CARDS 2004 Twinning Project

Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic of Croatia

Comments on the Draft Law on Administrative Court Procedure

Note: All referrals to the Law on General Administrative Proceedings are based on the draft from 18 September 2008.

Authors:

Jaka Ćurković, Judge at the Higher Social Security Court Rhineland-Palatinate, Germany

Klaus Hage, Resident Twinning Advisor and Judge at the Administrative Court Minden, Germany

Eckart Hien, Project Leader and former President of the German Federal Administrative Court

Martin Koehler, Judge at the Austrian Supreme Administrative Court

Klaus Lernhart, Vice President of the Administrative Court Freiburg, Germany

Stefan Rosenmayr, Judge at the Austrian Supreme Administrative Court

I. Introduction

1. Status quo

The current Law on Administrative Disputes (LAD) is mainly based on the Administrative Dispute Act of 1977 of the former Socialist Federal Republic of Yugoslavia. This Act was adopted by the Republic of Croatia in 1991 and has undergone some amendments in order to be aligned with the legal order of the Republic of Croatia.

In accordance with this law and the Law on Courts, the status quo of the administrative judiciary is described as follows:

The Administrative Court of the Republic of Croatia (in the following: Administrative Court) which has its seat in Zagreb has jurisdiction in administrative matters. The court is staffed with a President, a Vice President, 31 judges and 30 court advisors. In addition to that, the court employs 45 civil servants and 13 employees. The Court is divided into three departments: the Social Department with four chambers, the Financial Department with three chambers and the Property Department with three chambers as well. Decisions are as a rule taken by a chamber of three judges, in some cases five judges.

Over the last three years the number of incoming cases has been relatively stable (around 15,000/year) while the number of solved cases has increased steadily. As a result, in the last two years the Administrative Court was able to reduce its backlog by about 1,500 cases a year. This is shown in the following table:

year	incoming cases	solved cases	pending cases (1 January)	increase/ decrease
2006	15,250	14,612	39,262	+ 640
2007	14,409	15,874	39,902	- 1,444
2008	14,986	16,622	38,458	- 1,656
2009			36.802	

In 2008, the average duration of proceedings was 2 years and 5 months, down from 3 years and 3 months in 2007.

The annual workload as established by the Ministry of Justice is currently at 280 cases per year for judges and court advisors alike. The annual workload for the presidents of the three departments is reduced to 170 cases per year.

Cases are not assigned to judges and court advisors by a work schedule but by the President of the Administrative Court. In principle, cases are assigned strictly according to their age, i.e. the date an action was filed. However, the President can give urgent cases preferential treatment and assign them immediately. Cases are assigned in packages of 30 to 50 cases. If a judge or court advisor has only a few cases left from the last assignment, new cases are assigned. Because of the existing

backlog, cases often are assigned to judges or court advisors two and a half to three years after the action has been filed.

The chambers decide on cases following internal deliberations without a public oral hearing. As a rule, the court does not establish the facts of a case itself. If the court holds that the administration insufficiently established the relevant facts, the court will repeal the respective administrative act and refer the case back to the administrative body which in turn has to issue a new administrative act which may again be challenged before the court.

As a rule, the current Law on Administrative Disputes grants the Administrative Court only cassatory powers. This means that if the court concludes that an administrative body illegally refuses to issue an administrative act in favour of a citizen (e.g. building permit), it can only repeal the challenged act (= cassatory decision; cp. Art. 42 para. 2 LAD) and refer the case back to the administrative body (Art. 62 para. 1 LAD). Apart from a few exceptions (Art. 42 para. 3 to 5 LAD), the court is not competent to order an administrative body to render the requested administrative act (= reformatory decision).

The back referral of cases to administrative bodies in many cases results in a second (in some cases even a third, forth …) action being filed in the same case after the administrative body has rendered a new decision ("ping-pong effect"). This "ping-pong effect" is one of the main problems of the administrative judiciary because it prolongs the overall duration of proceedings. This term comprises the period from the first application before an administrative body until the rendering of a final court decision. From the view of the citizen or an investor that is the decisive period. In addition to that, it is the overall duration of proceedings that is decisive for the question whether the duration of proceedings violates the European Convention on Human Rights.

2. The need for a reform of the administrative judiciary and a new Law on Administrative Court Procedure

The efforts of the Administrative Court to deal with its considerable case load and to continuously reduce the backlog of pending cases with the available number of judges, court advisors and supporting staff as well as with the current legal provisions deserve full recognition. Nevertheless, a reform of the administrative judiciary is indispensable for the following reasons:

- The current Law on Administrative Disputes is not in line with EU-standards (acquis communautaire), thus being an obstacle on Croatia's way to accession to the European Union.

- The current Law on Administrative Disputes lacks provisions for more effective court proceedings.

- And finally the draft bill for a new Law on General Administrative Procedure (LGAP) introduces some new legal instruments which have to be considered in the new Law on Administrative Court Procedure.

For more detailed information about the need to reform please refer to the working group's Strategy paper as well as to the working group's Drafting guidelines which were both adopted by the Cabinet.

Since the proposed changes are quite fundamental, the working group that drafted the new Law on Administrative Court Procedure decided not only to amend the existing Law on Administrative Disputes but to draft a completely new law.

3. Basic Principles for a new Law on Administrative Court Procedure

The new Law on Administrative Court Procedure was drafted based on the following basic principles:

a) Legal protection against all administrative actions

The new Law on Administrative Court Procedure provides legal protection against all administrative measures regardless of their form (e.g. administrative acts, factual acts, non-observance of administrative contracts). Moreover, all law suits concerning administrative matters fall into the jurisdiction of the administrative courts. For further details please refer to the comments on Art. 2.

b) Full jurisdiction on facts and law

Under the new Law on Administrative Court Procedure administrative courts have full jurisdiction over facts and law. The restrictions of the current Law on Administrative Disputes for the administrative courts to establish facts were deleted. For further details refer to the comments on Art. 3 para. 4, Art. 36 and Art. 50.

c) Mandatory oral hearings

Under the current Law on Administrative Disputes, the decision to hold an oral hearing is left to the discretion of the Administrative Court. In practice, this discretion is exercised to the extent that no oral hearings take place. Under the new Law on Administrative Court Procedure, oral hearings before courts of first instance in principle are mandatory. For further details as well as for exceptions to this rule please refer to the comments on Art. 3 para. 2, Art. 45, Art. 46 and Art. 79.

d) Reformatory instead of only cassatory decisions

The new Law on Administrative Court Procedure not only grants administrative courts the competence to repeal unlawful administrative acts (cassatory decision) but also empowers them to put legal obligations on administrative bodies (reformatory decision), e.g. to render an administrative act, to provide a certain information or to hand back a seized object. For further details please refer to the comments on Art. 3 para. 5, Art. 12 and Art. 66 to 70.

e) Decision of appropriate cases by a single judge

In order to achieve a more efficient deployment of judges, the new Law on Administrative Court Procedure restricts the size of chambers to three judges. In addition to that, chambers at first instance courts are competent to transfer cases of lesser

complexity and/or importance to be decided by one of its members as a single judge. For further details please refer to the comments on Art. 5.

f) Future structure of the administrative jurisdiction

The new Law on Administrative Court Procedure foresees an independent administrative jurisdiction with two court instances. Taking into account the geographical proportions of the Republic of Croatia, four regional first instance courts in Osijek, Rijeka, Split and Zagreb and a Supreme Administrative Court in Zagreb are established.

The new court structure demands considerable additional resources for court buildings, equipment and staff. This investment is, however, indispensable in order to be able to effectively implement the necessary procedural amendments by the new Law on Administrative Court Procedure. In particular mandatory oral hearings and the establishment of facts by the court are difficult to implement with only one central court. Moreover, the new court structure would complement the Croatian Government's decentralization policy and would bring administrative courts closer to the citizens.

4. Further innovations

In addition to the above listed principles the new Law on Administrative Court Procedure contains several further innovations. The most important are:

- New system of actions including legal protection against general acts (Art. 12, 19, 66 to 70, 74)

- Prevention of delays in proceedings (Art. 43, 80)

- Second instance as appeal instance (Art. 77 et seq.)

- Effective "filter" between first and second instance (Art. 77 para. 1)

- Provisional court protection (Art. 88 et seq.)

- Costs of litigation (Art. 93 et seq.)

- Efficient enforcement of court decisions (Art. 107 et seq.)

- Electronic communication (Art. 27 to 30)

5. Legislative technique

The new Law on Administrative Court Procedure prefers general and abstract norms rather than detailed ones, making use of indefinite legal terms like e.g. "complications of a factual or legal nature" (Art. 5 para. 2, Art. 46 para. 1), "general importance" (Art. 5 para 2, Art. 77 para. 1 No 2), "reasonable interest" (Art. 12 No 3) or allowing the court to decide on procedural matters at its discretion (e.g. Art. 5 para. 2, Art. 22 para. 1, Art. 39 para 1 sentence 2, Art 43 para. 1 to 3, Art 45 para. 2 etc.). This ap-

proach was chosen to provide the courts with the necessary flexibility to decide on a wide variety of cases. The reality often is too complex for closely defined provisions.

In addition to that, even the best legislator is not able to foresee every single concrete case whilst formulating a law. This fact leads to the consequence that in many cases even thoroughly drafted definitions will result in legal gaps, whereas an indefinite law term would comprise these cases.

Therefore, the modern doctrine of legislation has been moving more and more to short laws, making use of general and abstract legal terms. This legislative approach has the following advantages:

- Laws are shorter, have a clearer structure and are easier to understand and to apply.

- General and abstract legal terms cover a wider range of cases, i.e. also those cases the legislator was not able to anticipate. Such laws remain operational for a longer period of time and gaps in the law are less probable.

6. Remarks

Due to structural differences between Croatian and English, many legal terms and sometimes even whole passages could not be translated word by word but had to be paraphrased. The main objective of the translation team, which consisted of a professional translator, three judges from the Administrative Court, the Resident Twinning Advisor and the RTA-assistant was to carry the content of the provisions from the original English version to the translated Croatian version. This applies to the draft bill as well as to these comments.

All referrals to the Law on General Administrative Procedure in the draft for a new Law on Administrative Court Procedure as well as in these comments refer to the respective draft as of September 2008. Deviating from the project assumptions this law has not yet been passed by Parliament. The two subsequent drafts as of January 2009 and February 2009 were not submitted to the working group for the draft of a new Law on Administrative Court Procedure in English.

For a comprehensive assessment of the impacts of the new Law on Administrative Court Procedure and recommendations for the smooth implementation of this law please refer to the report “Impact assessment of the draft for a new Law on Administrative Court Procedure and recommendations for its implementation”.

II. Comments

Table of contents

The table of contents is part of the law and enables persons who do not apply the Law on Administrative Court Procedure on a daily basis to get a quick overview on the content of the law and to find certain provisions.

Part 1 General provisions

Article 1 Goals of the law

Art. 1 defines the (main) goals of the Law on Administrative Court Procedure: the protection of individual rights and legal interests as well as to ensure the legality of administrative measures.

In the European tradition, judicial protection by administrative courts in principle has two different objectives. On the one hand the protection of individual rights and legal interests and on the other hand the surveillance of the legality of administrative measures. While the German tradition emphasizes the protection of individual rights, the French tradition tends to focus on the objective control of the legality of administrative measures.

The present draft – following Art. 2 para. 1 of the Law on Administrative Dispute (LAD) – emphasizes the protection of rights and legal interests: Art. 14 para. 1 requires that the plaintiff claims a violation of his rights or legal interests and an action can only succeed when these rights or legal interests in fact are violated (Art. 66 para. 1, Art. 68, as well as Art. 67 para. 1, 69 and 70, “entitled”). Consequently, it is not sufficient for the success of an action that the challenged administrative measure is unlawful.

The protection of individual rights and legal interests also serves the protection of legality, since decisions issued by administrative courts are an important orientation for administrative bodies. So in practice, many decisions that were issued to solve a particular conflict in the first place, become essential guidelines for the decision of other, often hundreds or thousands, similar cases.

Under Art. 2 para. 4, 21 and 45 et seq. LAD the department of public prosecution can file an action or a special legal remedy against decisions of the Administrative Court aimed at the examination whether the objective law was observed. This role of the department of public prosecution is reduced: According to Art. 14 para. 3 LACP an respective action or a respective legal remedy can only be filed, if this is specifically provided for by law. This change is proposed for the following reasons:

- Actions or legal remedies filed by the department of public prosecution in practice do not play a great role: During 2006 to 2008 only 66 of the about 45.000 actions filed before the Administrative Court were filed by the department of public prosecution (Art. 2 para. 4 LAD). And in addition to that, in the same period the department for public prosecution appealed only 77 decisions issued by the Administrative Court before the Supreme Court of the Republic of Croatia (Art. 21 and 45 et seq. LAD).

- The (partial) abolition of the right of the department for public prosecution does not mean that unlawful administrative acts cannot be repealed: If the office for public prosecution gets notice of an unlawful administrative act, it has to inform the supervisory body of the administrative body who has issued the respective act. Under Art. 103 para. 3 ZUP the supervisory body is entitled to revoke any administrative act that clearly violates material law. This solution also has the advantage that the adminis-

trative body may do so within three years (Art. 103 para. 4 LGAP), while the deadlines for an action or a legal remedy filed by the department of public prosecution under the Law on Administrative Disputes are much shorter (between 30 days and three months, cp. Art. 24 and 46 LAD).

According to EU-law, member states also have to ensure judicial review of decisions of administrative bodies in the implementation of EU-law (ECJ case 265/78, Ferwerda, para. 10, case C-465/93, Atlanta FruchthandelsgesmbH). In the exercise of their control, it is the task of the national courts – pursuant to the principle of cooperation laid down in Article 10 EC – to ensure the legal protection which persons derive from the direct effect of provisions of EU-law (ECJ, case C-213/89, Factortame and others, para. 19, and case C-432/05, Unibet, para. 37). Therefore, once Croatia has acceded to the EU, the Croatian administrative courts will have to grant respective legal protection even if this should not be explicitly stipulated by Croatian law.

The requirement of judicial control of any decision of a national authority (that might infringe rights derived from EU-law) reflects a general principle of EU-law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECJ, case 222/84, Johnston, and case C-97/91 Oleificio Borelli v Commission, para. 14).

Article 2 Scope of the law

Art. 2 defines the scope of the Law on Administrative Court Procedure.

The Law on Administrative Court Proceedings applies in administrative court proceedings (para. 1). These proceedings comprise all proceedings concerning administrative matters unless such a matter is assigned by law to any other court than an administrative court (para. 2). The term „administrative matter“ is defined in Art. 2 of the Law on General Administrative Procedure (LGAP):

> (1) Administrative matter is any matter in which an administrative body in administrative proceedings decides about rights, obligations or legal interests of individuals, legal persons or other parties (further: parties) directly applying laws, other regulations and other acts which are governing the respective administrative field.
>
> (2) Administrative matter also is any matter in which it is stipulated by law to issue a decision or to conclude an administrative contract.

The use of the term “administrative matter” is the most important link between the Law on General Administrative Procedure and the Law on Administrative Court Procedure. This link assures that the scope of cases decided by administrative bodies on the administrative level and by administrative courts on the judicial level is – as a rule – congruent.

However, the legislator may deviate from the strict congruence between the application of the Law on Administrative Court Procedure, administrative court proceedings

and administrative matter as foreseen in para. 2. Para.2 also allows the legislator to assign any administrative matter to other courts. By such an assignment, court proceedings concerning these matters are excluded from the definition “administrative court proceedings” (para. 2). An example for such an assignment is the assignment of expropriation cases to the county courts (Art. 42a of the Law on Expropriation).

Furthermore, the legislator may also decide (para. 3) that

- the Law on Administrative Court Procedure has to be applied by other courts (e.g. Art. 42 b of the Law on Expropriation),

- another code of procedure has to be applied by the administrative courts.

Compared to the Law on Administrative Disputes (LAD) the protection before administrative courts is broadened: Art. 6 para. 1 LAD restricts court protection in administrative matters to the review of the legality of administrative acts. Art. 66 and 67 LAD extend judicial protection to other individual administrative measures which do not qualify as an administrative act, but only if the plaintiff claims a violation of certain constitutional rights. By contrast, para. 2 extends judicial protection by administrative courts to all administrative matters, regardless of the type of the challenged administrative measure. The reason for this is that administrative bodies may not only interfere with individual rights by administrative act but also by other forms of administrative measures, like e.g. factual acts or the non-observance of administrative contracts.

The most important change of jurisdiction caused by para. 2 concerns cases in which an administrative body does not comply with an administrative act is has issued or a court decision. Until now, such cases fell into the jurisdiction of the civil courts. Under para.2, both cases fall into the jurisdiction of the administrative courts: In the case of non-compliance with an Administrative act, an action for performance (Art. 12 No 4) can be filed; in the case of non-compliance with a court decision, enforcement proceedings can be instituted (Art. 107 ff).

Many laws regulating special fields of administrative law contain provisions that assign cases concerning the respective field of administrative law to the administrative courts. Because of the abstract definition of the term „administrative court proceedings“ these provisions are obsolete, because they only repeat what is already stipulated in para. 1 and 2. Over the next years, the legislator should try to delete these provisions.

Article 3 General principles

Art. 3 contains the most important principles of the Law on Administrative Court Proceedings. The provision can be referred to as “LACP in a nutshell”:

Para. 1:
Administrative court proceedings have to be conducted in conformity with the principle of fair trial as laid down in Art. 6 of the European Convention on Human Rights (ECHR), especially

- the principle of equality of arms,

- the right to inspect files (cp. Art. 42),

- the right to offer evidence and the right to be heard on all facts and evidence (cp. Art. 35), and

- the right that administrative courts give reasons for their decisions (cp Art. 63, 76).

The principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his/her case – including evidence – under conditions that do not place him/her at a substantial disadvantage compared to his/her opponent. This e.g. implies that the content of any communication between the court and one of the parties (e.g. instructions according to Art. 33 para. 3 or advice according to Art. 38) is made known to all other parties.

Para. 2

As far as “civil rights and obligations” are the subject of proceedings, Art. 6 ECHR guarantees a public hearing before at least one court instance. The term “civil rights and obligations” is interpreted broader than under most national laws and comprises many fields of law that in many national systems are classified as public law. For example, the European Court of Human Rights has classified the following proceedings as “civil”:

- proceedings concerning a permission, license or the like which is required for the practicing of a profession, the running of a business or the carrying out of any other economic activity,

- proceedings which have direct consequences for the right of ownership with respect to property or the use or the enjoyment of property (e.g. expropriation, planning, issuing of building permits), or

- proceedings concerning social security benefits (e.g. health insurance, work accident insurance, welfare allowances, state pensions).

According to Art. 4 and Art. 2 para. 1 and 2, these proceedings – as before – fall into the jurisdiction of the administrative courts.

In addition to that, public hearings guarantee transparency and are a probate means to strengthen public trust in the work of the courts. Therefore, Art. 3 para. 2 guarantees a public oral hearing before at least one court instance regardless whether the subject of the dispute has to be classified as “civil” in the sense of Art. 6 ECHR or not.

Art 3 para. 2 only states a basic principle. The details, including exceptions, are regulated in Art. 45, 46 and 80.

Para. 3:

Following Art. 6 ECHR, Art. 3. para. 3 stipulates the obligation of the courts to conclude proceedings within reasonable time. Proceedings can be concluded by a decision of the court (Art. 58) but also because of a withdrawal of the action by the plaintiff (Art. 51), an acknowledgment of the claim by the defendant (Art. 52) or a court settlement (Art. 54).

Before it can be decided whether proceedings were concluded in due time, the relevant period has to be defined. As a rule, the relevant period begins at the moment the respective proceedings are instituted, i.e. the moment an action is filed. However, if prior to court proceedings further procedural steps are required, e.g. the filing of an appeal in front of an administrative body (cp. Art. 110, 134 and 136 LGAP), the European Court of Human Rights shifts the beginning of the relevant period to the filing of these proceedings.

The relevant period ends when the uncertainty concerning the disputed right or obligation ends. That is the moment in which the court decision has become final, regardless whether further legal remedies are not provided for or whether the deadline for the filing of such remedies has expired. Consequently, appeal proceedings have to be included into the relevant period. The same applies to proceedings before a lower court or administrative instance in case the challenged decision is revoked and the case is remanded to a lower court or administrative instance to be decided anew.

Whether proceedings were concluded within reasonable time can not be answered in the abstract but only on a case-by-case basis. The European Court of Human Rights decides this question based on a detailed review of the course of the whole proceedings taking into account the following criteria: the complexity of the case, the conduct of the applicant, the conduct of the court or other public authority conducting the proceedings and the significance of the proceedings for the applicant.

Para. 4:

Art. 6 ECHR requires as well that in principle evidence has to be produced before the parties and can be challenged by them. In order to meet this requirement, Art. 3 para. 4, Art. 50 and Art. 78 para. 2 determine that the administrative courts of first instance as well as the Supreme Administrative Court establish the facts of a case themselves. The courts are obliged to do so ex officio; they are neither bound by the parties' pleadings nor by their motions to take evidence (Art. 36)

However, this does not mean that the court has to begin with the establishment of the facts from the beginning. On the contrary, Art. 3 para. 4 allows the court to make use of those facts that have already been established by the administrative body as far as the court adopts the formers findings as its own, e.g. – but not restricted to – in cases, when certain facts are not disputed by the parties, or when the evidence collected by the administrative authority is a sufficient basis for the determination of facts by the court.

Para. 5:

Under the Law on Administrative Disputes the Administrative Court in principle has only cassatory powers. This means that if the court concludes that an administrative body illegally refuses to issue an administrative act in favour of a citizen (e.g. building permit), it can only repeal the challenged act (= cassatory decision; cp. Art. 42 para. 2 LAD) and return the case to the administrative body (Art. 62 para. 1 LAD). Apart from a few exceptions (Art. 42 para. 3 and 5 LAD), the court is not competent to order an administrative body to render the requested administrative act (= reformatory decision). As a result, some cases come back to the court again, some even several times, which leads to a so-called “ping-pong effect”.

Art. 3 para. 5, Art. 12, Art. 19, Art. 66 to 70 and Art. 74 significantly broaden the judicial powers of the administrative courts. Under the new system of actions, the courts are competent to

- repeal an administrative act which imposes a burden on the plaintiff (Art. 12 No 1, Art. 66),

- order an administrative body to issue an administrative act which grants a right to the plaintiff (Art. 12 No 2, Art. 67),

- declare that an administrative act which has lost its legal consequences was unlawful (Art. 12 No 3 and Art. 68),

- order an administrative body to act (e.g. payment of money or return of confiscated goods), to tolerate a measure or to omit a measure (Art. 12 No 4, Art. 69),

- declare the existence or non existence of a legal relationship, the nullity of an administrative act or the nullity of an administrative contract (Art. 12 No 5, Art. 70),

- declare a general act which is not comprised by the term “other regulations” in Art. 128 indent 2 of the Constitution of the Republic of Croatia null and void (Art. 19, 74).

Art. 12 No 2 and 4, Art 67 and Art. 69 substantially reduce the above mentioned “ping pong effect” by enabling the administrative courts not only to decide on the lawfulness of administrative measures but also on the measure itself. The reduction of the “ping-pong effect” will result in a shorter duration of proceedings (as defined in the comments on para. 3) and in a reduction of the number of incoming cases. Because of these effects, the step from a mere cassatory to a reformative system is one of the most important steps in the reform of administrative court procedure.

Part 2 Organization of the administrative jurisdiction

Article 4 Administrative courts

Para. 1:

Art. 4 para. 1 establishes a two tier system with four administrative courts of first instance and a Supreme Administrative Court. The seats of the courts of first instance

(Osijek, Rijeka, Split and Zagreb), the seat of the Supreme Administrative Court (Zagreb) and the court districts are defined in the Law on Courts and the law on Court Districts and Court Seats.

For the courts of first instance the following court districts are proposed:

Administrative Court in Osijek: territory of the Brodsko-posavska, Osječko-baranjska, Požeško-slavonska, Virovitičko podravska and Vukovarska-srijemska counties and the cities of Daruvar and Grubišno Polje and the municipalities of Dežanovac, Đulovac, Hercegovac, Končanica, Sirač, Veliki Grđevac, Velika Pisanica and Velika Trnovitica from the Bjelovarško-bilogarska county.

Administrative Court in Rijeka: territory of the Istarska, Primorsko-goranska and Ličko-senjska counties and the city of Ogulin and the municipalities of Bosiljevo, Josipdol, Plaški, Saborsko and Tounj from the Karlovačka county.

Administrative Court in Split: territory of the Dubrovačko-neretvanska, Šibensko-kninska, Splitsko-dalmatinska and Zadarska counties.

Administrative Court in Zagreb: territory of the City of Zagreb, the Koprivničko-krizevačka, Krapinsko-zagorska, Međimurska, Sisačko-moslavačka, Varaždinska and Zagrebačka counties, the cities Duga Resa, Karlovac, Slunj and Ozalj and the municipalities Barilović, Cetingrad, Draganić, Generalski Stol, Kamanje, Krnjak, Lasinja, Netretić, Rakovica, Ribnik, Vojnić and Žakanje from the Karlovačka county and the cities Bjelovar, Čazma and Garešnica and the municipalities Berek, Ivanska, Kapela, Nova Rača, Rovišće, Šandrovac, Severin, Štefanje, Veliko Trojstvo and Zrinski Topolovac from the Bjelovarško-bilogarska county.

The main criterion for the division of court districts was the distance to the administrative court of first instance so that all citizens live in a reasonable distance to the next such court.

Para. 2:

The ratio legis of Art. 4 para.2 is the protection of the independence of the administrative jurisdiction. Administrative courts must not be a part of public administration but have to be organized as independent judicial bodies.

In order to protect their independence, no administrative tasks – except tasks of court administration – should be assigned to administrative courts. Otherwise judges of the same court would have to control the decisions of their colleagues.

The organizational separation as well as the separation of tasks are also of special importance with regard to the perception of the work of the administrative courts by the public. Maximal separation is an indispensable condition for public trust in the impartiality of the administrative courts.

Article 5 Composition of administrative courts

Under the current Law on Administrative Disputes, all decisions have to be taken by a chamber of three (Art. 3 para. 2 LAD), in some cases even five judges (Art. 54 LAD). These strict rules do not allow an efficient deployment of judges. Therefore, the draft foresees that decisions can be taken by a single judge: According to Art. 40 certain decisions, which are not decisions on the merit, have always to be decided by the reporting judge. This provision is complemented by Art. 5 para. 2, which – under certain conditions – allows the assignment of cases pending at the administrative courts of first instance to a single judge.

Para. 1:

As under Art. 3 para. 2 LAD decisions are taken by a chamber of three judges. A panel of five judges (cp. Art. 54 LAD) is not foreseen anymore.

Para. 2:

Para. 2 enables the chamber to assign cases to one of its members who then will decide the case as a single judge if the following requirements are met:

- Only “easy” cases may be assigned, i.e. cases that do not display any particular complications of a factual or legal nature.

- Only cases that are not of general importance may be assigned to the single judge. A case is of general importance if the decision is of relevance for further cases. This is the case e.g. if no case law on a certain legal question so far has been established, if courts of first instance have decided the same legal question in a different way or if the case is of special public interest. A case that only raises a legal question that is clearly regulated by law in principle is not of general importance.

The two aforementioned requirements have to be met cumulatively.

In practice, the ruling on the assignment does not necessitate a chamber session but can be taken in a written procedure (per rolam): The reporting judge drafts the respective ruling and then sends it together with the file to the presiding judge and further to the third judge. Only if one of the judges has doubts about the assignment to a single judge, the judges should meet for a short, informal discussion of the case.

If a provision stipulates that a certain measure, in particular a procedural decision, falls into the competence of the presiding judge (e.g. Art. 47 para 1), these actions fall into the competence of the single judge once the case has been assigned to him.

The ruling to assign a case to a single judge cannot be appealed (sentence 2). However, in extreme cases, the judgment issued by the single judge can be appealed (Art. 77 para. 1 No 4) with the argument that this judgment is based on a procedural deficiency because it was arbitrarily assigned to the single judge. On the other hand, an appeal against a judgment of the chamber cannot be based on the fact that the case has not been assigned to a single judge (sentence 3). In such a case the parties rights are not affected because a right that a case is assigned to a single judge

does not exist.

A reassignment of a case to the chamber by the single judge is not possible because this is not foreseen by law.

Part 3 Jurisdiction

Article 6 Jurisdiction of administrative courts of first instance

Because of the new two tier structure (Art. 4 para. 1) the jurisdiction of the courts of first instance on the one side and the Supreme Administrative Court on the other side has to be defined. According to Art. 6, the administrative courts of first instance adjudicate on all proceedings unless these are assigned to the Supreme Administrative Court (cp. Art. 8 para. 2).

Article 7 Territorial jurisdiction

Art. 7 answers the question to which of the four courts of first instance courts a case is assigned. Art. 7 para. 1 to 4 contains four respective criteria:

- locus rei sitae (para. 1)

- home port or home airport (para. 2)

- legal residence (para. 3) and

- seat of the first instance administrative body (para. 4).

Para. 1 and 2:

The regulations in para. 1 and 2 are justified since as a rule the proximity of the local court will facilitate the proceedings, especially if evidence has to be taken.

The term “legal issue connected to a certain place” includes e.g. matters regarding the operation of a business or the performance of any other activity in a certain place, the construction of buildings or the approval of flight routes to an airport. The term also comprises taxes on or other duties connected to immovable property or another place.

Para. 3:

The regulation in para. 3 on the one hand guarantees, that in respective cases the plaintiff can proceed before the court nearest to him/her. On the other hand, this provision prevents the concentration of too many cases before the Administrative Court in Zagreb. If to these cases para. 4 would apply as well, too many cases had to be dealt with by the Administrative Court in Zagreb since many administrative bodies are centralised there.

Para. 4:

If a case does not fall under one of the aforementioned specific rules, the subsidiary rule in para. 4 applies. This provision e.g. comprises cases concerning matters falling under para. 3 if the plaintiff has neither a legal nor a habitual residence nor a seat in the Republic of Croatia. Para. 4 is also applicable if a matter falling under para. 1 to 3 cannot be allocated to a court of first instance (e.g. if large premises for which a building license is applied for spread over two court districts).

Para. 5:

A court is prevented from exercising its jurisdiction for legal reasons e.g. when all of its members in a certain case are excluded because of doubts regarding their impartiality (Art. 71 No 7 Civil Procedure Act; CPA). Factual reasons could be the consequences of catastrophes or illness of the members of the court.

The Supreme Administrative Court has to decide either upon a motion by one of the parties or upon a motion by the respective first instance court.

Article 8 Jurisdiction of the Supreme Administrative Court of the Republic of Croatia

Para. 1:

The Supreme Administrative Court decides as second and last court instance on legal remedies against decisions of the courts of first instance and as court of first instance on matters explicitly listed in para. 2.

Para. 2:

The assignment of the matters enumerated in para. 2 is justified as these matters usually are of above average importance and sometimes also politically sensitive.

Article 9 Referral of cases between administrative courts

The rulings under para. 1 to 4, as all other rulings, can be issued without oral hearing (Art. 45 para. 3). However, the parties have to be heard in advance (Art. 35).

Para.2:

As a rule, a court may accept its jurisdiction without the issuing of a respective ruling by just continuing with the proceedings (e.g. service of the action to the other parties). Only if the jurisdiction of an administrative court of first instance is contested by one of the parties, this court has to decide on its jurisdiction by ruling. This ruling can be appealed with a complaint (Art. 81 para. 1).

Para. 2 does not apply to the Supreme Administrative Court: Since its rulings are non-appealable (Art. 81 para. 1) it would be a mere formality to demand a decision by separate ruling. Instead the Supreme Administrative Court may give the reasons for its decision to accept its jurisdiction in the judgment.

Para. 2 does not apply to cases in which a party argues that the case falls into the jurisdiction of a court from another jurisdiction; in those cases Art. 10 para. 2 applies.

Para. 3:

According to para. 3, the Supreme Administrative Court has to decide on a negative conflict of jurisdiction, i.e. if two courts of first instance denied their jurisdiction.

Para.4:

According to para. 4, the Supreme Administrative Court has to decide on a positive conflict of jurisdiction, i.e. if two courts of first instance accepted their jurisdiction. In these cases the courts of first instance courts can only fulfil their obligation to submit the case to the Supreme Administrative Court, if they know about the fact that another court has accepted its jurisdiction, too. The parties are obliged to inform the courts respectively or to submit the case to the Supreme Administrative court themselves.

Article 10 Referral of cases to courts of other jurisdictions

Art. 10 largely corresponds to Art. 9 with the difference that it concerns the referral of cases to courts of other jurisdictions. Deviating from Art. 9 para. 2, Art. 10 para. 2 also applies to the Supreme Administrative Court.

According to Art. 23 para. 2 CPA conflicts of jurisdiction between courts of different jurisdictions as e.g. conflicts of competence between administrative courts and courts of another jurisdiction shall be decided by the Supreme Court of the Republic of Croatia. Art. 10 complies with this provision.

Article 11 Forwarding of cases to the Constitutional Court of the Republic of Croatia

If a case falling into the jurisdiction of the Constitutional Court is filed before an administrative court, this court forwards the case without further formalities to the Constitutional Court. In this case, a ruling is not necessary. However, the parties have to be informed. If the Constitutional Court does not accept its jurisdiction it proceeds according to its own rules of procedure.

Part 4 Types of actions

Article 12 Types of actions

The ratio legis of Art. 12 is to give the reader of the law an overview of the goals that can be achieved with an action. In that respect Art. 12 corresponds to Art. 6 para. 1 and Art. 66 LAD which have a similar function. The content of the operative part of the judgment on the respective types of action is regulated in Art. 66 to 70.

The following goals can be achieved with an action:

- the repeal of an administrative act (action for the repeal of an administrative act, No 1),

- the issuance of an administrative act, which has been refused or omitted (action for the issuance of an administrative act, No 2),

- the declaration of the unlawfulness of an administrative act which has lost its legal consequences (action for the declaration of the unlawfulness of a ceased administrative act, No 3),

- an order to act, to tolerate a measure or to omit a measure (action for performance, No 4),

- the declaration of the existence or non-existence of a legal relationship or of the nullity of an administrative act or an administrative contract (declaratory action, No 5).

Art. 12 does not limit Art. 2. That means that an action that fulfils the definition „administrative court proceedings“ may not be judged inadmissible because the types defined in Art. 12 do not seem to cover the respective action. Instead, one of the types provided for in Art. 12 has to be interpreted extensively.

The different actions are not to be understood as strict and separated types. If the court gains the impression that the petition formulated by the plaintiff (Art. 33 para. 2 No 1) does not correspond to the aim of his action (Art. 33 para. 1 No 3), it is the task of the court to help the plaintiff to formulate a corresponding petition (Art. 38). Only if the plaintiff in spite of the help of the court insists on a certain petition may the action as the case may be dismissed as inadmissible.

Different types of actions may also be combined if this is adequate to cover the plaintiff’s claim and the requirements of admissibility of the respective types of actions are fulfilled.

No 1:

The action for the repeal of an administrative act may only be instituted against a disadvantageous administrative act. Disadvantageous is any administrative act that imposes a duty on somebody, e.g. the payment of a fee, the confiscation of an object or the tearing down of an illegally erected building. The issuance of an administrative act has to be sought with an action under No. 2.

The Law on Administrative Court Procedure does not contain a definition of the term “administrative act”. This definition is given in Art. 96 LGAP.

No 2:

If the plaintiff seeks the issuance of an administrative act, No 2 applies. No 2 comprises the following cases:

- The plaintiff applies for a beneficial administrative act. Beneficial is any administrative act that constitutes a right like e.g. the right to receive a pension or the right to erect a building.

- No 2 also applies if an administrative body issues a beneficial administrative act that grants the plaintiff less than he applied for, e.g. if the plaintiff wants a pension to the amount of 4000,- HRK per month and the administrative body granted him a pension to the amount of 3000,- HRK per month.

- The plaintiff may also ask for the issuance of an administrative act that imposes a duty on another person, e.g. the order to tear down a house that was built illegally.

No 2 comprises the refusal to issue as well as the omission of an administrative act. However, in the case of an omission (= administrative inaction), the special provisions in Art. 16 apply.

No 3:

In many cases an administrative act has already lost its legal consequences at the time the court decides on an action.

Examples:

a) The plaintiff applies to sell goods on a Christmas market (December 2007). His application is refused. The court decides on the case in July 2008.

b) The Minister of the Interior forbids a demonstration which is planned for 18 June 2008. The court decides on the case in August 2009.

c) The police confiscate a certain object. The court decides after the police have returned the confiscated object.

Without the provision under No 3 the action in those cases would be inadmissible. An action for the repeal of an administrative act or an action for the issuance of an administrative act would be inadmissible since at the time of the court decision the plaintiff does not anymore have a legal interest in the revocation of the challenged administrative act (e.g. the confiscation) or the issuance of an administrative act (e.g. the license concerning the participation at the Christmas market). No 3 allows the plaintiff – provided the challenged decision was unlawful – to receive a respective declaration by the court, if he has a reasonable interest in such a declaration.

Such an interest exists, if the plaintiff credibly claims that

- a similar situation could arise in the future and that the administrative body would repeat its decision (danger of repetition),

- he would use a respective declaration to institute proceedings to claim damages or

- he needs a respective declaration for his/her rehabilitation, e.g. if the challenged administrative act is based on criminal, misdemeanour or other dishonourable

charges.

An action for the declaration of the unlawfulness of a ceased administrative act is admissible regardless of the moment when the respective act has lost its legal consequences. If this happens after an action under No 1 or 2 has already been filed, the plaintiff may adjust his petition to the new situation (sentence 2 of No 3).

No 4:

With the action for performance the plaintiff may seek an order that the defendant

- performs a measure (e.g. to render information, to pay money, to hand out an object),

- tolerates a measure (e.g. obligations resulting from an administrative contract, Art. 130 LGAP),

- omits a measure (e.g. to omit a warning concerning a defective product).

For the issuance of an administrative act No 2 is lex specialis.

The omission to issue an administrative act can not be sought with an action for performance. The plaintiff has to wait until the act is issued and to challenge this act with an action under No 1.

An action for performance is also admissible if an administrative body refuses to comply with a beneficial administrative act (e.g. for the payment of money), which the administrative body has issued itself. However, in the special situation that the administrative act has been issued based on a respective court decision the plaintiff does not have to lodge an additional action for performance but is directly entitled to submit a motion for enforcement of the court decision (cp. comments on Art. 108).

If the negative decision of an administrative body regarding an administrative measure has lost its legal consequences, No 3 applies mutatis mutandis.

No 5:

With an action for the declaration of the existence or non-existence of a legal relationship the plaintiff can request a declaration on the existence or nonexistence of a right or an obligation which is based on administrative law, provided that the defendant disputes the claimed right or obligation. Examples:

- the plaintiff claims a certain status, e.g. to be a Croatian citizen by birth or to be a civil servant,

- the plaintiff claims that his license to run a café includes the right to use the pavement in front of the café without further permission.

The declaratory action must relate to a concrete case which is disputed between the parties. The plaintiff may not abuse this action to clarify “interesting” legal questions which in practice are not disputed.

A declaratory action is only admissible if the plaintiff has a reasonable interest in the requested declaration. In order to decide whether the plaintiff has such an interest it has to be examined in which way the requested declaration could help the plaintiff. For example, such an interest is given if the plaintiff is facing criminal or misdemeanour charges for a violation of an obligation which is based on administrative law. In such a case the plaintiff has a reasonable interest to obtain a declaration by the administrative courts which he could use in penal or misdemeanour proceedings.

An action for the declaration of the existence or non-existence of a legal relationship is inadmissible, if the plaintiff could have filed another action under No 1 to 4. If for example an administrative body issues an administrative act which states the obligation to pay a certain amount of money as income tax, the addressee of this act could not file a declaratory action with the aim to declare that he does not have to pay income tax. Instead, he has to challenge the respective act with an action for the repeal of an administrative act.

Article 13 Subject of actions for the repeal of an administrative act and actions for the issuance of an administrative act

Art. 13 defines the subject of actions for the repeal of an administrative act and actions for the issuance of an administrative act. This is necessary to clarify which administrative decision – the decision of the first instance administrative body or the decision on the objection (cp. Art. 110 et seq. LGAP) – is subject of the proceedings.

Para. 1 and 2:

As a rule, both the decision of the first instance administrative body and the decision on the objection are subject of the proceedings. In this respect it does not matter, whether the decision on the objection amended the decision of the first instance administrative body (para. 1) or not (para. 2).

Para. 3:

Para. 3 regulates an exception for the case that the decision on the objection affects the rights of a person for the first time. In this case, only the decision on the objection is subject of the proceedings.

The constellation that only the decision on the objection affects rights or legal interests can be divided into two subgroups:

- The first instance administrative body grants the applicant the requested right (e.g. a building license). Upon the objection of another person (e.g. a neighbour), the second instance administrative body revokes the decision of the first instance body. The applicant can only claim that the decision on the objection violated his rights or legal interests.

- The first instance administrative body denies to grant the applicant the requested right (e.g. a building license). Upon the applicant's objection, the right (e.g. a building license) is granted. This decision could violate the rights or legal interests of a third person (e.g. a neighbour). However, this person can only claim that the decision on the objection violated his rights or legal interests.

Para. 4:

Para. 4 contains another exception for the case that objection proceedings are not foreseen by law. Many laws on special fields of administrative laws foresee that an action can be filed directly against the decision of the first instance administrative body.

Article 14 Standing to sue

The provision aims at preventing the so called "actio popularis".

Para. 1:

An action is only admissible if the plaintiff can claim to a violation of his own rights or legal interests. The claimed violation has to be possible. If it is impossible that an administrative measure could violate the plaintiff's rights or legal interests, the action is inadmissible.

On the other hand, the action is already admissible if the claimed violation of own rights or legal interests seems to be possible. The question, whether the right or legal interest actually was violated belongs to the decision on the merits.

The extension of the standing to sue to (possible) violations of legal interests follows the current trend throughout Europe.

In many cases, the material law does not state expressively that it aims at the protection of rights or legal interests of certain groups of persons. In this case, in order to answer the question whether (and if yes: which) rights or legal interests are at stake, the relevant material law has to be interpreted. Decisive is the ratio legis of a provision; whether its sole purpose is to maintain public order or whether it is also intended to protect rights or/and legal interests of certain groups of people.

Examples:

- A provision of planning law according to which all interests affected by a building project have to be weighed against each other, could be interpreted to the effect that it is intended to protect the rights and interests that have to be included in the weighing (e.g. the health of persons who are affected by emissions).

- A provision that regulates the closing time for pubs could be interpreted to the extent that its sole purpose is to maintain public order. But it could also be interpreted to the extent that it is (also) intended to protect the rights and legal interests of neighbours against disturbances (especially noise) during the night.

Para. 1 is in line with EU-law. The European Court of Justice has held that national provisions concerning the standing to sue and other requirements for the admissibility of an action do not violate EU-law, if these provisions do not undermine the right to effective judicial protection when exercising the rights conferred by EU-law (ECJ, case C-174/02, Streekgewest Westelijk Nord-Brabant, para. 18, case C-432/05, Unibet, para. 37). The procedural rules governing actions for safeguarding an individual's rights under EU-law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU-law (principle of effectiveness; ECJ, case 33/76, Rewe, para. 5, case C-432/05, Unibet, para. 43).

Para. 2:

Para. 2 clarifies that administrative bodies can lodge an action as well and that they also have to claim a violation of own rights or legal interests, especially their right to self government.

Inter-se-proceedings between administrative bodies that belong to the same legal entity in principle are not admissible, unless the law provides for an explicit exception.

Para. 3:

Deviant from Art. 2 para. 4 LAD, para. 3 stipulates that the department of public prosecution can file an action aiming at the examination of the observance of the objective law only if this is specifically provided for by law. For the ratio legis for this provision please refer to the comments on Art. 1.

Article 15 Completion of administrative remedy procedure

According to Art. 110 LGAP a party may file an objection against the decision of a first instance administrative body unless otherwise provided for by law. In addition to that, Art. 134 LGAP and Art. 136 LGAP foresee that a party may file a complaint in order to ensure the fulfilment of an administrative contract (Art. 134 para. 1), against a measure of a provider of public services (Art. 136 para. 1) or against any other administrative measure (Art. 136 para. 2). Art. 15 stipulates that in these cases the respective proceedings have to be completed before an action is filed. Otherwise the action is inadmissible.

If respective proceedings are not foreseen by law, an action can be filed directly against the decision of the first instance administrative body within the deadline under Art. 17.

Article 16 Administrative inaction

Art 16 regulates the formal requirements for the admissibility of an action in case an administrative body does not decide on an application, an objection or a complaint (= administrative inaction).

Para. 1:

Para. 1 No 1 regulates the case that an application to issue an administrative act is not decided within the deadline prescribed by law (e.g. Art. 70 para. 2 and 71 para. 2 LGAP) and that an administrative objection procedure (Art. 110 LGAP) is not provided for by law. If these requirements are met, an action can be filed directly after the deadline has expired.

If, on the other hand, the deadline is not kept but an administrative objection procedure is foreseen by law, an objection may be lodged (Art. 110 para. 2 and 119 LGAP).

Para. 1 No 2 concerns the inactivity of the administrative body that has to decide on an objection. If the decision on the objection is not rendered in time (e.g. Art. 121 LGAP) an action can be filed directly after the deadline has expired and without the administrative objection proceedings having been completed. This applies for actions for the repeal of an administrative act as well as for actions for the issuance of an administrative act.

Para. 2:

Para. 2 corresponds to Art. 119 para. 2 LGAP. The provision enables the court to set an administrative body a new time limit to render a decision if the court holds that a decision has not yet been taken for justified reasons. Such reasons may lie in the fact that the case necessitates the establishment of complicated facts (especially in cases where expert opinions are needed) or in the conduct of the party (when the delay is caused by the party). Organisational reasons like a permanent work overload of an administrative body do not constitute a justification in this sense.

Para. 3 and 4:

Para. 3 and 4 apply, if the “missing” decision on the application to issue an administrative act or on the objection is rendered while an (admissible) action filed according to Art. 16 para. 1 is pending. Para. 3 applies, if the administrative body decides in favour of the plaintiff. Para. 4 applies if the application or the objection of the plaintiff are rejected.

If the administrative act applied for is issued or the objection acceded to, the court has to conclude the proceedings by ruling and to decide on the costs (Art. 93 et seq.). However, if the plaintiff is of the opinion that the administrative act or the decision on the objection do not completely comply with his/her application or his/her objection, he/she can file a motion to resume the proceedings. In this case the court has to examine whether the administrative act or the decision on the objection fully comply with the application/objection. If this is the case the court dismisses the motion by judgment. Otherwise it annuls the ruling on the conclusion of the proceedings, continues with the proceedings and decides on the merits of the case (Art. 66 and 67).

If after the filing of the action according to para. 1 the application to render an administrative act or the objection is rejected, the court continues with the proceedings. The plaintiff does not have to file a new action or another motion. Before deciding the

case, the court has to examine whether all requirements for the admissibility of the action are met (e.g. standing to sue, Art. 14).

Para. 5:

Para. 1 to 4 apply mutatis mutandis if the information about the measures taken on a complaint is not given within the deadline prescribed by law (Art. 138 para. 2 LGAP).

Article 17 Deadlines for filing an action

The ratio legis this provision is legal certainty. All parties whose rights or legal interests are affected by an administrative act have to know within a reasonable period of time whether this act has to be followed.

Actions under Art. 12 para 1 to 3 have to be filed within a deadline of 30 days from the day of service of the decision on the objection or – if such a procedure is not foreseen by law – within 30 days from the day of service from the day of service of the administrative act. If the deadline is not kept, the action is inadmissible. However, if certain requirements are met, the court may reinstate the expired deadline (Art. 26).

Actions under Art. 12 para 4 and 5 have to be filed within a deadline of 30 days from the day of service of the decision on the complaint. However, there are two exceptions:

- An action for the declaration of the nullity of an administrative act (Art. 12 No 5) is exempt from the deadline. Administrative acts that are null and void can not become final. This follows from Art. 102 para. 3 LGAP. According to this provision, the nullity of an administrative act can be declared at any time.

- For the declaration of the nullity of an administrative contract (Art. 12 No 5) a deadline is not foreseen either (cp. Art. 132 LGAP).

Art. 25 contains general rules that apply not only to the deadline under para. 1 and 2 but to all deadlines regulated by this law. For the computation of deadlines Art. 114 of this law in combination with Art. 112 et seq. CPA apply.

Article 18 Procedural orders issued by administrative bodies

The ratio legis of para. 1 is to prevent that administrative proceedings are unduly prolonged by giving the parties the possibility to challenge any decision on the procedure (e.g. an order to appear before the administrative body, an order to submit a certain document or an order concerning the taking of evidence). Para. 2 contains two exceptions from the principle in para. 1 in order to guarantee an effective legal protection.

Article 19 Action for the control of the constitutionality and the legality of general acts

Para. 1:

Croatian scholars are of the opinion that a gap regarding the judicial review of general acts exists. According to them Art. 128 indent 2 of the Croatian Constitution does not cover all general acts (e.g. Omejeć, Zbornik radova "Upravno pravo i upravni postupak u praksi – aktualnog pitanja i problemi", Inženjerski biro, Zagreb 2006; Đerđa, Zbornik Pravnog Fakulteta Sveučilišta Rijeci, Vol. 29, Br. 1 (2008). To close this potential gap, Art. 8 para. 2, 19 and 74 foresee the legal review of general acts that do not fall under Art. 128 indent 2 of the Croatian Constitution by the Supreme Administrative Court.

Para. 1 is formulated in a way to close the gap that Croatian scholars identified. It does not define the cases falling under the provision but only in a very broad manner indicates the cases that are **not** comprised by it, i.e. all cases falling under Art, 128 indent 2 of the Croatian Constitution. However, it would be preferable if para. 1 would contain an unequivocal definition which kind of general acts are comprised by it. The MS-experts were not able to prepare a respective definition because they do not have enough knowledge of the Croatian legal system which is necessary to fulfil this task. However, it is recommended to extend the jurisdiction of the Supreme Administrative Court to all regulations/bylaws issued by cities, municipalities and counties as well as regulations issued by professional associations (e.g. bar association, chamber of commerce). A Constitutional Court in the long run is overburdened if its jurisdiction comprises the control of the constitutionality and legality of such regulations/bylaws.

The "direct" control of general acts, i.e. proceedings in which the constitutionality and legality of a general act is the main subject, is not the only method to establish the constitutionality and legality of such acts. It is an established legal principle that in proceedings concerning an administrative measure (e.g. an administrative act) which is based on a general act these issues may also be raised ("indirect" control). Another question is whether the court that decides on the administrative measure is also competent to decide on the constitutionality and legality of the general act. Croatia, like many other countries, for most general acts reserves this decision for its Constitutional Court.

The "direct" control of the constitutionality and legality of general acts has one big advantage compared to the "indirect" control. A decision issued in proceedings of "direct control" that declares a general act null and void has erga omnes effect (Art. 75 para. 2). That means that such a decision does not only bind the parties of the respective proceedings but applies to everyone. Therefore, "direct control" is more effective since the same legal decision has only to be decided once

The draft for a new Law on Administrative Court Proceedings does not exclude the "indirect" control of general acts. Both forms of control of general acts are possible. However, if proceedings under Art. 19 are pending at the Supreme Administrative Court, administrative courts of first instance as well as the Supreme Administrative

Court may suspend other pending proceedings for whose decision this general act is relevant as well (Art. 56 para. 2 No 2).

Para. 2:

Comparable to an action under Art. 12, an action under Art. 19 is only admissible if the plaintiff can claim that the general act violates his rights or legal interests (cp. Art 14); e.g. if the general act regulates the exercise of a profession or the use of land. However, under para. 2 it is sufficient that this violation takes place in the near future. This could e.g. be the case if the general act has already been published, but has not yet entered into force.

It is not necessary that the claimed violation is directly caused by the general act. It is sufficient that another measure, as for example an administrative act, which is based on the general act causes the violation.

Para. 2 does not apply if the action is filed by an administrative body.

Para. 3:

The deadline under para. 3 has been foreseen for the sake of legal certainty. If someone is affected by a general act for the first time after the deadline has expired, he/she is bound by the general act. However, in this case this person may claim the illegality of the contested general act in proceedings before an administrative court according to Art. 12 or in proceedings before another court. The administrative court or the other court then would have to examine the legality of the general act in the course of the respective proceedings (cp. comments on para. 1).

Para.4:

Para. 4 enables the Supreme Administrative Court to broaden the factual basis for its decision by asking public authorities which are not a party to the case to submit their opinion.

Para. 5:

Art. 46 enables the court to decide cases that do not display any particular complications of a factual or legal nature without public oral hearing without the consent of the parties. Since the legal review of a general act according to para. 1 does not meet these requirements, the application of Art. 46 is generally excluded.

Part 5 General provisions on procedure

Article 20 Capacity to be a party and procedural capacity

Para. 1 corresponds to Art. 4 LGAP; Para. 2 to Art. 28 LGAP.

Article 21 Parties

Article 21 defines the legal term “party”.

According to Art. 15 LAD the defendant in administrative court proceedings could only be an administrative body. Because of the introduction of the administrative contract this will change. Individuals, legal entities and other entities to sue may also be a party to such a contract (Art. 130 para. 1 LAGP). Therefore, it is possible that in future an administrative body sues an individual for the performance of the latter's contractual obligations. Both Art. 20 and 21 are formulated in a way to include this case.

Contrary to Art. 16 LAD, third persons whose rights or legal interests could be affected by the court decision are not a party to the proceedings by law but only after they are summoned to the proceedings by the court (cp. Art. 22).

Article 22 Summons to join the proceedings

The provision regulates the participation of third persons who are neither plaintiff nor defendant in administrative court proceedings. The provision not only applies to the main proceedings, but also to provisional proceedings (Art. 88 et seq.).

The participation of third persons in proceedings serves three aims:

- protection of rights and legal interests of third persons,

- inclusion of third persons into the res judicata effect of a decision (cp. Art. 75 para. 1 and Art. 21),

- avoidance of contradicting court decisions.

According to Art. 16 LAD, a person who would suffer direct harm by the repeal of the challenged administrative act has – by law – the position of a party. If the court does not give such a person the opportunity to participate, this person may file a motion for the reopening of proceedings (Art. 52 para. 1 No 6 LAD).

This legal solution suits a mere cassatory system, but not a system in which the courts can also issue reformative decisions. This is shown by the following case:

The operator of an airport files an action with the petition to order the administrative body to issue a building license for a new airstrip. The approach path of the airplanes stretches over an area with 20.000 inhabitants. Under Art. 16 LAD, the persons living in this area could not participate in the proceedings in spite of the facts that their rights or legal interests would be affected by the issuance of the building license because at stake is not the repeal of an administrative act but the issuance of such an act. The participation of affected persons is not only in the interest of these persons but also in the interest of the operator of the airport because of the inclusion of these persons into the res judicata effect of the court decision (cp. Art. 75 para. 1, Art. 21 No 3)

Another problem in the case above is the great number of persons affected by the building project. If all these persons would be awarded the status of a party by law, the court would have to establish the names and addresses of these persons ex offi-

cio in order to give them the opportunity to participate in the proceedings. This is virtually impossible or would at least substantially delay the proceedings.

The summons of a third person under para. 1 to 4 to the proceedings has the following consequences:

- The third person becomes a party of the proceedings (Art. 21 No 3).

- The third party may submit both petitions on the merit and procedural motions (Art. 22 para. 5).

- The res judicata effect of a decision extends to the third party (Art. 75 para. 1).

Concerning the additional consequences of a summons under para. 4 please refer to the comments on this provision.

Para. 1:

Para. 1 enables the court to summon any third person to join the proceedings whose rights or legal interests are connected to the subject of the proceedings, because in this case his/her rights or legal interests could be (indirectly) affected by the decision of the court. The court can do so ex officio or on a respective motion; the motion can be filed by the parties as well as by the third person itself. The motion has to specify the person(s) that ought to be summoned.

In principle, the decision whether to summon third persons under para. 1 is subject to the discretion of the court. Since the court under para. 1 is not obliged to summon third persons it is not obliged either to establish the names and addresses of persons on whom para. 1 could apply. Therefore, it lies within the responsibility of the parties or third persons to file a respective motion. If such a motion is filed and if the rights or legal interests of the respective person could be affected, the court as a rule should accede to this motion.

In order to achieve legal certainty by including persons affected by the building project (or at least a part of them) into the res judicata effect, the operator of the airport in the above mentioned case could file a motion under para. 1 (cp. the categories presented below as part of the comments on para. 2).

If the court rejects a motion to summon a third person to join the proceedings under para. 1, the third person can file a complaint (Art. 81) against the respective ruling. The same applies to the parties, provided that they have a legal interest in the participation of the third person especially that the res judicata effect extends to him/her (Art. 75 para. 1).

The failure to summon a third party to join the proceedings under para. 1 has no further implications for the main proceedings. The rights and legal interests of the third person are sufficiently protected since the third person did not become a party (Art. 21 No 3) to the proceedings so that the res judicata effect (Art. 75 para. 2) does not extend to him/her, so that the third person may challenge an administrative act is-

sued based on the court decision or – in the case of the repeal of an administrative act – file a new application before the administrative body.

Para. 2:

In contrast to para. 1, third persons have to be summoned to join the proceedings if the court's decision could not only indirectly but directly interfere with their rights or legal interests. This is the case if the decision of the court would at the same time necessarily infringe the rights or legal interests of third persons.

Para. 2 does not only protect third persons, but also the main parties (= plaintiff and defendant). Para. 2 protects their interest to extend the res judicata effect to the third party since without this extension a judgment in cases falling under para. 2 would be virtually useless because the judgment would not bind the third person. The guarantee of effective legal review is an important aim of the provision.

The wording of para 2 is very abstract. The decision whether rights or legal interests are directly affected or not in many cases is difficult. Para. 2 demands a qualified infringement of rights or legal interests by the decision of the court which exceeds the infringement in cases falling under para. 1 and which justifies the legal consequences of para 2 (mandatory instead of discretionary summons, failure to issue a mandatory summons is a grave procedural deficiency). Whether such reasons exist has to be decided with respect to the above mentioned ratio legis of para. 2. In addition to that, other reasons also have to be taken into account, like the individualization of the prospective circle of third persons.

In order to facilitate the differentiation between para. 1 and para 2 the following categories can be distinguished:

1. Action for the repeal of an administrative act (Art. 12 No 1) affecting third persons

This is the standard case for a mandatory summons under para. 2. To this category belong all cases in which a plaintiff files an action against an administrative act that grants the addressee of this act a license, a right or another advantage.

Examples:

- Action of a neighbour against a building license, the holder of the license has to be summoned under para. 2.

- Action of a competitor against the appointment of a civil servant/judge, the appointed civil servant/judge has to be summoned under para. 2.

- Action with the aim to revoke a subsidy granted to a commercial competitor, the commercial competitor has to be summoned under para. 2.

In these cases, the court has to summon the addressee of the beneficial administrative act according to para. 2: If the court acceded to the action of the plaintiff, the judgment would repeal the administrative act and thus **directly** interfere with the

rights and legal interests of the addressee, who also is identified by the petition of the plaintiff.

2. Action for the issuance of a beneficial administrative act

a) This category comprises cases in which a person pursues the issuance of an administrative act that could infringe the rights and legal interests of other persons. In these cases the persons that claim an infringement of their rights or legal interests do not have to be summoned under para. 2, but may be summoned under para. 1.

Examples:

- Action for the issuance of a building license

- Action for the issuance of a license to run a business (e.g. a disco)

Unlike a judgment deciding on an action for the repeal of an administrative act, a judgment deciding on the issuance of an administrative act does not itself amend the legal situation but only obliges the administrative body to do so by ordering this body to issue a specified administrative act. And unlike the petition to repeal an administrative act issued to a certain person, the petition to issue an administrative act to the applicant does not identify any other person whose rights or legal interests could be infringed. In addition to that, the example above concerning the action for the issuance of a license to build an airstrip shows that in many of these cases it would be virtually impossible for the court to identify all persons whose rights or legal interests could be affected. Therefore, in these cases the possible infringement of the rights or legal interests of third persons is not sufficiently concretized, so that the decision of the court would only **indirectly** interfere with the rights and legal interests of third persons.

b) This, however, does not mean that a judgment deciding on an action for the issuance of an administrative act could under no circumstances **directly** infringe the rights or legal interests of a third person. If the petition to issue a certain administrative act identifies a third person to a comparable extent as the petition for an action falling under category 1, the possible infringement of rights and legal interests of a third person are sufficiently concretized so that the decision of the court would **directly** interfere with the rights and legal interests of third persons.

Example:

- Action aimed at the granting of an exemption in order to be allowed to build a house nearer to the neighbouring premises than foreseen by law: Through the indication of the neighbouring premises the third person(s) whose rights or legal interests could be infringed are clearly identified.

3. Action for the issuance of a disadvantageous administrative act against an individualized third person

As this category also concerns actions for the issuance of an administrative act, the same principles as for category 2 apply. If the petition to issue a certain administra-

tive act identifies a third person to a comparable extent as the petition for an action falling under category 1, the possible infringement of rights and legal interests of a third person are sufficiently concretized so that the decision of the court would **directly** interfere with the rights and legal interests of third persons.

Example:

- Action for the issuance of a demolition order for the house on neighbouring premises: Through the indication of the neighbouring premises the third person(s) whose rights or legal interests could be infringed are clearly identified.

For all other cases that do not fall into one of the categories above, the decision has to be based on the circumstances of the respective case.

For provisional proceedings the categories above apply mutatis mutandis.

If the court rejects a motion to summon a third person to join the proceedings under para. 2, the third person as well as the parties can file a complaint against the respective ruling.

The failure of the court to summon a third person to join the proceedings under para 2 is a grave procedural fault. If the court notices such a failure, it must ex officio catch up on this failure as soon as possible. This also applies to the Supreme Administrative Court if such a failure is discovered during appeal proceedings.

The failure of the court to summon a third person to join the proceedings under para. 2 does not give this person the right to appeal the judgment issued in the main proceedings, since he/she has not become a party to the proceedings (cp. Art. 21 No 3). The rights and legal interests of the third person are sufficiently protected since the res judicata effect of the issued judgment (Art. 75 para. 2) does not extend to him/her.

Para. 3:

Para. 3 defines a special case of a mandatory summons: If an administrative measure necessitates the approval of another administrative body, the court has to summon this body.

Para. 4:

Para 4 defines a further case of a mandatory summons. In addition to that, para. 4 enables the court to not only summon another administrative body, but also to issue a judgment against this body.

The provision has two aims:

- protection of the plaintiff

- avoidance of further court proceedings.

The provisions on the jurisdiction of administrative bodies in social matters sometimes are so complex that even the involved administrative bodies are not sure in whose jurisdiction a claim falls. This complexity should not be held against the plaintiff. It happens from time to time that an administrative body mistakenly declares itself competent and negates the material claim of the applicant, while the court affirms the material claim but holds that the case falls into the jurisdiction of another administrative body. Without the regulation contained in para. 4 the court would have to dismiss the action if it finds out that the plaintiff sued the wrong defendant and the plaintiff would have to initiate new administrative proceedings and – if the other administrative body would also reject the application – to file a new action. This is not adequate because the plaintiff would lose a lot of time and ineffective because the case often would come to the court again.

Para. 5:

Para. 5 regulates the right of a summoned party to file petitions on the merit as well as procedural motions.

Para. 6:

Para. 6 sentence 2 serves the protection of the summoned party (right to be heard, cp. Art. 35). The information can be given in written form especially by sending copies of the important documents from the files

Article 23 Actions against public authorities

Para. 1 and 2:

Para 1 and 2 stipulate against whom the action has to be directed if the defendant is a public authority. As a rule, the action has to be directed against the administrative body that has taken, refused to take or omitted an administrative measure (para. 1 sentence 1 and para. 2). This also applies if an administrative act has been amended by the decision on the objection (cp. Art. 13 No 1).

Para. 1 sentence 2 contains an exception falling under Art. 13 No 3: In these cases an action has to be directed against the administrative body that has decided on the objection.

Para. 3:

Para 3 regulates who may represent an administrative body, especially in oral hearings.

Article 24 Service of documents

The provisions on the service of documents follow the respective provisions of the Law on General Administrative Procedure as these provisions provide a more efficient set of rules as the respective provisions of the Civil Procedure Act.

Article 25 Deadlines

Art. 25 not only applies to the deadline for the filing for the action (Art. 17) but to all deadlines foreseen in this law (e.g. Art. 77 para. 2 and 81 para. 3).

Para. 1:

Para. 1 determines the beginning of deadlines. A deadline begins to run upon service, notification or pronouncement of a respective decision.

Para. 2:

If an administrative or court decision is not served, notified or pronounced to a person at all or if the procedural requirements for the serving of documents, the notification or the pronouncement are not met, the deadline for the filing of an action or a legal remedy is extended to three months from the day on which

- the party actually had knowledge of the respective decision or

- the party should have had knowledge of it. This is the case when he/she has no knowledge of the decision because of gross negligence on his/her part. Gross negligence is given, if the party has knowledge, that somebody exercises rights which have to be granted by an administrative act.

Example:

A neighbour is aware of construction works on a nearby property but did not receive the respective building license. In such cases the neighbour is obliged to pursue his rights by asking the neighbour or the competent administrative body whether a building license has been issued. The failure to act accordingly constitutes gross negligence.

If the service, notification or pronouncement is made up or if the fault concerning the service, notification or pronouncement is healed, the general deadline (e.g. Art. 17, 77 para. 2 or 81 para. 3) is actuated.

Para. 3:

If the information on the legal remedy against an administrative or court decision is completely missing, incomplete or wrong, the deadline for filing an action or a legal remedy is extended to three months upon service, notification or pronouncement of the decision (sentence 1). The information is incomplete if one of the requirements set out in Art. 98 para. 7 LGAP or Art. 63 para. 6 are not met; it is wrong if one of the necessary elements of information is incorrect.

There are two exceptions to the aforementioned rule:

- If the information incorrectly states a longer deadline than the one provided for by law, this longer deadline applies.

- If the information incorrectly states that a legal remedy is not available, an action or a legal remedy has to be filed within three months from the day on which the party had positive knowledge of the possibility to file an action or a legal remedy. Deviant from para. 2 it is not sufficient if the party only should have had knowledge about this possibility.

If later on the missing information on legal remedies is provided for, an incomplete information is completed or a wrong information corrected, the general deadline (e.g. Art. 17, 77 para. 2 or 81 para. 3) is actuated. However, if the new information contains another fault, para. 3 applies again.

Article 26 Reinstatement

The possibilities and requirements for the reinstatement are the same as in the Civil Procedure Act with one exception: The absolute deadline of three months for the lodging of the motion in Art. 118 para. 3 CPA is insufficient with respect to ensuring an effective legal protection. Therefore, this deadline was prolonged to one year (para. 2).

Article 27 Electronic communication

Article 28 Service of electronic documents

Article 29 Electronic files

Article 30 Access to electronic files

Art. 27 to 30 offer all possibilities of modern communication from the electronic submission of documents, over electronic file-keeping to the access of electronic files via the internet. Electronic communication will facilitate the communication between parties and the court, especially over great distances.

However, before electronic communication can start, the necessary infrastructure and the necessary hard- and software have to be provided for. This not only applies to the courts, but also to administrative bodies and lawyers since electronic communication necessitates the respective equipment on both sides. Therefore, electronic communication and electronic file-keeping will not start before the Ministry of Justice has ordered so by decree. The respective decrees also have to regulate the necessary technical specifications.

Art. 27 to 30 provide a very flexible solution for the introduction of these new means of communication: the different components (electronic submission of documents, electronic keeping of files etc.) may be introduced one after another. It is also possible to start respective projects in pilot courts or only for certain types of proceedings.

It has to be stressed that even after electronic communication and electronic file-keeping will have started no individual, legal entity or other entity entitled to sue is obliged to make use of these possibilities. The traditional ways of communication per letter or fax will still be admissible.

Part 6 First instance proceedings

Article 31 Filing of an action

Para. 3:

Para. 3 gives the plaintiff the possibility to exclude the risk of not keeping the deadline for filing an action (Art. 17) because of delays by the post service: If the plaintiff sends his/her action by registered mail, it is considered to be filed on the day it was submitted to the post office.

Para. 4:

The pendency of an action depends on the filing of the action with the court (and not e.g. on the delivery of the action to the defendant). If in other provisions legal consequences are tied to the pendency of a case (e.g. Art. 72 para. 2), para. 4 applies.

Para. 5:

This provision protects plaintiffs who are often inexperienced in legal affairs from not keeping the deadline for the filing of an action (Art. 17) because they sent the action to the wrong administrative court or the administrative body that decided on the challenged administrative measure. If this happens, the deadline to file an action is presumed to be kept, as long as it reached the wrong administrative court or the administrative body within the deadline.

Para 5 also eases access to court for plaintiffs living abroad. Postal service from foreign countries is not always reliable and often takes long. Therefore, a deadline to file an action is also kept, if it reaches a Croatian consulate within the deadline. The term “consulates” comprises embassies and other consulates.

The addressees listed in para. 5 have to forward the action to the competent administrative court without delay. This case has to be distinguished from a referral as foreseen in Art. 8 or 9.

Para. 5 does not regulate, how an action can be filed with an addressee listed in para. 5. Therefore it can be filed in writing or fax as foreseen by para. 2 or – if foreseen by the rules that govern the filing of applications with these addressees – also orally in front of a civil servant who records the application in written minutes.

Article 32 Actions from abroad

Para. 1:

Para. 1 like Art. 146 para. 1 CPA stipulates that a party that does not have his/her seat, legal residence or habitual residence in the Republic of Croatia upon the filing of the action has to authorize a person who has his/her seat or legal residence in the Republic of Croatia to receive mail from the court.

Para. 2:

According to the current case law of the Administrative Court of the Republic of Croatia, an action from abroad is immediately dismissed, if the plaintiff has not authorized a person living within the Republic of Croatia to receive mail from the court.

Because of the deadlines for filing an action (Art. 17), this solution is inadequate for administrative court proceedings. These deadlines prevent, that unlike in civil proceedings, an action dismissed for formal reasons can successfully be repeated. It is hardly possible that the repeated action is filed within the deadline of 30 days foreseen in Art. 17. Therefore, para. 2 stipulates that if the plaintiff does not fulfil his/her obligation under para. 1, the court has to instruct the plaintiff about this insufficiency and has to set him/her a deadline to name a person authorized to receive mail. If the plaintiff does not follow this order within the set deadline, the court can choose whether it dismisses the action as inadmissible or whether it proceeds according to Art. 51 para. 2.

The deadline set by the court has to be reasonable. The fact that the plaintiff lives abroad and that he might not know anybody in Croatia but would have to find somebody to receive his mail has to be considered. Because of these circumstances, a deadline of at least 45 days seems appropriate.

Article 33 Content of the statement of claim

Para. 1:

Para. 1 defines the indispensable content for a statement of claim. If these requirements are not kept, the court according to para. 3 has to instruct the plaintiff about the deficiencies and has to set him/her a deadline to complete the statement. If the plaintiff does not follow this court order, the action is considered to be withdrawn para. 4).

The deadline set by the court has to be reasonable. The fact that many plaintiffs are inexperienced in legal affairs and have to ask other persons for help has to be considered.

If the action is filed by a representative of the plaintiff, the action has to be signed by the representative. In these cases the provisions of the Civil Procedure Act regarding representatives and the power of attorney apply.

If the action is filed by fax, it is sufficient that the document sent by fax contains a signature.

Para. 2:

Para. 2 contains additional requirements, which however are not indispensable. If the plaintiff does not fulfil these requirements, the court must not proceed according to para 3 and 4 and also must not dismiss the action as inadmissible.

Article 34 Service of the statement of claim

Para.1:

Para. 1 states the obligation of the court to serve the statement of claim upon all other parties. An exception can only be made if the action is evidently inadmissible. This exception does not dispense the court from its duty to grant the right to be heard (Art. 35), i.e. from informing the plaintiff of the probable inadmissibility of the action and to give him the opportunity to react, e.g. to withdraw the action. The exception only dispenses the court from its duty to serve the action upon the other parties.

The exception in para. 1 only applies if the action is “evidently inadmissible”. This requirement is not met, if there is only a reasonable doubt as to the admissibility of the action or if further inquiries are necessary to decide on the admissibility of the action. In these cases, the action has to be served upon all other parties.

An action is inadmissible if the formal requirements for filing an action are not met.

Examples:

- the plaintiff has no standing to sue (Art. 14),
- the necessary objection or complaint proceedings have not been completed (Art. 15),
- the deadline for filing an action (Art. 17) has not been kept,
- the plaintiff does not have a legal interest for the declaration of an administrative act that has lost its legal consequences as unlawful (Art. 12 No. 3),
- the plaintiff does not have a reasonable interest in the requested declaration (Art. 12 No 5),
- the plaintiff does not (anymore) have a legal interest to pursue his/her action because the challenged administrative act has lost its legal consequences,
- the plaintiff has lost his/her legal interest to pursue his/her action because he/she has refused to accept an acknowledgement which in all aspects complies with his/her claim,
- the plaintiff who files an action from abroad has not named a person to receive mail (Art.32)
- the statement of claim does not meet the requirements under Art. 33 para. 1.

The case that an action is filed with an incompetent court does not fall within this category, in this case Art. 9 to 11 apply.

Article 35 Right to be heard

The aim of this regulation is to ensure the compliance with the principle of fair trial (Art. 3 para. 1). The right to be heard requires that the party has to be given the **opportunity** to comment on all relevant facts and evidence as well as on the relevant legal aspects of the case before the court takes a decision (judgment or ruling, Art. 58). If the party does not make use of this opportunity, the court may nevertheless decide (cp. also Art. 47 para. 2).

Concerning questions of material law or the taking of evidence the parties are usually heard during an oral (Art. 45 para. 1) or preliminary (Art. 39 para. 1 sentence 2 No 1) hearing. However, the hearing of the parties does not in each case have to take place in a hearing before the court. This would not be effective. Therefore, in many cases, especially if the admissibility of an action or procedural measures (e.g. the assignment of a case to a single judge, Art. 5 para. 2, or the suspension of proceedings, Art. 56) are concerned, the hearing of the parties takes place in written form: The court in a letter to the parties informs them about its opinion/intention and sets them a deadline for their comments.

At any rate, decisions by which the proceedings are concluded fall into the scope of this article. The same applies to rulings which do not conclude the proceedings but refer to procedural issues which concern the party's rights or legal interests like e.g. rulings on the referral of cases to another court (Art. 9 and 10), the forwarding of a case to the Constitutional Court (Art. 11), rulings on the imposition of fines (Art. 48 para. 1) or rulings on the access to files (Art. 42). Only decisions that solely concern the course of proceedings and that with absolute certainty cannot have any negative impact on the rights or legal interests of the parties, are not comprised by this article.

The right to be heard also implies that the content of any communication between the court and one of the parties (e.g. instructions according to Art. 33 para. 3 or advice according to Art. 38) is made known to all other parties (cp. comments to Art. 3 para. 1).

In addition to the general regulation on the right to be heard in this article particular respective provisions are to be found in several other articles of this law (e.g. Art. 46 para. 1 sentence 2; Art. 50 para. 2, Art. 51 para. 2 sentence 3; Art. 64 para. 1 sentence 2).

Article 36 Inquisitorial Principle

In principle, it is the court's duty to investigate all facts and circumstances relevant for the proceedings. However, the parties are obliged to assist the court with this task, since in most cases the parties know all relevant facts and means of evidence themselves. If a party does not submit facts and circumstances which belong to its personal sphere or knowledge, the court has no obligation to conduct respective investigations on its own, unless it is evident to the court that such facts and circumstances which are relevant for the decision exist.

The court has to conduct the necessary investigations ex officio. The same applies to the question whether evidence – and if yes with which means – has to be taken. Regarding the means of evidence and the further regulations on evidence proceedings, Art. 219 to 276 CPA apply (Art. 50 para. 4).

Art. 36 constitutes one of the main difference between administrative court proceedings and civil court proceedings. In civil court proceedings the parties are obliged to submit the relevant facts and means of evidence.

Article 37 Binding effect of the plaintiff's claim

On the one hand, this article contains the principle of "ne ultra petita" according to which the court may not grant the plaintiff more than what he asks for.

On the other hand, the article also stipulates the duty of the court not to stick to the letter of the plaintiff's petition but to establish the "real" meaning of his/her petition and to interpret it accordingly. This process is closely connected to Art: 38: If there are any doubts whether the plaintiff's petition covers his "real" aim, the court has to discuss this issue with the plaintiff and – if necessary – to help him to reformulate his petition.

Article 38 Duty to advise the parties

The provision pursues several aims:

- Protection of the parties: Lack of judicial knowledge should not be a decisive factor in the outcome of judicial proceedings.

- Equality of arms: Unlike administrative bodies most plaintiffs who file an action against administrative measures often are inexperienced in legal affairs.

- Speeding up of proceedings: Judicial indications enable the parties to take all missing steps that are necessary to enable the court to decide on the case.

Art. 38 applies to all parties including administrative bodies. However, the provision is of special importance for individuals that are not represented by a lawyer.

In spite of its duty to advise the parties, the court has to stay impartial and may not favour one of them. To prevent any doubts as to the impartiality of the court, all other parties have to be informed about any judicial indication the court gives to a party.

Article 39 Preparation of the oral hearing

To conduct proceedings as efficiently and quickly as possible, the court has to try to decide the case based on only one oral hearing. In order to reach this aim, the oral hearing has to be properly prepared. To this end article 39 offers several "tools" which the court can apply according to the specific circumstances of the case.

Especially preliminary hearings (Para. 1 No 1) appear to be highly effective to obtain the necessary information and declarations before the final oral hearing. Moreover, such a hearing usually presents a good opportunity to reach an amicable settlement.

In order to prepare the oral hearing properly it is mandatory that judges work on the case files from the moment an action is filed so that necessary indications to the parties (Art. 38) can be given in an early stage of the proceedings.

Article 40 Decisions by the reporting judge

In order to accelerate the proceedings and to unburden the chamber of decisions of minor importance the reporting judge has to take the decisions listed in this article as a single judge. A decision according to Art. 5 para. 2 is not necessary.

After the beginning of an oral hearing all decisions are taken by the chamber (if the case has not been transferred to a single judge according to Art. 5 para. 2), because then the chamber is already familiar with the case.

Article 41 Obligation to forward documents and files and to provide information

Para. 1 sentence 1:

As the administrative court has to establish all the relevant facts ex officio, it is important that **all** public authorities and not only the administrative body/bodies that are a party to the proceedings are obliged to submit all files, all documents and all information the court deems necessary to decide on the action.

Para. 1 sentence 2:

The duty of public authorities to name all parts of a document or file and all information that in their opinion has to be kept secret is intended to help the court to decide which parts of a file are exempt from access to court files (Art. 42 para. 3).

Para. 2:

Para. 2 gives the court the necessary means to enforce the fulfilment of the obligations under para. 1. If these means are not successful (e.g. if files are lost or destroyed) the court has to try to obtain the relevant information in another way. If the court has no further possibility to investigate the facts of the case, the decision has to be taken according to the principles of burden of proof.

The rulings on the summoning (No 1) and on the imposition of a fine (No 2) may be challenged by complaint (Art. 81). The complaint against the imposition of a fine has suspending effect (Art. 82 para. 2). After the ruling has become final the fine can be enforced according to Art 107 et seq.

Article 42 Access to files

Access to files in court proceedings is guaranteed by Art. 6 ECHR.

Para. 1 sentence 2:

To keep draft versions of court decisions and similar texts separate from the official court files and to exempt them from access by the parties is necessary to safeguard a feasible and adequate preparation of the decision. Otherwise the court is not able to prepare the decision in an unbiased manner.

Para. 2:

In order to protect the confidentiality of deliberations the minutes on deliberations and voting (Art. 61 para.2) are exempt from access to files.

Para. 3:

All public authorities have to forward all their files concerning a specific case (Art. 41 para. 1 sentence 1), but can identify those parts of the files, that according to overriding public interest, overriding interests of third persons or of the plaintiff should be exempted from access to files or that according to other regulations (e.g. Art. 20 para. 2 of the Law on Secret Data or the Law on Protection of Personal Data) have to be kept secret (Art. 41 para. 1 sentence 2). However, the decision whether files are exempt from access to court files is not taken by public authorities but by the court.

The access to court files is closely connected to the right to be heard (Art. 35). Files that were excluded from access must not be used for the court's decision to the disadvantage of any party.

Para. 4 and 5:

Para. 4 and 5 regulate the procedure for the decision on access to files. Para. 4 applies if the case has not been transferred to a single judge (Art. 5 para. 2), para. 5 if it was transferred. The decision on access to files can be appealed by complaint (Art. 81 para. 1). Such a complaint has suspending effect (para. 4 sentence 3 and para. 5 sentence 3).

Article 43 Exclusion of late pleadings

The provision enables the administrative court to speed up the proceedings by setting the parties a deadline for their statements or submissions. If the deadline is not kept, the court may (para. 3) reject the respective statement or submission. The deadline has to be in an adequate relation to the activity requested from the party.

Para. 2 No 3 extends only to such documents etc., as to which the party has no legal right to refuse their submission. Of course, the party is not obliged to submit any document etc. if this would be illegal.

A rejection according to para. 3 is only permitted if all three requirements (delay, no reasonable excuse, instruction) are met. If this is the case, however, the court does not have to reject late pleadings; the decision is left to the court's discretion.

"Decision of the court" (para. 3 No 1) means the decision on the action, i.e. the decision that concludes the court instance. This decision would be delayed in the sense of para. 3 No 1, if the admission of late pleadings resulted in a prolongation of the proceedings that would not have occurred in the case of its rejection (e.g. if an additional oral hearing was necessary), as long as the prolongation is not irrelevant. An example for an irrelevant prolongation is the prolongation of the oral hearing itself (e.g. because of the hearing of a witness who is present at the court). If the court terminates several hearings on the same day, it is obliged to plan enough time for

unforeseen events like the hearing of a witness present at the court. Para. 3 No 1 does not apply, if the case could not be decided for other reasons, e.g. if the court had to take evidence because of pleadings that were not late.

Para. 3 No 2 (“reasonable excuse”) also applies if the request of the court according to para. 1 or 2 was unclear or ambiguous.

Article 44 Amendment of the action

Art. 190 para. 2 CPA allows the amendment of an action if the defendant agrees with it or if the court holds that such an amendment would be suitable.

The agreement does not have to be stated explicitly, it can also be implied, e.g. if the defendant – either orally or in written form – argues on the matter of the amended action without objecting the amendment.

Article 45 Principle of public oral hearing

Para. 1:

In principle, the court of first instance has to decide based on an oral hearing (principle of mandatory oral hearing, cp. Art. 3 para. 2). This is necessary because of Art. 6 ECHR. The reservation of the Republic of Croatia concerning the application of Art. 6 ECHR only applies to the laws already in force at the time Croatia ratified the European Convention (1997).

Exceptions from this rule are only admissible if expressively stated by the Law on Administrative Court Procedure:

- if both parties in advance agree with a decision without oral hearing (para. 2),

- if the court decides by ruling (para. 3),

- if the requirement under Art. 46 are met (cp. comments to Art. 46)

These exceptions are in line with Art. 6 ECHR.

For the exclusion of the public, Art. 307 to 309 CPA apply mutatis mutandis (sentence 2).

Para. 2:

The consent with a decision without oral hearing has to be stated expressively. If a party does not answer a respective request of the court, it has not consented in the sense of para. 2.

Article 46 Judgment without public oral hearing without consent of the parties

Para 1.:

The provision aims at the simplification and acceleration of proceedings in cases which in the opinion of the court are without factual and legal difficulties, especially routine cases in which the legal questions are already solved by previous decisions or may be solved easily on the basis of the law text, e.g. if the deadline to file an action (Art. 17) has obviously not been kept.

In those cases the court may issue a judgment without a public oral hearing even without the consent of the parties. However, the parties have to be heard in advance in written form (cp. comments on Art. 35) that the court intends to proceed in this way. If a party raises objections against the court's intention, the court has the choice whether to follow these objections and proceed according to Art. 45 para. 1 or whether to proceed as announced.

Art. 46 applies to first instance proceedings, no matter whether these proceedings are decided by a court of first instance or by the Supreme Administrative Court (cp. Art. 8 para.2). In appeal proceedings, Art. 46 does not apply (Art. 78 para. 1).

Para. 2:

If a judgment based on Art. 46 has been issued, the parties has the choice whether to lodge an admissible legal remedy or to demand a public oral hearing before the court which has issued the challenged judgment. Of course, this only applies to a party to whose (partial) detriment a case was decided.

Because of the aforementioned choice of the parties, Art. 46 does not violate Art. 6 ECHR: If a party chooses to lodge an admissible legal remedy, it waives its right to an oral hearing.

Para. 3 and 4:

If a hearing is requested on time (para. 2), the judgment issued according to para. 1 is presumed to not have been issued. Therefore, the court has to issue a new judgment based on the hearing. However, para. 4 enables the court to refer to its judgment under para. 1 to the extent that it follows its reasoning in this judgement.

Article 47 Summons to oral hearings

Para. 1:

Sentence 1 only applies if a case has not been assigned to a single judge (Art. 5 para. 2). If the case has been assigned to a single judge, the single judge acts instead of the presiding judge (cp. comment to Art. 5 para. 2).

The deadline in sentence 2 is intended to give the parties enough time to prepare for the oral hearing. Because of this legis ratio, the deadline may be shortened with the consent of all parties.

Sentence 3 allows the shortening of the deadline in urgent cases. However, in this case, it still has to be assured that the parties have enough time to prepare for the hearing.

On a respective motion of a party or ex officio the court has to postpone a hearing, if a legitimate reason exists (Art. 114 LACP, 116 CPA). Such a legitimate reason has especially to be acknowledged if a party is prevented from attending the hearing without his/her fault, e.g. in the case of illness or if the party booked a trip before the summons. The same applies, if the lawyer or another representative of the party cannot attend the hearing without his/her fault, e.g. if a lawyer has to represent another client in court at the same time and the summons for the other proceedings was issued earlier. The guideline for the decision on a postponement has to be the protection of the parties' right to be heard in an oral hearing.

Para. 2:

The provision (indirectly) stipulates that the court may decide a case, even if one or all parties do not appear to an oral hearing. However, this is only possible if the parties were informed respectively.

If the party has a legitimate reason for its failure to appear to a hearing, it can file a motion for reinstatement (Art 26 para. 1 LACP, Art. 117 et seq. CPA).

Para. 3:

The provision has two aims: To enable the court to settle the case based on only one oral hearing and to facilitate the settling of cases without judgment (Art. 51, 52 and 54). For both purposes it often is advantageous that the administrative body is represented by a person with special knowledge, e.g. a technical expert in planning cases or a doctor in health insurance cases.

The court's request is not enforceable. Art. 48 which allows the imposition of a fine does not apply. If however the failure to follow the court's request causes additional costs, e.g. because of the postponement of an oral hearing or because of the necessity to hear an external expert, these costs may be imposed on the administrative body (Art. 101 LACP, Art. 156 para. 1 and 2 CPA).

Article 48 Appearance in person

The provision refers to cases in which the court considers the personal appearance of parties as necessary to establish the facts of the case, especially to get an impression of personal circumstances relevant for the decision. The personal appearance of the party in many cases also is essential to settle the case without a judgment (Art. 51, 52 and 54).

The ruling on the imposition of the fine may be challenged by complaint (Art. 81). The complaint has suspending effect (82 para. 2). After the ruling has become final, the fine can be enforced according to Art 107 et seq.

Article 49 Procedure at oral hearings

Art. 49 provides the basic framework for the course of an oral hearing. Para. 1 and 5 are similar to Art. 36 LAD, para. 2 to 4 contain additional provisions. The aim of the provision is to give the oral hearing a structure that ensures the protection of the parties' right to be heard (Art. 35).

Para. 1:

Sentence 1 only applies if a case has not been assigned to a single judge (Art. 5 para. 2). If the case has been assigned to a single judge, the single judge acts instead of the presiding judge (cp. comment to Art. 5 para. 2).

Para. 2:

The summarization of the content of the file is intended to give the parties the possibility to control whether the court overlooked facts or arguments or misunderstood something. With the consent of the parties this procedural step may be skipped.

Para. 3:

The discussion of the factual and legal aspects of the case (sentence 1) has to be adjusted to the specific circumstances of the case and has to be focussed on the main legal issues. It is the task of the presiding judge to find an adequate balance between the opportunity for the parties to submit their personal view and the requirements of focussed and efficient proceedings. This does not mean that a party can extend his/her pleadings without limits. The presiding judge may execute his/her power to maintain order in order to limit a party's pleadings, in extreme (rare) cases even through the imposition of fines (Art.114 LACP, Art 318 CPA).

The presiding judge should always keep in mind that the oral hearing is not only of utmost importance in order to instil public trust in the implementation of the rule of law by the administrative courts but also for providing an atmosphere during the hearing which enhances the chance for an amicable settlement (Art. 54). Therefore, the presiding judge as a rule should give the parties the opportunity to speak for themselves even if they are represented by a lawyer. Moreover, the court should try to find out the interest behind the formal subject of the proceedings in order to reach a settlement which even may avoid further legal disputes in the future.

The main issue concerning the admissibility of a question (sentence 3) is the relevance of a question for the case to be decided. The court also has to prevent that a question or the prospective answer could violate a person's rights.

Para. 4:

As a rule, the court should decide a case based on only one oral hearing (Art. 39 para. 1). However, there may arise new circumstances or aspects during the hearing which with respect to the obligation of the court to establish the facts ex officio and to the right of the parties to be heard necessitate an additional oral hearing. In these cases the court has to adjourn the hearing or, if this question has to be discussed first as part of the deliberations (Art. 61), to reopen the hearing.

If a party submits additional written pleadings after the closing of the hearing and before the issuing of the decision (Art. 62 para. 2 and 3), the court's decision on a reopening depends on whether these pleadings contain new factual or legal aspects which are relevant for the decision of the case and whether these pleadings are excluded under Art. 43.

Article 50 Taking of evidence

Art. 50 does not stipulate that the court has to begin with the establishment of the facts from the beginning. On the contrary, Art. 50 allows the court to make use of those facts that have already been established by the administrative body as far as the court adopts them as its own, e.g. – but not restricted to – in cases, when certain facts are not disputed by the parties and are not contrary to the content of the files, or when the evidence collected by the administrative authority is a sufficient basis for the decision of the court.

To the extent that the relevant facts are not sufficiently clear on the basis of the files the court has to establish these facts itself and – if necessary – take the respective evidence.

Para. 1:

As a principle, evidence has to be taken by all judges who decide on the case together in order to ensure that all of them gain a direct impression of the means of evidence. However, this does not exclude that in preparation for an oral hearing (Art 39) evidence is taken by one of the members of the chamber or a judge from another court (para. 1 sentence 2).

Para. 2:

Para. 2 emphasizes the right to be heard (Art. 35) for the process of the taking of evidence and ensures that the parties are properly informed. If, however, a party fails to attend the oral hearing without having applied for a postponement with justified reasons, the court may nevertheless take a decision on the basis of the results of the oral hearing including the evidence taken at this oral hearing.

Para. 3:

Although it is suitable to summon witnesses and experts well in advance to an oral hearing, the deadline under Art. 47 para. 1 sentence 2 does not apply to the summons of witnesses and experts. The summoning of witnesses or experts on short

notice in some cases is necessary to avoid delays in the proceedings and does neither affect the rights of the parties nor the rights of witnesses or experts.

Para. 4:

Art 50 only contains basic rules for the taking of evidence. For the details, para. 4 refers to Art. 219 to 276 CPA

Article 51 Withdrawal of the action

Para. 1:

Art. 28 LAD states that the action can be withdrawn until the moment the decision is sent out. This rule does not fit in a two instance system. Therefore, para. 1 stipulates that the action may be withdrawn up to the moment the decision becomes final. This means that the withdrawal may even be declared during the second instance proceedings. In case an appeal against the first instance judgment has not been lodged, the action may be withdrawn until the expiration of the deadline under Art. 77 para. 2 sentence 1. If the action is withdrawn after a judgment has been issued, this judgment becomes invalid. For reasons of clarification the court should include a respective declaration in its ruling according to para. 3.

Para. 2:

The basic idea of the regulation is that the plaintiff has to demonstrate his/her interest to pursue the action by fulfilling his/her obligation to cooperate in the proceedings. The court may in a first step informally remind the plaintiff to comply with this obligation, even several times. Beyond this informal step the regulation in para. 2 enables the court to call upon the plaintiff to contribute to the proceedings properly by requesting a certain activity from the plaintiff. Subject of such a request may only be activities that fall into the “cooperation-sphere” of the plaintiff. The request has to be sufficiently precise, so that the plaintiff is able to understand what exactly is demanded from him. The court may only request an activity from the plaintiff which is necessary to complete the proceedings. Para. 2 does not dispense the administrative court of its duty to establish the facts itself, as long as this is possible without the cooperation of the plaintiff (cp. also Art. 43 para. 3 sentence 2). If the request does not meet all of the above mentioned requirements, the legal consequences of sentence 2 do not apply, i.e. it must not be presumed that the action is withdrawn.

If the plaintiff does not comply with the request, but demonstrates his interest to pursue the action otherwise the presumption of withdrawal is not justified either. Insofar it is sufficient that the plaintiff reacts on the demand in a manner which makes clear that he/she wants to maintain the action.

The legal consequences of sentence 2 only apply if the court has submitted the same order at least twice and each time combined with the setting of a deadline. In order to ensure that the plaintiff has received them, the orders have to be served. The last order has to contain the information according to sentence 3. If this information is missing, the legal consequences of sentence 2 do not apply.

Para. 3:

The provision refers to para. 1 as well as para. 2. If an action is withdrawn or presumed to be withdrawn, the court by ruling has to conclude the proceedings and to decide on the costs (sentence 1). This ruling is not appealable by complaint (Art. 81 para. 1) but only by a motion according to sentence 2. The ratio legis of this provision is that the proceedings shall be continued before the court that issued the ruling to conclude the proceedings. Thus, a motion under sentence 2 is also admissible if the Supreme Administrative Court issues such a ruling. This is necessary to ensure effective legal protection of the plaintiff.

Para. 4:

The provision regulates the possible decisions on a motion under para. 3 sentence 2 and their consequences. If the court holds that an action has been withdrawn or that it is presumed to be withdrawn, it dismisses the motion by judgment (sentence 1). The term “judgment” implies that the court has to decide based on an oral hearing (cp. Art. 45 para. 1 and 3). However, Art. 45 para. 2 and Art. 46 apply. A respective judgment of a court of first instance can be appealed according to Art. 77.

If the court holds that the action has not been withdrawn or is not presumed to be withdrawn, the court annuls the ruling to conclude the proceedings and continues with the proceedings (para. 4 sentence 2) as if the annulled ruling had never been issued.

Article 52 Acknowledgement of the claim

If in the course of court proceedings the administrative body comes to the opinion that the plaintiff’s claim is founded, it may acknowledge the plaintiff’s claim. In some cases this is a suitable way to avoid that the administrative body has to bear costs (cp. comments on Art. 97 para. 2). However, an acknowledgement only concludes the proceedings to the extent that the plaintiff accepts it. If the plaintiff does not accept the acknowledgement, the court has to decide the case. However, to the extent that the acknowledgement covers the plaintiff’s claim, the action has become inadmissible: The plaintiff has no reasonable legal interest anymore in a court decision because there is an easier way (acceptance of the acknowledgement) to get what he/she requests from the court.

An acknowledgement has to be sufficiently precise as it is an enforceable title (Art. 108 No 3). In principle, an acknowledgement should be formulated like the operative part of a judgment. However, an acknowledgement has not always to be declared expressively. If the administrative body fulfils the plaintiff’s claim (e.g. if it issues the requested administrative act), this can be interpreted as a factual acknowledgement.

If the acknowledgement refers to the claim as a whole, the court by ruling has to conclude the proceedings and decide on the costs (sentence 2 and Art. 51 para. 3).If the acknowledgement is confined to only a part of the claim, the court concludes the proceedings by ruling as to this part and continues the proceedings as to the part not comprised by the acknowledgement. Should the plaintiff react on a partial acknowl-

edgement by withdrawing the action as to the remaining part of the claim, the court has to conclude the proceedings insofar as well (Art. 51 para. 3).

The consent of third parties (cp. Art. 22) is not necessary in order to conclude the proceedings upon an acknowledgement, because only the plaintiff and the defendant are entitled to dispose of the proceedings. On the other hand, the acknowledgement has no binding effect for those third parties, so that these parties may file an action against the implementation of the acknowledgement, if the respective measures affect their rights or legal interests. Therefore, Art. 52 causes no gap in the legal protection of third parties.

Article 53 Amendment of the administrative act

The filing of an action against an administrative act does not prevent the administrative body from amending or substituting the challenged administrative act in favour of the plaintiff as well as to his/her detriment.

In case an amendment or substitution is in favour of the plaintiff, the court shall ask the plaintiff (para. 1) to declare whether he/she accepts the new act or whether and with which aim he/she wants to continue the proceedings. This request has to be served to the plaintiff, since it actuates a deadline (Art. 24 para. 1). The further course of the proceedings depends on the plaintiff:

- If he/she does not answer the court's request, Art. 51 para 2 to 4 apply mutatis mutandis (para. 2 sentence 1).

- If he/she states that he/she does not want to continue the proceedings the court by ruling has to conclude the proceedings and to decide on the costs (para 2 sentence 2).

- If he/she states that he/she does not accept the new act, the proceedings are continued (para. 2 sentence 3). However, for reasons of procedural economy, the new act replaces the old act (para 2 sentence 4).

- If he/she states that he/she accepts the new act but wants to continue the proceedings according to Art. 12 No 3 the proceedings are continued respectively (para. 2 sentence 3).

In case an amendment or substitution is to the detriment of the plaintiff, the new act is automatically included in the proceedings.

Article 54 Court settlement

The law suit may be settled not only by a court decision, by withdrawal or by acknowledgement, but also by an agreement of the parties before the court. Such an agreement can be concluded in an oral hearing, in a preparatory hearing (Art. 39 para. 1 sentence 2 No 1), or by written acceptance of a written proposal of the court. The ratio legis of Art. 54 is to provide the possibility for an amicable solution for the pending law suit and possibly also for the conflict of interests behind this law suit in

order to not only settle the actual dispute but also to avoid future disputes between the parties.

Under procedural aspects, only plaintiff and defendant would have to agree on a settlement, but not third parties, because – as laid out before (cp. comments on Art. 52) – only the plaintiff and the defendant are entitled to dispose of the proceedings. However, a court settlement is not only a procedural measure but also an administrative contract (double nature of court settlements). Therefore, Art. 130 LGAP et seq. apply to court settlements as well. According to Art. 131 para. 1 LGAP, administrative contracts which affect the rights of third persons necessitate the consent of these persons. If such a contract is concluded without the consent of these persons, it is null and void (Art. 132 para. 1 LGAP). Therefore, third parties have to agree to a court settlement, if this settlement affects their rights.

The court is obliged to examine whether an agreement is suitable and if so may submit respective proposals to the parties (para. 1). Of course, these proposals have to respect the legal order, because otherwise a respective settlement would be null and void (Art. 132 para. 1 LGAP). However factual and/or legal uncertainties are an indication to take an amicable settlement into consideration. Moreover, rights and legal interests that go beyond the pending law suit may be included into a settlement.

A court settlement has to be sufficiently precise as it is an enforceable title (Art. 108 No 4). Like an acknowledgement, a settlement should be formulated like the operative part of a judgment. If a settlement refers to the claim as a whole, the court by ruling has to conclude the proceedings (para 3 and Art. 51 para. 3). A cost decision is only necessary if the settlement does not contain a respective provision (cp. Art . 97 para. 3). If the settlement only covers a part of the claim, the court concludes the proceedings by ruling as to this part and continues the proceedings as to the part not comprised by the settlement.

Article 55 Mediation

Mediation as a special technique for resolving disputes outside or within court proceedings has been spreading worldwide in recent years. EC Law also deals with mediation, although with regard to the limited legislative competence of the EC in this field only referring to cross-border disputes in civil and commercial matters. According to the 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 member states are obliged to transform the provisions of this directive into national law until 21 May 2011. Art. 3 of this directive contains the following definitions:

> “For the purposes of this Directive the following definitions shall apply:
>
> (a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) "Mediator" means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation."

Even if the scope of the directive may not extend to administrative court proceedings, the Law on Administrative Court Proceedings should offer this possibility of alternative dispute resolution as well. Of course mediation shall and cannot replace the normal court procedure or the conclusion of court proceedings by a court decision. But in certain cases (especially with more than two parties) which may amount to 10 - 20 percent of the pending cases, mediation should be taken into consideration as a possibly more effective means of sustainable dispute resolution.

According to the above mentioned definitions mediation can be understood as a confidential procedure for settling conflicts between parties by consensual solutions which are sought for voluntarily and on the parties' own responsibility, but with the help of a qualified mediator who has passed a respective training. It is a basic principle of mediation that the mediator must not have the authority to decide the dispute unilaterally. This requirement at a first glance seems to complicate if not hinder the use of judges as mediators. However, this requirement can be met by internal court provisions which stipulate that the mediator judge is excluded from deciding the case if the mediation is not concluded by an amicable settlement.

Mediation in pending cases may be superior to the traditional approach because it is focussed on the interests of the parties behind the dispute instead on formal claims as such. This implies basic differences between the traditional way of preparing a solution of the dispute and the mediative way. The main structural differences are the following:

Procedural aspect	**Court procedure**	**Mediation**
Focus / Object	Formal claim	Interests in conflict
Personal participation	Only parties of the court proceedings	All persons affected by the conflict
Perception	Law	Interest
Facts to be considered	Relevant as to applicable law	Relevant as to the whole conflict of interests
View	Directed to the past	Directed to the future
Method	Public oral hearing	Confidential talks
Aim	Legal certainty	Sustainable pacification
Solutions	- Court decision or - law orientated settlement	Autonomously developed consensual agreement

	with mutual concessions	
Consequences	Winner / Loser	Win – Win

Reasons to choose mediation instead of the normal court procedure may be:

- The parties want to preserve a good personal or business relationship despite the concrete dispute;

- A complex conflict behind the concrete dispute could not be resolved by a single court decision on the concrete claim but only by an overall comprising agreement;

- The parties want to emphasize and preserve their own responsibility for a solution;

- The parties are interested in a common effort to find a solution that satisfies all of them;

- The parties want their private sphere or business secrets to be protected and not to be displayed in public oral hearings;

- The parties are interested in a fast resolution of the conflict.

Reasons to reject mediation may be:

- One or all parties are interested in a court decision on a legal question of general importance (cp. Art. 77 para. 1 No 2);

- The parties failed to find a solution in mediation before, also outside court proceedings;

- There is evidently no margin for negotiable solutions because of strict legal provisions (which is rarely the case, especially because of the possibility “to enlarge the cake”, i.e. to broaden the points of interest to be considered in search of a satisfactory solution for all parties);

- The conflicting interests are not complex but easily to be assessed so that there is no need for further investigating and revealing of the interests. In such cases already the attempt to reach an amicable settlement within the ordinary court procedure may be promising.

Para. 1:

Art. 55 refers to cases already pending at an administrative court or the Supreme Administrative Court. Other disputes are beyond the scope of the provision. The initiative to propose mediation in pending cases usually is taken by the court. This does not exclude, of course, a respective suggestion by one or all of the parties.

The court may propose and the parties may choose the referral of the case either to an external or to a court mediator. The proposal for mediation should be made in the early stage of the proceedings before the legal positions of the parties have been

established and the willingness to get involved in interest-orientated talks has declined. Besides, an early proposal can be motivating for trying out mediation as the parties may rightly expect a faster solution of their conflict than it could be achieved by proceedings through two court instances.

As mediation proceedings – because of the structural differences mentioned above – have to be separated from normal court proceedings, the court has to refer the case to the mediator and suspend the proceedings before the chamber. In case the mediation should fail or for any other reason, every party is entitled to demand the continuation of the normal court proceedings at any time. Thus, the acceptance of mediation by a party does not hold a procedural risk.

The structural characteristics of mediation proceedings and its necessary separation from the ordinary court proceedings as a rule entail the necessity to keep this separation also after the court proceedings have been resumed on demand of one of the parties. Therefore, mediation files and regular court files have to be kept separate as well – unless all mediation parties renounce the separation.

In principle, the mediation parties are free to agree on procedural rules for the mediation proceedings. This may for good reasons also imply the agreement that no participant of the mediation proceedings including the mediator may be named as witness should the court proceedings have to be continued.

Para. 2:

A judge performing working as mediator still acts as part of the judiciary as that he/she is entitled to record a settlement according to Art. 54 para. 3.

Para. 3:

Mediation can only be offered by a person who is trained to conduct mediation in a professional manner as may legitimately be expected by the parties. Therefore, at each administrative court at least one judge should receive respective training. It is assumed that until now no legally binding training curricula have been developed in the Republic of Croatia. Therefore, respective standards should be developed as well as measures to ensure the quality of mediation as stipulated in Art. 4 of the directive mentioned above. For the meantime, training abroad should as well be considered.

Last but not least: A judge who got acquainted with the principles of mediation, in particular with the method of looking at the interests behind a legal dispute, will be able to integrate this broader approach as “mediative element” in normal court proceedings – with a higher chance to broker an amicable settlement (Art. 54).

Article 56 Suspension of proceedings

The ratio legis of this provision is to give the parties time for negotiations for a settlement (para. 1) or to prevent that several courts or administrative bodies decide on the same issue (para. 2).

Para. 1:

On respective motions by the plaintiff, the defendant or third parties summoned under Art. 22 para. 2 to 4 (but not parties summoned under Art. 22 para. 1), the court has to suspend the proceedings until one of these parties demands to continue with the proceedings. The provision also applies if the court proposes to suspend the proceedings and all aforementioned parties agree.

Para. 2 No 1:

A preliminary issue is an issue that is of legal relevance for the decision of the case (e.g. the question of Croatian citizenship if a person claims a right which only is granted to Croatian citizens). The court has the choice ("may") whether to decide this question on its own or to suspend the proceedings, if this question is subject to other already pending proceedings before another court or an administrative body. Insofar considerations of expedience may be considered. If the issue has already been decided by another court or administrative body as an operative part of the decision the administrative court is bound (prejudicial res iudicata effect), provided that this decision is final. This may be the case for instance in decisions concerning the status of persons (e.g. Croatian citizenship, validity of a marriage).

It is not required, that the parties of the proceedings pending at the administrative court and the parties of the proceedings pending at another court or administrative body are identical.

Para. 2 No 2:

If an action according to Art. 19 is pending before the Supreme Administrative Court, another administrative court or another chamber of the Supreme Administrative Court may suspend its proceedings if the same general act is relevant for its decision as well. A decision of the Supreme Administrative Court to declare the relevant general act null and void would have erga omnes effect (Art. 75 para. 2) so that any administrative court – like every other institution or person – would be bound by such a decision.

If – on the contrary – the Supreme Administrative Court holds that the challenged general act is lawful, this decision would have no erga omnes effect and would therefore not bind another administrative court. In this case, the court could incidentally (cp. comments on Art. 19) examine the legality of the general act and also deviate from the legal opinion of the Supreme Administrative Court that the relevant general act is lawful, especially if new legal aspects arise in the proceedings before the other court which have not been dealt with by the Supreme Administrative Court.

Article 57 Pilot proceedings

The aim of this provision is the simplification of the proceedings in so called "mass-proceedings".

Para. 1:

The simplified procedural provisions provided for mass proceedings (para. 2 and 3) apply, if more than twenty first instance proceedings are directed against the same administrative act or if the same legal question arises in more than twenty first instance proceedings. Para .1 is only applicable if several cases are pending before the same chamber. If the cases are pending before different chambers, the chamber can try to proceed according to Art. 56 para. 1 in order to suspend some of these proceedings. This, however, requires respective motions by or the approval of the parties.

It is at the discretion of the court whether it applies Art. 57 at all. The same applies to the decision how many and which of the cases it chooses as pilot proceedings. Both the choice of the pilot cases as well as the suspension of the other proceedings has to be decided in one (non-appealable) ruling. The ruling has to enumerate all respective proceedings.

Para. 2:

After the decisions on the pilot proceedings have become final, the suspended proceedings have to be settled. In many cases the parties – depending on the outcome of the pilot proceedings – will react with a withdrawal of the action (Art. 51), an acknowledgement (Art. 52) or a court settlement (54), if they are informed about the outcome of the pilot proceedings. For the remaining cases, Para 2 enables the court to decide these cases without oral hearing without the consent of the parties (cp. also Art. 46), if the requirements para. 2 are met. The parties have to be heard in advance. The hearing of the parties does not necessitate an oral hearing but can take place in written form

Para. 3:

The main advantage provided by Art. 57 is the possibility to use evidence established in the pilot proceedings in the suspended proceedings. As a consequence, the court may dismiss a motion for the taking of evidence relating to facts on which evidence has already been established in pilot proceedings if the court unanimously holds that the admission of such evidence would not contribute to the establishment of new relevant facts. The refusal to admit new evidence does not necessitate a separate decision but may be contained in the judgment according to para. 2.

Part 7 Decisions

Article 58 Types of decisions

The distinction between judgments and rulings is of substantial importance as at least partially different provisions apply to these two types of decisions, e.g. as to the necessity of an oral hearing (Art. 45 para. 1 and 2 Art. 45 para. 3), legal remedies (Art. 77 and Art. 81) or the statement of reasons (Art. 63 para. 1 and Art. 76).

A judgment is a decision which concludes the main proceedings before a court instance (para 2 sentence 1). Para. 2 sentence 2 clarifies that this also applies to the

decision on an inadmissible action. This provision avoids possible conflicts with regard to Art. 6 ECHR.

All decisions that are not taken by judgment are taken by ruling. Rulings e.g. are issued in provisional proceedings (Art. 88 et seq.), in proceedings on the determination of costs (Art. 105 and 106), and in enforcement proceedings (Art. 113 et seq.). The same applies to the conclusion of proceedings that do not end with a judgment (e.g. Art. 51 para 3) and decisions on procedural matters (e.g. Art. 5 para. 2, 22 para. 6, Art. 41 para. 2 No 2, Art. 56, Art. 57 para. 1).

Article 59 Basis of decisions

The provision refers to the establishment of facts and the consideration of evidence as well as to the assessment of legal questions.

The court is free in its consideration of evidence. In principle, there are no strict rules that the court would have to follow like e.g. that matching testimony by two witnesses outweighs the testimony of one witness. This includes all means of evidence (as witnesses, experts, documents etc.) and the results of the investigations of the court itself. The reference to the overall result of the court proceedings means that the court has to summarize and weigh the evidence taken and has to substantiate its decision on the establishment of facts. Of course, the court may only take into consideration facts and evidence that were introduced into the proceedings and on which the parties were given an opportunity to comment (Art. 35 para. 2, Art. 50 para. 2).

The courts of first instance are not bound by the legal opinion of the Supreme Administrative Court or any other higher court except in cases which have been referred back to the administrative court (Art. 78 para. 3 sentence 2) and in the case of Art. 75 para. 2. This also applies to the Supreme Administrative Court. On the other hand each deviation from the decision of a higher court should be carefully considered, since such a deviation is a valid reason for an appeal (Art. 77 para. 1 No 3). Therefore, a deviation from the legal opinion of the Supreme Administrative Court should only be considered if there are new facts, legal provisions or new arguments the higher court did not take into account.

Article 60 Composition of the bench

Ratio legis is the protection of the principle of orality of proceedings (Art. 45), the principle of direct perception of evidence by the court (Art. 50) and the right to be heard (Art. 35). In addition to that, para. 1 complements Art. 59.

The provision only applies, if an oral hearing has taken place. If several hearings were conducted, the decision (= judgment or ruling, cp. Art. 58 para. 1) has to be taken by the judges who participated in the last hearing. The oral hearing, on which a decision is based, is the hearing directly before the decision is taken.

If the parties consent with a decision without oral hearing, para. 1 does not apply, even if an oral hearing has taken place before the consent was given. In this case the decision is not based on an oral hearing. The decision is taken by the judges who participated in the deliberations.

A violation of para. 1 is a procedural deficiency in the sense of Art. 77 para. 1 No 4. It has to be presumed that the challenged judgment is based on this deficiency.

Article 61 Deliberation and voting

Para. 1:

Decisions are taken by majority vote. All judges have to vote, an abstention is not admissible.

Para. 2:

Separate minutes of the deliberations and the voting are kept. In order to protect the confidentiality of deliberations, these minutes are exempt from access to court files (Art. 42 para. 2).

Para. 3:

Para. 3 limits the presence of persons at the deliberations and voting in order to prevent undue influences on the deciding judges and in order to protect the confidentiality of deliberations.

Article 62 Issuing of decisions

Art. 62 regulates how decisions are issued, i.e. how they come into existence. The provision distinguishes between decisions based on an oral hearing (para. 1 to 4) and decisions that are not based on a hearing (para. 5).

The public pronouncement of judgments is protected by Art. 6 ECHR.

Para. 1 to 3:

As a rule, decisions (= judgments and rulings, Art. 58 para. 1) based on an oral hearing are pronounced on the day the oral hearing has been closed (para 1). If a court has several hearings on the same day it is at the discretion of the court whether it deliberates and votes on the case after each hearing and then immediately pronounces the decision in open court or if it does so after all cases have been heard.

If for complex cases the court needs more time for its deliberations it can postpone the public pronouncement for up to 15 days (para. 2). The date for the pronouncement has to be announced immediately after the hearing has been closed.

If all parties consent, the court can serve the written decision upon the parties (para. 3). In this case the decision is not publicly pronounced. This exception like Art. 45 para. 2 (consent with a judgment without oral hearing) is in line with Art. 6 ECHR.

Para. 4:

The court not only has to pronounce its decision but also to prepare a written judgment in which it lays down the reasons for its decision (cp. Art. 63 para. 4). In order to guarantee that the judges still remember all facts of the case when they prepare the written judgment, para. 4 sets the court a deadline of thirty days for the preparation and the sending out of the written decision. In exceptional cases the court president can prolong the deadline by another thirty days.

Para. 5:

Decisions that are not based on an oral hearing are not pronounced but served upon all parties.

Para. 6:

The provision clarifies that the parties receive authenticated copies of the written decision. The signed original (cp. Art. 63 para. 7) remains in the court files.

Article 63 Content of decisions

The provision contains formal requirements that the written decision has to fulfil.

Para. 3:

The operative part of a decision is the most important part of the decision; it contains the holding of the court. For examples for the formulation of the operative part for the different types of actions please refer to the comments on Art. 66 to 70.

Para. 4:

Art. 6 ECHR demands that the court gives reasons for its decision. The statement of reasons has several purposes:

- The statement of reasons enables the parties (and also a higher court instance) to review the decision of the court: on which facts did the court base its decision? Which legal provisions did the court apply? Which legal arguments were decisive for its decision.

- Court decisions of a higher court instance also serve as guidelines for administrative bodies and lower courts. The statement of reasons gives them explanations for the decision of further cases.

In the statement of reasons the court has to respond to the main legal arguments of the parties.

Para. 5:

Para. 5 allows the court to replace the legal reasoning by a reference to the legal reasoning in

- the challenged administrative act,
- the challenged decision on an objection (Art. 110 et seq. LGAP) or a complaint (Art. 134 et seq. LGAP),
- another court decision which has to be attached,

provided that the court follows the legal arguments of this act/decision.

The provision spares the court unnecessary work but still enables the parties to inform themselves which legal arguments were decisive for the decision of the court. Therefore, para. 5 is in line with Art. 6 ECHR.

Art. 76 para. 1 and 2 contain further exceptions for rulings regarding the legal reasoning.

Para. 6:

Every decision of an administrative court has to inform the parties about the admissible legal remedy, the applicable deadline and the court at which the remedy has to be lodged. If the information is missing, incomplete or wrong, Art. 25 para. 3 applies.

Article 64 Correction of obvious errors

Para. 1:

Once a court decision is issued (Art. 62) it not only binds the parties but also the court. Therefore, as a rule, the court is not allowed to change its decision. Para. 1 deviates from this principle, allowing the court to correct obvious errors. These comprise errors in names and numbers, spelling and calculation as well as comparably obvious errors.

Para. 1 does not allow the correction of the content of a decision. The provision only applies to errors in declaration not to errors in the decision making process. The declaration of the court has to deviate from what the court wanted to declare.

Examples:

- The action aims at a monthly pension of 3.000,- HRK. In the operative part of the judgment the court orders the administrative body to grant the plaintiff a pension of 2.500,- HRK. From the statement of reasons it follows that the court wanted to grant the plaintiff a pension according to the petition.

In this case, the error can be corrected according to Art. 64 para. 1.

- The action aims at a monthly pension of 3.000,- HRK. In the operative part of the judgment the court orders the administrative body to grant the plaintiff a pension of 2.500,- HRK. From the statement of reasons it follows that the court is of the opinion that the plaintiff can only claim 2.500,- HRK per month.

If the court finds out after it has issued the decision (Art. 62) that this decision was wrong, it can not correct this error according to Art. 64 para. 1. The plaintiff would have to file an appeal in order to receive a higher pension.

An error is “obvious”, if it can easily be detected, especially from the judgment itself or the files.

Obvious errors can be corrected anytime, ex officio or upon a respective motion by the parties. The decision on the motion falls into the jurisdiction of the court that has issued the erroneous decision and is taken by ruling. Respective rulings by a court of first instance can be challenged by complaint (Art. 81 para. 1). Before the decision on the correction is issued, the court should hear the parties (sentence 2).

Para. 2:

A reference to the ruling on the correction has to be made on the original and on each authenticated copy. For this purpose the court has to ask the parties to send their authenticated copies back to the court.

Article 65 Complementation of decisions

Art. 65 also deviates from the principle that the court is not allowed to change its decision once it has been issued (cp. comments on Art. 64). Art. 65 para. 1 and 2 enable the court to complement an incomplete decision, i.e. if the court forgot to decide on a (part of a) petition filed by the parties (para. 1) or if it forgot to decide on the apportionment of costs (para. 2).

The court only may complement its decision upon a petition by the parties. The petition has to be filed within 15 days from the service of the incomplete decision (para. 1 and 2). The decision on the motion falls into the jurisdiction of the court that has issued the incomplete decision.

Para. 1:

The decision on the complementation has to be taken in the same form as the incomplete decision. In case of an incomplete judgment, the court has to decide on the complementation by judgment as well. This also implies that the decision has to be based on an oral hearing (Art. 45 para. 1). However, Art. 45 para. 2 and Art. 46 which enable the court to decide by judgment without oral hearing also apply. In case of an incomplete ruling, the court decides on the complementation by ruling as well; in this case an oral hearing is not necessary (Art. 45 para. 3).

If a court of first instance decides on the complementation, the respective judgment or ruling can be challenged by appeal (Art. 77) or complaint (Art. 81) respectively.

Para. 2:

Para 2 contains an exception to para. 1: If the court has not decided on the apportionment of costs (cp. Art. 93), it may decide on the complementation without oral

hearing by ruling (cp. Art. 45 para. 3), regardless whether the incomplete decision is a judgment or a ruling.

According to Art. 94 this decision can only be challenged together with the decision on the merits.

Before Articles 66 to 70

Art. 66 to 70 correspond to Art. 12 No 1 to 5 (types of actions, cp. the respective comments). They regulate the content of the operative part of the judgment for each type of action. In certain cases also a combination of different types of actions and respective operative parts of the decision are possible (cp. Art. 66 para. 2 which contains an example for such a combination).

In addition to the decision on the merits, every judgment has to contain a decision on the apportionment of costs (Art. 93 para. 1). The examples below (cp. comments on Art. 66 to 70) refer to typical cases. In any case, administrative bodies bear their own costs regardless of the outcome of the proceedings (Art. 95 para. 4).

In many cases the factual situation or the relevant legal provisions change while a case is pending at the court.

Examples:

a) A drives a car with 0.7 ‰ for the fifth time in three years. In accordance with the law, the administrative body repeals A's driver's license for one year. A files an action with the aim to repeal this act (Art. 12 No 1). Three months after the issuing of the challenged act, the law is changed to the extent that driving a car up to 0.8 ‰ is legal. The court decides the case 10 months after the challenged act was issued.

b) B applies for a pension for invalidity. The administrative body based on an expert opinion rejects the application. B files an action with the aim to order the administrative body to grant him a pension. While this action is pending, B has an accident with severe injuries. A new expert opinion comes to the result that he now is invalid.

c) C applies for a building license. The administrative body rejects his application in spite of the fact that the applicable law grants him a respective claim. C files an action with the aim to order the administrative body to issue him the respective license. While the action is pending the material law is changed; according to the new provisions the building project would be illegal.

These cases demonstrate that it makes a difference whether the case is decided based on the factual and legal situation at the moment the administrative act was issued or whether the decision is based on the factual and legal situation in the moment the court decides.

The Law on Administrative Court Procedure does not contain explicit rules for this problem. Sometimes the material law contains transitional provisions that solve this question. However, in most cases respective provisions do not exist. In these cases, the problem has to be solved by interpreting the law applicable in the concrete case.

Based on the applicable law, German courts have developed the following principles that can serve as broad guidelines:

- As to actions for the repeal of an administrative act as a rule the date of the issuance of the latest administrative decision (if an objection procedure is foreseen this would be the decision on the objection) is decisive. This follows from the nature of an administrative act which determines legal positions in individual cases and is characterised by the circumstances in the moment of the decision. The above mentioned principle also follows from the nature of the action of repeal which serves the control of administrative decisions by the courts. Therefore, in these cases later changes in the factual or legal situation as a rule are irrelevant for the decision of the court. Thus, in example a) the later change of the law does not help the plaintiff.

However, there are many exceptions to this rule, e.g. for administrative acts with permanent effectiveness (e.g. the prohibition of certain activities); in these cases the date of the court decision is decisive.

- As to actions for the issuance of an administrative act (Art. 12 No 2) as a rule the date of the court decision is relevant. This follows from the nature of this action which – unlike the action for the repeal of an administrative act – does not so much serve the control of administrative decisions but the realisation of individual claims. At the same time, this principle avoids further court proceedings and is thus strengthening the effectivity of judicial review: If the moment of the last administrative decision would be decisive, the court would have to reject the claim. However, because of the changed legal situation the plaintiff could initiate new administrative proceedings and – if the application would be rejected anew – file a new action.

Therefore, in cases b) and c) the changes in the factual or legal situation are relevant for the decision of the court. In case b) the court has to order the administrative body to grant the pension from the moment on the plaintiff is invalid. In case c) the court has to reject the action for the issuance of the building license; the plaintiff can at most claim damages because of the unlawful refusal of the administrative body to issue the license.

To this principle there are exceptions as well: The most important exception concerns cases where the law grants a certain amount for a certain period of time like e.g. for the salary of public servants. In this case the provision(s) which regulate(s) the respective period of time is/are applicable.

- As to actions for performance (Art. 12 No 4) and declaratory actions (Art. 12 No 5) as a rule the date of the decision of the court is relevant as well.

The question which moment is decisive has great implications for the submissions of the parties as well as for the duty of the court to establish facts (Art. 36). If changes in the factual or legal status of a case are relevant for the decision of the court, the parties should include them into their submissions to the court. If the court hears about such changes, it has to establish the relevant facts ex officio (Art. 36).

Article 66 Operative part of the judgment – action for the repeal of an administrative act

Para. 1:

A judgment on an action for the repeal of an administrative act (Art. 12 No 1) repeals the challenged disadvantageous administrative act and a respective decision on an objection to the extent that the act is unlawful and violates the rights or legal interests of the plaintiff. The court does not order the administrative body to repeal the act but repeals this act itself in its judgment. An additional decision of the administrative body is not necessary.

Examples for the plaintiff's petition and the operative part of the judgment:

a) Complete repeal

Examples: Payment of fees, revocation of a driving licence, order to tear down a building

aa) Petition

The plaintiff proposes to repeal the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (administrative body), issued …. (date).

bb) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are repealed.

The defendant has to bear the costs of the proceedings.

If no second instance procedure is foreseen, the part concerning the second instance decision is to be left away. This also applies for the following examples.

b) Partial repeal (limited petition)

Example: order to tear down a garage and a house, the plaintiff accepts the order concerning the garage but not the order concerning the house

aa) Petition

The plaintiff proposes to repeal the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (administrative body), issued …. (date) insofar as the tearing down of the house in A-street x in B-town is ordered.

bb) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are repealed insofar as the tearing down of the house in A-street x in B-town is ordered.

The defendant has to bear the costs of the proceedings.

c) Partial repeal (unlimited petition)

Example: order to pay a fee, the plaintiff challenges the administrative act completely but the action has only partial success

aa) Petition

unlimited petition, wording like a) aa)

bb) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are repealed insofar as the determined amount exceeds …. HRK. Besides this, the action is dismissed.

The plaintiff has to bear x/10 of the court fees, the defendant x/10 of the court fees and x/10 of the plaintiff's costs.

Para. 2:

The judgment under para. 1 may be combined with the order to reverse the implementation of the administrative act (e.g. the return of a confiscated weapon, driver's license etc.) if the plaintiff files a respective petition. This additional petition may be filed simultaneously with the petition for the repeal of the administrative act or in the course of the proceedings. The provision enables the plaintiff to pursue both aims in the same proceedings, and avoids the inefficient necessity of two subsequent proceedings. Para. 2 is lex specialis to para. 3.

The court has to order the complete or partial reversal of the administrative act to the extent that this is possible and proportional. If the reversal is impossible or unproportional the petition has to be dismissed. In this case, claims for damages remain unaffected.

Example for the plaintiff's proposal and the operative part of the judgment:

a) Petition

The plaintiff proposes to repeal the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (administrative

body), issued …. (date) and to order the …. (first instance administrative body) to return the plaintiff's driver's license.

b) Operative part of he judgment

The administrative act of ….(first instance administrative body), issued …. (date), and the second instance decision of …. (administrative body), issued …. (date), are repealed.

The …. (first instance administrative body) is ordered to return the plaintiff's driver's license.

The defendant has to bear the costs of the proceedings.

Article 67 Operative part of the judgment – action for the issuance of an administrative act

Para. 1:

If the court accedes to an action for the issuance of an administrative act (Art. 12 No 2) it does not issue the requested administrative act itself but orders the administrative body to issue this act. The principle of division of powers as well as practical reasons favour this solution: According to the principle of division of power administrative measures are taken by the administration while the courts are "only" responsible for an effective legal review of such measures. And in many cases the courts do not have the "technical" knowledge necessary to issue an administrative act themselves, e.g. if a building license for a big building or an industrial plant has to be issued. If the administrative body does not follow the court's order, the plaintiff may file a motion to enforce the court's decision (Art. 107 et seq.).

For the success of an action for the issuance of an administrative act it is only decisive whether the plaintiff has a claim that the requested administrative act is issued. Therefore, deficiencies in the administrative proceedings or formal deficiencies of the administrative act that rejected the plaintiff's application do not lead to the success of the action.

If the court decides on an action for the issuance of an administrative act, it has by all means to decide on the merits (except in cases falling under para. 2). The court may not confine its examination to the question whether the reasons the administrative body gave for its decision are in line with the law and if not refer the case back to the administration. This also applies if the administrative body did not establish all the facts of a case because it negated one of several requirements for the issuance of an administrative act.

Example:

A applies for a building license. The administrative body rejects the application with the argument that his premises are situated in a nature reserve. The court holds that this is not the case.

In this case the court has to examine whether all other requirements for the issuance of the requested license are met. If the respective facts have not been established by the administrative body the court has to establish them itself and – if necessary – take evidence (e.g. site inspection).

Example for the plaintiff's petition and the operative part of the judgment (e.g. issuance of a building license, issuance of a residence permit for foreigners):

a) Petition

The plaintiff proposes to repeal the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) and to order the …. (first instance administrative body) to issue a building license for the premises on A-street x in B-town on the basis of the plaintiff's application from …. (date).

b) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are repealed. The …. (first instance administrative body) is ordered to issue a building license for the premises on A-street x in B-town on the basis of the plaintiff's application from …. (date).

The defendant has to bear the costs of the proceedings.

Para. 2:

Para. 2 is a further consequence of the principle of division of powers. It refers to the case that the rejection of the requested administrative act is unlawful because the administrative body has incorrectly exercised its discretion. Because of the principle of division of powers the court may not replace the discretionary decision of the administrative body by its own discretionary decision. Instead, the court has to refer the case back to the administrative body and has to order it to take a new discretionary decision with regard to the legal opinion of the court.

Example for the plaintiff's petition and the operative part of the judgment:

a) Petition

The plaintiff proposes to repeal the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) and to order the …. (first instance administrative body) to take a new decision on the plaintiff's application from …. (date) with regard to the legal opinion of the court.

b) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), is-

sued …. (date) are repealed. The …. (first instance administrative body) is ordered to take a new decision on the plaintiff's application from …. (date) with regard to the legal opinion of the court.

The defendant has to bear the costs of the proceedings.

An exception only applies if the discretion of the administrative body is reduced to nil. This is the case if only one of the theoretically possible discretionary decisions would be legal and all other decisions illegal. In this case no discretion is left so that the court has to order the administrative body to issue the requested administrative act.

Article 68 Operative part of the judgment – action on the declaration of the unlawfulness of a ceased administrative act

Regarding the aim and the admissibility of the action on the declaration of the unlawfulness of an administrative act that has lost its legal consequences as well as regarding respective examples it is referred to the comments on Art. 12 No 3.

Example for the plaintiff's petition and the operative part of the judgment:

a) Petition

The plaintiff proposes to declare that the administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are unlawful.

b) Operative part of the judgment

The administrative act of …. (first instance administrative body), issued …. (date), and the second instance decision of …. (second instance administrative body), issued …. (date) are declared unlawful.

The defendant has to bear the costs of the proceedings.

Article 69 Operative part of the judgment – action for performance

Regarding the aim and the admissibility of the action it is referred to the comments on Art. 12 No 4.

The action is successful if a legal basis (e.g. a legal provision or an administrative contract) for the claim of the plaintiff exists and it the requirements as defined by the legal basis are met. If a claim is based on an administrative contract, the administrative body may also be the plaintiff and other parties may be the defendant (cp. comments on Art. 21).

Example for the plaintiff's petition and the operative part of the judgment:

a) Petition

The plaintiff proposes to repeal the decision on the complaint of …. (administrative body), issued …. (date) and to order the defendant to pay the plaintiff 4000,- HRK per month, beginning on 1 May 2008.

b) Operative part of the judgment

The decision on the complaint of …. (administrative body), issued …. (date) is repealed. The defendant is ordered to pay the plaintiff 4000,- HRK per month, beginning on 1 May 2008.

The defendant has to bear the costs of the proceedings.

Article 70 Operative part of the judgment – declaratory action

Regarding the aim and the admissibility of the action it is referred to the comments on Art. 12 No 5.

Examples for the plaintiff's petition and the operative part of the judgment:

a) Declaration of the existence/non-existence of a legal relationship (Art. 12 No 5 alt. 1)

Example: An innkeeper wants to put tables and chairs on the sidewalk in front of his café. He is of the opinion that the license for his café includes a respective right. The administration does not accept his position and tells him to apply for an extra license.

aa) Petition

The plaintiff proposes to repeal the decision on the complaint of …. (administrative body), issued …. (date) and to declare that his license to run a café in A-street x, B-town includes the right to put 10 tables and 40 chairs on the sidewalk in front of his café.

bb) Operative part of the judgment

The decision on the complaint of …. (administrative body), issued ….(date) is repealed. It is declared that the license of the plaintiff to run a café in A-street x, B-town includes the right to put 10 tables and 40 chairs on the sidewalk in front of his café.

The defendant has to bear the costs of the proceedings.

b) Declaration for the nullity of an administrative act/administrative contract (Art. 12 No 5 alt. 2)

aa) Petition

The plaintiff proposes to repeal the decision on the complaint of …. (administrative body), issued …. (date) and to declare the administrative act of …. (first instance administrative body), issued …. (date,) and the second instance decision of (second instance administrative body), issued …. (date), to be null and void.

bb) Operative part of the judgment

The decision on the complaint of …. (administrative body), issued ….(date) is repealed. The administrative act of …. (first instance administrative body), issued …. (date,) and the second instance decision of (second instance administrative body), issued …. (date), is declared to be null and void.

The defendant has to bear the costs of the proceedings.

Article 71 Operative part of the judgment – complementary provisions

Para. 1:

Para. 1 contains a special provision for actions for the issuance of an administrative act (Art. 67 para. 1). For reasons of procedural economy the court may restrict its decision to the question if the claimed right to payment of money exists as such, if only this question is disputed by the parties and leave the decision on the amount of the payment (e.g. pension or other social benefit) to the administrative body.

After a judgment issued under para. 1 has become final the administrative body has to issue an administrative act containing the decision on the amount of the payment. If the plaintiff is not content with this decision, he/she may challenge this decision by filing a new action for the issuance of an administrative act.

Para. 2:

Para. 2 stipulates that if the plaintiff wins an action that is aimed at the payment of money or at the issuance of an administrative act that is aimed at the payment of money, the defendant has to pay interest on the disputed amount. The obligation begins with the pendency of the claim (Art. 31 para. 4). The duty to pay interest can be seen as a generalized compensation for damages suffered through the unlawful behaviour of the defendant. Para. 2 does not exclude the claiming of further damages.

Para. 3:

Para. 2 applies mutatis mutandis if the repeal of an administrative act results in an obligation to pay or refund money.

Article 72 Control of discretion

Because of the principle of division of powers the administrative court must not exercise discretion instead of the administrative body but may only examine whether the discretion has been exercised according to the law. This legal principle does not only

apply to actions for the issuance of an administrative act (cp. Art. 67 para. 2), but to all cases in which an administrative body is empowered to exercise discretion.

If in the case of an action for the repeal of an administrative act (Art. 12 No 1) an administrative body has unlawfully exercised its discretion, the court has to repeal the administrative act. In this case the administrative body may issue a new administrative act if the legal requirements (especially deadlines) can still be met.

An exception applies, if the discretion is reduced to nil (cp. comments on Art. 67 para. 2), i.e. if among the several theoretically possible discretionary decisions only the one chosen by the administrative body is lawful. In this case the court has to reject the action.

For actions for the issuance of an administrative act (Art. 12 No 2) Art. 67 para. 2 applies.

For actions for the declaration of the unlawfulness of a ceased administrative act (Art. 12 No 3) the court has to examine whether the exercise of discretion was lawful. If this is not the case, the court has to declare that the challenged act was unlawful (compare comments on Art. 68).

For actions for performance (Art. 12 No 4) Art. 67 para 2 applies mutatis mutandis.

Sentence 1:

No 1 concerns the case that an administrative body did not exercise its discretion at all. This fault mostly happens, if the administrative body did not recognise that a decision is at its discretion.

No 2 concerns the violation of the statutory limits of discretion. Such limits can stem from the provision which authorises an administrative body to exercise discretion (example: to raise a fee between 100 and 300 HRK) or from general legal principles, especially constitutional law (e.g. fundamental rights or the principle of proportionality).

No. 3 refers to the ratio legis of the provision which authorises an administrative body to exercise discretion.

In order to decide whether discretion was exercised lawfully the court has to examine the statement of reasons of the challenged administrative act or other respective clues (e.g. written notes in the administrative files).

Sentence 2:

The ratio legis of this provision is to increase the efficiency of court proceedings: Without the provision, the court would have to repeal an administrative act if the reasoning for the exercise of discretion is insufficient. In this case the administrative body could take (action for the repeal of an administrative act) respectively would have to take (action for the issuance of an administrative act) a new decision which could be challenged before an administrative court anew. Sentence 2 enables the

administrative body to amend its reasoning in order to prevent repeated court proceedings. If the plaintiff recognizes that the new reasoning is sufficient he/she can – in order to prevent the rejection of the action and in order to prevent that he/she has to bear the costs of the proceedings (cp. Art. 95 para. 1) – withdraw the action and file a motion that the administrative body has to bear the costs (cp. Art. 97 para.1 sentence 2).

However, sentence 2 only applies if discretion has been exercised at all. The wording of the provision ("amend") allows the completion or exchange of parts of the reasoning for the exercise of discretion but not the exercise of discretion for the first time. In the latter case, sentence 1 No 1 applies.

Article 73 Violation of procedural rules

The ratio legis of this provision is to increase the efficiency of court proceedings: According to Art. 66 para. 1 a disadvantageous (cp. comments on Art. 12 No 1 and Art. 66 para. 1) administrative act has to be repealed, if this act is unlawful and violates the rights of the plaintiff. An administrative act not only is unlawful if it violates material law but also if in the process of the issuance of such an act procedural provisions were violated. Respective procedural provisions are either codified in the Law on General Administrative Procedure or in other administrative laws.

Courts are not obliged to examine all legal issues of a case. If a court finds out that for one reason a challenged administrative act is unlawful, it may repeal this act without having to examine whether this act was also unlawful for other reasons. In principle, there are no objections against this efficient working method. However, because of this working method a court will in most cases repeal an administrative act because of a procedural deficiency without even examining whether it is in line with material law.

The repeal of an administrative act for the sole reason that procedural rules were violated does not really help the plaintiff. The res judicata effect (cp. Art. 75 para 1) of such a court decision does not extend to questions of material law, because the court did not decide on these questions. Therefore the administrative body could issue the same disadvantageous administrative act again. If the plaintiff is still of the opinion that this act violates material law, he would again have to file an action.

Therefore, Art. 73 stipulates that the violation of procedural rules alone shall not justify the repeal of an administrative act if it is obvious that the violation has not influenced the result of the decision. Because of this rule the court in these cases has to examine the question that the parties in most cases are only interested in – whether the challenged administrative act is in line with material law.

If Art. 73 applies, the court may impose a part or all costs of the proceedings on the administrative body (Art. 102). Concerning the ratio legis of this provision, it is referred to the comments on Art. 102.

Article 74 Operative part of the judgment – action for the control of the constitutionality and legality of general acts

Regarding the aim and the admissibility of this action it is referred to the comments on Art. 19.

Para. 1:

As the declaration of a general act as null and void has erga omnes effect (Art. 75 para. 2), the respective judgment has to be published in order to secure widespread information about the voidness of the respective provisions.

Para. 2:

The aim of this provision is to guarantee legal security in case that a general act is declared null and void by limiting the ex-tunc effect of such a declaration. Final judgments which are based on a general act that was declared null and void, remain unaffected by this declaration. Para. 2 excludes another legal review of respective judgments, be it via a motion to reopen the proceedings (cp. Art. 83) or in any other way.

However, respective decisions must not be enforced anymore, in so far the principle of the rule of law prevails.

Para 3:

The regulation applies to pending proceedings based on Art. 19. It aims at preventing severe disadvantages connected with the implementation of the general act before a decision on its constitutionality and legality has been taken by the Supreme Administrative Court.

Deviating from Art. 91 para. 1 No 1, Art. 74 para. 3 does not require a preliminary assessment of the success of the action by the court, since in many cases that would be too complex for preliminary proceedings. However, a temporary injunction may only be issued if this is indispensable to avoid grave and irreparable consequences. In order to decide whether this is the case the court has to weigh the advantages and disadvantages of the implementation of the general act.

Article 75 Res judicata effect

Para. 1:

Para. 1 contains the principle that final judgments have binding effect only inter partes and their legal successors. The provision applies mutatis mutandis to rulings to the extent that these can have a material binding effect (e.g. rulings in provisional proceedings).

Para. 2:

Deviating from para. 1, para. 2 stipulates that decisions that declare a general act null and void have erga omnes effect. Decisions with which an action according to Art. 19 is dismissed or rejected, do not fall under para. 2. This is adequate because of the danger that not all factual and legal implications of the general act were considered on the basis of the individual case submitted to the Supreme Administrative Court. Therefore, para. 2 does not prevent administrative courts, particularly courts of first instance, to "indirectly" (cp. comments on Art. 19) control the respective general act.

Article 76 Rulings

The Law on Administrative Court Procedure knows two types of decisions: judgments and rulings (Art.58). Concerning the distinction between the two it is referred to the comments on Art. 58. In principle, the same provisions apply for judgments and rulings (cp. Art 59 to 65). Art. 76 para. 1 contains exemptions regarding the statement of reasons.

Like Art. 63 para. 5, Art. 76 para. 2 allows the court to refer to the legal reasoning of a challenged ruling to the extent that it follows this legal reasoning.

Part 8 Legal remedies

Basically there are two types of judicial review of court decisions by a higher court instance: appeal and revision. The main difference between the two types is that in appeal proceedings the higher court is entitled to a full review of facts and law, while the revision court is restricted to the review of legal questions and cannot establish facts itself. Under the new Law on Administrative Court Proceedings the second instance court, the Supreme Administrative Court of the Republic of Croatia (Art. 4 para. 1), is an appeal court. This concept has the following substantial advantages:

- It provides a higher degree of certainty that the final decision is based on correctly established facts since not only one but two court instances fulfil this task.

- It avoids the "ping-pong-effect" (cp. comments on Art. 12 para. 5) between the two court instances, i.e. the back referral of cases to the lower court with the possibility that the case comes back to the higher court again. This "ping-pong effect" would result if the higher court instance would be confined to the review of legal questions because it would have to refer the case back to the lower court if it holds that the lower court has not established relevant facts or that procedural rules were violated during the establishment of facts.

The avoidance of the ping-pong effect leads to a reduction in the duration as well as the costs of court proceedings which suits both citizens and administrative bodies.

Article 77 Right to appeal

Para. 1:

Para. 1 grants the parties the right to appeal, but not without limitations. These limitations aim at the reduction of second instance proceedings in order to allow the Supreme Administrative Court to concentrate on cases that deserve a full review by a second court instance. Therefore an effective “filter” between court instances is needed, in order to eliminate cases of typically minor importance. This “filter” is provided by para. 1. The four reasons for admission stipulated in this provision allow the Supreme Administrative Court to reject cases by ruling that do not deserve a full second instance review.

On the other hand, the application of the reasons for admission should not be too restrictive, as otherwise the task of the Supreme Administrative Court – the unification and development of case law as well as the review of first instance decisions for the sake of individual justice – could not be sufficiently fulfilled. Therefore, the requirements for the admissibility of an appeal should be assumed to be met, if it cannot be established without substantial effort that they are not met.

In administrative court proceedings, appeals cannot be limited based on the value of the claim: Firstly, in administrative court proceedings the value of a claim often cannot be reliably determined because deviating from civil proceedings many administrative court proceedings are not aimed at the payment of money but at the determination of non-monetary rights and duties (e.g. citizenship, residence permit for foreigner, building license, license to run a business). And secondly, even if a claim is of relatively minor value, the decisions of administrative courts may nevertheless have an enormous impact for public administration and state finances because the case may have pilot function for thousands of similar cases, especially but not constrained to cases concerning tax or social matters. As administrative bodies are expected to observe final decisions issued by administrative courts in comparable cases as well, many decisions of administrative courts tend to have far broader impacts on public administration and state finances than could have been assumed when considering only the financial dimension of the individual case.

On the other hand, a limit based on the value of the case would not allow the Supreme Administrative Court to fulfil its task to unify and to develop case law, since a lot of important cases would not even reach this court.

No 1:

As a rule, serious doubts as to the lawfulness of a judgment exist if the result of the judgment of the court of first instance seems more likely to be unlawful than lawful. The respective decision is, however, no mathematical operation, so that the appeal should also be allowed based on No 1 if the success of the appeal seems to be open, especially if the case contains exceptional difficulties either concerning the facts of the case or the legal questions raised by it.

Serious doubts may not only result from an incorrect application of legal provisions but also from an incorrect establishment of facts. Incorrect “facts” cannot be the basis

of a lawful decision if these facts are relevant for the decision ("Da mihi factum, dabo tibi ius").

In order to decide the question whether serious doubts exist the Supreme Administrative Court does not have to examine the judgment as intensely as if it were deciding on the appeal itself, a summary examination is adequate and sufficient.

No 2:

No 2 aims at the unification and development of the case law by the Supreme Administrative Court. A case is of general importance

- if the legal questions concerning procedural or material law that are raised by the case are not only relevant for the individual case, but also for numerous other cases already pending or to be expected in the future, or

- if the decision on the case may have far-reaching consequences for the public, especially economic ones.

The concrete question at stake has to be relevant for the decision on the individual case. This is the case, if the Supreme Administrative Court cannot decide on the case without answering this question. Therefore, an appeal based on No 2 is not admissible if it aims at the solution of abstract legal problems or the removal of factual uncertainties.

As a rule, a case is not of general importance anymore, if established case law concerning the relevant legal questions has already been established. However, in such a case the Supreme Administrative court may admit the appeal if it considers to deviate from established case law.

No 3:

No 3 also aims at the unification of case law. The provision applies if the judgment of the court of first instance is based on an abstract legal opinion that deviates from a decision or a legal opinion of the Supreme Administrative Court or the Constitutional Court. Legal opinion in the sense of No 3 is a decision taken at a session of a court department or the general assembly of judges. These decisions do not decide on a concrete case but on an abstract legal question.

The deviation has to be relevant for the decision on the individual case. This is the case, if the Supreme Administrative Court cannot decide on the appeal without having to deal with the deviation.

No 4:

The term "procedural deficiency" in No 4 applies only to respective deficiencies in first instance court proceedings but not to respective deficiencies in administrative proceedings. Only a violation of provisions relating to court procedure may cause a relevant deficiency, i.e. primarily the provisions of this law and other laws referred to (e.g. the Civil Procedure Act, the Law on General Administrative Procedure, the Execution

Act), but also general procedural principles like e.g. the principle of fair trial (cp. comments on Art. 3 para. 1).

Other than procedural deficiencies, like violations of material law, are not relevant in this context.

Examples for relevant procedural deficiencies are:

- a judge who was excluded by law took part in the decision
- the right to be heard was not granted
- the decision was not based on a public oral hearing and the requirements of Art. 45 para. 2 or Art. 46 were not met
- the decision does not contain a statement of reasons
- a motion for the taking of evidence has been dismissed without or without legally sufficient reasons

No 4 only applies if the procedural deficiency may have influenced the decision of the court of first instance. This has to be assumed if such an influence seems possible, i.e. if doubts as to the possibility that the deficiency had an influence cannot be eliminated.

Para. 2 to 5:

If an appeal is lodged at the court of first instance (para. 2 sentence 1) the respective files have to be sent to the Supreme Administrative Court even in case the deadline for the filing of the appeal (para. 2 sentence 1) has not been kept. If the Supreme Administrative Court comes to the conclusion that the appeal is inadmissible for this or any other reason it has to dismiss the appeal by ruling (para. 4). Such other reasons may primarily be that none of the reasons of admission (para. 1 No 1 to 4) applies.

If one of the reasons of admission stated in para. 1 applies, a separate decision on the admissibility of the appeal is not required; this question has to be dealt with as part of the judgment on the appeal (cp. para. 5). However, the parties should be informed beforehand that the Supreme Administrative Court holds that the appeal is admissible and intends to decide on the merits. This information is demanded by the right to be heard (Art. 35 para. 1) and gives the parties the opportunity to complete their arguments regarding the merits of the case.

The intention of para. 3 is to provide the court with all information necessary to proceed with appeal proceedings as fast as possible. If these requirements are not met, the court may not dismiss the appeal as inadmissible.

With regard to judgments without oral hearing without consent of the party it has to be kept in mind that if the party lodges an appeal **and** applies for an oral hearing, the procedure is continued before the court of first instance (cp. Art. 46 para. 2 sentence 2).

Article 78 Complementary provisions

Para. 1:

Unless stipulated otherwise in Art. 77 to 80, the provisions for first instance proceedings also apply to appeal proceedings.

Art. 46 is not applicable in appeal proceedings: If the appeal is inadmissible, the court decides without oral hearing by ruling (Art. 77 para. 4, Art. 45 para. 3), so that Art. 46 is not needed. If the appeal is admissible, it is hardly conceivable that a case that passed the “filter” provided by Art. 77 para. 1 meets the requirements set in Art. 46.

Para. 2:

The full scale review of first instance judgments corresponds to the role of the Supreme Administrative Court as an appeal instance.

Since an appeal court can also establish facts, the parties as a rule may also submit new facts and evidence which the Supreme Administrative Court has to consider within the limits set by Art. 80.

Para. 3:

For reasons of procedural efficiency and in order to prevent unduly prolonged proceedings the Supreme Administrative Court as an appeal instance shall as a rule decide the case itself. However, appeal cases which based on the legal opinion of the Supreme Administrative Court necessitate an extensive establishment of facts may be referred back to the court of first instance (sentence 1). In this case the court of first instance is bound by the legal opinion of the Supreme Administrative Court when establishing the lacking facts (sentence 2).

Article 79 Public oral hearing in appeal proceedings

Para. 1:

As a rule, the Supreme Administrative Court may, but is not obliged to hold an oral hearing in appeal proceedings. This is in line with Art. 6 ECHR because – as a rule – this provision only demands an oral hearing in one court instance.

Para.2:

Para. 2 contains two exceptions from para. 1. These exceptions are necessary because of Art. 6 ECHR, which demands that if in second instance proceedings new facts or evidence are submitted or if new legal issue arise which are relevant for the decision of the case, an oral hearing has to be held.

No 1:

Regarding the submission of new facts and evidence that are relevant for the decision on the case it has to be distinguished between facts or evidence that came into

existence **after** the decision of the court of first instance was issued, and such facts or evidence that already existed **before** the decision of the court of first instance was issued. In the first case, an oral hearing as a rule is required. Facts and evidence that came into existence after the first instance decision was issued, cannot be rejected according to Art. 80. Insofar the party has a reasonable excuse (Art. 80 para. 1 No 2) since it was impossible to submit these facts or evidence within the deadline set by the court of first instance. However Art. 43 also applies in second instance proceedings (cp. comments on Art. 80) so that these facts or evidence could be rejected under this provision. In the second case (facts and evidence already existed before the first instance decision) it has to be examined whether these facts or evidence have to be rejected under Art. 80. If this is not the case, an oral hearing is required.

No 2:

If new legal aspects arise an oral hearing is required if these aspects are relevant for the decision of the case. Such new legal aspects may be introduced by the parties or the Supreme Administrative Court itself. Art. 80 does not apply to legal issues.

If according to No 1 or 2 an oral hearing is required, the Supreme Administrative Court may nevertheless decide without hearing if the parties consent (Art. 79 para 2 sentence 2, Art. 45 para. 2).

Article 80 Exclusion of late pleadings in appeal proceedings

Regarding the ratio legis of the exclusion of late pleadings it is referred to the comments on Art. 43.

In addition to Art. 80, Art. 43 also applies in appeal proceedings (Art. 78 para. 1). That means that the Supreme Administrative Court also may set the parties deadlines and reject late pleadings under this provision.

Para. 1:

Para. 1 concerns new facts and evidence which have not been submitted during first instance proceedings but are submitted for the first time in appeal proceedings. If the requirements under para. 1 sentence 1 are fulfilled the Supreme Administrative Court has to reject these new facts and evidence.

Para. 2:

Para. 2 concerns facts and evidence which were already submitted to the court of first instance and which were rejected by this court based on Art. 43. If this rejection was lawful, the Supreme Administrative Court also has to reject these facts and evidence. If the rejection by the court of first instance was unlawful, the respective facts and evidence have to be taken into consideration by the Supreme Administrative Court.

Article 81 Complaint

Unlike for appeals against judgments (cp. Art. 77 para. 1) there are no general reasons of admission to be fulfilled for complaints against rulings. Such general limitations are not adequate for complaint proceedings:

- Most complaint proceedings are less complicated than appeal proceedings because they often refer to only one legal question like e.g. a complaint against a ruling that denies the summons of a third party to join the proceedings (Art. 22), a complaint against a ruling that denies access to files (Art. 42) or a complaint against a ruling that imposes a fine (Art. 41 para. 2 No 2, Art 48 para. 1 sentence 2).

- Another main field for complaint proceedings are complaints against decisions in provisional proceedings (Art. 88 et seq.). In these proceedings the court already decides based on a summary examination of the case (Art. 89 para. 2, Art. 91 para 1 No 1). Besides, these proceedings have to be decided quickly.

In addition to that, the Law on Administrative Court Proceedings contains several provisions that exclude complaint proceedings altogether (e.g. Art. 5 para.2, Art. 22 para. 6, Art. 57 para. 1, Art. 81 para. 2).

Para. 1:

Only rulings of courts of first instance can be challenged with a complaint. Regarding the distinction between judgment and ruling it is referred to the comments on Art. 58. In many cases the admissibility of a complaint is excluded (e.g. Art. 5 para. 2 Art. 22 para. 6, Art. 57 para. 1, Art. 81 para. 2).

Rulings of the Supreme Administrative Court cannot be appealed at all.

Para. 2:

Rulings on the course of proceedings such as rulings on measures to prepare the oral hearing, on an adjournment, on the taking of evidence, on the combination or separation of proceedings etc. are non-appealable for reasons of efficiency: Otherwise the parties could endlessly delay the proceedings by challenging every single procedural decision. The exclusion of complaint proceedings in these cases does not leave the party without legal protection; respective violations can be claimed in appeal proceedings (cp. Art. 77 para. 1 No 4)

Para. 3 and 4:

Para. 3 and 4 contain formal requirements for lodging a complaint (deadline, formal requirements of the statement of complaint etc.) which are very similar to the respective provision on the formalities for lodging an appeal (cp. Art. 77 para. 2).

The intention of para. 4 is to provide the court with all information necessary to proceed with the complaint as fast as possible. If these requirements are not met, the court may not dismiss the complaint as inadmissible.

Article 82 Suspending effect of complaints

Para. 1:

Principally complaints do not have suspending effect except in cases falling under para. 2. Para. 1 enables the Supreme Administrative Court to order the suspending effect on a respective motion by the parties.

A motion under para. 1 is only admissible if the challenged ruling is enforceable. This requirement in many cases is not met because as a rule only final court decisions are enforceable (cp. Art. 108 No 1 and 2). In these cases a respective motion would be inadmissible.

However, a petition for ordering the suspending effect of a complaint may e.g. be of procedural relevance in provisional proceedings if the court of first instance has restored, ordered or declared the suspending effect of an objection or action against an administrative act according to Art. 89 para. 1 No 1 to 3. In such a case a party who has an interest in the immediate implementation of the challenged administrative act may file a motion under para. 1 with the aim to suspend this ruling. If the Supreme Administrative Court would accede to this motion and suspend the challenged ruling, the challenged administrative act could again be implemented.

The Supreme Administrative Court decides at its discretion. In its decision the Supreme Administrative Court should take into consideration the prospective outcome of the complaint as well as the factual consequences of the implementation of the challenged act respectively its non-implementation (cp. Art. 91 para. 1).

Para. 2:

The automatic suspending effect of a complaint against measures falling under para. 2 is justified because of the severe consequences of the implementation of these measures.

Para. 3:

Para. 3 contains an exemption to para. 2 and is necessary in order to guarantee the order at oral hearings as well as the immediate implementation of enforcement measures.

Part 9 Reopening of proceedings

Art. 83 to 87 take over Art. 52 to 59 LAD to which only minor changes were applied.

Art. 54 LAD was not adopted. Regarding the number of judges deciding on a motion for reopening, Art. 5 para. 1 and 2 apply.

Art. 58 LAD was not adopted either because its content is already covered by Art. 87.

Article 83 Reopening of proceedings

Art. 83 para. 1 No 1 to 5 adopt Art. 52 No 1 to 5 LAD.

Art. 52 No 6 LAD was not adopted. According to Art. 16 LAD a third person whose rights or legal interests could be infringed by the repeal of an administrative act is a party in respective court proceedings. For the reasons explained in the comments on Art. 22, this solution does not match with a reformative system. The ratio legis of Art. 52 No 6 LAD is the protection of third persons who fall under Art. 16 LAD. Consequently, Art 52 No 6 was not adopted.

However, this does not mean that a person whose rights or legal interests are affected by a court decision and who was not summoned to court proceedings (Art. 22) is without legal remedy. A third person who has not been summoned to the proceedings has not become a party in these proceedings (Art. 21 No 3). Therefore, this person is not bound by the court's decision (Art. 75) and could institute separate court proceedings against the administrative act which infringes his/her rights or legal interests.

Art. 83 para.1 no 6 to 8 contain reasons for the reopening of proceedings that are not foreseen in Art. 52 LAD. No 6 and 7 correspond to Art. 421 para. 1 No 1 CPA, No 8 to Art. 421 para. 1 No 3 CPA.

Article 84 Deadline for the filing of a motion for reopening

Art. 84 corresponds to Art. 53 LAD.

Article 85 Filing of a motion for reopening

Art. 85 corresponds to Art. 55 LAD. Para. 1 was adopted to the new two tier structure (Art. 4 para. 1).

Article 86 Decision on the motion for reopening

Art. 86 corresponds to Art. 56 and 57 LAD. Art. 56 para. 1 LAD was not adopted; the principle of mandatory oral hearing (Art. 45 para. 1) also applies to motions for the reopening of proceedings. However, inadmissible motions may be decided by ruling (para. 1) and thus without oral hearing (Art. 45 para. 3).

The deadline for the other party to answer on the motion (para. 2) was prolonged in accordance with Art. 34 para. 2.

Article 87 Complementary provisions

Art. 87 corresponds to Art. 59 LAD.

Part 10 Provisional proceedings

It is an indispensable requirement of effective legal protection to grant provisional court protection in order to provide an interim legal solution adequate to the legal interests of the parties until the decision of the case has become final. Such provisional decisions shall in particular avoid irreversible infringements of rights which otherwise may occur simply by the passage of time between the filing of the action and the respective final decision.

Effective provisional proceedings are also commanded by the acquis communautaire (see e.g. European Court of Justice, Case C-213/89, The Queen v. Secretary of State for Transport, ex parte Factortame and Others [1990] ECR I-2433).

Shaped after the German model, Art. 88 et seq. provide a well balanced system of provisions which cover all possible constellations and which take into account all private and public interests at stake.

Art. 88 et seq. distinguish two main types of provisional protection: the suspending effect of legal remedies against a disadvantageous administrative act (Art. 88 to 90) and temporary injunctions (Art. 91). Regarding the suspending effect of legal remedies against a disadvantageous administrative act, it has to be further distinguished whether only two parties (the addressee of the administrative act and an administrative body, cp. Art. 89) are involved in the proceedings or also third parties (cp. Art. 90). Art. 92 contains complementary provisions that apply for both types of provisional protection.

Article 88 Suspending effect

Para. 1 foresees that as a rule every objection against a disadvantageous administrative act and every action for the repeal of such an act have suspending effect. Disadvantageous is any administrative act that imposes a duty on somebody, e.g. the payment of a fee, the confiscation of an object or the tearing down of an illegally erected building.

Art. 115 para. 1 LGAP provides suspending effect only until the decision on an objection has been served, however with a reservation clause in favour of deviating regulations in other laws. It is doubtful, whether Art. 115 para. 1 LGAP alone would meet the requirements of effective legal protection as laid down in Art. 13 ECHR (see e.g. European Court of Human Rights, 5 February 2002, Conka against Belgium – 51564/99 –); especially if the objection procedure is followed by court proceedings, because there would be a gap between the decision on the objection and the filing of an action for the repeal of the administrative act. Para. 1 avoids this gap by extending the suspending effect beyond the service of the decision on the objection until the expiration of the deadlines for filing an action. If an action is filed, this action has suspending effect until the decision of the administrative court becomes final. This applies respectively if no objection procedure is admissible, i.e. if an action can be filed directly against an administrative act.

Moreover, this solution has compelling advantages concerning procedural effectiveness. Without the solution in Art. 88, the plaintiff would have to institute provisional

proceedings in order to be granted suspending effect for the whole duration of the main proceedings. This would arguably result in a wave of additional proceedings which would hinder administrative courts to decide on main proceedings in due time. As a consequence, the already existing backlog could increase further instead of being reduced.

The solution provided by Art. 88 et seq. does not lead to an ineffective administration:

a) If special fields of material law necessitate the immediate implementation of certain administrative acts, Art. 115 para. 1 LGAP and Art. 88 para. 2 No 3 allow to exclude the automatic suspending effect of a legal remedy by special law. Art. 88 para. 2 No 2 already contains such a special provision for the payment of public revenues (taxes, fees, custom duties, costs, social security contributions or other comparable financial obligations), in order to protect public finances. However, in these cases the principle of effective legal protection demands that the plaintiff may file a petition for the ordering of suspending effect (cp. Art. 89 para. 1 No 2).

b) If the suspending effect is not excluded by law, the administrative body may revoke the suspending effect of legal remedies in cases where the immediate implementation of a disadvantageous administrative act is required (Art. 115 para. 2 LGAP and Art. 88 para. 2 No 1). In these cases the principle of effective legal protection demands that the plaintiff can file a petition for the restoration of the suspending effect (cp. Art. 89 para. 1 No 1).

The above suggested solution is not contradictory to Art. 115 para. 1 LGAP because this provision – like Art. 88 para. 2 No 3 – already contains an opening clause for other laws. Besides, the rules of lex specialis and lex posterior would also apply in favour of the LACP-solution. Nevertheless it may be considered for the sake of legal clarity to amend Art. 115 para. 1 LGAP by prolonging the suspending effect until the administrative act becomes final.

In case that the suspending effect should not be extended beyond the service of the decision on the objection it would at least be necessary to provide effective legal protection through provisional proceedings. In this case Art. 88 et seq. could be formulated as attached in annex 1. However, the expert group clearly regards this alternative as a second choice for the following reasons:

- The alternative provisions provide citizens with a weaker legal protection, because these provisions contain a gap between the moment the decision on the objection is served and the filing of an action for the repeal of the administrative act.

- The expert group expects that the alternative provisions could lead to an increased number of provisional proceedings that could hinder or slow down the reduction of the existing backlog of cases.

Article 89 Restoration, ordering and declaration of the suspending effect

Para. 1:

In compliance with the principle of effective legal protection (cp. comments on Art. 88) Art. 89 provides legal protection for the addressee of a disadvantageous (cp. comments on Art. 88) administrative act. The addressee of such an act may seek

- the restoration of the suspending effect of an objection or an action for the repeal of an administrative act, if this effect was revoked by an administrative body (Art. 115 para. 2 LGAP, Art. 88 para. 2 No 1),

- the ordering of the suspending effect of an objection or an action for the repeal of an administrative act, if this effect is excluded by law (Art. 115 LGAP, Art. 88 para. 2 No 2 and 3),

- the declaration that an objection or an action for the repeal of an administrative act have suspending effect, if an administrative body wrongly denies this effect.

Beneficial administrative acts are not comprised by Art. 89 para. 1. Beneficial is an administrative act that constitutes a right like e.g. the right to receive a pension or the right to erect a building.

Para. 2:

Para. 2 provides guidelines for the court's decision. In its decision the court has to weigh all affected private and public interests. The result of a summary examination of the legality of the challenged act and the consequences of its implementation play the main role for the court's decision.

- It is not in the public interest to implement unlawful administrative acts. Therefore as a rule a petition will be successful if the summary examination of the legality of the administrative act leads to the result that to a high degree of probability the act will be repealed by the decision on the objection or the action.

- On the other hand there is a strong public interest to implement legal administrative acts. Thus, reasons for dismissing the petition are more likely to prevail the less the objection or action will probably be successful. However, the consequences of executing the act have to be considered in all cases, especially if these consequences are not reversible or if basic rights are affected. In some cases this may lead to the result that the suspending effect has to be granted even if the administrative act is more likely to be considered as lawful.

- If a summary examination does not allow a decision whether the challenged act is legal or not (e.g. because of complicated legal questions or because of an unclear factual situation) the consequences of the implementation of the challenged act gain even more weight. The following rule of thumb applies: The graver the consequences of the implementation of the challenged act, the heavier the interest to suspend the implementation of the challenged act weighs.

Decisions in provisional proceedings have to be taken within a few weeks, often even within a few days or hours. Under these circumstances, a thorough examination of the case is often not possible. Therefore, para. 2 enables the courts to decide provisional proceedings based on a summary examination of the case. That means that the court does not have to take a definite decision on complicated legal questions and also does not have to establish the facts with the same scrutiny as in main proceedings. Regarding these issues, no strict rules apply. Depending on the individual circumstances of the case, the court has to assess how urgent a decision has to be taken and which measures can be taken before the decision has to be issued. However, very often time does not allow for the taking of evidence.

Para. 3:

Para. 3 enables the court to combine the decision under para. 2 with complementary orders. Such orders may be necessary to meet the requirements of the principle of proportionality.

Para. 4:

Para. 4 concerns cases in which the petitioner has a justified interest in the immediate provisional reversal of the implementation of the administrative act, e.g. the return of a confiscated object. The decision has to be based on the weighing of the affected interests mentioned in para. 2.

Article 90 Administrative acts affecting third persons

Art. 90 protects the interests of third persons who are affected by an administrative act that is not directed at them but at somebody else and the interests of the addressee of an administrative act if that act is challenged by a third person.

Para. 1:

Para. 1 No 1 refers to the case that the objection or action by a third person (e.g. the neighbour affected by a building permission) has by law suspending effect. In this case the court, upon a respective petition of the holder of the permission, may revoke the suspending effect.

Para. 1 No 2 refers to the opposite case that the objection or action of the third person does not have suspending effect. In this case the court, upon a petition by the third person, can order/restore the suspending effect.

Para. 2:

Para. 2 covers the case that e.g. the owner of an industrial plant is ordered to reduce its emissions and that his/her objection or action against this act has suspending effect. In this case third persons (e.g. the neighbour of the plant) can seek the revocation of the suspending effect.

Article 91 Temporary injunctions

Art. 89 and 90 apply if the plaintiff defends him/herself against disadvantageous consequences stemming from an administrative act whereas Art. 91 applies if the plaintiff wants an administrative body to act in his favour, e.g. to issue an administrative act which confers a right upon him/her, the return of a confiscated object or the factual payment of money. Provisional protection in this kind of cases is also required by the acquis communautaire (e.g. the European Court of Justice, Case C-465/93, Atlanta Fruchthandelsgesellschaft).

The petition can only be successful, if both requirements stated in para. 1 are met, i.e. if the court concludes that the raised claim is likely to be justified and if an injunction is indispensable to avoid grave and irreparable consequences.

As a rule, an injunction shall only provisionally secure the plaintiff's rights, but not finally grant his claim. An exception applies, if the granting of the claim (or a part of it) is the only way to avoid grave and irreparable consequences (e.g. social aid dedicated to safeguard the minimum costs of living expenses).

Article 92 Complementary provisions

Para. 1:

Para. 1 regulates within whose jurisdiction provisional proceedings fall. As a rule, provisional proceedings have to be decided by the administrative courts of first instance. The Supreme Administrative Court is competent to decide on provisional proceedings if

- the respective subject matter falls into its jurisdiction as first instance court (Art. 8 para. 2),

- appeal proceedings are pending.

Para. 2:

Provisional proceedings as a rule are decided based on the facts submitted by the parties and based on the files of the involved administrative body (cp. comments on Art. 89). Further investigations, especially the taking of evidence, is only required if the court is convinced of their necessity to decide the case properly. In cases in which the petitioner is unable to submit and substantiate all facts for his petition because the necessary information is not at his disposal, the court shall raise the information necessary to decide on the petition ex officio.

Para. 3:

Provisional proceedings are decided by ruling. As a consequence, an oral hearing is not mandatory (Art. 45 para. 3). However, this provision does not forbid an oral hearing if the circumstances of the individual case should necessitate one.

If the other members of the chamber are not present and if a decision has to be taken without further delay, the presiding judge may decide alone. This provision stipulates an exception to Art. 5 para. 2. According to this provision, a single judge can only decide a case if the chamber has assigned this case to him. If the requirements set in Art. 92 para. 3 are met, the presiding judge may decide alone without such an assignment.

Part 11 Costs of proceedings

Art. 61 LAD stipulates that – regardless of the outcome of the proceedings – each party has to bear its own costs. By contrast, in civil court proceedings as a rule the losing party has to bear the costs. It is elusive for which reasons this principle should not also apply in administrative court proceedings. It is unfair if citizens have to bear the costs of proceedings even if the challenged administrative measure was unlawful and infringed their rights.

In addition to that, in some cases Art. 61 LAD unduly restricts access to court. This relates to all cases in which the costs for court proceedings, especially lawyer's fees, are so high that in comparison with what can be gained in court it does not seem to be worthwhile to institute court proceedings.

Because of these reasons, Art. 93 et seq. in principle follow Art. 151 et seq. CPA. However, there is one important exception: According to Art. 164 CPA judges not only have to decide on the merits of a case but also on the costs. In order to relieve judges of this often time consuming, but not very difficult task, the cost decision is split in two decisions: The decision on the apportionment of costs (basic cost decision), which is taken by judges, and the decision on the determination of costs which is taken by a court advisor or court officer. For more details please refer to the comments on Art. 93 and 105.

Article 93 Decision on the apportionment of costs

Deviating from Art. 164 CPA, the court only decides who has to bear the costs (apportionment of costs or basic cost decision), but not which costs have to be reimbursed or on the amount of these costs. The latter issues are decided in an extra ruling (cp. Art 105 – determination of costs). The distinction between basic cost decision and the decision on the determination of costs allows to assign the latter decision to a court advisor or a cost officer. These issues are not so complicated that they have to be decided by a judge. Thus, the provision allows a more efficient deployment of judges.

Article 94 Legal remedy against decisions on the apportionment of costs

The purpose of this provision is to relieve the Supreme Administrative Court. This court shall not have to decide on appeals that only challenge the decision on the apportionment of costs.

Article 95 Principles

Para. 1:

Para. 1 follows the principle “the winner takes it all”. Like in civil proceedings (Art. 154 para. 1 CPA), the winning party shall get its costs reimbursed from the losing party.

Para. 2:

If an action is only partially successful, the court can decide whether to split the costs proportionally or whether each party has to bear its own costs. In the latter case, the court fees are split evenly.

Para. 3:

If a party only succeeds to a proportionally insignificant extent, the court can decide that this party has to bear the entire costs.

Para. 4:

Para. 4 states an exception to para. 1 to 3. Social as well as practical reasons speak for this solution:

- Plaintiffs in proceedings on social matters usually are meriting special protection because of their social status. Therefore, in these cases, administrative bodies should bear their own costs, even if they won the proceedings.

- Para. 4 does not only apply to proceedings on social matters but also to proceedings on other matters: The provision helps to reduce the workload of the courts, since it decreases the number of cases in which reimbursable costs have to be determined (cp. Art. 105). For administrative bodies the costs arising from legal proceedings are in most cases negligible. Since – as a rule – administrative bodies have the necessary knowledge to conduct legal proceedings in administrative matters that fall within their competence, they do not need representation by a lawyer. Therefore, as a rule, administrative bodies could only claim travel expenses and costs for postage and telecommunication.

Costs incurred to the administrative courts (e.g. costs for taking evidence) do not fall under Art. 95 para. 4

Article 96 Third parties

Para. 1:

Third parties can be summoned to proceedings against their will. For this reason, they shall only bear costs if they engage themselves actively in the proceedings. The term “petition” does not include procedural motions, but only petitions in the sense of Art. 33 para. 2 No 1, i.e. a petition concerning the merits of the case.

Para. 2:

In order to decide whether it is equitable to impose costs of a third party on the losing party, the court has to weigh all circumstances of the case.

If a third party has filed a petition or a legal remedy it runs the risk to bear at least a part of the costs of the winning party (cp. para. 1). To compensate this risk, it is – as a rule – equitable to impose the costs of the third party on the losing party, if the former has success with its petition.

However, this does not necessarily mean that the third party would always have to bear its own costs, if it did not lodge a petition: If e.g. an administrative act that is beneficial for the third party (e.g. building permit) is challenged, it is in most cases equitable to impose the costs of the third party for defending the administrative act on the losing plaintiff, because the third party has no choice whether it is summoned to the proceedings (mandatory summons, Art. 22 para. 2). The same applies, if the plaintiff strives for an administrative act that is to the detriment of the third party (e.g. order to tear down a building owned by the third party).

The variety of possible cases (cp. the examples given above) necessitates a flexible solution that allows the judge to take all the circumstances of the case into account. Therefore, the vague (but flexible) term “equitable” is used.

Article 97 Withdrawal, acknowledgement and court settlement

Para. 1 :

In most cases, a petition, an action or a legal remedy is withdrawn because the challenged administrative measure or court decision is lawful. In these cases, the plaintiff/the person who filed the legal remedy has to bear the costs (sentence 1). However, there are also exceptions, e.g. if the action is withdrawn because of a change in the applicable law. If in such a case the challenged administrative measure was unlawful and violated the plaintiff’s rights or legal interests, the defendant should bear the costs. Sentence 2 gives the court the possibility to react according to the circumstances of the individual case.

Comparable to Art. 96 para. 2, the variety of possible cases necessitates a flexible solution that allows the judge to take all circumstances of the case into account. Therefore, the vague (but flexible) term “equitable” is used.

Para. 2:

In most cases an acknowledgement is declared because the challenged administrative action was unlawful. In these cases, the defendant has to bear the costs (sentence 1). However, the following examples show that exceptions from the rule are necessary (sentence 2):

- Sometimes an acknowledgement is declared although the challenged administrative action fully complied with the law. This can be the case, if the applicable law changed

during the court proceedings or if facts came into existence during the proceedings for the first time (new facts). In these cases the plaintiff should bear the costs.

- In many proceedings, facts that already existed before the proceedings began (old facts) are established for the first time. This in many cases indicates that the defendant did not fulfil his obligation to thoroughly investigate all facts. If this is the case, the defendant should bear the costs. However, there are also cases in which the defendant could not establish facts for reasons that come from the sphere of the plaintiff, especially if he did not meet his obligation to fully cooperate (e.g. failure to authorize his doctors to deliver a report on his health status). Under these circumstances, the plaintiff should bear the costs.

The aforementioned examples show that Art. 52 and 97 para. 2 allow administrative bodies to avoid the reimbursement of costs, if they react to changing circumstances by declaring an acknowledgement. If e.g. during the proceedings new facts came into existence for the first time that support the plaintiff's claim and if the administrative body does not react on this new situation the administrative body would lose the law suit with the consequence that it would have to bear the costs (Art. 95 para. 1). If the administrative body declares an acknowledgement, the court can impose the costs on the plaintiff.

Para. 3:

Compare Art. 159 para. 1 CPA.

Article 98 Administrative inaction

The provision privileges the plaintiff regarding the cost risk in cases that an action against administrative inaction is filed. According to Art. 16 para. 2, the court may suspend the court proceedings and set a deadline within which the administrative body has to issue a decision if it is justified that the administrative body has not taken a decision within the deadlines stipulated by the Law on General Administrative Procedure. If such a justified reason does not exist, the administrative body has to bear the costs even if the plaintiff's action is rejected.

Article 99 Reopening of proceedings and reinstatement

Para. 1:

Para. 1 allows the court to allocate the costs of a successful action to reopen proceedings to the person or legal entity which is responsible for the cause that justified the reopening. In some cases these causes fall into the sphere of the court, e.g. if a judge took part in the decision who was disqualified by law (cp. Art 83 No 6). In this case the costs for the proceedings can be allocated to the Republic of Croatia.

Para. 2:

Para. 2 allocates the costs caused by an application for restoration of the status quo ante to the party that applied for restoration, irrespective of its fault. The provision is only of practical relevance if the application caused additional costs.

Article 100 Failure to take evidence in administrative proceedings

Administrative bodies have to investigate all facts ex officio (Art. 7 LGAP). If an administrative body does not comply with this obligation, the court has to establish the facts itself. If an administrative body does not conduct obviously necessary inquiries, the court may impose the costs for the taking of evidence (e.g. costs for an expert opinion) on the administrative body, even if – based on the new evidence – its decision is confirmed by the court.

The question whether an administrative body failed to conduct obviously necessary inquiries has to be decided based on the legal opinion of the administrative body: If a provision stipulates two requirements to obtain a right and an administrative body with reasonable arguments negates requirement a and therefore does not conduct further inquiries concerning requirement b, Art. 100 does not apply. If, however, the administrative body affirms requirement a, but does not conduct obviously necessary inquiries on requirement b, the court may impose costs for taking evidence on the administrative body.

Art. 100 aims at ensuring that administrative bodies meet their obligation to investigate all necessary facts by preventing that they take financial advantages of a failure to meet this obligation. The provision thus helps to shorten court proceedings: If the administrative bodies establish all necessary facts themselves, further inquiries by the court are not needed.

Article 101 Costs based on fault

Art. 156 para. 1 CPA stipulates that costs that are based on fault of a party have to be borne by this party. According to Art. 156 para. 2 CPA the court may decide that the legal representative or the agent of the party has to pay the costs of the opposing party which were caused by his fault. Art. 156 para. 3 CPA is not adopted. Insofar, Art. 93 and 105 apply.

Article 102 Violation of procedural rules in administrative proceedings

According to Art. 73 an action is rejected although the administrative body has violated procedural rules which are intended to protect the rights of citizens (“protection of material rights through procedural standards”), e.g. the right to be heard before an administrative decision (Art. 27 para. 1 LGAP). For the ratio legis of this provision please refer to the comments on Art. 73. However, the violation of procedural rules has to have consequences. Otherwise administrative bodies might be inclined to disregard procedural provisions. Therefore, Art. 102 allows the court to impose a part or all costs of the proceedings on the administrative body that violated procedural rules.

Article 103 Distribution of costs between several parties

Art. 103 provides a rule for the distribution of costs if several plaintiffs (or defendants or third parties) have to bear the costs of proceedings together. The rule not only applies to co-litigants (Art. 161 CPA) but also to other constellations in which several parties share the same procedural position.

Article 104 Reimbursable costs

Para. 1:

Art. 104 para. 1 No 1 to 4 specifies the most important types of reimbursable costs. Art. 104 para. 1 No 5 is comparable to Art. 155 para. 1 CPA. The question which further costs (e.g. costs for taking evidence) are necessary may be decided based on the case law covering Art. 155 para. 1 CPA.

Para. 2:

Cp. Art. 155 para.2 CPA.

Para. 3:

Whether the representation by a lawyer is necessary has to be decided from the point of view of a reasonable person. Primarily, the education and the knowledge of the party are decisive. If a party has no legal expertise the representation – as a rule – is necessary.

Article 105 Determination of reimbursable costs

Para. 1:

The decision on the determination of costs has the purpose to implement the decision on the apportionment of costs (= basic cost decision) and to create an enforceable title (Art. 108 No 5). Regarding the distinction between basic cost decision and the decision on the determination of costs as well as the reason for this distinction please refer to the comments on Art. 93.

In order to relieve the Supreme Administrative Court, the determination of costs is concentrated at the first instance courts, which determines the costs for the first and the second instance proceedings after the proceedings as a whole have ended. Only if the Supreme Administrative Court decides as a first instance court (Art. 8 para. 2), the costs are determined by a court advisor or cost officer of this court.

Unlike under CPA, the determination of costs itself is not performed by judges. It is not necessary that judges perform this time consuming task. These questions can as well be decided by court advisors or – preferably – by cost officers. A cost officer is a civil servant who does not have a law degree but received a special training in cost matters. The provision allows an efficient organisation of the determination of costs, e.g. that one or more cost officers decide the respective requests under the supervision of a court advisor who decides difficult cases himself.

It is assumed that respectively trained civil servants do not yet exist. In order to allow a more efficient deployment of court advisors, the training of cost officers should begin before the new LAD enters into force.

The determination of costs only takes place after the decision that concludes the proceedings and contains the decision on the apportionment of costs (e.g. Art. 51 para. 3, Art. Art. 93 para. 1) has become final. A deadline for the filing of the request for determination is not necessary: The material claim for the reimbursement of costs is limited by the general rules on the statute of limitations. A deadline for the filing of a petition for the determination which is shorter than the statute of limitations would have the adverse effect that the material claim would still exist, but could not be claimed in proceedings according to Art. 105. However, the claimant could still pursue his claim with a “normal” action, on which the chamber or a single judge would have to decide. This would contradict the ratio legis of Art. 105 to relieve judges from deciding on the determination of costs.

Para. 2:

The obligation to pay interest is an efficient means to encourage debtors to fulfil their obligations as soon as possible and – indirectly – also to speed up the work of the courts. If parties, especially administrative bodies, have to pay interest because of the slow work of the courts, this will lead to complaints that hopefully will lead to a quicker processing of applications on the determination of costs.

Art. 105 para. 2 gives the first instance courts 60 days to decide on applications for the determination of costs, regardless whether the decision of the court advisor/cost officer (para. 1) is appealed (Art. 106 para. 1) or not. If an application can not be processed in this time, the debtor (in most cases administrative bodies, cp. Art. 95 para. 4) has to pay interest.

Article 106 Complaint against rulings on the determination of reimbursable costs

Decisions by the court advisor or cost officer can be appealed to a chamber of the first instance court. A further appeal is not allowed. The purpose of this provision is to relieve the Supreme Administrative Court. This court shall not have to decide on complaints that challenge the decision on the determination of reimbursable costs.

Part 12 Enforcement

The effective enforcement of judgments and other titles is a crucial element of the realisation of the rule of law and of effective legal protection. It is also comprised by Art. 6 ECHR and belongs to the requirements of the acquis communautaire (European Court of Human Rights, 19 March 1997, Hornsby against Greece: “execution of a judgment given by any court must therefore be regarded as an integral part of the trial for the purposes of article 6 of the European Convention on Human Rights, it being understood that the right of access to a court would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party”.). Likewise the enforcement is fundamental to realise the principle of separation of powers.

Therefore the enforceability of administrative court titles which appears to have not been common in the Croatian legal order until now has to be regulated. Moreover,

the enforceability will be definitely of greater importance because the new law enables the administrative courts not only to repeal administrative acts but also to impose obligations on administrative bodies. This will consequently lead to the situation that administrative bodies can be defendants in enforcement cases if they do not comply with a respective court decision.

In a well functioning legal system the necessity of taking enforcement measures against administrative bodies is a rare exception. It should be taken for granted that as a rule administrative bodies comply with court decisions or other titles with respect to their obligation to follow the constitutional principle of the rule of law. Nevertheless, provisions for an efficient enforcement against administrative bodies are necessary in case an administrative body should not fulfil its obligation to respect judgments or other enforceable titles.

Art. 107 et seq. distinguish whether a title has to be enforced in favour or against administrative bodies. For the enforcement in favour of administrative bodies, the respective provisions of the Law on General Administrative Procedure apply (Art. 109), unless the enforcement debtor is also an administrative body. In this case only the regulations of Art. 110 et seq. apply.

For the enforcement against administrative bodies Art. 110 et seq. provide a bundle of means applicable according to the circumstances of the individual case, in particular fines against the administrative body or its head (Art. 111), the issuing of an administrative act by the court itself (Art. 112), the appointment of a commissioner (Art. 113) and additional means of enforcement for monetary obligations (Art. 110 para. 2).

Article 107 General Provisions

Para. 2:

It seems to be reasonable that the administrative court of first instance, which has dealt with the matter, is responsible for the enforcement of the title, which in most cases will be a final judgment. The court of first instance is in a better position to deal with motions for enforcement because it is familiar with the case and in closer relation to the actual and local situation. In cases where the Supreme Administrative Court has acted as a first instance court (Art. 8 para. 2), it shall also be competent as enforcement-court.

Para. 3:

Decisions in enforcement matters are taken by ruling. A complaint against such a ruling does not have automatically suspending effect (Art. 82 para. 3).

Enforcement is not initiated ex officio but only on a motion of the party who is the holder of a title (enforcement creditor).

Para. 4:

Concerning the means of enforcement the court is not bound by the motion of the enforcement creditor but chooses the applicable means of enforcement at its discretion. Guidelines for the decision are the effectiveness of the means on the one hand and the principle of proportionality on the other. This means that among several suitable means of enforcement the court has to choose the least onerous for the enforcement debtor.

Article 108 Enforceable titles

Art. 108 contains an enumeration of enforceable titles. No 1 comprises judgments and such rulings that are not mentioned expressively under No 2 and 5. No 6 contains an opening clause for other titles if another law provides that they are enforceable.

Decisions under No 1, 2 and 5 can only be enforced after these decisions have become final.

A judgment which orders an administrative body to issue an administrative act that grants the plaintiff a payment or that orders the delivery of a certain object is the basis for the issuance of the respective act as well as for the enforcement of the obligation (e.g. payment, delivery) stemming from this act.

Examples:

a) By judgment the court orders an administrative body to issue an administrative act that grants the plaintiff a monthly pension to the amount of 4000,- HRK.

If the administrative body does not issue a respective administrative act nor pay the monthly pension, based on the judgment the plaintiff may file a motion of enforcement for the issuance of a respective administrative act as well as for the monthly payment.

If the administrative body issues the respective administrative act but does not pay the monthly pension the plaintiff based on the judgment may file a motion for the enforcement of the monthly payment.

b) By judgement the court orders the Croatian Institute for Health Insurance to issue an administrative act to grant the plaintiff a wheelchair.

Like case a)

c) By judgment the court orders an administrative body to issue an administrative act that grants the plaintiff a monthly pension and to determine the amount of the pension in the administrative act (cp. Art. 71 para. 1).

If the administrative body does not issue a respective administrative act, the plaintiff based on the judgment may file a motion of enforcement for the issuance of a respective administrative act. After the amount has been determined in the administra-

tive act (whether voluntarily or by enforcement), the plaintiff based on the judgment could also file a motion of enforcement for the monthly payment should the administrative body refuse to pay.

Article 109 Enforcement against individuals, legal entities and other entities entitled to sue

Art. 109 concerns cases in which a petition for enforcement of a title has been filed by an administrative body against an individual etc. The petition aims at forcing the debtor to comply with a decision of an administrative court which imposes an obligation (e.g. an obligation resulting from an administrative contract) or another title (e.g. a court settlement).

As a rule, the enforcement against individuals and entities follows the provisions of part 9 of the Law on General Administrative Procedure. In these cases it is adequate that the court basically has to apply the same rules as an administrative body when enforcing its own decisions.

In this context it has to be carefully distinguished between the enforcement of court titles enumerated in Art. 108 and the enforcement of disadvantageous administrative acts. If such administrative acts are not challenged before the administrative court by an action for repeal it is self-evident that the administrative body itself is competent for its enforcement according to part 9 of the Law on General Administrative Procedure. However, even if such administrative acts have been challenged before an administrative court by an action for repeal and have been approved by the court as lawful, they keep the character of administrative acts which have to be enforced by the administrative body. In these cases the court has no jurisdiction for enforcement, so that a respective petition by an administrative body would have to be dismissed as inadmissible. In practice, the enforcement of administrative acts by administrative bodies will be far more numerous than the enforcement of enforceable titles against individuals etc.

As far as the enforcement of court titles is concerned the regulations of part 9 of the Law on General Administrative Procedure apply mutatis mutandis, i.e only to the extent that their content is compatible with the principles of administrative court proceedings as laid down in the Law on Administrative Court Procedure. Insofar it has to be considered that certain provisions of part 9 of the Law on General Administrative Procedure are fitting solely within the frame of the administrative procedure, e.g. Art 143 LGAP. Primarily applicable are the provisions on the means of enforcement (Art. 147, 149 LGAP et seq.), especially Art. 147 LGAP which concerns the enforcement of monetary obligations. In these cases the jurisdiction of the administrative court as enforcement court as such remains unaffected, although the administrative court will address the civil judiciary for enforcement measures.

Article 110 Enforcement against administrative bodies

Para. 1 and 2:

Art. 110 distinguishes between the enforcement of non-monetary and monetary obligations.

For the enforcement of non-monetary obligations the following means of enforcement apply: penalty fines against the administrative body or its head (Art. 111), the issuing of the claimed administrative act by the court itself (Art. 112), appointment of a commissioner (Art. 113).

For the enforcement of monetary obligations Art. 111 and 113 apply likewise; in addition to that the administrative court may charge the enforcement authorities of the civil judiciary with the enforcement (Art. 110 para. 2). These authorities proceed according to the Enforcement Act. In most of these cases, the administrative courts will need the help of a bailiff.

The obligation to pay penalty fines (Art.111) is a monetary obligation in the sense of Art. 110 Para. 2 as well.

If an administrative body does not respect a court decision this constitutes a severe violation of the constitutional principle of division of powers. Such violations do not set a good example for citizens and could damage their trust in the rule of law. Therefore, enforcement cases against administrative bodies have to be given priority to other enforcement cases in order to restore the trust of the public in the rule of law.

Para. 3:

The enforcement against an administrative body may only begin after this body was notified of the enforcement. The notification shall give the administrative body the opportunity to comply with the respective title and thus to prevent enforcing procedures. It depends on the administrative body's reaction if enforcement means have to be applied by the administrative court and if the administrative body has to bear additional costs resulting from the enforcement provoked by its unlawful way of proceeding.

The enforcement creditor has to be informed about the notification and its content as well.

Para. 4:

As the administrative body knows its obligation resulting from the respective title it is adequate not to require a prior notification for the enforcement of mandatory injunctions (Art. 91) or in other urgent cases, e.g. if a further postponement of the fulfilment of the obligation would cause severe disadvantages to the enforcement creditor.

Article 111 Penalty fines

The court has the choice whether to impose the fine on the administrative body, its head or on both. As a rule, the first penalty fines should be imposed on the administrative body only.

The term "head" in this context has a functional meaning: It also refers to the head's deputy in case the head of the administrative body is absent.

The amount of the fine should be adjusted to the circumstances of the case, particularly with regard to the importance of the matter at stake, the conduct of the administrative body in the past and an assessment of the necessary impact of the penalty.

Article 112 Issuance of administrative acts by the court

Art. 12 No 2 gives the plaintiff the possibility to sue an administrative body for the issuance of an administrative act. Because of the principle of division of powers administrative courts in their judgments do not issue the respective administrative act themselves, if such an action is successful, but order the responsible administrative body to issue the respective administrative act. Only if the administrative body does not comply with this judgment and the enforcement creditor (= the former plaintiff) institutes enforcement proceedings (Art. 107 para. 3) are administrative courts allowed to issue an administrative act themselves. This limitation of the principle of division of powers is justified, as the administrative body had the opportunity to comply with the judgment before, but failed to do so and insofar violated this principle itself.

Art. 112 only applies for suitable cases:

Art. 112 must not be applied if the administrative act is based on a discretionary decision of an administrative body. The principle of division of powers does not allow the court to exercise discretion instead of the administrative body (cp. Art. 67 para. 2). However, if the discretion is limited to the extent that only one of several possible decisions would be lawful (reduction of discretion to zero, cp. comments to Art. 67 para. 2), Art. 112 applies as well.

Art. 112 should not be applied in complex cases, in which the issuing of the administrative act requires special knowledge of technical preconditions and/or has to be combined with respective modifying clauses (e.g. building license for an industrial plant).

On the other hand, many cases from social security law, tax law or cases concerning the granting of a status (e.g. citizenship, asylum, residence permit for foreigners) are suitable for the issuance of a claimed administrative act by the court.

Article 113 Commissioner

Para. 1:

The nomination of a commissioner is a severe intervention in the powers of an administrative body and should be the last remedy to enforce a title if all other measures have not been successful or – because of the previous conduct of the administrative body – do not promise to be effective.

Para. 2:

The court has discretion in selecting the person of a commissioner. It is of high importance that the person selected has the necessary professional knowledge and personal authority and that he is able to perform this task in addition to his normal duties.

Para. 3:

From the moment of the nomination of a commissioner the representatives of the administrative body lose their competence in the particular case. This does not mean that the administrative body as such loses its competence in relation to the enforcement creditor. The commissioner only takes over the internal power to act for the administrative body. He decides which measures have to be taken to comply with the enforceable title. The content of these measures depend on the nature of the obligation to be fulfilled. It is at the organisational discretion of the commissioner how these measures are prepared within the administrative body. He also decides by himself whether and to what extent his presence in the administrative body is adequate.

Para. 4:

The tasks of a commissioner are very demanding. Also, these tasks have to be accomplished in addition to his/her normal workload. Therefore, the commissioner has to receive an appropriate remuneration for his work.

Para. 5:

It is adequate that the administrative body has to bear the costs of the commissioner and of the measures taken by him because its own conduct as enforcement debtor has caused the court to choose this means of enforcement.

Part 13 Complementary provision

Article 114 Reference to the Civil Procedure Act

The Law on Administrative Court Procedure creates a separate code of procedural rules, even if it contains some explicit references to the Law on General Administrative Procedure and the Civil Procedure Act. In addition to that, the provisions of the Civil Procedure Act apply subsidiarily if this law does not contain specific provisions and if the CPA-provisions comply with basic principles of administrative court procedure.

As for a subsidiary application of provisions from the Civil Procedure Act it has to be examined in every individual case if the Law on Administrative Court Procedure contains sufficient regulations or if there is the need for complementary rules to solve the procedural questions raised in that case. In a second step it has to be examined that the chosen provisions of the Civil Procedure Act are in line with basic principles of administrative court procedure, in particular the inquisitorial principle (Art. 36), i.e. the task of the administrative court to establish the facts of a case ex officio.

Part 14 Transitional and concluding provisions

Art. 115 et seq. contain provisions that regulate the transition form the old Law on Administrative Disputes to the new Law on Administrative Court Proceedings.

Art. 115 et seq. several times refer to the day/moment “this law enters into force” (Art 115 para. 1 to 5, 116 para. 1, 117, 119 para. 1). This term indicates the day/moment, the law has completely entered into force, thus the day/moment indicated in Art. 120 para. 2 and **not** the one indicated in Art. 120 para. 1.

Article 115 Supreme Administrative Court of the Republic of Croatia

Para. 1 stipulates that the present Administrative Court shall become the Supreme Administrative Court In the opinion of the expert team there is no alternative to this solution: The present Administrative Court is the only institution that has the staff with the necessary knowledge and experience to head the new enlarged administrative jurisdiction.

Para. 2 to 5 regulate that in principle the judges, court advisors, civil servants and employees currently working at the Administrative Court will continue to work at the Supreme Administrative Court.

In medium term, the number of judges and court advisors at the Supreme Administrative Court will probably have to be reduced to around 20 to 25. However, in the short term a higher number of judges is needed in order to reduce the still substantive backlog of cases remaining at the Supreme Administrative Court. It is therefore strongly recommended that all judges employed at the Administrative Court will stay at the Supreme Administrative Court. The necessary reduction of judges at this court should be accomplished through retirement: From 2012 to 2016 altogether 11 judges currently working at the Administrative Court will retire, among them 8 in 2013.

Most of the court advisors currently employed at the Administrative Court will meet the requirements to be appointed as judge at an administrative court of first instance. It is therefore strongly recommended to recruit about 20 to 25 of the court advisors currently employed at the Administrative Court as judge at a court of first instance. Compared with other candidates these persons have the advantage that they are not only experts in administrative law but are also familiar with the work routines at a court. The remaining court advisors should stay at the Supreme Administrative Court.

With the reduction of the number of court advisors and – to a lesser extent – the number of judges working at the Supreme Administrative Court, less supporting staff in the court’s registry, the typing office etc. are needed. However, similar positions will have to be staffed at the new first instance court in Zagreb. Therefore, some civil servants should be transferred to this court and some employees offered new positions at this court. To protect the current status of these persons, they should keep all acquired rights from their current employment relationship, especially their current salary.

Art. 116 Establishment of administrative courts of first instance

Art. 116 contains organisational provisions concerning the setting up of the four new administrative courts of first instance in Osijek, Rijeka, Split and Zagreb. The new courts have to be fully operational **before** the new Law on Administrative Court Proceedings enters into force (para. 1 sentence 1). In order to reach this aim in time it is

foreseen that for each of these courts a commissioner is appointed who is responsible for the setting up of his/her court (para. 1 sentence 2, para. 2). The new law will probably enter into force in the first half of 2011 (cp. Art. 120).

Art. 117 Delegation of judges to the Administrative Court of the Republic of Croatia

It has to be guaranteed that at least some judges at the new courts of first instance have gained some work experience in the administrative jurisdiction **before** they start to work as judge at one of the new courts. Art. 117 gives the Ministry of Justice and the National Judicial Council the opportunity to appoint judges to each of the new courts before these courts begin to function. These judges then will be transferred to the Administrative Court for the period until the new law enters into force in order to gain some practical experience and in order to help reduce the existing backlog at the Administrative Court.

Art. 118 Proceedings on a request for the protection of constitutionally guaranteed human rights and fundamental liberties

Art. 66 et seq. LAD foresee the request for the protection of constitutionally guaranteed human rights and fundamental liberties (Art. 66 LAD) as a separate type of action. These provisions were not taken over into the new system of actions (cp. Art. 12). However, several administrative laws stipulate that certain measures can be challenged with such a request (e.g. Art. 103 para.1 of the Constitutional Law on the Constitutional Court of the Republic of Croatia). In order to guarantee judicial protection in cases where the respective measures are not comprised by the term “administrative matter” (Art. 2 para. 2) and in order to clarify which provisions are applicable, Art. 118 stipulates that instead of Art. 66 et seq. LAD the provisions of the new Law on Administrative court Proceedings apply.

Art. 119 Pending cases

As a rule it takes at least two to five months before a new lawsuit in main proceedings can be decided by the court: The lawsuit has to be served upon the other parties (Art. 34 para. 1 LACP), the defendant has to answer the lawsuit and to send the files of the administrative proceedings (Art. 34 para. 2 LACP) and the case has to be prepared (Art. 39 LACP) for the oral hearing (Art. 45 para. 1 LACP). In order to use the first months after the start of the new court structure efficiently and in order to reduce the still substantial backlog at the Administrative Court, the 8000 most recently filed cases pending at the Administrative Court at the time the new Law on Administrative Court Procedure enters into force, are transferred to the four new administrative courts of first instance. 8000 cases correspond to the workload for the four new courts for about half a year. More cases should not be transferred to the new courts of first instance in order to prevent a backlog at these courts and in order to enable these courts to solve new incoming cases in due time.

The transferred cases are decided on the basis of the new Law on Administrative Court Proceedings, while the cases that remain at the Supreme Administrative Court will be decided based on the old Law on Administrative Disputes.

Art. 120 Entering into force

Para. 1:

Art. 115 para. 1 LGAP stipulates that as a rule an objection against an administrative act has suspending effect, unless this effect is excluded by law. And under Art. 115 para. 2 LGAP an administrative body may exclude the suspending effect if certain requirements are met. The ZUP does not provide provisions for provisional proceedings that provide citizens with a legal remedy for seeking an interim solution that in particular prevents irreversible violations of rights and legal interests for the time period until the court decision in the main proceedings has become final. However, the acquis communautaire demands respective regulations. In order to close this gap, Art. 88 to 91 and Art. 92 para. 2 to 4 shall enter into force ahead of the rest of the new Law on Administrative Court Proceedings on the same day the new Law on General Administrative Procedure enters into force.

Para. 2:

The transition from the present one instance structure to the foreseen two instance structure necessitates a sufficient transitional period. This period is mainly needed for the setting up of new administrative courts of first instance and the training of judges and court advisors as well as the training of court officers. In order to properly prepare the transition a transitional period of 18 months is necessary

Dependent on when the Sabor will pass the Law on Administrative Court Procedure, it can be reasonably expected that this law will enter into force between January and June 2011.

Art. 121 Expiration of the Law on Administrative Disputes

Art. 121 regulates the expiration of the Law on Administrative Disputes.

Annex 1

Alternative provisions on provisional proceedings

Note:

Because of the reasons stated in the comments on Art. 88, the expert group clearly considers the alternative provisions as second choice.

Article 89 Suspending effect

Not needed

Article 89 Ordering, restoration, prolongation and declaration of the suspending effect

(1) On a petition by the addressee of a disadvantageous administrative act the court may completely or partially

1. order that an objection against such an act shall have suspending effect, if this effect is excluded by law (Art. 115 para. 1 LGAP),

2. restore the suspending effect of an objection against such an act if this effect was revoked by an administrative body (Art. 115 para. 2 LGAP),

3. prolong the suspending effect, until the respective act has become final,

4. if an action for the repeal of such an act is pending, order its suspending effect until the act has become final,

5. declare that an objection against such an act has suspending effect if an administrative body wrongly denies it.

(2) For its decision under para. 1 No 1 to 4 the court shall weigh the public and private interests in the immediate effectiveness of the challenged administrative act against the private interests in its suspension, taking into consideration the result of a summary examination of the legality of the challenged administrative act as well as the consequences of its implementation.

(3) If the court accedes to the petition, it may at the same time order a party to provide security or to meet any other condition. The court may also grant the suspending effect for a certain period of time.

(4) If the court accedes to the petition and the administrative act has already been implemented, the court on a respective petition of the plaintiff may order provisional measures how and to what extent to reverse the implementation, provided that this is possible and proportional.

Article 90 Administrative acts affecting third parties

(1) If a third person files an objection or an action for the repeal of an administrative act against a beneficial administrative act, the court may

1. on a petition by the beneficiary revoke the suspending effect of an objection or

2. on a petition of the third person order, restore or prolong the suspending effect of the objection or action.

(2) If the addressee of a disadvantageous administrative act which is beneficial for a third person files an objection against such an act, the court may on a petition of the third person revoke the suspending effect of this objection.

(3) Art. 89 para. 2 to 4 apply mutatis mutandis.

Article 91 Temporary injunctions

(1) In cases not falling under Art. 89 and 90 the court may on a respective petition, which may be filed even before an action is filed, issue a temporary injunction

1. if the court based on a summary examination comes to the result that the claim raised is likely to be justified, and

2. if an injunction is indispensable to avoid grave and irreparable consequences.

(2) Art. 89 para.3 applies mutatis mutandis.

Article 92 Complementary regulations on summary proceedings

(1) Jurisdiction for provisional proceedings lies with the court competent under Art. 6 and 7. If an appeal is pending, the jurisdiction lies with the Supreme Administrative Court.

(2) The plaintiff has to substantiate the necessary facts at least by prima facie evidence.

(3) Provisional proceedings are decided by ruling. The presiding judge may decide alone if the decision has to be taken without delay and the other members of the chambers are not available.

(4) On a petition or ex officio the competent court may amend or revoke rulings on provisional proceedings if the factual or legal situation on which the ruling was based has changed or if facts are submitted that without fault of the party could not have been submitted in previous proceedings.