18, 19 et seq. In 2013, the Commission renewed its recommendations and reformulated the task: It redefined the "SOLVIT cases . . . as all cross-border problems caused by a potential breach of Union law governing the internal market by a public authority, where and to the extent such problems are not subject to legal proceedings at either national or EU level", see Commission recommendation on the Principles governing SOLVIT, C (2013) 5869 final, recital 9.

[323] Cf. ECJ, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839; ECJ Case C-198/01 *CIF* [2003] ECR I-8055.

[324] Lottini (2010), pp. 5, 8, 19–21.

While dealing with the case and corresponding with the responsible administrative authorities, the Lead SOLVIT center will exchange information with the home SOLVIT center of the appellant so that the home SOLVIT center can keep him/her informed. Finally, a solution will be proposed that the national administration deliberately agreed to (as it is not obliged to follow the advice by the SOLVIT center) but that the appellant is not obliged to accept. The appellant can still pursue legal action or lodge appeals or complaints before the responsible administrative or judicial bodies if the problem has not been resolved or if the proposed solution is considered unacceptable by the applicant. The problem in this context may be that by the end of the SOLVIT procedure, time limits provided for in national regulations for lodging an action before a domestic court might be lapsed so that the appellant no longer can take the case to the court. If a case cannot be resolved by the SOLVIT network, the home SOLVIT center is supposed to assist the applicant in finding another way to deal with the problem.

The 2011 evaluation of the SOLVIT system endorsed the overall well functioning and effectiveness of the system. Around 90 % of the more than 1,000 cases submitted per year have been resolved. Resolved cases generally do not only solve the individual problem encountered by the applicant but engender a change in attitude or work practice of domestic administrative authorities or even induce a change of legal rules so that the same problem might not be encountered again by anyone else. Thus, the SOLVIT system works on different levels: it is not only a dispute settler but also a tool for improving the implementation of EU law in the EU Member States, usually by giving hints to the betterment of national administrative procedures but sometimes also by inducing domestic legislative changes. Finally, the adoption of a common set of quality and performance standards by the SOLVIT centers (drafted in cooperation with the Commission) may contribute to a further uniformization of national authorities' activities and regulations.[325]

In some countries, there is some overlap between the SOLVIT network and the ombudsman in certain policy areas, and more than half of the SOLVIT centers are understaffed. Another key weakness is when home and Lead SOLVIT centers disagree over the legal analysis of the submitted cases as this is a stumbling bloc for an effective problem solution. A further problem is the fact that once an applicant takes the case to a court, the case no longer will be dealt with by the SOLVIT system; this is a problem as, usually, a time limit has to be respected for lodging an action before a court; that the case is dealt with by the SOLVIT system does not affect this deadline. This deters potential applicants from using SOLVIT.[326] Hence, SOLVIT is seen as still falling short of its potential. Therefore, the Commission recently reinforced SOLVIT by the new recommendation already mentioned which tries to make SOLVIT more visible and improve its functioning

[325] Lottini (2010), pp. 5, 8, 23, 26.

[326] Lottini (2010), pp. 5 and 25.

in particular by requesting the member states to advance and better equip their SOLVIT centres.[327]

16.5.3 Conclusion

Putting the EU internal market into lively practice is a matter of great concern and a pivotal challenge for the EU Commission. Hence, the Commission paves new ways and is very creative in employing innovative institutional structures and regimes both at supranational and at national levels for the sake of uniform, coherent, and correct application of EU law. Alternative Dispute Resolution is one of the several novel means used by the EU Commission to foster the sound, correct administration of the EU Internal Market and its completion. This means is used both on supranational as well as national levels.

At supranational level, alternative internal dispute resolution schemes might initially have been motivated by the requirement of effective legal protection of individual rights as in the beginning of the establishment of EU agencies it was far from settled that legal acts issued by agencies could be subject to judicial control by the ECJ.[328] Alternative dispute resolution before agencies again serves the function of relieving the burden on the EU Courts but is also a means to correct in a—compared to Court proceedings—rather quick and informal way the malapplication of EU internal market law. Seen in this perspective, appeal procedures that provide for a devolutive effect that grants the power to the board of appeals to directly replace the contested decision are preferable as they appear more effective. The same applies to proceedings having an automatic suspensive effect.

At national level, ADR combines with the trend of the Commission to establish horizontal networks of national administrations to improve uniform application of EU law across all EU Member States and to develop common best practice standards. The SOLVIT system shows its effectiveness in reducing formal court proceedings before domestic courts and also before EU courts with regard to infringement proceedings under Article 258 TFEU. Its effectiveness, however, is reduced due to the fact that the initiation of formal judicial proceedings leads to a termination of the SOLVIT procedure. The complainant hence has to choose between court proceedings and alternative ways, and choosing the latter will lead to an exclusion of the former as the time span for taking a dispute to court will lapse. Despite this disadvantage, the benefits of ADR clearly have to be seen: the citizen does not need to take a case to the court in a foreign judicial system that he/she

[327] European Commission, *Making the Single Market deliver*, *Annual governance check-up 2011*, 2011, p. 29.; Commission recommendation on the Principles governing SOLVIT, C (2013) 5869 final, p. 6.

[328] This issue finally was decided in the CFI Case T-411/06 *Sogelma*, cit, above, and has explicitly been clarified in the Lisbon Treaty by virtue of the changes in Article 263 TFEU, as explained *supra* Sect. 16.5.1.1.

might not be familiar with. There is no risk of having to bear the costs of a judicial proceeding. SOLVIT might also operate smoother and quicker, and in case a solution is not offered, the case might still be followed up by the Commission.

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Part III
Comparative Perspectives

Chapter 17
Administrative Appeals in Comparative European Administrative Law: What Effectiveness?

Dacian C. Dragos and David Marrani

17.1 Administrative Appeal: The Concept

In administrative law, there are two major ways of contesting allegedly unlawful decisions: the administrative appeal and the judicial review (court action).

The administrative appeal is a request addressed to a public authority by which the aggrieved person requests administrative measures to be taken regarding an administrative act: annulment, modification, or even issuance of a new act (when this has been refused by the administration). Judicial review, on the other hand, is an adversarial proceeding by which an individual transfers the conflict with a public authority to the (administrative) courts.

The administrative appeal can be addressed to the authority that issued the unlawful act—*contestation*, *opposition*, *recours gracieux*, *appeal in reconsideration*, *remonstrance*—or to its superior body—*hierarchical appeal*, *recourse*. There is also the so-called *quasi-hierarchical appeal*, *external appeal*, or sometimes *recours de tutelle*[1] addressed to an agency that is not the superior body of the issuer of the act but has the power to control such decisions, in its quality of specialized control agency or overseeing body. The administrative appeal may be used not just for administrative acts but for administrative contracts as well, alongside conciliation, arbitration, or mediation.

[1] Chapus (2008), p. 581; Van Lang et al. (1999), p. 282.

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In principle, administrative appeal and the judicial review are independent, and the rules for their exercise normally do not interfere with one another.[2] Each action can be exercised separately, and those aggrieved by an administrative decision can opt freely between these two ways of contesting the decisions.[3] In many jurisdictions, however, the applicable law requires that prior to commencing court proceedings, an administrative appeal must be filed. Other jurisdictions, without imposing the exercise of the administrative appeal, still link—in different ways—the administrative appeals to the judicial review.[4]

A chief feature of administrative justice is that it allows parties to resolve their dispute at the administrative level: they have the possibility to challenge the decision before the administration itself prior to resorting to courts. The administrative appeal may be included, in a broad sense, in the category of *alternative dispute resolution* tools for the realization of the administrative justice when compared to the resolution of the disputes by courts; it has been strongly recommended by the Council of Europe[5] and has found its way into most of the jurisdictions, as well as in the EU law.

Administrative appeals suggest the existence of a conflict with the administration. Consequently, there has to be an administrative decision or an administrative inaction in order to trigger the administrative appeal; an initial request addressed to a public body to issue, for instance, an authorization, shall not be considered as an administrative appeal. Only the refusal (implicit or explicit) to resolve such a request can be considered an administrative decision and can be the object of an administrative appeal.

17.2 Mandatory vs. Optional Administrative Appeals

From a comparative perspective, there are two major systems of administrative appeals—*mandatory* and *optional*.

The first one, adopted by a large number of legal systems (among which are those in Germany, the Netherlands, Hungary, Slovenia, Poland, Serbia, Denmark, Czech Republic, and Romania[6]), precludes an action to a court in the absence of a prior administrative appeal. At the level of EU law, in specific areas, administrative appeals are required prior to launching procedures by the Commission—regarding infringements of Union law by Member States, aids granted by Member States or

[2] Auby and Fromont (1971), p. 215; Darcy and Paillet (2006), p. 2; Rivero and Waline (2006), p. 206.

[3] Darcy and Paillet (2006), p. 22.

[4] Auby and Fromont (1971), p. 219.

[5] Council of Europe (2001).

[6] See the corresponding chapters in this book.

when it comes to access to Union documents, appeals of servants within the Union civil service and in procedures of EU agencies.

The second type of appeal (*recours administratif*), promoted by the French legal system and those inspired by it (partially Belgium, Italy), attaches certain effects to the exercise of an administrative appeal (prorogation of the time limits for bringing an action in a court of law) without making it mandatory.[7]

Many countries are experiencing (experimenting?) with different systems of administrative appeal. Austria, for instance, has completely changed its system from one where the administrative appeals were mandatory before going to court to one where they will still be mandatory but during court proceedings.[8] Spain is combining mandatory administrative appeal for administrative decisions that are not final at administrative level with optional appeal for final decisions.[9]

It is also noteworthy that no jurisdiction confines itself to only one system of administrative appeals. Even where the appeal is optional, there are instances where special legislation makes its use mandatory.[10] For instance, in France—although the appeal is in principle optional—there are mandatory appeals in fiscal matters,[11] in case of decisions issued by the municipal councils,[12] in litigation relating to university elections,[13] etc. Similarly, in Belgium, the unregulated appeal is optional, while appeals regulated by law are mandatory.[14] In Italy, the reform of 1971 led to the abandonment of the mandatory administrative appeal due to its ineffectiveness; however, the two forms of administrative appeal still subsist: an optional appeal in reconsideration to the issuer and a hierarchical appeal as pre-condition for the *riscorso straordinario al Capo dello Stato*.[15]

The rules that govern the *optional* appeal have typically a jurisprudential source and are quite flexible.[16] The claimant does not have to prove that there is a specific interest at stake; there usually is no requirement to conform to formal provisions, and often there is no time limitation for an appeal.

In the case of the mandatory appeal, which is more formalist than the optional one, the proceedings are to be conducted, within clear time limits, in an adversarial manner, and the final decision is subjected to extensive rules of motivation (for instance, in Germany, Netherlands, Hungary, Czech Republic, Serbia, Slovenia, and Romania[17]). In these jurisdictions, as we have highlighted above, a court action

[7] Van Lang et al. (1999), p. 98.

[8] See the chapter on Austria in this book (Chap. 7).

[9] See the chapter on Spain in this book (Chap. 7).

[10] Chapus (2008), p. 350; Isaac (1968), p. 621; Darcy and Paillet (2006), p. 22.

[11] Dupuis et al. (1999), p. 57.

[12] Debbasch and Ricci (2001), p. 307.

[13] Darcy and Paillet (2006), p. 23.

[14] See the chapter on Belgium in this book (Chap. 6) and Schwarze (2009), p. 172.

[15] See the chapter on Italy in this book (Chap. 3).

[16] See the chapter on France in this book (Chap. 2).

[17] See the respective chapters in this book.

is conditioned by the prior exhaustion of administrative remedies by way of administrative appeals.

Not all mandatory appeals are regulated in the same strict manner, though. In Poland, for instance, the appeal is a nonformalized legal remedy—it does not require any detailed statement of grounds, and the appellant merely needs to state the dissatisfaction towards the decision. Different approaches are being imposed nonetheless by field legislation.

A variation of the administrative appeal is also the *quasi-judicial appeal*, regulated by special rules in different fields. It is addressed to a specialized public authority that is a combination of an administrative body and a judicial one. The decision on the appeal is still an administrative decision, issued by an administrative body, but the procedure has also features comparable to court procedures. This is the case, for instance, in Italy, where an appeal to the Presidency is to be resolved only upon the advice of the Council of the State,[18] or in Romania, where there are specialized agencies performing such tasks: for instance, the National Council for Solving Public Procurement Disputes or the National Council against Discrimination.[19]

A fourth type of appeal is the appeal to the *supervisory authority*, in connection with decisions issued by autonomous public bodies. For instance, in Belgium, an appeal can be lodged to the supervisory authority in order to obtain the suspension or the annulment of an administrative decision due to a violation of law or a principle of good governance regarding that decision. Also, in Denmark, administrative acts issued by local government may be appealed to the minister only if authorized by statute.[20] In Romania, decisions of autonomous local authorities may be appealed to the Prefect, but this appeal is unregulated.[21]

17.3 The Foundations and Rationale of Administrative Appeals

The legal foundation of the administrative appeal can be found in the citizens' right to address petitions to the government,[22] a fundamental right that has found its recognition in many constitutions or modern legislations. The right to petition is then supplemented with the administrative principle of revocation—according to which administrative decisions may be revoked by their issuer.[23]

[18] See the chapter on Italy in this book (Chap. 3).

[19] See the chapter on Romania in this book (Chap. 14).

[20] See the chapter on Denmark in this book (Chap. 5).

[21] See the chapter on Romania in this book (Chap. 14).

[22] Auby and Fromont (1971), p. 216; Isaac (1968), p. 619.

[23] Rarincescu (1936), supra 1, p. 118.

An administrative appeal has a threefold rationale. *Firstly*, from the perspective of public authorities, it offers them a chance to make good on their duty to reconsider allegedly unlawful acts[24]; the prospective lawsuit should make public authorities assess again, perhaps more carefully than before, their initial decision[25]; the appeal avoids formal court proceedings, the costs of a lawsuit, and the possibility of having to pay compensation—not to mention the prospect of having its image affected by losing a lawsuit. *Secondly*, administrative appeals evidently protect in the same time private parties who have allegedly been aggrieved thereby; proceedings offer the participants the possibility of having a disputed decision annulled in a simple, fast, and free-of-charge proceeding. In this respect, the administrative appeal is usually much more beneficial for individuals than court trial. On the other hand, if the appeal is flatly rejected by the public authorities, the claimant has an opportunity to reassess his/her chances of winning in court and make a more informed decision in this direction based on the reasoning put forward by the public authority—it basically provides a test run for a full-blown court trial. *Thirdly*, the court's excessive caseload is sensibly eased when administrative appeals do their job in keeping parties out of court.

The worst case scenario, as far as the rationale for administrative appeals goes, is when the public authority is silent in response to the administrative appeal—*administrative silence*. In such a case, the claimant will confront the public body for the first time in court without being able to benefit from a test run during administrative appeal proceedings. Even in this case, the administrative appeal must receive some consideration in the course of the court proceedings in the sense that the attitude of the public authority could be deemed culpable. The administrative silence should be considered when deciding on the costs of litigation. The judge should address separately the fact that the public authority has not answered the administrative appeal in due time, consequently pushing the claimant to go to court. The other variant is that the party desists altogether because of cost of court litigation, in which case the administrative appeal has not had the envisaged effect.

Besides protecting the public authorities (and, hence, the public interest) and private parties by allowing public authorities to reform allegedly unlawful acts, the second important function of administrative appeals is relieving administrative courts of cases that can be solved at administrative level.

However, there is utility in the administrative appeal even when the case reaches the court. Thus, Auby and Fromont[26] have acknowledged the utility of the mandatory administrative appeal as being twofold: first, it tries to steer the administrative conflict clear of trial as much as possible; if the trial is inevitable, it constrains the parties to define precisely its object so that the claimant will know exactly what the

[24] Serdeen and Stroink (2002), p. 172; Iorgovan (2006), p. 453.

[25] Dupuis et al. (1999), p. 57.

[26] Auby and Fromont (1971), p. 42.

public body's arguments are, and the latter will analyze the decision and decide if it can be defended in a court of justice.

Another argument as to administrative appeals being more suited for solving administrative disputes than courts comes from the fact that judges may not always have the ability to grasp the full realities of the public administration, especially in the context of the extraordinary development of the tasks performed by public bodies, and that public administrators are better equipped to do this.[27]

A noticeable advantage of the administrative appeal in those jurisdictions that pay reverence to the legality principle is its wide scope. The claimant can invoke not only legality aspects but also opportunity ones or issues pertaining to the principle of good administration, while as in court the decision will be mainly assessed by applying legality standards.[28] The administrative appeal can resort also to the "benevolence of the administration" in order to resolve the matter,[29] where no strong legality arguments can be put forward.

When analyzing the pros and cons of the administrative appeal, it may be argued that an appeal to the issuing authority (recourse in reconsideration) has against it the subjectivity of the issuer in reassessing its decision, but on its side the fact that it is "the appeal to the best informed authority."[30]

The hierarchical appeal is justified, on the other hand, by the necessity of a less subjective control of the contested decision; the subjectivity is not excluded[31] but tempered, and the superior body has, supposedly, more diverse means of action than the subordinated body.[32]

The critics of the administrative appeal argue that the institution is useless and even obstructive.[33] In case the public authority is silent on the initial petition, or when it rejects it altogether, an administrative appeal is considered as an unnecessary and unreasonable complication of the situation, as it is exposing again the claimant to the same refusal.[34]

Hierarchical appeal attracts similar criticism[35] because, in many cases, the superior would rather try to "cover" his/her subordinate than to satisfy the grievance of an individual—not to mention the case when the subordinate was following the instructions of the superior when issuing the contested decision. On the other hand, this attitude has the risk, in case of losing the court case, of associating the superior body to the issuer body in paying compensations to the aggrieved person. Such

[27] Prevedourou (1996), pp. 167–180.

[28] See, for instance, the chapter on Hungary in this book (Chap. 10).

[29] Brabant et al. (1973), p. 272; Darcy and Paillet (2006), p. 21.

[30] Isaac (1968), p. 624; Darcy and Paillet (2006), p. 20.

[31] See the chapter on France in this book (Chap. 2).

[32] Isaac (1968), p. 624.

[33] See the Italian doctrine preceding the 1971 reform of the administrative appeals in the chapter on Italy in this book (Chap. 3).

[34] Ionescu (1970), p. 374; Iorgovan (2006), p. 592; Deleanu (2009), p. 289.

[35] Rarincescu (1936), p. 110.

arguments were traditionally used by the French scholars to stress that administrative appeals provide only limited guarantees to those aggrieved by administrative decisions and thus has a reduced pedagogical importance, while the administrative judge is the main guarantee of the administrative legality and of the rights and interests of individuals.[36]

The appeal to the supervisory authority (*recours de tutelle*) may feature a more neutral attitude regarding the decision contested, and thus such authorities are more likely to annul an illegal decision or to refuse its approval. In Belgium, for instance, this form of appeal is therefore much more effective for the citizen than an appeal in reconsideration or a hierarchic appeal.[37]

17.4 Different Time Limitations for Filing Administrative Appeals

The 2001 Recommendation issued by the Council of Europe's Committee of Ministers on the length of administrative appeal procedures suggests that conclusion of the appeal should be reached within a reasonable time, and this may be achieved by subjecting the appeal to time limits or otherwise.[38]

From a comparative perspective, there are several options regarding the legal arrangement of the time frames for *exercising* the administrative appeal: (a) fixed versus nonfixed time limits, (b) length of time limits: lowest to highest. These options are then applicable to the time limit for *answering* the administrative appeal.

First, there is the option of having a fixed time limit, within which the applicant could lodge the appeal, and further maximal limits for resolution of the appeal. A characteristic of all systems analyzed here is that the public administration receives a better treatment that the citizens: more generous deadlines and rather weak sanctions for nonobservance of the time limits.

In Italy, for instance, there is a fixed time limit of 30 days from the communication of the decision, but the answer has to be given in 90 days from the complaint; the deadline for *riscorso straordinario al Capo dello Stato* is 120 days, but the answer can easily come after 2–3 years. However, it was noted that this is still much shorter than normal judicial review proceedings (first instance and appeal combined).[39] The same situation is to be found in Hungary—deadlines of 15 and 30 days for filing the appeal and also very short ones—8 days—in tax matters,[40] which may be regarded as unreasonable, while the public authorities enjoy 60 days

[36] Brabant et al. (1973), p. 280.

[37] See the chapter on Belgium in this book (Chap. 6).

[38] Council of Europe (2001).

[39] See the chapter on Italian in this book (Chap. 3).

[40] See the Hunagrian chapter in this book (Chap. 10).

for their response. In Slovenia, a 15-day deadline for filing the appeal is followed by 2 months for issuing a new act or otherwise solving the appeal, but it usually takes longer to reach a decision.[41]

In the Netherlands, the deadline for exercising the administrative appeal (objection—*bezwaar* or hierarchical/quasi-hierarchical appeal—*beroep*/*goedkeuring*) is 6 weeks after the publication of the decision.[42] The deadline runs in parallel with the one for filing a court action, so the appellant has to be aware of the possible implications. The administrative authority has 6 or 12 weeks to issue a decision on the objection or on the appeal, and the term can be postponed for a maximum of 6 weeks. Empirical data show that at the central level of government objection proceedings seldom make those deadlines.[43] Other studies show that timeliness is an issue for most individuals, and 81 % of them consider the 12- or even 18-week deadline for a decision on their objection too long.[44]

In Germany, the law imposes a fixed deadline for exercising the administrative appeal—1 month from the communication of the decision—but it runs only if the public body has fulfilled some requirements regarding the reasoning of the decision: the decision has to state the remedies available and the corresponding deadline. If the requirements are not met, the deadline for the administrative appeal is extended to 1 year.[45] If there is an inexplicable delay in solving the appeal, the applicant may go directly to court without having to exhaust the objection procedure or just wait until it is solved, because there are no time limits set for the court action.[46]

Fixed time limits are employed also in Belgium, although they may be only indicative for the public authority. However, even in these cases, if the public authority does not reach a decision within 4 months after an express request of the petitioner, that silence will be considered as a negative answer.[47]

The rule that public authorities benefit from generous time limits has also its exceptions in the sense that public authorities are sometimes subjected to quite short time limits: the *self-verification* by the issuing body in Polish law should take place within 7 days after the filing of the appeal (14 days in tax-related cases)[48]; the lack of self-verification leads to the case being taken over by the appeal body.

Finally, there are cases where the petitioner and the administration are put on an (almost) equal footing: in Romania, the deadlines for filing the appeal and for answering the appeal are, in principle, the same—30 days—while in Hungary they are 15 and 30 days, respectively.[49]

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[41] See the Slovenian chapter in this book (Chap. 12).

[42] Serdeen and Stroink (2002), supra 23, p. 173.

[43] See, for details, Lanbroek, Willemsen, Remac, ...

[44] B.W.N de Waard et al. (note 11) cited by Lanbroek, Willemsen. . ..

[45] See, for details, the chapter on Germany in this book (Chap. 1).

[46] See the German chapter in this book (Chap. 1).

[47] See the Belgian chapter in this book (Chap. 6).

[48] See the chapter on Poland in this book (Chap. 11).

[49] See the corresponding chapters in this book.

In systems where the administrative appeal is not mandatory, the time limit to file a court action plays an important role. Thus, in France, where theoretically there is no deadline for exercising the administrative appeal, for practical reasons—the conservation of the deadline for lodging the court action—the appeal shall be exercised within the court action deadline, which is 2 months from issuance. However, there is a time limit for answering the administrative appeal—2 months from lodging the appeal[50]—and the absence of an answer is equaled to a rejection. The deadline for lodging a court action starts running again after the administrative appeal gets an answer (explicit or implicit). By special legislation, the prorogation effect of the administrative appeal can be excluded (for instance, by establishing a very short term for exercising the court action—15 days).[51] In Belgium, the Council of state has ruled that appellate bodies are not obliged to answer the administrative appeal (either organized or nonorganized) or to respect a certain time limit for solving the appeal.[52] In Italy, those aggrieved by an administrative decision may always ask the decision maker for reconsideration, but the public authority is not under a duty to reply.[53]

In other jurisdictions that followed the French example, the general rule that administrative appeals are not constrained by time limits is rendered ineffective in practice by numerous exceptions. Thus, in Denmark, the principle that the appeal is not subjected to time limits is contradicted by special legislation (welfare, taxation), which instituted deadlines between 2 weeks and 3 months.[54]

17.5 The Scope of the Administrative Appeal

The scope of the administrative appeal refers to the extent of powers bestowed upon the appellate body.

The final objective of the appeal from the perspective of the appellant is first and foremost the *revocation* of the decision. It could also refer to the alteration of a decision or *issuance* of a new decision. However, the possible outcomes of an administrative appeal procedure range from dismissing the request to upholding the individual administrative act or to disregarding the appeal altogether.

The question is when the administrative appeal shall be considered as resolved—at the time of the positive answer or at the time of the issuance of a new decision? The last solution is more appropriate, taking into consideration the interest of the claimant, although in practice, a simple answer to the appeal, in the sense that the request will be resolved, is taken for granted by applicants.

[50] Darcy and Paillet (2006), p. 21; Rivero and Waline (2006), p. 205.

[51] Chapus (2008), p. 370.

[52] See the chapter on Belgium in this book (Chap. 6).

[53] See the chapter on Italy in this book (Chap. 3).

[54] See the chapter on Denmark in this book (Chap. 5).

The outcome of the appeal can be looked at from two angles: for the claimant, it is intended to provide revocation or amendment of the decision, but a clarifying response of the public authority explaining that the decision is legal can also deter the claimant to challenge the decision in court. Very hard to determine are cases when the claimant renounces the court action even if the decision is unlawful and the administrative appeal was rejected. In this case, the decision not to go to court is only partially a result of the administrative appeal because the aggrieved person did not intend to go to court anyway.

If the decision was revoked by the issuer, or annulled by the superior body, the claimant has the possibility to file a court action for compensations, so the matter is often not solved entirely at the administrative level. Here, the question is whether public bodies can decide upon compensations themselves and put an end to the dispute for good.

All jurisdictions analyzed in the book are reluctant to allow the settling of compensation claims during administrative proceedings, except for cases where the appellate body is a tribunal with powers comparable to a court. This is not to say that legally compensation in administrative appeal procedure is not possible. Other factors may play a role in this—legal culture, established administrative practices. For instance, the Romanian administrative authorities are reluctant to grant compensation (preferring to wait for a court judgment instead) due to the manner in which public authorities are controlled afterwards by the Court of Auditors. The Court of Auditors refuses to approve such expenses, so public authorities guide claimants to lodge a court action in damages on the basis of the revoked administrative decision. Moreover, special legislation indirectly prevents public authorities to "move freely" on this matter: when trying to recover damages from the public official or public servant responsible for breaching the law, the Law on civil servants status no. 188/1999 requires a *court decision* as the base for recovery (art. 72). Consequently, it cannot be done on the basis of an administrative decision issued as a result of an administrative appeal. Also, the authors of the German chapter state that "in the context of German administrative law the granting of compensations and all questions concerning state liability are in general—for historical reasons—not really considered as an object of administrative proceedings but as a subject of (private) tort law."[55]

The powers of the appellate body depend on their positioning within the administrative system. The appeal to the issuer usually presupposes the widest powers of dispute resolution because the issuer can decide upon its own acts (in principle) freely. That is not always the case: in Romania, for instance, administrative decisions that have produced legal effects cannot be revoked anymore, so the public authority has to resort itself to the court in order to get an annulment (which is a fictional solution envisaged by the legislator, as it never happens in practice).

[55] See the German chapter and Stelkens (2005), pp. 770–779 (pp. 778f).

The appeal to the hierarchical body is also quite wide in its scope, regardless of how the supervisory powers are defined in general in a given administration. Consequently, even where in principle superior bodies cannot interfere with their subordinate bodies except for giving guidance and for cases when the law expressly states otherwise, the administrative appeal has a devolutive effect, which means that the appellate body is entrusted with deciding the matter de novo without being bound by the findings of the issuing body.

Most of the jurisdictions analyzed here follow this pattern: in Poland, Belgium, etc., the issuer of the decision loses its decision-making power, and the hierarchical or appellate body takes over. In the Netherlands, for instance, objection and administrative appeals at another administrative authority have a full devolutive effect—the administrative authority shall revoke the challenged decision, may change the justification of the decision or the legal basis or, if necessary, shall make a new decision replacing it. However, the objection itself defines the dispute at hand, so the administrative authority may not go beyond the scope of the appeal as it was defined by the interested person.[56]

In other jurisdictions, the picture is more diverse. In Denmark, for instance, the extent to which the reviewing authority returns the act to the issuer or decides to modify it differs across the different areas of law and is, to a certain extent, also determined by tradition.[57]

In Germany, also, the powers of the public bodies in charge of the objection procedure, although strictly defined around the *administrative act* that is the subject matter of the procedure, are *not* limited only to quashing or maintaining the act[58]—the procedure is reopened (or continued), with the prospect of different outcomes.

The scope of the review performed by the appeal bodies may include not only legal norms but also policy aspects or opportunity considerations (review of the public authorities' discretion). This is one of the main benefits of the administrative appeal as opposed to the review performed by courts. It may also include new facts that are relevant for the case.

Another aspect of the scope of the review regards the application of the principle of *non reformatio in pejus*. The question here is whether public authorities may worsen the situation of the applicant in its (his/her) own (administrative) appeal.

The question is therefore whether the appeal should be dealt with by the public body within the confines of a *bound competence*, meaning that the appellate body is held to answer the claimant only within the limits of the request, or whether the authority can consider itself notified for an analysis *de novo* of the decision, which implies the power to modify the decision in a way that may not be to the advantage of the applicant.

As for the first hypothesis, it is obvious that the claimant does not want that an appeal initiated with a view to defending his/her rights to turn against him/her,

[56] See the chapter on Netherlands in this book (Chap. 4).

[57] See the chapter on Denmark in this book (Chap. 5).

[58] See the chapter on Germany in this book (Chap. 1).

making the situation worse (worsening the situation). So an interdiction of the *reformatio in pejus* should serve the individuals seeking an easy dispute resolution. The argument for the second hypothesis is that the appeal only initiates the control and cannot establish its limits.

Mixed offerings are on the table also for the application of this principle. The possibility to reform an administrative decision against the interest of the claimant is allowed in Germany, with restrictions in some cases and with different solutions in the Federate States.[59] The only condition is that the appellant should be heard before the detrimental decision is taken, so he/she has a possibility to express a view on the matter. In France, it is possible as a rule, but only if the decision creates other rights. The exemption does not hold if a legal text empowers the superior body to decide without limits upon the opportunity of the subordinate's decision.[60] Romania has no legal prescriptions for this issue; so, theoretically, the *reformatio in pejus* is possible. Exceptions can be found in the special legislation. Thus, the Code of fiscal procedure[61] states clearly that by solving the contestation the fiscal organ cannot worsen the situation of the complainant (art. 213, par. 3).

In Netherlands, the principle applies fully to the objection and administrative appeal proceedings as being a specific application of the principle of legal certainty. This applies only with regard to the appellant and not to third party interests; conversely, if third parties are the appellants, it does not apply to the beneficiary of the original decision. A *reformatio in peius* is however permissible if the authority has generally the competence to amend at any time and also *ex officio* the contested decision to the detriment of the applicant.[62] The same must be said about Denmark, where an appeal launched by a single complainant is protected by the principle of *non reformatio in peius*, unless the original decision is void, whereas in the case of more complainants, the preeminence is given to the legal certainty of the act.[63] In Poland, the appeal body cannot issue decisions to the detriment of the appellant (unless the challenged decision constitutes a gross violation of the law or of the public interest); however, in tax-related matters, the practice to perform a "supplementary tax assessment" makes the principle ineffective.[64] In Hungary, the principle extends also to taxation: no new resolution to the detriment of the taxpayer may be adopted before 1 year following the initial audit decision.[65] The principle is fully applicable in Serbia.[66]

In Slovenia, the struggle between the public interest in reconsidering the case anew once it was appealed and the private interest of the person filing the appeal not

[59] See the German chapter in this book (Chap. 1); Schröder (2002), p. 137.

[60] Brabant et al. (1973), p. 278.

[61] Governmental Ordinance no. 92/2003, published in the Official monitor no. 24/12/2003.

[62] See the chapter on the Netherlands in this book.

[63] See the chapter on Denmark in this book (Chap. 5).

[64] See the chapter on Poland in this book (Chap. 11).

[65] See the chapter on Hungary in this book (Chap. 10).

[66] See the Serbian chapter in this book (Chap. 15).

to be prejudiced in his/her own appeal gives way to a tempered solution: the *reformation in pejus* is possible only when severe legal errors defined by the General Administrative Procedure Act are present.[67] In Belgium, the appellate body investigates the entire case disregarding the limits set by the challenged decision; however, if a part of the decision can clearly be separated from the whole, it is sometimes admitted that the administrative appeal is limited to that part of the decision.[68] In Italy, although the appellate authority is bound by the grounds raised by the claimant, in case of polycentric disputes the claimant could find his/her situation worsened.[69]

Another question that can be raised in the context of the scope of the administrative appeal is whether the appellant can *modify* the scope of the review when reaching the court or the review should rather match the scope of the administrative appeal. The Romanian jurisprudence has always looked for a sort of link between the administrative appeal and the judicial review, though not going very deep into their scope.[70] Minimum requirements are held by the courts: the administrative appeal should regard the same decision that is contested in court, and third parties cannot benefit from administrative appeals exercised by the addressee of the act.[71]

In the comparative law, approaches differ: in Italy, for instance, the scope of administrative appeal has to be observed when lodging the court action: the claimant cannot modify the reasoning from the administrative appeal and invoke other grounds for judicial review.[72] In France, Professor Chapus argued also that the administrative appeal "crystallizes the judicial review" because the plaintiff will not be able to invoke other grounds than those invoked in the administrative appeal, except for public order grounds.[73] Some courts have convened, on the other hand, that grounds based on the same cause can be accepted.[74]

17.6 The Suspensive Effect of the Administrative Appeal

As to the *suspensive effect* of the administrative appeals, the question (from a regulatory point of view) is whether it should be left to the decision of the public authority, be left to the decision of the court, or have *de jure* effects.

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[67] See the chapter on Slovenia in this book (Chap. 12).

[68] Lust (2007), p. 36.

[69] See the Italian chapter.

[70] See the Romanian chapter.

[71] Bucharest Court of Appeals, decision no. 1445/2006, in Bogasiu (2006), p. 1.

[72] Brabant et al. (1973), p. 274. See also the Italian chapter.

[73] Chapus (2008), p. 353.

[74] CE 13 Mars 1996, *Assoc. Reg. Pour l'enseignement...en Champagne-Ardennes*, apud Chapus (2008), supra 14, p. 355.

The Council of Europe's Committee of Ministers 2001 recommendations state that "[national] regulations may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority."[75]

The automatic suspension of the challenged administrative act is promoted in a number of jurisdictions. Thus, in Germany, during the objection procedure and the court proceedings, an *administrative act* may not be put into practice. The suspensive effect ends if the appeal or the court action is rejected or after 3 months from the statutory deadline for reasoning of the appeal, if the decision on appeal is achieved through negative silence. There are also exceptions from the rule, in cases where public charges and costs are involved, when it is about orders that cannot be postponed and measures by police enforcement officers, or other cases provided expressly by law. For instance, suspension of an order that revokes a driving license would put the driver in the position to drive again. However, the public authority may order immediate execution of the act in the public interest or in the overriding interest of a party concerned. The German system is thus enabling *de jure* suspension but empowers also the appellate body with performing an interest test that may make the legal provision ineffective. The Federate states have also the liberty to organize the suspensive effect in a different manner.[76] The automatic suspension is featured also by the Polish, Slovenian, Hungarian, Serbian, and the Czech legal systems,[77] with corresponding exceptions for cases where interim relief is granted.

Other jurisdictions have opted for the opposite solution: the appeal has no suspensive effect, but the suspension can be granted expressly by court order, usually in an expedited procedure. In France, the administrative appeal does not suspend the challenged decision, and exceptions shall be expressly regulated and strictly interpreted.[78] Thus, in the Netherlands, filing an objection or filing an appeal to a court does not have suspensive effect, but the court can grant the suspension upon request if conditions are met. However, there are exceptions to the rule, in environmental law and building law (authorizations for demolishing buildings, for instance, are suspended when challenged by administrative appeal).

In other cases, the suspension can be decided by appellate public bodies or by courts. The Italian, Belgian, Danish, and Spanish public authorities enjoy the competence to decide upon suspension.[79] The decision must be based on a balancing test regarding the public and private interests or the competing private interests at stake. It usually refers to the loss that is impossible or difficult to redress should the enforcement of the decision be carried out.

[75] Council of Europe (2001).

[76] See the chapter on Germany in this book (Chap. 1).

[77] See the corresponding chapters in this book.

[78] See the French chapter; Chapus (2008), pp. 652–658; Michel (1996), pp. 228–238.

[79] See the corresponding chapter in this book.

In Romania, the suspension is granted exclusively by the court on request. However, the request to suspend a decision can be filed at the same time with the administrative appeal, after lodging the administrative appeal, along with the court action or anytime during the court proceedings. Failure to lodge a court action within 60 days from the date when the suspension was granted ends the suspension and puts the decision back into force.[80]

In the context of the suspensive effect, the object of the decision challenged by administrative appeal is important—the suspensive effect is far more useful in case of negative (nonbeneficial) decisions.

17.7 The Administrative Appeal and the Judicial Review: Conditionality Versus Access to Justice

The organization of the administrative appeal depends on the role that the legal system is granting such pretrial proceedings in relation to the judicial review. Usually, the administrative appeal is governed by rules that are less strict than the judicial review. In systems where the administrative appeal is optional—France, Italy, Belgium (this last one with regard to the unorganized administrative appeal)—the person aggrieved by an administrative decision may choose between notifying the issuing authority and going directly to a judge or acting on them simultaneously. In the first scenario, the administrative appeal typically extends the time limit for filing a judicial review with the time needed for solving the administrative appeal (in France, 2 months; in Italy, 90 days, with the exception of the *riscorso straordinario al Capo dello Stato*); the judicial review deadline starts again after a decision on administrative appeal is reached expressly or by negative silence. If both remedies are filed at the same time and the matter is resolved in administrative appeal, a further judicial review may be dismissed as lacking object. In the same jurisdictions, on the other hand, organized (or statutory) administrative appeals are usually preventing parties from going to court without exhausting first this remedy. So there are two systems of administrative appeals, with different features.

On the other hand, in those systems where the administrative appeal is regulated as a *mandatory* stage prior to the judicial review, the interested person can file an action to court only when the administrative appeal procedure was previously exhausted. This practice applies as a rule in Germany, the Netherlands, Romania, Slovenia, Czech Republic, Poland, Serbia, Spain, Austria, as well as in the EU law.[81] Exceptions concern special standing for direct court actions—the public prosecutors, for instance, in Poland and Romania may directly address the court.

[80] See the Romanian chapter.

[81] See the corresponding chapters in this book.

The main conclusion here is that all jurisdictions are experimenting with both types of administrative appeals—mandatory and optional—with interchanging preferences for one or the other over the time. Thus, in France, in principle, the appeal is optional, but many statutory provisions are making it mandatory; in Italy, the perceived inefficiency of the administrative appeals finally led to the 1971 reform that abolished the conditionality between the administrative appeal and the judicial review, although maintaining the possibility to use these remedies. In Austria, recently, the 2012 reform states loud and clear the abolition of administrative appeal, only to reinstate them in a different setting.

In the context of the interplay between the administrative appeals and the judicial review, there are also novel institutions that attempt to bring the dispute to an end. The situation that poses such problems is when the administrative court rules that an order is unlawful, annulling it and instructing the administrative authority to issue a new order, but the public authority does not follow the instructions, and a new case comes back to court—this situation can be described as "the administrative loop." Over the last years in the Netherlands, courts have adapted their line of case law and now, as a general rule, try to settle disputes definitively in the sense that when deciding on an unlawful decision, they have the power to issue an interim decision, requiring the administrative authority to issue a new order or to provide better reasons for its old order. In this way, the matter is finally settled.[82] This is a good example of best practices that can spill over to other jurisdictions as a result of comparative legal research.

The relation with the judicial review is of critical significance in terms of justice administration—number of cases that reach the courts in different systems of administrative appeals. No research is available, at comparative level, regarding this matter. The Council of Europe's Committee of Ministers nevertheless has stressed that the large amount of cases and, in certain states, its constant increase can impair the ability of courts competent for administrative cases to hear cases in a reasonable time, within the meaning of Article 6.1 of the European Convention on Human Rights.

The conditionality between mandatory administrative appeals and judicial review raises also questions about *access to justice*, so the relevance of art. 6, par. 1 of the ECHR shall be considered.

> ARTICLE 6 – Right to a fair trial
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice

[82] See the Dutch chapter.

The ECHR has stated repeatedly that mandatory administrative appeals are not in breach of art. 6, par. 1 of the Convention,[83] although they are not necessarily conducted by impartial and independent review bodies. The emphasis was put always on the availability, in the end, of the action to court.

The Constitutional Court of Romania has expressed the same opinion as the ECHR regarding the national provisions instituting administrative appeals. They are constitutional in view of art. 21 of the Constitution on access to justice because they intend "to assure a climate of order, to avoid abusive procedures and to guarantee the rights of third persons."[84] In an earlier decision, the Court argued, "it is at the exclusive discretion of the legislative to institute such procedures, in order to speed up the court proceedings, reduce the expenses of the parties and keep irrelevant matters off courts, as long as the decision on administrative appeal is challengeable in court."[85] Nevertheless, there are voices that oppose such interpretation for cases where the administrative appeals are mandatory and restrict in any way the direct access of citizens to justice.[86]

It may be a valid point that very strict appeal procedures that entail only a limited deadline for filing the appeal and generous time limits for answering the appeals may practically restrict the access to courts or make the entire procedure unreasonable lengthy in the sense of art. 6, par. 1 of the ECHR. However, the authors of the national chapters gathered in this book are of the opinion that procedures featured by their national legal systems are in line with the ECHR and that there are no serious debates in their scholarly literature as to their compatibility with the Convention.

One requirement for the compatibility of the administrative appeals with the principles of the Convention is that in all cases the use of administrative appeals should allow for appropriate judicial review, which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration. This approach, doubled by the establishment of guarantees intended to make the use of administrative appeals effective (generous deadlines, thorough reasoning of the decisions, incentives for public bodies to do their best in solving the dispute for good, etc.), should always be in line with art. 6, par. 1 of the Convention.

In the United Kingdom, the internal appeal has been criticized for its lack of independence and impartiality when assessed against Article 6(1) of the European Convention on Human Rights.[87] The authors of the UK chapter are of the opinion

[83] Decision Le Compte and others v. Belgium (1) from June 23rd 1981, par. 51, Decision Ötzurk v. Germany from February 21st 1984, par. 58, Decision Lutz v. Germany from June 25th 1987, par. 57.

[84] See, for instance, Decision no. 441/2005, in *Curierul Judiciar* no. 11/2005, p. 34.

[85] The decision of the Constitutional Court in plenary session no. 1/1994, in *Curtea Constitutionala*, *decizii de constatare a neconstitutionalitatii 1992–1998*, RA Monitorul Oficial, 1999, p. 520.

[86] Deleanu (2003), p. 15; Chirita (2007), p. 312.

[87] Bailey et al. (2005), p. 92, cited in the UK chapter in this book (Chap. 9).

that the availability of external review diminishes the risks posed by such pretrial proceedings[88].

17.8 Hybrid Systems Between Courts and Public Authorities: The Role of Administrative Tribunals

The organization of the appeal following a judicial model can lead to the formation of an administrative body with quasi-judicial nature, a hybrid that aims at dealing with administrative disputes outside courts of law but still assuring a proper and balanced protection of the rights of parties. Their main function is to adjudicate disputes between citizens and governmental agencies. Although tribunals adjudicate many more administrative disputes than courts, their role as "dispensers of administrative justice"[89] receives relatively little scholarly attention. An effective administrative tribunal addresses in the same time the shortcomings of an administrative appeal procedure (lack of independence) and those of court proceedings (length, associated costs, and, in some cases lack, of specialization), providing for independent review and quick redress in (sometimes) less complex matters, which do not need the intervention of a court. Thus, the effectiveness of such complex institutions should be analyzed, from the point of view of their role of alternative review bodies outside courts.

The jurisdictions analyzed in this book offer a mixed picture. The United Kingdom is, by definition, the jurisdiction where tribunals have found their place and their effectiveness as a matter of fact.[90] The Dutch system of legal protection against the administration is currently moving from specialized Tribunals, comparable with the tribunal system in England until 2012, to an integration of the legal protection against the government in the Dutch judicial organization.[91] Article 112 of the Dutch Constitution provides that "The judgement of disputes involving rights under civil law and debts shall be the responsibility of the judiciary. Responsibility for the judgement of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament." In Denmark, the characteristic of the administrative appeal system is the existence of numerous sector-specific boards of appeal that are highly specialized collegiate public authorities whose sole or main purpose is to review administrative acts following an appeal, working independently from traditional hierarchical structures.[92] The

[88] See the UK chapter.

[89] Cane (2009), p. 5.

[90] See the chapter on UK in this book (Chap. 9); see also Cane (2009), p. 5.

[91] See the Dutch chapter.

[92] See the Danish chapter.

procedure used by these boards is a mix between the administrative procedure and the court procedure, involving judges as chairmen.

In France, many independent bodies (*Autorités administratives indépendantes*), combining regulatory powers with adjudicatory ones, are considered at least in part as an alternative to courts, as they offer redress before individuals who need to consider court action. Among the roughly 40 such authorities, some are directly in charge of ADR and solve disputes involving regulations that were not necessarily enacted by them[93]—for instance, the Commission on Access to Administrative Documents (*Commission d'accès aux documents administratifs*—CADA).

Other jurisdictions are wary of recognizing such hybridization, although it actually exists in practice: special appeal bodies dealing with appeals against decisions issued by Polish local governments (i.e., local government appeal boards) are working by the rules similar to those applicable to administrative courts.[94] In Romania, the closest to an administrative tribunal is the National Council for Public Procurement Disputes, which in theory is dependent on the Government but in practice has proved to be rather independent in its decisions.[95] In Germany, the Public Procurement Tribunal is also an instrument of legal protection for the tenderers,[96] which could be included in the category of administrative tribunals.

17.9 Empirical Insights: Are Administrative Appeals Living up to Their Role?

From the comparative literature, it emerges that there is no easily accessible empirical research measuring the effectiveness of administrative appeals. Few texts that dare to tackle the issue are just assumptions based on perceptions.

The Council of Europe's Committee of Ministers has recognized their potential role in reducing the caseload of the courts while still securing a fair access to justice.[97] It was also pointed out that court procedures in practice may not always be the most appropriate to resolve administrative disputes and that the widespread use of alternative means of resolving such disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public.

The few writings that tangentially touched upon the issue describe only the organization of the administrative appeals in various jurisdictions without analyzing their influence on the judicial review and their effectiveness as ADR tools. Some authors argue, in a general manner, that administrative appeals are efficient: in Germany, for instance, administrative appeals end, in most cases, with a positive

[93] See the French chapter.

[94] See the Polish chapter and the references cited there.

[95] See the Romanian chapter.

[96] See the German chapter.

[97] Council of Europe (2001).

decision, avoiding thus court action;[98] other authors are even mentioning percentages—nine out of ten objections are positively answered—but without citing the research that was conducted for this purpose.[99] In the Netherlands, it has been argued that the objection is particularly useful in cases of decisions of a mandatory nature taken in large numbers involving numerous legal parties (social security, rent support).[100]

This is the reason why the editors asked authors of the national chapters to consider the aspect of effectiveness of administrative appeals based on empirical data, interviews with legal experts, and their own expertise in the field. The objective was to bring a fresh perspective on the actual effectiveness of such dispute resolution tools beyond the mere speculative assertions. However, the task has proven to be quite difficult, as few data is compiled by public authorities, and even where such data exist, it is hard to corroborate with data on court proceedings in order to correlate the findings.

In the Netherlands, for instance, the authors are of the opinion that the filtering effect of an objection is affected by the context in which the contested decision was taken. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1½ million and 30,000 per agency, annually), therefore the name "decision factories." Due to the fact that such decisions are very often taken in electronic proceedings (online applications), administrative mistakes may occur, so the objection procedure helps the administration to correct its errors or to explain the decision to the citizens in these cases. The effect is quite relevant, as only about 3 % of the addressees of all original decisions commence court proceedings after decisions on objections. Other types of decisions, occurring rarely and after a complex procedure (spatial planning, for instance), are less prone to errors that can be righted at administrative level, so the filtering effect of objection proceedings is less obvious.

The assessment of Dutch administrative appeals from an effectiveness point of view is influenced by its perceived role as a legal protection tool and only secondarily as a decision making tool. This gives the objection procedure a quasi-judicial nature—which is criticized by the authors of the Dutch chapter, who mention also various initiatives designed to make the procedure more informal again. Thus, the government has taken the initiative to stimulate civil servants and citizens to take an active informal approach and to cooperate instead of hiding behind formal rules, also by starting a project that encourages contacts and dialogue between the administration and citizens, as opposed to resorting to legal rules and thus allowing conflicts to flourish.

Even in countries that are at the forefront of innovation as regards ADR tools, such as the Netherlands, there were at some point attempts to get rid of

[98] Schwarze (2009), p. 136.

[99] Schröder (2002), p. 137.

[100] Serdeen and Stroink (2002), p. 174.

administrative appeals. Thus, the idea that an agreement between appellants and public bodies to skip administrative pretrial proceedings might advance the final dispute resolution has not been received with gusto by the doctrine.[101]

In Germany, the question whether the objection procedure is a useful tool for solving disputes or an annoying pretrial has been discussed for decades.[102] In this context, sort of counterintuitive, public authorities do not compile even now relevant data on objections, their outcome, and the consecutive court actions. The same conclusions based on data from between the 1950s and 1980s are reiterated and held as true: less that 10–20 % of objections are challenged in court. The effectiveness of the objection is contested in formalized procedures that include extensive public participation and held to be more important in other instances. The thousands of authorities on multiple different levels (federal level, *Land* level, district level, municipal level, tax authorities, social security institutions and other specialized administrative authorities), which may be involved in an objection procedure, make compilation of data a difficult endeavor. However, taking into account that the number of court cases avoided due to the objection procedures is not the only criterion for judging their effectiveness, the authors of the German chapter stress the fact that based on its ability to ensure effective legal protection, an objection may be considered as generally an effective remedy. The decision to file an objection against an administrative act is more easily to be taken than the one involving a court action (time limits, costs, complexity of the procedure are taken into account). Illustrative to this option is the fact that in a given *Land*, when given the option to use an objection procedure and a court action, about 80 % of the complainants opted for the objection procedure instead of going directly to court.[103] There is no doubt that sometimes these procedures are used only to buy some more time for reflection towards starting court actions. But this benefits both complainants and public authorities; moreover, public authorities use this intermission in order to "straighten up" their administrative act.

In France, mandatory administrative appeals are often seen as effective since they provide some guarantees to the citizens and avoid the cost and delays of judicial procedures. At some point, the strategic objective of having more prelitigation ADR mechanisms was included in the law—the law of 31st December 1987 on reforming administrative litigation stated that the Conseil d'Etat would determine by decree the conditions under which administrative litigation or arbitration must necessarily be preceded by prior administrative appeals or conciliation. However, there was no follow-up regarding this provision. A part of the doctrine inclines toward the generalization of mandatory administrative appeals,[104] especially in matters such as the invalidation of driving licenses, public services, and in laws relating to foreigners and to prisons. However, there are still traditional

[101] See the literature cited in the Dutch chapter.

[102] See the German chapter.

[103] See the German chapter, note 15.

[104] See the literature cited by the authors of the French chapter.

approaches that mandatory appeals add to the procedures and that impartial judicial review is the sole venue where citizens may find their rights and interests duly heard.

In Denmark, the figures presented in the study show that only a very limited number of cases (2–3 %) are brought before the courts, and of these the courts uphold the decisions of the boards in up to 95 % of the cases. One has to remember that this is a legal system where administrative appeals are quite well organized and have a tradition in the administration. So the authors conclude that administrative review appears to be effective "even if a part of the explanation of the low number of cases that are brought before the courts is likely to be attributed to structural and practical barriers, such as the risk of litigation costs and lengthy court processing time."[105] Another argument working in favor of the effectiveness of administrative appeal is that appellate bodies annul a large number of decisions issued by public authorities, so this form of review is helpful for those interested in contesting a decision made in first instance.

A different picture seems to be offered by Italy, where administrative appeals are not a prerequisite for judicial review and are rarely exercised because they are perceived as ineffective. The fault for the ineffectiveness of administrative appeal lies, according to the authors of the Italian chapter, in the administrative culture, which is at odds with trusting public servants to pursue the public interest in dear decisions.

In Slovenia, the number of appeals and court actions seem to depend more on the awareness of the right to legal remedies than on mistrust in the administration. According to a survey conducted in 2012, the effective communication between the public servants and the citizens during administrative proceedings is influencing a great deal the outcome of the administrative appeal.

The different setting in which administrative appeal work in the United Kingdom does not make them irrelevant. Thus, it is a common feature of an administrative dispute to start with an internal appeal to the relevant public body, or to an external appointed authority, regarding the public authority's "action, lack of action or standard of delivery."[106] Moreover, it is a common practice to have more than one-tier system, in which formal complaints are dealt with first by frontline staff, which can be escalated to senior officer or chief executive level,[107] or they can just go to the highest level of administration. Internal administrative reviews are an instrument of good administration. However, studies on specific appeal procedures reveal that applicants fail to challenge adverse decisions because of their lack of knowledge about the availability of the appeal and because of their skepticism regarding how the appeal will be treated.[108] Another frustrating shortcoming of the administrative appeal is its inability to hold public authorities accountable for their

[105] See the Danish chapter.

[106] Law Commission (2008), esp. p. 12, para 3.28, cited in the UK chapter.

[107] See the UK chapter.

[108] Cowan and Halliday (2003), esp. chapter 5.

actions—citizens often seek to be heard and understood.[109] However, because judicial review is a remedy of last resort, aggrieved citizens may have to exhaust the course of the internal appeal system before being able to approach the court with a request for judicial review, and the justifications behind this rule have to do with relieving the high court of cases that can be solved otherwise and thus saving valuable public resources. The authors conclude that internal appeal in public administration may be considered as a common sense procedure in the UK legal system.

In Serbia, based on the empirical research conducted for the purpose of this book, the author concludes that administrative appeals avert at least half of court actions, their effectiveness ranging from 54.64 to 98.77 %. One explanation for this success rate is the centralization of the competence for deciding on administrative appeals. Subcentral administrative authorities seldom appear as appellate authorities.

Finally, at the EU level, the preliminary administrative procedure is of essential importance in securing the observance of Union law by the Member States.[110] Research data show that in recent years more than 70 % of complaints were closed before the letter of formal notice, more than 80 % before the reasoned opinion and more than 90 % before a ruling of the Court.[111]

17.10 Final Considerations

Overall, the main conclusion is that when organized, administrative appeals are fulfilling their role as ADR tools or pretrial proceedings. They offer a good venue for seeking legal protection while playing also the role of pretrial procedures. However, their ability to provide legal protection comes with mixed blessings: there is sometimes reluctance to consider them as ADR tools because their role as legal remedies is well enshrined in the legal tradition of some legal systems and their status is rivaling the courts' (in Germany, Austria, Denmark, Slovenia, Serbia). When compared to other tools of ADR, like Ombudsman and mediation, arbitration, conciliation, they still hold the spotlight in the majority of jurisdictions analyzed here.

Unorganized administrative appeals are nevertheless important, either as a venue for seeking alternative dispute resolution or as informal procedures destined to keep parties out of courts of law. The importance associated to these appeals in countries that in principle reject the need for mandatory administrative appeals (France and Italy) is speaking for itself.

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[109] See the UK chapter and also Hunter and Cowan (1997).

[110] See the EU law chapter in this book (Chap. 16).

[111] European Commission (2008), p. 2, cited in the EU law chapter.

The administrative appeal remains the main competitor for courts when it comes to dispute resolution in administrative matters. The interplay between courts and bodies of administrative appeal deserves further analysis, as the findings of our research are not sufficient to draw very clear conclusions.

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Chapter 18
The Ombudsman: An Alternative to the Judiciary?

Milan Remac

18.1 Ombudsman as a State Institution

An Ombudsman institution is traditionally defined as an office provided for by the constitution or by an action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament; who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion; and who has the power to investigate, recommend corrective action, and issue reports.[1] This definition of the Ombudsman partially underlines the position of the Ombudsman among the other state institutions. It expressly notes the connection between the Ombudsman with two traditional bearers of the state power—the legislator (legislative power) and the state administration (executive power). The connection of the Ombudsman institution with the judiciary (judicial power) can be deducted from this definition as well as it underlines the investigative and dispute resolution powers of the Ombudsmen, i.e. powers that are also possessed by the judiciary.

The national chapters show that the Ombudsman institution is established in the majority of legal systems.[2] The exceptions to this rule are Germany and Italy. These two countries have not established a national Ombudsman institution. However, in both countries an Ombudsman institution can be found on a regional level or level of Bundesländer. For instance, there is a regional Ombudsman institution—*Difensore Civico* (for example, the region of Tuscany) or at *Bürgerbeauftragter* in Schleswig-Holstein.

[1] Ombudsman Committee (1974).

[2] Gottehrer (2010).

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One can presume that the Ombudsman institutions are connected with all main bearers of the state power, the national parliaments, the state administration, and the judiciary. Theoretically, and as shown by the national chapters, also practically a majority of the Ombudsman institutions interrelate with each of these powers while trying to protect their own independence. The level of the Ombudsman's institutional, economical, or functional independence depends on the way how the *national legislator* when establishing the Ombudsman regulates the interplay of the Ombudsman institution with the other state institutions. Different legislators may have opted for a different Ombudsman model with slightly different powers of the Ombudsmen, which may put them into a different position. The actual application of powers of the Ombudsman towards the other state institutions depends on the practice of each incumbent Ombudsman.

The national examples show that the Ombudsman is usually a monocratic body, as only a handful of countries have more than one Ombudsman institutions active at the same level (Austria or England on local level). At the same time, the Ombudsmen are not structured in a more tier system. Usually, one cannot appeal against the reports or decisions of the Ombudsmen even if there are local and national Ombudsmen or Ombudsmen with general competences and specialized Ombudsmen (children's Ombudsmen or pensions Ombudsmen). The Ombudsman institutions of the researched systems are not built on the basis of superiority, not even in the Ombudsman-fertile countries such as the UK or Belgium. The research proves that if there are different Ombudsman institutions, they are completely independent. This independence however does not exclude the existence of mutual cooperation among these institutions. Nonetheless, the national Ombudsmen are usually in a position of *primus inter pares*.

In a vast majority of the researched legal systems, one can observe a connection between the Ombudsmen and the bearers of the legislative powers usually, the national parliaments. In general, these institutions usually make propositions and subsequently choose the person of the Ombudsman, as for instance in Poland, in Serbia, or in the Netherlands. They usually have also a power to propose the dismissal of the Ombudsman to some other state institution, as for instance in the EU, or they have power to dismiss the Ombudsman if the legal conditions are met, as in the Netherlands. The national parliaments may also act as a political supporter of the Ombudsman and his findings, and conversely the Ombudsman can act as the representative of a parliament before the administration. As confirmed by an example of the UK, Romania, or the European Union, the Ombudsman can, in individual cases, submit a special report to the national parliament. By that report, the Ombudsmen can ask the parliaments to exercise their political powers in order to support the Ombudsman's recommendations that can potentially, in the opinion of the Ombudsmen, eliminate the injustice that has already happened or prevent new injustice. Although the power to submit special report is not connected with all of the researched systems (for example, the Netherlands), in all researched systems one can observe a possibility of the Ombudsman to inform the national parliament about his powers, interesting cases, or newest development in the practice. This happens by way of general annual reports that are submitted to the national

parliaments. Only in a handful of situations, Ombudsmen inform the national parliament about the actual individual investigation. In connection with the national parliaments, some of the Ombudsmen have a power to assess the administrative behavior of the parliament as well. This is the case of the European Ombudsman.

The state administration or the government (in general), i.e. the executive branch of state power, is connected with the Ombudsmen by the fact that it is the subject of the Ombudsman's investigation. The Ombudsmen receive complaints of individuals against the conduct of the administrative bodies, or they can start the investigations on their own motion. Of course, there are certain national specifics. As the Ombudsman should be able to give impartial and independent services and assessment of complaints, he must not be in any way subordinated to the state administration, i.e. the controlled subject. In the national chapters, one cannot find subordination between the Ombudsman institutions and the state administration. Impartiality and independence of the Ombudsmen from the administration are usually guaranteed by the constitution or by statute. The Ombudsmen thus stand outside the state administration, and they are independent on the administrative institutions within their competence. The Ombudsman institutions have broad investigative powers, which include accessing the files of the administration (as in Serbia), accessing the premises of authorities (as in Spain), hearing the witnesses (as in Romania) or exercising onsite investigations or inspections (as in the UK). An investigation of the Ombudsman often ends with a written report with possible recommendations. In the researched countries, these reports are usually legally nonbinding and cannot be enforced before the courts or other state institutions. A possible difference is on the local level in England. In a majority of cases, the state administration has only a possibility but not an obligation to follow the recommendations and reports or decisions of the Ombudsman. In some systems, the administration, when rejecting the Ombudsman's recommendations, has to give reasons for such a rejection.

In general, the Ombudsman institutions are established in order to supplement the judiciary.[3] In none of the system included in the research does the power of the Ombudsman extend to the behavior of the courts. Some of the systems expressly bar the Ombudsman from investigating the cases where the complainant has or had a remedy before a general court (the UK) or before an administrative court (the Netherlands). Sometimes, the Ombudsmen are expressly bared from questioning the soundness of the court's ruling (the European Ombudsman). In some legal systems, the bar is not expressly mentioned or otherwise visible (Slovakia). Conversely, in some legal systems (the Czech Republic), the Ombudsmen can act even in the case of court proceedings. Generally, however, the Ombudsmen can only act together with the courts but never against them. Courts often have powers to dismiss the Ombudsman, and they are sometimes the place where the Ombudsman has to take his oath (for example, the Court of Justice of the European Union). Another important point to mention is the fact that Ombudsman investigations do

[3] Reif (2004).

not stop time limits for the application to the court or other bodies. Thus, the individual usually stands before a choice—Ombudsman investigation or court proceedings. He has to decide, based on the powers of the national Ombudsman and the courts, which avenue of remedy suits his case better. Generally, the Ombudsmen and their reports are not "controlled" by the courts. However, in some of the researched systems, the courts can assess the legality of the decisions and actions of the Ombudsman either in general (the UK) or in connection to damages (the EU). Furthermore, several Ombudsman institutions (Poland, Czech Republic, Hungary, Romania, or Serbia) have a possibility to file a complaint before the constitutional court that underlines their special connection with the judiciary.

In connection with all (national) Ombudsman institutions included this research, one can observe that although these institutions cannot be completely included in any of the traditional parts of *trias politica* (legislative power, judicial power, and executive power), they function in close connection with these bearers of the state power, whether it is their status as a "representative" of the parliament, "investigator" of the government, and "supporter" of the judiciary. In all the researched systems, the Ombudsman is a specialized state institution that possesses special powers that are not identical with the powers of other state institutions or bodies. The character of the Ombudsmen and their powers put them not only among the state bodies but also among the possible checks and balances of administration within the state power (Fig. 1.1).

The national chapters show (see a brief overview depicted in Table 1.1) that the Ombudsmen as dispute resolution mechanisms are stable parts of their constitutional systems. They are placed among the dispute resolution mechanisms next to the judiciary, administrative appeals, and other extrajudicial means of dispute resolution. Based on these chapters, one can create the following scheme summarizing the most outstanding points connected with these institutions.

As noted before, Ombudsmen come in different shapes and sizes, and also the present research provides different types of Ombudsman institutions. When taking into account theoretical perspectives,[4] then the researched Ombudsman institutions include good administration or classical Ombudsmen and human rights Ombudsmen. The research also includes the Ombudsmen that, from the theoretical perspective, can be characterized as the rule of law Ombudsmen. A part of the Ombudsman institutions from the Southern (Spain), the Central (Poland, Hungary), and the Southeast Europe (Romania, Slovenia, and Croatia) is *expressly* and *directly* (ex lege) connected with the protection of human rights. These Ombudsmen were created after the fall of dictatorships and undemocratic regimes, and their connection with human rights is premeditated and rather important. These Ombudsmen are an exceptional example of a flexibility of the Ombudsman institution. Some of the Ombudsmen are connected with the assessment of procedural and substantive legal requirements, as in Austria, Serbia, and partially also Denmark.

[4] Reif (1999) and Kucsko-Stadlmayer (2008).

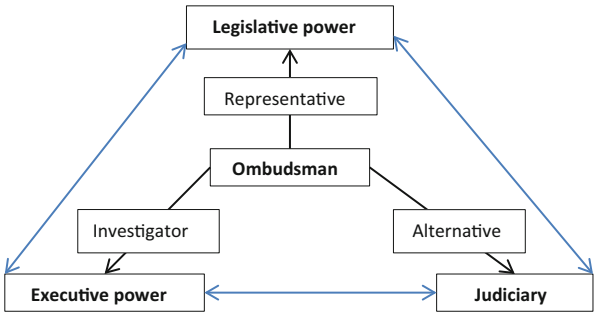

Fig. 1.1 Ombudsman and trias politica. *Source*: developed by the author

Apart from these Ombudsmen, the researched systems include the Ombudsmen of Western Europe (the Netherlands, Belgium, the UK, or Denmark) that are primarily connected with the assessment of conduct or behavior of administration against a general normative concept as good or proper administration. Because of the flexibility of the Ombudsmen and of their normative standards, it is often difficult to limit the Ombudsmen only to one normative standard. In the majority of the Ombudsmen, one can observe that there is a certain hybridization of their normative standards, and thus the Ombudsmen that traditionally assess only the compliance of the administrative conduct with a general concept such as good administration also include under the head of this concept compliance with the law or human rights (for example, in the Netherlands or in the UK). Hybridization of the normative standards of these Ombudsmen is connected also with the fact that the national legislators often connect the Ombudsman with several normative standards, and then the Ombudsmen have to specialize for all of them (for instance, Serbia, Spain, or Czech Republic). Thus, also, the Ombudsmen predominantly assessing the compliance with good administration or legal requirements often assess the compliance of administration with human rights and vice versa.[5]

In connection with the different types of the Ombudsman institutions, it is possible to see a considerable difference not only when talking about the assessment normative standards that are used in practice of the Ombudsman but also in a possibility of the national Ombudsman to actually develop the normative standards. The character of the assessment standard or assessment criteria is very often established by the legislator in the statute establishing the Ombudsman or in the Constitution. Thus, the Ombudsman has only a limited possibility to change the assessment standard, especially if he has to assess compliance only with expressly stated human rights or procedural or substantive legal requirements. None of the Ombudsmen included in the research have power to create generally binding rules. Thus, if they are connected only with human rights or the law, they should apply normative standards defined by somebody else (legislator or judiciary). The Ombudsmen who assess compliance with a general concept as good administration, proper administration, or maladministration are usually in a better position to

[5] Remac (2013), pp. 62–78.

Table 1.1 Overview of Ombudsman institutions included in the research

Ombudsman institution	Control criteria (normative standards)	Own inquiry	Time limit for complaining	Suspending effect for court proceedings	Can control judiciary and judges
The Board of Ombudspersons (*Austria*)	The laws and principles of good administration	Yes	No time limit	No	No
Federal Ombudsman/Flemish Ombudsman (*Belgium*)	Proper administration	No	1 year	No	No, except the administration of justice
Defender of Public Rights (*Czech Republic*)	Human rights, legality, and good administration	Yes	1 year	No	No, except the administration of justice
Parliamentary Ombudsman (*Denmark*)	Legality and good administrative conduct	Yes	1 year	No	No
Defenseur des Droits (*France*)	Fundamental rights	Yes	No time limit	No	No
Commissioner for Fundamental Rights (*Hungary*)	Human rights and fundamental freedoms	Yes	1 year	No	No
National Ombudsman (*Netherlands*)	Proper administration	Yes	12 months	No	No, except the administration of justice
Human rights defender (*Poland*)	Human rights and fundamental freedoms	Yes	No	No	Can demand information about cases and examine records
People's advocate (*Romania*)	Human rights and freedoms	Yes	1 year	No	No
Protector of citizens (*Serbia*)	Legality and good administration	Yes	1 year	No	No
Human rights Ombudsman (*Slovenia*)	Human rights and fundamental freedoms	Yes	No, speedy	No, except unjustified backlogs or abuse of power	Yes, in case of undue delay and abuse of power
Defensor del Pueblo (*Spain*)	Basic rights and public freedoms and good administration	Yes	1 year	No	No, except the administration of justice

(continued)

Table 1.1 (continued)

Ombudsman institution	Control criteria (normative standards)	Own inquiry	Time limit for complaining	Suspending effect for court proceedings	Can control judiciary and judges
Parliamentary Commissioner for Administration (*the UK*)	Maladministration	No	12 months	No	No, except the administration of justice

Source: Author's compilation based on data provided by each country team, following a matrix developed by the author [As there are no "national" Ombudsman institutions in Italy and Germany, these two countries are not included in this table. Term legality (as normative standard) in this connection means the assessment of compliance with procedural and substantive legal requirements.]

develop their own assessment standards. Although the term good administration is often defined in the nonbinding international documents as, for example, in Draft Report on the notion of "Good Governance" of the Venice Commission and in legal theory, it is only rarely explained by the legislator or judiciary. In such cases, the Ombudsmen can and, in order to fulfill their roles correctly also, should develop certain assessment standards that should be applicable when assessing the complaints based on the breach of good administrative practices by the administrative institutions. Application of standardized "good administrative principles" helps the individuals to know what can they expect from the administration and also the administration to know what the Ombudsman requires them to do. It can subsequently lead to the higher compliance with the Ombudsman recommendations and to theoretical decrease of complaints with the Ombudsman.

The general practice of the Ombudsmen to develop their own system of normative standards is connected mainly with the Ombudsmen that assess compliance with the general concept as good administration, proper administration, or maladministration. In this connection, it is possible to point to the practice of the Ombudsmen of the Netherlands, the UK, Czech Republic, the EU, or Belgium, who during the past years have developed their own lists of normative standards for good administrative conduct. They were allowed to do it because of their connection with these general concepts and because the national legislator did not expressly explain the content of these general concepts. The normative standards of these Ombudsmen have several common issues. First of all, they do not have legal binding power. They cannot bind the administration or bodies within their competence in any other way than moral. Second, these normative standards usually provide an opinion of the *incumbent Ombudsmen* on the scope of their control, whether it is maladministration, good administration, good governance, etc. This also means that, theoretically, the principles can change with every new officeholder. Of course, the spirit and the general content of these principles remains the same or at least very similar.

As an example, we can use the practice of the Dutch National Ombudsman who, in 2004 and also in 2011, "redeveloped" the list of requirements of proper administration that were originally developed by one of his predecessors in the 1980s.[6] These principles have in common also the fact that they are were published at the internet site of the Ombudsman, which makes them publicly available. The normative assessment standards have generally two addressees—the state administration and the individuals. The state administration should follow these normative standards in order to bring its conduct in compliance with the general normative concept (good administration), and the individuals can get acquainted with these standards in order to be able to know what kind of quality of conduct they can expect to receive from the administration.

Even if the Ombudsmen deal with the general concept as good administration, they can decide that they will not develop and publish these lists of the normative standards. They can potentially work without them (as in Denmark, Spain, or Serbia).

The Ombudsmen who assess compliance only with human rights or compliance with procedural or substantive legal requirements are relatively limited in the creation or development of normative assessment standards that would be different from those that are used by the courts or other state bodies. As can be observed from practice of some national Ombudsmen, they do not develop their own system of control based on other norms but legal (Poland, Hungary, and Serbia). These Ombudsmen apply in their daily work law and/or human rights as assessment normative standards.

Thus, the practice of development of the normative standards by the national Ombudsmen is directly connected with the type of the Ombudsman and the type of normative concept they protect. Even if the Ombudsmen deal with a general concept as good administration, the perception of this concept can be different in each researched country. Similarly, the compliance with certain procedural or substantive legal provisions (law) can be also different as there are can be different legal provisions that belong to the competence of each national Ombudsman. Probably the biggest similarity as to the normative standards of the Ombudsmen is connected with the "human rights Ombudsmen" as in most of the cases, the catalogue of human rights in countries included in the research are, in one way or another, connected with the international documents as the European Convention of Human Rights of the Council of Europe.

Because of the different Ombudsman models that are included in the research, it is possible to foresee that the impact of the Ombudsmen on the development of rule of law and on the development of good administration will be different. If an institution does not assess compliance with the law or at least with human rights, it is very difficult that such a body will have a direct impact on the rule of law. Because of that, it is also possible to assume that the alternative or rather supplementary character of the different national Ombudsman institutions in connection

[6] National Ombudsman of the Netherlands (2011).

with the judiciary and the court proceedings will be different. Some Ombudsmen (the UK or the Netherlands) even underline a difference between their scope of control (maladministration or proper administration) and legality.

18.2 Ombudsman as an Alternative to Judiciary: Strengths and Weaknesses

Although the Ombudsmen can be firstly perceived as an alternative to the judiciary when dealing with administrative law cases,[7] one can also perceive them as an alternative to the work of other state bodies. The Ombudsmen can be also an alternative to other specialized out-of-court dispute resolution mechanisms as mediation, conciliation, or other dispute resolution mechanisms. As shown in the national chapters, powers of several Ombudsman institutions can include mediation or conciliation techniques, and thus technically the Ombudsmen can be perceived as an alternative to other mediation or conciliation national mechanisms [France, Belgium (Flanders)]. Theoretically, an Ombudsman institution can be also seen as an alternative to administration. Of course, the Ombudsman generally does not decide substantive issues of cases but it can be an alternative to the work of national administration in connection with complaints of discontent individuals and other users of the administrative services. Usually, while depending on the legal system of every country, the complaints about administration should be first sent to the administrative body dealing with the case or administrative body of a higher instance. If there is not an obligation to send a complaint to one of these bodies, the Ombudsman can directly deal with the complaint. Despite these theoretical possibilities, this chapter points its attention to the first situation where an Ombudsman acts as an alternative to a national (ordinary or specialized administrative) judiciary.

The Ombudsmen as an alternative to the judiciary have to be primarily seen as part of nonjudicial or out-of-court dispute resolution mechanisms. Generally, the Ombudsman institutions, depending on the powers provided to them by the legal system, investigate behavior of the state administration following a complaint, on their own initiative or based on a reference from some other body, and thus they can potentially solve the dispute/problem between these subjects before it reaches the stage of a judicial dispute solution.

Historically, the role of the Ombudsman institution can be seen in the promotion of good administration or good practices of administration.[8] The Ombudsmen deal, for instance, with complaints of individuals against administrative malpractice, delays, bad administrative behavior, or bad human behavior of the officials in connection with their administrative functions as representatives of state power.

[7] Reif (2004).

[8] Gregory and Giddings (2000).

In connection with the researched Ombudsman institutions, for example, the Dutch National Ombudsman, the UK Parliamentary Ombudsman, the Danish Parliamentary Ombudsman, the Czech Public Defender of Rights, or the Serbian Protector of Citizens deal in their practice with standards of good administration. Nowadays, however, the Ombudsmen are often primarily perceived as human rights institutions. One can see a shift in their powers from simple promoting of compliance with a general concept as good administration to endeavor to add to the protection of human rights. This perception is supported by a number of international documents placing the Ombudsmen among the human rights institutions. This is, for instance, the case of the Paris Principles as annexed to the UN General Assembly Resolution 48/134. The national legal systems react to this development, and the "youngest" Ombudsmen very often have the character of the human rights Ombudsmen.[9] This is, for instance, the position of the Romanian Ombudsman, the Ombudsman of Slovenia, or the Polish Human Rights Defender.

However, no matter what the normative standard of the Ombudsman is, their role as an independent investigator or a control mechanism of the administration is the role that is connected with the all of the researched Ombudsmen. It is considered to be the most important and prevailing role of the existing Ombudsmen.[10] While exercising their control function, the Ombudsmen deal with the disputes between the individuals and the state administration. Thus, their control abilities are directly connected with their abilities to give protection to the individuals against the (state) administration and independent and impartial dispute resolution. These functions are rather similar to the functions of the administrative judiciary. They too, in a way, deal with the individuals discontented with the work of administration, and they can protect the interests of the individuals and solve the disputes while retaining their impartiality. In the work of the Ombudsmen, one can sometimes identify the normative function connected with the necessity to explain the content of the general normative concepts directly connected with their work as good administration, proper administration, or maladministration. Such guidance of the Ombudsmen and their investigations can have a potential educative impact.

The Ombudsmen were never a priori established in order to replace the courts. The national chapters show that the Ombudsmen were established in order to either cover concepts as maladministration or proper administration that are not primarily connected with the work of the judiciary (the Netherlands, the UK, or Belgium) or give additional possibility to individuals to protect human or fundamental rights (Spain or Romania). No matter what was the reason for the establishment of the Ombudsman institution, the national examples show that the Ombudsmen can supplement the judiciary. Their protection is an alternative to the protection that is provided to the individuals in their disputes with the (state) administration by the courts. In connection with the status of the Ombudsmen as alternative dispute settlement mechanism to the judiciary, one can point to several general strengths

[9] Remac (2013), pp. 62–78.

[10] Andersen et al. (2000) and Ziegenfuss and O'Rourke (2010).

and weaknesses of the Ombudsmen. As this book deals with alternative dispute resolution mechanisms in several legal systems, it was necessary to limit ourselves to the most outstanding strengths and weaknesses of the Ombudsmen included in the research. As these institutions have been established in different legal systems; their weaknesses and strengths are closely and directly linked with these systems. Despite the differences among these systems, one can discover a handful of similar strengths and weaknesses connected with the researched Ombudsman institutions.

Most of the strengths of the Ombudsman institutions in their position of the alternative dispute resolution mechanisms are directly connected with their flexibility. From the examples included in the previous chapters, one can see that the Ombudsmen come in all shapes and sizes.[11] They are institutions that are adaptable to different legal environments, from the common law system and democratic systems of the Western Europe to the changing system of postcommunistic countries. The variability of the institution is also connected with the flexibility of normative concepts that can be covered by the Ombudsmen. As shown by the national chapters, the Ombudsmen can cover different normative concepts: proper administration, maladministration, good administration, compliance with human rights, or even a compliance with the law in general. Such flexibility allows them to develop and adjust their own rules and standards so that they too reflect these concepts. Still, the choice of the general concept that is covered by the Ombudsman (the law, good administration, human rights, etc.) depends on the decision of the national legislator, who plays a decisive role in defining their remit, competences, and powers.[12] The Ombudsmen are often provided with discretion that enables them to decide whether they will investigate the complaint. An individual cannot compel them to investigate his complaint. However, if the Ombudsmen decide to, they are flexible in their choice of the working methods. The national chapters do not show that there are specific procedures that have to be step-by-step followed by the Ombudsmen during their investigations. The Ombudsmen themselves, based on the circumstances of the case, can change or adapt their working methods.

This flexibility of their working methods is connected with the low level of formalities of their work and investigation, especially if one connects it with the procedures before the national judiciary. Of course, the individuals, when complaining with the Ombudsmen, have to meet prescribed requirements as time limits, form of the complaint, or the exclusion of other remedies, but usually these requirements are not as formal as in the case of the court proceedings. Usually, the Ombudsmen do not have any formally preset hearings with certain place or time schedule. Thus, hearing of witnesses may happen in or outside their official premises. The way of the Ombudsman investigation can de facto differ from case to case, although there is usually a procedure that is followed by each national Ombudsman when dealing with individual complaints. The procedures also depend on the powers that the Ombudsmen actually have. For example, the statute on the

[11] Abraham (2008), pp. 681–693.

[12] Remac (2013), pp. 62–78.

Danish Parliamentary Ombudsman does not give this Ombudsman a specific power to "hear the witnesses," while the Parliamentary Ombudsman Act in the UK directly mentions this power. The low level of formalism is also linked with the fact that in all the researched Ombudsmen, use of a legal representative is optional.

The flexibility and the low level of formalities of the Ombudsmen investigations is also connected with another virtue of the Ombudsman investigation, a possibility to use various (formal or informal) investigation techniques. These can include formal hearing and also use of mediation or conciliation. Although lately, some of the national courts try to be more proactive and more open in using these techniques of solving the disputes,[13] the informal techniques are only very rarely used by the courts in order to solve the cases. Mediation as a specialized way of dealing with the cases can be found in the toolkit of Dutch *Nationale Ombudsman*, French *Protecteur des Droits*, or Spanish *Defensor del Pueblo*. Apart from the cases that require a full-scale investigation, the Ombudsmen can solve the simpler complaints by methods of a direct and active contact with the administrative body concerned. Usually, a large amount of complaints against the administration can be dealt with by a simple phone call or an email to this state institution. This underlines the problem-solving character of the Ombudsman investigations, and at the same time application of this informal intervention of the Ombudsman can speed up the solution of the actual problem.

Another strength of an Ombudsman institution is the fact that it can adopt a proactive approach. A proactive approach of the Ombudsmen goes back to their flexibility.[14] In the course of investigations, Ombudsmen usually act in an inquisitorial manner. They do not need to wait for a complainant to ask them to do some investigative action or act; they often do it by themselves. That is usually in contradiction with the adversarial character of the court proceedings.[15] The Ombudsmen do not approach the investigations from position of power, but they usually give the administration chance to deal with the complaint first. If a complaint was not communicated with the administration before it reached the Ombudsman, it is possible that an Ombudsman will reject the complaint.[16] This is a practice of the UK Parliamentary Ombudsman or the European Ombudsman. Being proactive in the case of the Ombudsmen means that they can react to certain situations in the administration by the investigation that was started by their own initiative. Mostly, they do not need to wait for a complaint of an individual, but they can address some administrative problems on their own motion. This practice is connected, for instance, with Romanian People's Advocate or the Protector of Citizens of the Republic of Serbia. Conversely, the UK Parliamentary Ombudsman or the Belgian Federal Ombudsman does not explicitly possess this power. This strength however depends on the national legislator and on its choices done while

[13] Alexander (2006) and Niemeijer and Pel (2005), p. 345.

[14] Collcutt and Hourihan (2000).

[15] Harlow and Rawlings (2009).

[16] Langbroek et al. (2013).

designing the national Ombudsman institution. An important advantage of the Ombudsmen is their possibility to look for the structural problems of the administration and address to the administration legally nonbinding recommendations about a possible way of dealing with these problems. The judiciary is usually interested only in solving the case at hand. The Ombudsmen can generalize, and if they find a recurring administrative problem of the kind, they can approach this problem in a structural way and deal with the problem as a problem of the administration institution as such rather than only the problem of an individual. A possibility to deal with structural problems is connected with the proactive approach of the Ombudsmen. As an example, one can point to the investigations of the UK Parliamentary Ombudsmen or the Dutch National Ombudsman. The legally nonbinding character of their reports and recommendations is connected with the fact that the Ombudsmen do not bind the administration in other than moral way. The administration does not have to follow these recommendations. This legally nonbinding character of reports and recommendations allows the administration to ponder about recommendations and possibly apply them in a manner that suits individuals, Ombudsmen, or their own possibilities and budget. The Ombudsmen themselves and some writers see this legally nonbinding character of the Ombudsman reports as big asset to their own work.[17] Apart from recommendations that react to a structural problem of the administration, one can find also recommendations in individual cases.

Furthermore, the Ombudsmen provide a low-cost dispute resolution. In all of the researched Ombudsman systems, the services of the Ombudsman are not connected with any considerable fee. Thus, an individual complainant can be attracted to the Ombudsman by a simple fact that in order to raise the Ombudsman's interest into his complaint, he does not need to spend any additional financial resources, maybe except a post-fee for sending him the complaint. The low-cost character of the Ombudsman is underlined also by the fact that an individual, during an investigation of the Ombudsman, does not need to be represented by a lawyer or an advocate.[18] Thus, the fees connected with the legal representation before the Ombudsman de facto does not exist unless the individual decides to use the help of a lawyer. In these cases, he must usually bear the costs of this representation. This is, for example, the practice in the EU, the Netherlands, or in the UK.

Flexibility of the Ombudsman procedures necessarily leads to enhanced speed of these proceedings. In most of the cases, the Ombudsmen are able to conclude their investigations in a time limit of 1 year and sometimes even sooner. Only in rare and usually overcomplicated cases does it take the Ombudsmen more than 1 year to come up with a written report or an assessment of the complaint and its contents. The speed of the Ombudsman investigation depends on specific issues of the case, on the system of Ombudsman's work, on the willingness of the administration to cooperate, etc. Of course, a particular time that the Ombudsmen have to spend on

[17] Buck et al. (2011).

[18] Nordic Council of Ministers (2002), p. 569.

the investigation of complaints differs from country to country. For example, according to the latest annual report of the Dutch National Ombudsman, in average it takes him 10 months to conclude the investigation of this Ombudsman with a written report but only less than 50 days if the complaint allows him the use of a less formal method of approaching the problem (investigation). One of the goals of the UK Parliamentary Ombudsman is to conclude 90 % of investigations within 12 months.[19] The time consumption is usually lower if the Ombudsmen use, instead of a full-scale investigation, only informal techniques.

Last but not least, one of the strengths of the Ombudsmen is included in various special powers of the Ombudsmen that can be derived from different legal systems. These powers go well beyond the role of the Ombudsman as a dispute resolution mechanism. The judiciary conversely does not have these powers. Some Ombudsmen possess powers that go further than just dealing with the complaints against the malpractice of the administration. This can include challenging the constitutionality of laws before the national constitutional courts, making legislative propositions to the national parliaments, drafting opinions at the request of the state institution, or informing the courts about possible disciplinary or criminal actions (Hungary). For example, the Ombudsmen of Romania, Hungary, or Poland have special powers that enable them to challenge the constitutionality of the statute with the constitutional courts. In Czech Republic, the Public Defender of Rights can exercise broad competences in connection with visits of the prisons and other places where freedoms of individuals are limited. The Polish Human Rights Defender can also demand that preparatory proceedings are instituted by a competent prosecutor in cases involving offenses prosecuted ex officio. French *Defenseur des Droits* is directly connected with protection of rights of minors.

In general, the strengths of Ombudsman institutions underline their alternative dispute resolution character in connection with the judiciary. It also shows that their dispute resolution is not just an alternative but an alternative of a different character when comparing with the dispute resolution of the judiciary. However, as put by Drewry, the Ombudsmen are not a global panacea for all the problems of the administration.[20] And thus, also, in the connection with their position as the extrajudicial alternative dispute mechanism, the Ombudsmen have some possible weaknesses that can impact their functions.

The first of the weakness of the Ombudsman institutions as alternative dispute resolution mechanisms to court proceedings is also one of their strengths, a legally nonbinding character of their reports and recommendations. This means that the administration can completely ignore the recommendations of the Ombudsman institutions and their reports. The administrative bodies are empowered and never obliged to follow these recommendations.[21] An acceptation of the Ombudsman

[19] The Parliamentary and Health Services Ombudsman of the United Kingdom: Annual Report (2011–2012).

[20] Drewry (1997).

[21] Mandelstam (2008).

recommendation depends on different issues as, for example, the discretion of the administrative body, the persuasiveness of the arguments of the Ombudsman, or interest of the administration, and naturally each case can be different. Acceptance of the recommendations of the Ombudsmen by the administration is thus only moral. That sometimes is not enough to persuade the administration to accept its fault and accept the recommendation. The national parts show that there is a difference in the compliance with the recommendations in the Western Europe and the countries with a communistic past. A legally nonbinding character of the Ombudsman reports totally differs from the character of the court judgments, in connection to which administration does not have another choice but to follow.[22] In certain legal systems, for example in the UK, the administration, when rejecting the Ombudsman recommendations or reports, must do it with a duly motivated decision.

One can see as a weakness of the Ombudsman institution also a personalization of the Ombudsman office, i.e. the fact that the actual effectiveness of the Ombudsman, also in connection with the respect of his recommendations, is largely connected with a person of the Ombudsman and the ability of this person to influence the administration. The Ombudsman should be a person generally accepted as a moral authority, not only by the administration but also by the individuals and the judiciary, because without a general acceptation of the Ombudsman, his reports and recommendations will not be accepted.[23] The personality of the Ombudsman and his acceptance by the administration is important as it represents an important condition of actual effectiveness of the work of the Ombudsman since it depends on the willingness of the administration to follow his recommendations.[24]

Apart from the personality of the Ombudsman and a freewill cooperation of the administration, the Ombudsman largely depends on the will and the original choices of the national legislator. It is the legislator that decides how in the end the Ombudsman institution is going to look like and what are going to be his competences, functions, and goals. A problem is that the Ombudsman can influence it only indirectly and ex-post. It is the legislator that decides whether the Ombudsman is going to deal with the law, good administration, human rights, or some other concept. The Ombudsman can only accept it and mostly exercise his discretion. Even if the Ombudsman has a power to exercise his competences and he has some discretion, it is usually up to him how and if in reality he is going to exercise these competences. Although in some of the legal systems the Ombudsman has power to propose legislative changes,[25] it is rare that the Ombudsman would propose the broadening of his own legislative powers. In connection with the national legislator, one another negative point is worth mentioning. If the legislator connects the

[22] Hertogh (2001).

[23] Kempf and Mille (1999).

[24] Schiavo-Campo and McFerson (2008).

[25] Kucsko-Stadlmayer (2008).

Ombudsman with a general concept as is good administration, he usually does not explain what this concept means and leaves the Ombudsman with discretion. This is, for example, the case of the Netherlands where the legislator has given the Dutch Ombudsmen power to assess proper behavior of administrative institutions or the case of the UK where the Ombudsman was given power to look for instances of maladministration. The national legislator only rarely explains the contents of this concept or its relations with, for example, legality that is assessed by the court and can partially overlap with this general concept. This then can lead to a question of the clarity of standards and principles that are used by the Ombudsman, and in the end it can be perceived as a weakness of this institution.

A potential disadvantage of the Ombudsman is represented by the statutory bars given to the Ombudsmen in connection with the judicial proceedings. If the court deals with the case or has already acted, the Ombudsmen are often excluded from any action in the same case, even if they deal with a different normative concept than the court. In these cases, the Ombudsman must usually wind up the investigation or not commence the investigation at all. This practice can be found in the Netherlands, the UK, or Slovenia, though the national specifics can be different. This weakness raises the question whether the Ombudsman can really be an alternative to the court proceedings. The investigations of the Ombudsman institutions do not stop the time limits for the court proceedings; neither do they influence the binding power of the administrative decisions or their consequences. The individual has to decide which subject he wants to use as he has only one chance. Complaining to the Ombudsman usually means that the time limit for appealing against the decision will pass in vain, and appealing to the court usually means the stop of the Ombudsman investigation because of a potential statutory bar. It is an individual who has to assess his own interests and possibilities, which sometimes can be limiting. Thus, the individual can either complain to the Ombudsman and potentially lose the right to go to court (unless the Ombudsman acts exceptionally fast) or start the court proceedings and lose the possibility to go to the Ombudsman because of existing/previous court proceedings. However, in some systems, the Ombudsman shall not instigate the complaint until all legal remedies have been exhausted. Then the exhaustion of the appeals to the courts is a precondition of the Ombudsman's work (Serbia, Austria).

If one looks at the subject matter that is investigated by the Ombudsman and by the courts and their normative concepts, one can question whether the area covered by the Ombudsman can be different from the area covered by the courts. If it is an Ombudsman institution that deals with a general concept as good administration or proper administration, then this overlap depends on the original choices of the legislator, interpretation of these choices by the courts and the Ombudsmen, and the Ombudsman's discretion. If it is the Ombudsman that expressly deals with human rights, then the overlap is only in connection with human rights and not with other issues dealt with by the court. At the same time, the object of the Ombudsman institution must not be the same as that of the judiciary. In a majority of the Ombudsmen described in the previous chapters, the Ombudsmen deal with the

conduct of state administration and not with administrative decisions. This distinction raises the question about the Ombudsman being an alternative to the judiciary.

The Ombudsman institutions are in a disadvantageous position towards the courts also by a relatively low number of cases they have to deal with per year. In most of the legal systems, the number of complaints received by the Ombudsman and complaints that lead to a report is, when comparing with the number of cases dealt with by the courts, marginal. The reason for this low number can be connected with the fact that the Ombudsmen are relatively young and thus still unknown institutions. It can be also explained by the fact that the individuals and even their legal representatives do not know precisely how and when they should use the protection provided by the Ombudsmen, and thus their complaints are rejected. Although the Ombudsmen try to be publicly visible as often as possible, much depends on the actual knowledge of the individuals and/or their legal representatives about the actual role of the Ombudsmen. An indicator of a low level of the knowledge of the public about the functions and roles of a particular Ombudsman institution can be, inter alia, perceived from an amount of complaints outside the Ombudsmen' competence. For example, according to Annual Report 2011 of the Slovakian Public Defender of Rights, 67 % of the received complaints were outside his remit.[26] The Czech Public Defender of Rights received in 2011 only 38 % of complaints, which were outside his remit. In the case of the Dutch National Ombudsman was this number in 2011 only 14 %.[27] And the complaints to the UK Parliamentary and Health Services Ombudsman that were outside her remit consisted in 2010–2011 only 11.7 % of all the cases. The ignorance of the population about the Ombudsman powers and proceedings may be connected with a high density of existing Ombudsman institutions in the country as is, for instance the case of the UK or Belgium, or with the fact that the potentially educative role of the Ombudsman that is, *inter alia*, reflected in the publication of their investigative reports is diminished by inability of the Ombudsmen to publish their reports.

18.3 Ombudsmen: An Alternative to the judiciary?

As shown in the national chapters, in each of the researched legal systems, the national Ombudsmen have a stable place in the systems of protection of individuals and resolution of disputes between the individuals and the administration. They can be connected with good administration, legality (in a broad sense), human rights, or a combination of thereof. But are the investigations of the national Ombudsman institutions included in this research and their dispute resolution functions a real alternative to court litigations? The question is quite difficult to answer. The reasons

[26] Defender of Public Rights of the Slovak Republic (2011).

[27] Defender of Public Rights of the Czech Republic (2011).

for this difficulty were partially noted also in the previous pages. To begin with, it is necessary to reiterate the fact that this book includes several legal systems and almost the same number of Ombudsman systems. These Ombudsmen have often different powers and competences not only in connection with the administration but also in connection with the judiciary. They can assess different issues in different ways. Simultaneously, despite a broad proliferation of the Ombudsman institution that started in the second half of the last century, there is no general (international) or broad national research that would, in similar fashion, compare the effectiveness of the Ombudsman in connection with the courts or the judiciary as such. Thus, this section can give only a limited question on this question. It wants, based on national experiences, to point out the perspectives from which the Ombudsman institution can be perceived, if not as a substitute of the judiciary, then at least as an alternative that can be used by an individual while trying to protect his/her interests.

a) Ombudsman as part of the pretrial procedures
   In all legal systems, it is the individual who can decide whether the Ombudsman will or will not be used before the court proceedings. The use of the dispute resolution through the Ombudsman is thus only optional. One of the exceptions is a judicial review procedure in England where, based on the jurisprudence of the English courts, an individual should use all other alternative means of dispute solution before applying to court for a judicial review procedure.[28] However, generally, the dispute resolution of the Ombudsmen is not an obligatory precondition for the proceedings of the judiciary. It is not a pretrial procedure that needs to be exhausted by the individual before applying to the court.[29] From this perspective, the investigations of the Ombudsman institution are only a supplementary to the procedures of the judiciary. Whether an individual can recourse to the Ombudsman before, during, or after the court proceedings can be regulated differently by the national laws. Thus, it depends on the choices of the national legislator. In general and based on the experiences of the researched countries, the investigation of the Ombudsmen is not an obligatory pretrial requirement for the court proceedings. As the use of the Ombudsman depends on an individual, this choice shows that the Ombudsman can be perceived as an *alternative* to the judiciary.
b) The object of control
   The object of control, i.e. the object of complaint, with the Ombudsman and object of appeal to the court are partially connected with the normative concepts that are assessed by these institutions (the following point). The object of control of the Ombudsmen and the judiciary depends on the original decision of the national legislator. Based on its will and original decision, this object of control can be more or less similar or different. The national chapters show that the

[28] The United Kingdom Pre-Action Protocol for Judicial Review, Civil Procedure Rules (2012).
[29] Langbroek et al. (2013).

decision of the legislator is not always clear cut. Most of the researched Ombudsmen can deal with actions of the administrative authorities (the UK), which cover administrative conduct (Belgium, Netherlands) but do not expressly exclude administrative decisions. Sometimes the Ombudsmen can expressly assess the contents of the administrative decision. Conversely, the courts are almost always interested only in the contents of the decisions adopted by the administrative authorities (as in the Netherlands), and often the formal conduct and behavior of the administration does not have an influence on the legality of the decision. Thus, from this perspective, the Ombudsman investigation is an alternative to the court procedures as long as there is an overlap between the objects of control of both institutions.

c) Review of judiciary v. review of the Ombudsmen

In all the researched systems, the Ombudsman institutions can control or review the behavior of certain state bodies and institutions against certain normative standards. These standards may have a different character. Based on the original decision of the national legislator, interpretation of the national court, or a wide discretion of the Ombudsman, they can range from an assessment of compliance with legal requirements or human rights to general concepts as good administration. As the national judiciary is mostly connected with the assessment of compliance with the law (including human rights), there might be some substantial overlap between the normative standards of the Ombudsmen and the normative standards of the judiciary. It is very probable that if these normative standards overlap, i.e. the substance of the normative standards of the Ombudsmen and the judiciary is the same, there is a possibility that the Ombudsman can be an alternative to the judiciary. This however depends on the organization of the system in which both institutions exist. It is more probable that the Ombudsman who assesses compliance with procedural or substantial legal provisions (the law) or compliance with human rights (Serbia, Poland, Hungary), just as the judiciary does, can become from this perspective a possible alternative to the judicial proceedings than the Ombudsmen, whose role is in assessing compliance with a general concept as good administration (the Netherlands, the UK, Belgium). Compliance with the good administrative or proper administrative standards is not primarily included in the legality review of the courts. While the courts always give their opinions on legality and human rights, they only rarely give an opinion on the substance of good administration (for example, the UK or the EU) or a conduct that is in accordance with good administration principles.

Nonetheless, one has to note that the general concept as good administration can sometimes be, thanks to the perception of the incumbent Ombudsman or national courts, overlapping with the concept of legality (for example, the Netherlands or the UK). Thus, from this perspective, one can potentially conclude that in connection with their normative standards, the Ombudsman can become an alternative to court proceedings but only to the extent of the overlap of these standards.

d) Subject of control
In all researched systems, the Ombudsman institution can assess the conduct of certain state institutions. These usually include governmental bodies, state administration, or private bodies fulfilling the public functions. The lists of institutions which conduct can be reviewed by the Ombudsman is either set by the statute in general way (Poland) or is precisely enumerated in the annex of the statute (the UK). The subjects that can be controlled by administrative or ordinary judiciary are also set in the statutes, though these subjects are usually broader than those overviewed by the Ombudsman. From this perspective, the Ombudsman can be seen as an alternative to the judiciary only if there is an overlap between the subjects controlled by both institutions. Obviously, if the actions (conduct and decisions) of a particular administrative body can be assessed only by the Ombudsmen or only by the judiciary, it excludes the possible position of the Ombudsman's investigation as an alternative to the procedures of the judiciary.

e) Unique Ombudsman powers
As the Ombudsman is a very flexible institution, the national legal systems often give him powers beyond the traditional investigation powers. These powers are then uniquely connected with the Ombudsman, and they are usually not given to the judiciary. This is, for instance, a possibility to question compliance of a certain legal provision of national law with the national Constitution in the proceedings before the Constitutional Court (Romania, Hungary). Similarly, some of the Ombudsmen can approach the structural (more general) problems of the administration (the Netherlands, the UK). This is something that the judiciary does not do. They are interested only in a particular individual case. The Ombudsmen often react to these structural problems by legally nonbinding recommendations. Apart from the individual recommendations that are directly connected with an individual complainant, the Ombudsmen can make recommendations that may suggest general improvements of the administrative processes or of administrative conduct. Potentially, these recommendations may have an impact on the prevention of the disputes between individuals and the administration. If the administration acts in accordance with these recommendations, this may lead to a decrease in the complaints being filed with the Ombudsman and potentially with the courts. Thus, if from this perspective the Ombudsman cannot be completely characterized as an alternative to court proceedings, it can theoretically function as a potential prevention mechanism of the court proceedings. An individual has usually no reason to complain about the administration with the Ombudsmen or with the judiciary if the problem did not occur. As these powers are not in the toolkits of the ordinary or administrative judiciary, the Ombudsmen are an additional rather than an alternative protection to an individual. Thus, from this perspective, the role of the Ombudsman as an alternative dispute mechanism to the court is questionable since the Ombudsman's powers provide a specific type of protection. Especially, these unique powers show that the Ombudsman is more than a dispute resolution mechanism.

Unique powers of the Ombudsmen however also include the possibility of the Ombudsmen to commence the investigation on own motion, i.e. without a complaint. Only in some cases do the Ombudsmen not possess this ability (Belgium, the UK). This power is not present in the toolkits of the judiciary. It is linked with the flexibility of the Ombudsman institutions to use various informal investigative methods. This second type of unique powers is used by the Ombudsmen during their investigations of administrative conduct. Thus, they in a way confirm an alternative character of the Ombudsman investigations to the formal court proceedings and procedures.

f) Amount of complaints with the Ombudsmen

When assessing the possibility of the Ombudsmen to act as real alternative to the court proceedings, one must necessarily look at the amount of complaints filed yearly with the particular Ombudsmen and appeals against the administrative filed with the judiciary. In all the systems included in the research, one can see that the amount of cases dealt with by different Ombudsmen is considerably lower than the amount of cases dealt with by the judiciary. The Ombudsman is obviously a specialized body that assesses only certain specific issues against the specific subjects. The competences of the judiciary are usually not so limited. Also, the amount of complaints filed with the Ombudsman is relatively stable, and if it is growing, then only in a very slow pace. Also, interestingly, a lot of complaints filed with the Ombudsmen are outside their competences. This leads to the decrease in the ability of the Ombudsman to provide help, and it also decreases the Ombudsmen's possibility to become a real alternative to the judicial dispute settlement.

The amount of the complaints outside the mandate of the Ombudsman differs with each legal system. The researched systems confirm that the number of complaints filed with the Ombudsman does not only depend on the population of the country but also on the knowledge about the Ombudsman system, the age of the Ombudsman system, and its clarity. Nonetheless, from this perspective, it is possible to conclude that even though the Ombudsman does not deal with a very large amount of complaints, those complaints that reach him and that are within his mandate confirm his alternative dispute resolution function in connection with the judiciary. And although in these particular cases the courts would not deal with the complaints as filed with the Ombudsman, there is a possibility that the complainant would start a case before the court anyways. Thus, at least partially, the Ombudsmen can be helpful in decreasing the workload of the courts. However, in this case, it is important to educate individuals (and their legal representatives) about the functions of the Ombudsmen and the way they can be useful. Nevertheless, as shown by the national examples, the Ombudsmen cannot compete with the judiciary as to the amount of cases dealt with by them during the year.

18.4 Conclusions

The Ombudsmen were never created in order to substitute the courts but merely to supplement them. They were developed in order to provide individuals with additional ways of protection of their interests and provide them with additional mechanism for a settlement of their disputes with the administration. Their additional powers allow them to flexibly react to the complaints about the administrative actions that are not always suitable to court proceedings.

When comparing with the judiciary, the Ombudsmen as dispute resolution mechanisms have several strengths and weaknesses. It is very often the role of the individual to assess these strengths and weaknesses and decide whether he/she will start the proceedings before the Ombudsman or the judiciary. These strengths and weaknesses can be different in different legal systems. The Ombudsmen can be generally characterized as out-of-court dispute resolution mechanisms. They have broad investigative powers. They are impartial and exercise their functions in an independent manner. When describing the judiciary as a traditional dispute resolution mechanism, the Ombudsmen are clearly an alternative that is given to individuals to deal with their disputes with the state administration by extrajudicial means.

Apart from the position of the Ombudsman as an alternative dispute resolution mechanism, one has to observe that the Ombudsmen possess also several special powers that push them further; they push them beyond the resolution of disputes. These powers show that the Ombudsman institution is more than a dispute resolution mechanism. They show a special position of the Ombudsman among other bearers of state powers. They certainly add to the checks and balances in democratic countries. As confirmed by the research, the Ombudsmen mostly act as a representative of the legislature, investigator of the executive, and a supporter or additional help to the judiciary. Thanks to their connections to all main state power bearers and their independence, they can have theoretically a potential influence on the proper exercise of state power. In some legal systems, it is possible to perceive the ability of the Ombudsmen to develop the normative standards for the state administration. These powers are visible, especially in the Ombudsman systems that are assessing compliance with the general concept as good administration. Only in limited circumstances and if allowed by the national law can the Ombudsmen that deal with legality or human rights develop certain additional rules for administration.

As this research deals with different Ombudsman systems that are in certain way interrelated, it was difficult to answer the question whether the Ombudsman is a real alternative to court proceedings. It is however possible to conclude that the work of the Ombudsman definitely supports the courts in providing administrative justice to individuals, and thus subsequently it can have some impact on the cases dealt with by the judiciary. In general, in connection with their functions, the Ombudsmen can act as an alternative dispute resolution mechanism to the judiciary. However, in connection with the amount of the cases is this role relatively limited.

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Chapter 19
Mediation in Administrative Proceedings: A Comparative Perspective

K.J. de Graaf, A.T. Marseille, and H.D. Tolsma

19.1 Introduction

Mediation is a subject of keen interest in the European Union member states. It is no surprise that the method is also gaining ground in the efforts to resolve administrative law disputes in an amicable way. Mediation brings the promise of an interest-based, fast, cheap, and informal resolution for different kinds of disputes. The rise of mediation and its potential benefits over traditional administrative court proceedings is met with enthusiasm in some countries and with skepticism in others. It is therefore a suitable subject for a comparative analysis and an outlook towards the future.

This chapter is concerned with all forms of alternative dispute resolution (ADR) in administrative proceedings but focuses in specific on mediation in administrative law disputes between citizens and administrative authorities. It will provide a comparative analysis for which the chapters on the national legal systems in this volume have served as a basis. We will start with a brief introduction to administrative law disputes and ADR in general (Sect. 19.2) and present the influences of the European Union on the use of mediation (Sect. 19.3). After that, we will provide a general legal perspective on ADR in administrative law, which will focus on theoretical, substantive, and procedural constraints (Sect. 19.4). All chapters on national legal systems refer to the important implications of the rule of law on the development of ADR in administrative proceedings. We will then provide a comparative perspective and an analysis on the basis of some relevant questions into the way mediation in administrative law disputes fits within the structure of the national legal systems of administrative adjudication (Sect. 19.5). This chapter will end with some concluding remarks on the role of mediation in administrative proceedings (Sect. 19.6).

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19.2 Administrative Law Disputes and Alternative Dispute Resolution

What disputes should be considered administrative law disputes, and what are alternative forms of dispute resolution in administrative proceedings? Without hoping to present an answer to those important questions on the divide between administrative and private law that will suffice for all European national legal systems and with some hazard of oversimplifying this crucial demarcation, we will consider any dispute on the (non)application of a competence by an administrative authority that changes the legal position of a person or good in a way that no ordinary (legal) person is able to do, as subjected to administrative law and, therefore, an administrative law dispute. National legal systems in Europe are familiar with either a specialized administrative court system or special procedural rules on administrative law disputes between citizens and administrative authorities. One common element of administrative dispute resolution in countries that apply the rule of law is that citizens are entitled to appeal against an administrative decision by an administrative authority and that they are able to request the annulment of such a decision by a court when it is contrary to written or unwritten public law (appeal procedure or judicial review). This form of appeal is sometimes preceded by a (mandatory) administrative procedure in which the contested decision is reviewed either by the administrative authority that made the decision (internal review) or by another administrative authority on both questions of legality and the use of discretion (objection procedure or administrative review). For the purpose of this chapter, we will consider appeal procedures and objection procedures as normal forms of administrative dispute resolution.

This chapter focuses on alternative forms of dispute resolution in administrative proceedings. That subject is closely related to negotiated decision making by administrative authorities.[1] It is quite clear that there is an important relation between negotiated decision making and forms of ADR like negotiation, conciliation, and mediation. The quality of administrative decision making could benefit from the use of mediation techniques by administrative authorities.

ADR in administrative proceedings can refer to different forms of dispute resolution. *Arbitration* is a technique where the disputants refer their dispute to one or more persons (arbitrators or arbiters) by whose decision they agree to be bound; the decision is legally binding for both sides and enforceable. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts. There aren't many examples of arbitration in administrative law disputes for reasons that are obvious when analyzing the constraints for ADR in administrative law (see Sect. 19.2).

[1] See, on that issue, De Waard (2000).

When national chapters refer to arbitration, it is to point out that arbitration in administrative law is either rare[2] or can only be used in disputes that resemble private law disputes in the sense that disputants are able and allowed to arrange for the legal relationship between them without breaching the law.[3] Arbitration could be applied in disputes regarding public–private contracts, concessions, and procurement but is not well suited to disputes considered classic administrative disputes. Therefore, this chapter will not focus on arbitration as a specific form of ADR.

Mediation[4] is a form of negotiation facilitated by a neutral third party (mediator) and/or experts.[5] It is based on the continuing voluntary consent of all disputants. Unlike an arbitrator, the mediator has no authority to impose a decision or other measures upon the parties. The goal of mediation is generally to seek a future-oriented solution to the dispute (conciliation), thus allowing the parties to move forward and continue their cooperation. Such a forward-oriented perspective is perceived to enable value-added cooperative approaches. The mediator uses various techniques to open or improve dialogue between disputants, aiming to help the parties reach an agreement. The neutral third party, the mediator, must be independent and impartial. Confidentiality and secrecy are to be observed during and after the process of mediation by all parties concerned. The three basic elements of mediation (voluntariness, impartiality, and confidentiality) can also be found in the 1980 UNCITRAL Model Rules on Conciliation and are essential to a number of legislative acts on mediation in European countries.[6] The techniques of the mediator have been refined on the basis of predominantly American research on the benefits of "principled bargaining."[7] Mediation has changed into a professional activity in which mediators have to be certified and have to demonstrate they have expert knowledge on the mediation techniques. In most cases, they must be linked to professional bodies that monitor and guarantee quality. Mediation can theoretically be used before or during administrative proceedings like objection or appeal procedures (administration-based and court-annexed mediation), and the positive outcome is likely to have an effect on the outcome of these procedures and on the contested decisions. In European countries such as the Netherlands, England, France, Germany and other countries, mediation and mediation techniques are

[2] See Belgium (Sect. 6.4), which allows persons governed by public law to be party to arbitration (and mediation) in cases explicitly established by statute or royal decree. Also, see Germany (Sects. 1.1 and 1.4).

[3] Cf. Romania (Sect. 14.5), which will allow mediation only regarding rights that the parties can dispose of. Also see Serbia (Sect. 15.4).

[4] See, for recent comparative information on mediation in general, Hopt and Steffek (2013).

[5] Also see the "authorized inspector" in the Czech Republic (Sect. 13.4.2.2) and the "liaison officer" in Hungary (Sects. 10.2.2 and 10.4). Both are seen as alternatives to the normal administrative law remedies.

[6] See UNCITRAL Conciliation Rules, A/RES/35/52, 10 December 1980 (articles 2, 7, 14 and 20), arguably the world's first set of mediation rules.

[7] Golann (2009) and Goldberg et al. (1985).

used in an increasing extent to avoid or to settle disputes about governmental decisions in all sorts of administrative law disputes.

Since the mid-1990s mediation is on the rise as alternative form for settling disputes between citizens and administrative authorities. The appeal of mediation is that it is flexible and provides disputants with a quicker, cheaper, and emotionally less stressful manner to handle their dispute than the complex and highly formal legal proceedings. Mediation also increases the control the parties have over the resolution of their dispute. One of the goals of stimulating mediation in administrative law disputes is to enhance the efficiency and effectiveness of normal administrative proceedings by decreasing the number of court judgments necessary to resolve administrative disputes. Also, it is believed that using mediation or mediation techniques in administrative law disputes will lead to higher acceptance of decisions and better relations (and trust) between government and its citizens. Mediation also scores high on aspects of procedural justice; parties have the opportunity to be heard and are able to take control of the process and the outcome of dispute resolution.[8] In recent years, several European countries have implemented a policy to grow awareness among civil servants, lawyers, and judges about the potential positive influence of mediation and the use of mediation techniques (effective communication and conflict resolution skills) during administrative proceedings. National legislatures have introduced legislation concerned with mediation in general, and in some cases those regulations refer to mediation in administrative proceedings as well.

19.3 Influences of the European Union on the Use of Mediation

In light of the comparative perspective of this chapter, a rather interesting question is whether the use of mediation was triggered by the legislative acts of the European Union in any way.

There is no European Administrative Procedural Act. However, a mandate to codify general rules on administrative (procedural) law for the European institutions can be found in Article 298 TFEU. It requires the European Parliament and the Council to adopt, in accordance with the ordinary legislative procedure, the necessary provisions in order to achieve "an open, efficient and independent European administration." It aims to ensure that the Union legislature develops, through legally binding rules, the fundamental right to good administration enshrined in Article 41 CFREU based on the codes of good administrative behavior developed by the European Ombudsman, the Parliament, and the Commission. Although there certainly is a relation between good administrative behavior and the use of mediation (techniques), there is usually no direct referral to it in legal documents. On the

[8] See Marseille and De Graaf (2012), pp. 136–137.

basis of the mandate enshrined in Article 298 TFEU, the European Parliament's "Working Group on EU Administrative Law (WGAL)" published a working document "State of play and future prospects for EU Administrative Law" on 19 October 2011. One of the recommendations to the European Parliament concerns the internal review of administrative decisions of European institutions (objection procedures). Such procedures are treated in many different ways throughout different EU agencies, bodies, and offices. The working group recommends (nr. 13) that any future general instrument of internal review of decisions "should attempt to draw conclusions from past experience and incorporate some generally applicable provisions which foster alternative dispute resolution without prejudice to judicial remedies." However, there is no codification of European administrative law at Union level at the moment, and it appears that this future process of codification will not play an important role where the development of ADR in administrative proceedings is concerned.[9] The principle of national procedural autonomy also plays an important role in reaching the conclusion that the primary goal of European law isn't the harmonization of administrative procedural law in all Member States. According to the principle of procedural autonomy, the national courts perform their duties as "Union courts" within the context of the national system of judicial protection and procedural law.[10] The European Union is not primarily concerned with the development of mediation or ADR in administrative proceedings in the legal systems of the Member States.

Some national chapters refer to recommendation Rec(2001)9 adopted by the Committee of Ministers of the Council of Europe on 5 September 2001 on alternatives to litigation between administrative authorities and private parties. The impact of that recommendation is considered not very significant to the development of ADR in general administrative law in the European countries.[11] The recommendation itself acknowledges some of the inherent problems of ADR in administrative law disputes.[12] Relevant for the development of ADR in European countries seems to be the Mediation Directive that was to be implemented by May 2011 and is now applied in the Member States. The Directive concerns mediation in

[9] Most regulations on EU agencies do not contain provisions on alternative means of dispute resolution (see the chapter on European Union Law, Sect. 16.5.1.2). The document of the Working Group on EU Administrative Law does acknowledge the crucial role of the European Ombudsman and the Code of Good Administrative Behavior in applying mediation and mediation techniques (see recommendation nr. 23) and furthermore refers to Article 7(4) of Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004/752/EC, Euratom, OJ L 333, 9.11.2004, p. 7: "At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement."

[10] See Jans et al. (2007), p. 40.

[11] The national chapter on Slovenia refers to the recommendation in a footnote (Sect. 12.5), and the chapter on Spain states that it had null or very little impact on Spain's basic administrative law (Sect. 8.3.2).

[12] Cf. Kovač (2010), p. 745.

cross-border civil and commercial disputes.[13] This EU directive defines mediation as a confidential and structured proceeding in which the parties, voluntarily and on their own responsibility, seek an amicable settlement of their dispute with the assistance of a mediator. The Directive sets out comprehensive provisions on confidentiality, court-mandated mediation, and the effect of the statutes of limitations. Also, it demands of Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request; the choice of mechanism is left to the Member States. Strictly speaking, the directive isn't relevant for administrative law.[14] Furthermore, the relevance the directive has is confined to cross-border disputes. Despite those inherent limitations, several of the national chapters deservedly refer to it as relevant for the development of mediation in administrative disputes. In Germany, for example, the legislature implemented the Mediation Directive in such a way that the implications are relevant for both civil and commercial disputes and administrative disputes even if they cannot be considered cross-border disputes.[15] In most European countries, however, the Mediation Directive was transposed into the national legal system by introducing legislation for the use of mediation in all civil and commercial disputes. Few European countries have introduced legislation that is specifically tailored to mediation in administrative proceedings between administrative authorities and citizens.

19.4 Common Constraints for ADR in Administrative Proceedings

The use of mediation—or mediation techniques—can be incorporated into the process of administrative decision making by interpreting existing legal standards and deduce a legal duty for administrative authorities to strive toward consensus. Where appropriate and legal, the existence of this duty can also have significant impact after a decision has been taken and during administrative proceedings. Some have indeed argued that such a legal duty to strive for consensus could be derived from the principle of due care.[16] However, a traditional reaction to the use of mediation in order to resolve administrative law disputes is that it is complicated for a number of reasons. The reaction is triggered by a number of elements in both the relation between administrative authorities and citizens and the structure and

[13] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24-5-2008, pp. 3–8.

[14] See on the implementation of the Directive and mediation in general in the EU: de Palo and Trevor (2012).

[15] See the national chapter on Germany (Sect. 1.4.2).

[16] Cf. Tolsma (2007), p. 74. Also see Härtel (2005), pp. 753–762; and Pitschas (2004), pp. 396–403. De Waard (2000), p. 229 speaks of an "implied legal duty to negotiate."

characteristics of administrative law that at first sight seem to be at odds with the idea of mediation and conciliation. In this section, we try to give an overview of possible constraints for mediation in administrative proceedings; some of these issues have been raised in the national chapters as well. It should be kept in mind that this overview of potential constraints on mediation in administrative law disputes is not meant to imply that those disputes are not well suited to mediation as a method of dispute resolution.

19.4.1 The Relationship Between Citizens and Administrative Authorities

In countries where the rule of law is firmly established in the legal system, any administrative authority will have to interact with its citizens while taking into account its special position. In general, such a legal system will allow the amendment of the legal position of a citizen by a unilateral decision of an administrative authority, although several European countries implemented legislation that would equally allow an administrative authority to serve the general interest by using the form of a contract with citizens to come to a similar change of the legal position of the citizen.[17] Therefore, the relationship between citizens and administrative authorities is, in a traditional view, *de iure* asymmetrical, authoritarian, and hierarchical. This view of the relationship seems contradictory to the idea of facilitated negotiation to end a dispute in administrative proceedings. In most western countries, however, legal scholars observe a tendency towards cooperative arrangements between administrative authorities and private actors. There are a number of reasons for this tendency. One is that the legal systems are overloaded with complex regulations, and the executive is unable to look after the execution of the public interest without the help of its citizens. Furthermore, the idea that citizens are nothing more than the object of the actions of the administration is obsolete. Administrative authorities strive towards good governance and a service-oriented approach to decision making by allowing meaningful participation in the decision-making procedure. Unlike the private law relations between private actors, the core of the legal relation between administrative authorities and citizens is unequal. In fact, most legal systems acknowledge that the relation between them is *de facto* asymmetrical; in many situations, the administrative authority can be characterized as the Repeat Player and the citizen as the One Shotter.[18] The latter usually has less experience, less financial means, and less legal expertise. Many principles underlying administrative proceedings in the countries that are discussed in this book regard this inequality as a reason to attempt to level it out by allowing the

[17] See, for instance, the explicit references thereto in the chapters on Germany (Sect. 1.4.1) and the Czech Republic (Sect. 13.4.2.1).

[18] Galanter (1974), pp. 95–160.

administrative courts a more active role than its private law compeer and by not allowing the parties to dispose of their rights or their obligations by the concurrence of the wills.

19.4.2 Constraints Based on the Rule of Law, the Use of Discretionary Powers, and the Public Interest

Administrative law is concerned with the exercise of powers of a public law nature. Such powers entrusted to various agents within the public administration are essential for the discharge of the public tasks or duties assigned to these offices. Related to the issue discussed in the previous paragraph is the constraint for ADR in administrative proceedings that lies in the fact that decisions and actions of administrative authorities must be to the benefit of the public interest based on the competences awarded to it by the legislator and in conformity with the law. The implications of the acceptance of the rule of law in the legal systems of the European Union are important. Negotiating the settlement of an administrative law dispute after the decision was taken by the administrative authority can only be lawful if the authority is legally competent to amend its previous decision.[19]

Any exercise of power by an administrative authority is subject to boundaries. The administrative authority does not have full discretion in exercising its powers. Every decision relating to the exercise of powers under public law is bound by the statutory rules governing the matter in question. Even when those rules imply that the administrative authority has no discretion, the use of mediation or mediation techniques might be useful. In that case, the authority must however limit itself to explaining the situation or suggesting alternatives for the conflict that has risen. Reviewing the decision will not solve the dispute. In other cases, the statutory rules may also mean that the authority has a margin of discretion. Discretionary power means that in response to an objection or appeal the administrative authority can investigate whether using its discretionary power in a different way can lead to a decision that is more in keeping with the interests of the interested parties. However, this discretion is always subject to certain restrictions. Even when the statutory provisions offer administrative authorities discretion in the way that they are able to decide on a particular issue like the application for a permit, the rule of law demands that these discretionary powers are applied in a purpose-specific manner. In any case, they should reflect the specific goal(s) that the legislator had in mind when attributing the competence to the administrative authority, and the result of the application of the competence should be to the benefit of the public interest. The fact that the legislator attributes competences to administrative authorities with a specific purpose (a specific general interest) in mind is a restriction of some importance when negotiating in administrative proceedings. Any agreement that

[19] Cf. De Graaf and Marseille (2007), pp. 81–98.

entails an obligation for a citizen or administrative authority that has no basis in any statute or is seen as irrelevant to the use of the discretionary power that has led to the conflict in the first place has to be considered at odds with the rule of law. It is not unthinkable that any of the parties to such an agreement will claim that concluding the settlement to the dispute constitutes abuse of power by the administrative authority (*détournement de pouvoir*) and that it therefore could not be bound by it.

The consequence of this is that the possibilities for government authorities to modify the contested administrative decision in order to reach or carry out an agreement are sometimes limited.

19.4.3 The Relevance of the Interests of Third Parties

Another constraint for ADR in administrative proceedings that administrative law scholars frequently put forward is the fact that many conflicts either involve or will, in some way, influence the legal position of third parties that are not involved in the proceedings. A dispute between the applicant of a building permit and the administrative authority that refused the application cannot be solved entirely by reaching an agreement that implies that the competent authority will retroactively accept the application; any neighbor that was happy to hear the application was initially denied will probably start administrative proceedings when information on the change of position of the administration reaches him. To be certain that the use of ADR could indeed lead to a binding resolution of the conflict, any interested third party should be included in the (facilitated) negotiations. It is often these sort of issues that bring up important questions of effectiveness, efficiency, and legitimacy of the involvement of the administrative authority or the administrative court in facilitating the settlement of a dispute in another manner than by judgment; it is primarily the task of the administrative authority to take a decision that is both in conformity with the law and reasonable. The answer lies of course in the general interest of amicable dispute settlement in a civilized society, in the fact that a judgment is seen as *ultimum remedium* and in the costs of adjudication in general. Still, a relevant question remains. What time, costs, and efforts should administrative courts or authorities invest in possible dispute resolution by way of mediation or negotiation? This is a question that any legal system will have to answer, and the answer will probably differ considerably in light of the cultural and historical backgrounds of the legal system of a specific country.

19.4.4 Equal Treatment and the Fear of Precedent

Another substantive issue that is relevant when it comes to ADR in administrative proceedings is the principle of equality as a principle of good governance. This basic principle for any behavior of any administrative authority implies that all

equal cases shall be treated equally and unequal cases shall be treated differently in a way that reflects the differences between the cases on the basis of legally allowed and objective reasons. We will not discuss this principle in depth here, but it is obviously of influence when mediating or negotiating in administrative proceedings. When an administrative authority is negotiating the way it shall exercise its discretionary power, there is more at stake than the single use of the competence in that particular instance. Any administrative authority is obliged to act and decide systematically and consistently and treat equal cases equally. This will limit the possibilities of an administrative authority negotiating on the use of a discretionary power, as the use of the power in this one instance will have to be repeated when the same conditions are met in another case. Successful application of any method of ADR is only in order when an administrative authority is willing to change the way it uses this particular competence in any similar case that the future might bring and therefore is willing to change its policy for legitimate and objective reasons. In any other situation, the result of ADR will be considered (unwanted) precedent for future use of the competence. The principle of equality could therefore be considered a complicating factor when considering mediation in administrative proceedings.[20]

19.4.5 Transparency

One of the key elements of mediation as an important form of ADR in administrative proceedings is that the facilitated negotiations are confidential of nature. Mediation is seen as a confidential process, and parties will usually have to agree to this confidentiality when the process of mediation starts with the help of a (professional) mediator. Negotiations for the settlement of a conflict are deemed to be more open, free, and informal when the parties involved don't have to worry that what they say, write, or bring to the table during the process will be used against them in a later stage of the conflict. The EU Mediation Directive that is concerned with cross-border civil and commercial disputes states in Article 7(1) that member states shall ensure that, unless the parties agree otherwise, neither mediators nor others involved in the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except where this is necessary for overriding considerations of public policy of the Member State concerned or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

It follows from the above that confidentiality is an important aspect of the mediation process. In this respect, the nature of mediation and one of the basic

[20] See Bondy and Mulcahy (2009), p. 34, as referred to in the chapter on the UK (Sect. 9.2.2).

principles of administrative law seem in conflict with each other.[21] Access to information of the administration is to be seen as one of the most important characteristics that will allow for public participation and contribute to the accountability and legitimacy of the functioning of the administration. Governmental documents are an important source of information for citizens and will encourage integrity, efficiency, and effectiveness in public administration. This is reflected in the legislation in many of the EU member states and in several important international agreements and treaties.[22] Seeking government transparency is a citizen's right and resolving administrative law disputes in a confidential manner might infringe on that right. The chapter on administrative proceedings in the UK explicitly states on this aspect of mediation that it is important to recognize that good administration may be best served by a visible dispute resolution mechanism that is accountable to the rule of law.[23]

19.4.6 Prescribed Period for Administrative Proceedings

A last potential constraint that is of a more formal nature but could be of some importance when a process of mediation starts in a conflict between an administrative authority and interested parties is the fact that administrative proceedings like internal administrative review (objection procedure) or an appeal procedure will, in most cases, have to be initiated within a prescribed short period, and the procedure itself has set time frames for getting to the end of the procedure within a certain prescribed period of time.

In any case in which the administrative authority has taken a decision that has lead to a conflict and ADR is a serious option for resolving it, one should understand that attempting to resolve the conflict using an alternative process will probably not suspend the statutory appeal period that applies for initiating the "normal" administrative procedures. All parties must keep in mind that there is the possibility that the appeal period, the period for treating the internal review, or the judicial review procedure by the administrative court will expire. However, in many of the discussed legal systems, the law will allow for suspension of time prescriptions and other measures that allow administrative proceedings to accommodate (or not oppose) the possibility that either long negotiation or mediation between the parties could result in the amicable dispute resolution. The EU Mediation Directive, although not applicable to administrative proceedings, stipulates in Article 8 that member states shall ensure that parties who choose mediation in an attempt to settle

[21] Cf. the chapter on the UK (Sect. 9.2.2).

[22] See the Council of Europe Convention on Access to Official Documents (Convention no. 205) and Articles 4 and 5 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

[23] Chapter on the UK (Sect. 9.2.2).

a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. Such a provision is all the more relevant when mediation is used in administrative law disputes.

19.5 A Comparative Outlook

In this section, we will allow for a comparative analysis on the basis of the information contained in the chapters on the national legal systems. The analysis is designed to answer certain questions in a comparative manner. Is an administrative authority allowed to resort to mediation in administrative law disputes, and can a mediation agreement replace an administrative decision? What is the role of mediation before or in administrative proceedings, and what is the relation between the two? What is the substantive or procedural effect of successful mediation in administrative proceedings? We will try to answer some of these questions on the basis of the chapters on the national legal systems.

Quite a lot of countries have embraced the potential of mediation (by a third party) and mediation techniques (by civil servants in their behavior to citizens) in light of a service-oriented approach and the finding that this method could be to the benefit of the quality of decision making, the settlement of administrative law disputes, and the relationship between government and its citizens. The chapter on the Dutch legal system stipulates that mediation techniques are deemed to be part of the internal review procedure or administrative appeal. The Dutch ministry of Interior and Kingdom Relations is indeed actively supporting and stimulating administrative authorities that are willing to use the so-called Informal Pro-active Approach Model for handling applications for internal review. The model basically consists of a public servant ensuring quick and direct personal contact with the citizen concerned (telephone call or informal meeting) and using communication skills such as listening, summarizing, and questioning from an open, unbiased approach and certain conflict management techniques that can lead to deescalation and conflict resolution. The results—measured by the percentage of initiated internal review procedures that were canceled after informal approach was applied—are very positive.[24] Where the Dutch policy seems to reinvest in (informal) objection procedures, in Austria and Germany the objection procedure is becoming rare. The section on alternative dispute settlement in the chapter on Austria discusses the possibility to revise a final administrative decision by way of petition (art. 68 *Allgemeines Verwaltungsverfahrensgesetz*). Although the formal objection procedure was almost completely removed from the Austrian administrative system of adjudication, the chapter also refers to the potential importance of the possibility of the administrative authority to voluntarily amend, change, or

[24] See www.prettigcontactmetdeoverheid.nl ("pleasant contact with the government").

retract the contested decision in light of objections against it [art. 14 (1) *Verwaltungsgerichtsverfahrensgesetz*]. Without explicit provisions on the matter, the same development seems *a fortiori* present in German public administration. The extensive abolishment of the objection procedure by the German *Länder* has led to a variety of informal actions by administrative authorities to avoid unnecessary procedures before the administrative courts. Administrative authorities actually invite affected parties to make use of the right of petition to open informal communications on the contested decision. Even the decision itself may be accompanied by openings for informal communication to avoid affected parties going to court; in many cases, the administration is able to clarify inconsistencies and resolve the potential dispute. The administration has proven very resourceful in setting up complaint management systems that will allow for an informal approach and possible solution to the conflict before an appeal is lodged with the administrative court.[25] In the UK, the policy on "Transforming Public Services" certainly seems to have the same goal in mind. It strives to develop a range of policies and services that will, as far as possible, help people to avoid legal disputes in the first place and provide tailored solutions where they cannot.[26]

There seem to be no countries in which there is an explicit provision that prohibits administrative authorities to resort to mediation or mediation techniques for either the improvement of the quality of decision making or the settlement of administrative law disputes. A number of authors do however point out that public law is substantively at odds with the concept of negotiated settlement. As an example, we could refer to the legislation on settlement in Belgium. The provision on the possibility of settlement during court proceedings states that "any dispute that is susceptible to be controlled via a settlement, may be the subject of a mediation" (art. 1724 *Gerechtelijk Wetboek*). The article continues: "The legal persons governed by public law can be a party to mediation in cases established by law or by Royal Decree." This is an explicit reference to the fact that all national legal systems will allow settlements only on those subjects where the law allows the parties to dispose of the rights and duties involved; parties will generally not have at their disposal those rights and duties that are part of administrative law.[27] If we also consider that the core guiding principle of all decisions of administrative authorities shall be to the benefit of a specific general interest, the conclusion should be that there is not much room for a legal compromise in administrative proceedings. Practically, all chapters on the national legal system emphasize this particular point. Nevertheless, it follows from the aforementioned developments in The Netherlands, Austria, Germany, and several other countries that mediation,

[25] See the chapter on Germany (Sect. 1.2.5.3).

[26] Cf. the chapter on the UK (Sect. 9.1) and "Transforming Public Services: Complaints, Redress and Tribunals," accessible at www.dca.gov.uk. The most significant references in judgments to ADR in public law are *R* (*C*) v *Nottingham City Council* [2010] EWCA Civ 790 and *Cowl* v *Plymouth City Council* [2001] EWCA Civ 1935.

[27] Also see the chapter on Romania (Sect. 14.5), specifically art. 46 of the Law on mediation (no. 192/2006). Also see the chapter on Serbia (Sect. 15.4).

mediation techniques, and informal communication could mean a significant effect in the number of court proceedings that are avoided.

Several European countries have introduced legislation or soft law specifically tailored to mediation. In the UK, Article 3.1 of the Pre-Action Protocol for Judicial Review states that the disputants should consider whether some form of ADR would be more suitable than litigation and, if so, endeavor to agree which form to adopt. Both parties may be required by the court to provide evidence that alternative means of resolving their dispute were considered for litigation should be a last resort and claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed, the court must have regard to such conduct when determining costs. Although these incentives for parties to resort to ADR are potentially strong, the preaction protocol also refers to the obligation that judicial review must be filed promptly and, in any event, not later than 3 months after the grounds to make the claim first arose and furthermore states that no one shall be forced to use ADR (art. 3.4).[28]

In July 2012, the German legislator implemented the EU Mediation Directive and adopted the so-called Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution.[29] While the EU Directive is applicable to cross-border commercial disputes only, the implementation does not distinguish between cross-border and domestic disputes and is also concerned with mediation in public law matters. Paragraph 173 *Verwaltungsgerichtsordnung* (hereafter VwGO) was amended in such a way that the administrative courts are allowed to propose the parties to resort to mediation and suspend proceedings for as long as the mediations last (paragraph 278a VwGO) but may also direct the disputants to a so-called *Güterichter*, who is not competent to decide in the legal dispute by judgment but can resort to mediation and all other possible methods of dispute resolution [paragraph 278(5) VwGO]. The question on whether or not to include a separate concept of in-trial mediation along with out-of-court mediation was a major controversial issue. Whereas the draft bill originally proposed by the German government provided for such a concept, it was adopted in a modified manner. Instead of being an independent concept in the legislative act, it is now mentioned as one of the potential methods for judicial conciliatory proceedings.

The new civil procedural code that was introduced In Romania in 2012 demands the courts to organize a pretrial session to inform the parties about the possibilities of mediation and recommend its use; court proceedings are only allowed to continue if parties have refused mediation. A specific legislative act on mediation with a similar goal was already adopted in Romania in 2006.[30] According to this law, mediation may commence either at the initiative of parties or at the recommendation of the judge when the parties consent to that recommendation; court

[28] The Pre-Action Protocol for Judicial Review is accessible at http://www.justice.gov.uk/courts.

[29] See *BGBl*. 2012 I, 1577 (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung).

[30] Also see the chapter on Serbia (Sect. 15.4), specifically the Mediation Act (no. 18/2005).

proceedings will be suspended as long as a settlement is negotiated with the help of a mediator. Mediation can only be allowed in disputes where the object of the mediation is not against the provisions of the law or against the public order. Although there are some clear incentives for the court to stimulate mediation as a form of ADR, there still seem to be some important questions on the general issue of allowing administrative authorities to negotiate the application of public law competences that should always be applied to the benefit of the general interest.

A successful mediation process will start and end with a contract between the disputants. The agreement that is intended to end the dispute can be qualified as a public law contract in any legal system, but not every system of administrative law will allow the administrative authority to amend the legal position of a person or good by way of a contract. This brings us to the question of the effects of the agreement in administrative proceedings. Some legal systems that are discussed in the national chapters have explicit provisions on such contracts, and the authors refer to those provisions.[31] Although we could imagine that it is relevant for the development of mediation in administrative law that the agreement shall have a direct binding effect on the legal position of the private party involved in the mediation, this doesn't seem the case in practice. The chapter on German administrative law stipulates that a formal contract is only more likely to be concluded when the resolution of the dispute has a third-party effect. In other cases, the willingness of the administrative authority to compromise or settle the dispute will most likely lead to the informal agreement that the administrative authority will either withdraw or change the contested decision. This possibility of the administrative authority to take a new decision that it knows the private party will agree with seems to be the predominant legal effect of a successful mediation in administrative proceedings. During the internal review procedure, such an informal agreement could lead to a decision on the application for internal review that will be accepted by all parties,[32] or—when the agreements mean that the contested decision should remain as it is—the application for internal review could be withdrawn. If mediation is successful during court proceedings, the appeal could of course also be withdrawn.[33] However, if the agreement entails the obligation of the administrative authority to take another decision, it could be wise to wait for the new decision. In most of the legal systems, the procedural provisions will allow for the pending appeal to be extended to encompass the new decision as well; in that case, the appeal against the new decision—that all parties now accept as the outcome of the mediation—will be deemed inadmissable because the interest needed to bring the case to court is lacking since the applicant has accepted that

[31] See, e.g., the chapters on German and Spanish laws.

[32] See the chapter on Hungary (Sect. 10.4).

[33] To our knowledge, the German *Verwaltungsgerichtsordnung* allows to formally end the appeal by concluding a so-called *Prozessvergleich* (paragraph 106 VwGO, a contract to end an appeal in court) that will have a *Doppelnatur*. It regulates both the intended substantive legal issues and the intended procedural effect, namely the end of the appeal. We are not aware of any other legal system that has provisions on this specific kind of contract.

specific decision in the mediation procedure. If the agreement covers all aspects of the dispute, including costs, and the administrative authority has indeed satisfied all obligations that were agreed upon, the appeal could be withdrawn safely by the applicant.[34]

19.6 Concluding Remarks

Mediation is on the rise as an important form of ADR in administrative law. Although all forms of administrative proceedings could potentially benefit from the positive influence of mediation on the relationship between disputants (administrative authorities and private actors), there seems to be an emphasis on the exploration of the possibilities of mediation in those disputes that are not yet brought before administrative courts. Most legal systems that are discussed in this book actually have growing policies to implement mediation, mediation techniques, and communication skills within all processes that demand civil servants of governmental agencies to interact with private parties. When public law decisions are at the basis of the conflict, the structure and core aspects of administrative law will have an important role in deciding whether mediation could have a role in resolving the dispute.

There are a number of reasons for doubting the potential positive effects of mediation in administrative proceedings; the unequal relationship between administrative authorities and private parties in legal issues and, in fact, the predominance of the rule of law, the principle that governmental powers shall be applied consistently in a purpose-specific manner and to the benefit of the general interest, the access to information that allows for transparency, for public participation and will contribute to the accountability and legitimacy of the functioning of the administration. Nonetheless, it seems important to recognize that mediation could also be relevant in administrative court proceedings and that it is of eminent importance to remove obstacles that would impede on that potential. This means that the procedural rules should facilitate, accommodate, and allow for amicable settlement of administrative law disputes by using mediation (techniques). Some relevant issues have come up in this chapter. First, it could be of some importance to inform parties of mediation. Second, the procedural provisions could—if necessary—be amended in such a way that administrative proceedings will be suspended for the time an amicable solution is under serious negotiation. Third, when an agreement is concluded, it should be clear to parties what legal effect such an agreement has on the pending administrative proceedings. These are all procedural issues that need clarification in several legal systems. Furthermore, it could be beneficial to the mediation process when a legal system would make clear whether,

[34] See, on this issue, the chapter on the Netherlands (Sect. 4.4) and Romania (Sect. 14.5).

and to what extent, confidentiality of the (facilitated) negotiations could legally be guaranteed.

Any expert in administrative law will agree that negotiating the rights and duties between administrative authority and private actors is a challenging task when there is a discretionary competence of the administrative authority. Even if there is room to negotiate, there are numerous substantive criteria to be met. There is a risk that either administrative authorities will allow more than what a private actor is entitled to according to law or that the private actor agrees to receive less than the law would give. It is in that respect that we feel that any legal system that allows mediation and negotiation in administrative law disputes to lead to compromise will have to recognize that such a system would also benefit from a stable, robust, and easily accessible system of judicial review.

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