


CARDS 2004 Twinning Project

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

Strategy Paper for the Drafting of a new Law on Administrative Disputes

Goals:

- **Alignment of the Law on Administrative Disputes (Zakon o upravnim sporovima) with the acquis communautaire (especially Art. 6 of the European Convention on Human Rights)**

- **Reduction of the duration of proceedings and reduction of the existing backlog of cases**

- **Increased efficiency of judicial review**

Solutions:

a) Reform of procedural law

- **Legal protection against all administrative actions**
- **Full jurisdiction on facts and law**
- **Mandatory oral hearings**
- **Reformatory instead of mere cassatory decisions**
- **Decision of appropriate cases by a single judge**

b) Organisational reform

- **Two tier administrative jurisdiction**

Table of Contents

I. Introduction

The legal review of administrative decisions by independent courts is an accepted European standard and an important contribution to ensure the rule of law in particular to protect individual rights. Furthermore, the administrative judiciary plays a decisive role for the economic development of a country: Almost all investment-decisions (e.g. shopping malls, factories) or infrastructure projects (e.g. roads, airports) have to pass through a licensing process which can become the subject of legal review by administrative courts. Effective administrative courts also increase the transparency of administrative decisions and play an important role in the fight against corruption. And last but not least, a well functioning administrative judiciary is needed in order to comply with the EU accession criteria set in Chapter 23 "Judiciary and Fundamental Rights", in particular European rule of law and human rights standards (above all Art. 6 of the European Convention on Human Rights, Art. 47 of the Charter of Fundamental Rights of the European Union).

In Croatia the legal review of administrative decisions falls into the jurisdiction of the Administrative Court of the Republic of Croatia. Its broad jurisdiction encompasses – among other fields of law – health insurance and pension law, welfare law, asylum and residential law, building law, enterprise law and financial law. Founded in 1977, the Administrative Court in spite of the recent transition of the political and social system has directed the development of administrative law in Croatia for more than three decades. However, at the threshold to a new era – Croatia's accession to the EU – the Administrative Court faces three major challenges which necessitate new solutions:

- Alignment of procedural rules with the acquis communautaire: The current code of procedure, the Law on Administrative Disputes, does not meet the standards set by the acquis communautaire regarding two key issues (full jurisdiction on facts and law, oral hearings).

- Reduction of the duration of proceedings and reduction of the existing backlog of cases: In 2007, the average duration of proceedings in front of the Administrative Court amounted to 3 years and 4 months. This situation is not in line with the acquis communautaire either, which also requires a judgment in due time. The present duration of proceedings is the result of a huge backlog of almost 39.000 pending cases which was mainly built up in the years 1998/1999 and was caused by a steep increase in the number of incoming cases (from 12.636 in 1997 to 29.649 in 1998 and 20.602 in 1999). In 2007, the 32 judges and 30 court advisors working at the Administrative Court decided 15.874 cases – an increase of

9% compared to 2006. However, in the same year 14.409 new law suits were filed. These numbers show that the backlog can not be significantly reduced, if no new approaches are taken.

- Increased efficiency of judicial proceedings: The current Law on Administrative Disputes can be optimized in order to increase the efficiency of judicial proceedings. For details, please refer to III.2 d) and e) below.

Measures necessary for the alignment of the procedural rules with the acquis communautaire seem to contradict the goal to reduce the duration of proceedings as well as the backlog: Oral hearings and the establishing of facts take some time. However, these inevitable side effects will be outweighed by additional measures, especially by more efficient rules to conduct judicial proceedings. Therefore, the solutions proposed in this paper can not be evaluated one by one, but have to be regarded as a whole.

II. The CARDS 2004 Twinning Project

The main objective of this project which started in September 2007 is to draft a new Law on Administrative Disputes that meets the standards set by the acquis communautaire. For this purpose, a working group of Croatian, German and Austrian experts from different judicial backgrounds (judges, professors and civil servants), was founded. In a first step, the experts analysed the current Law on Administrative Disputes, respective laws from other European states and the acquis communautaire. Based on this analysis, the working group agreed on procedural solutions (basic principles) for a new Law on Administrative Disputes as well as on a new structure for the administrative jurisdiction.

III. Analysis and solutions

1. The acquis communautaire in the field of administrative dispute

EU law does not provide a set of codified rules on administrative dispute. Consequently, the European Court of Justice has identified general principles of law to fill in this void. One of these principles is the guarantee of fundamental procedural rights. At their core is Art. 6 of the European Convention on Human Rights which according to the case law of the European Court of Justice is part of the acquis communautaire. In addition to that, the European Court of Justice has decided that Art. 6 of the European Convention on Human Rights in its function as part of the acquis communautaire is not limited to civil rights and criminal charges, but also applies to administrative procedure and administrative dispute. In addition to Art. 6 of the European Convention on Human Rights, Article 47 of the Charter of Funda-

mental Rights of the European Union guarantees to everyone the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law in all matters.

Therefore, the new Law on Administrative Disputes has to guarantee, among others, the following procedural rights:

- the right to a decision by an independent and impartial tribunal which has full jurisdiction over facts and law,
- the right to be heard and public access to procedure, including oral hearings and
- the right to a decision in reasonable time.

However, EU-Law does not prescribe in detail how these rights have to be guaranteed. This leaves States wide discretion to choose between different concepts, especially regarding organizational matters. Art. 6 of the European Convention on Human Rights guarantees access to “an independent and impartial tribunal”. A tribunal in this sense can be defined as any independent authority deciding a dispute and meeting further requirements of independence (e.g. sufficient duration of office, lack of any impression of partiality). Thus, not only courts, but also independent administrative authorities may be qualified as a tribunal in this sense (cp. III.3 below).

2. Reform of the Law on Administrative Disputes

a) Legal protection against all administrative actions

Art. 6 of the European Convention on Human Rights not only contains procedural guarantees in judicial proceedings, but also grants a right to access to such proceedings. In contrast to this, Art. 6 Paragraph 1 of the current Law on Administrative Disputes restricts judicial review of administrative actions to administrative acts (= acts which contain a decision on rights or obligations). However, administrative bodies may not only interfere with individual rights by administrative acts but also by other forms of administrative actions (e.g. factual acts, non-observance of administrative contracts, silence of administration).

Judicial review of administrative actions is widened by Art. 26 (silence of administration) as well as Art. 66 and 67 of the current Law on Administrative Disputes. The latter regulations stipulate that a law suit can also be filed for the protection of rights and freedoms of human beings and citizens guaranteed by the Croatian Constitution. However, only some of these cases fall into the jurisdiction of the Administrative Court (Art. 66) while most of them fall into

the jurisdiction of the county courts (Art. 70). This concept poses some difficult legal questions regarding the demarcation between administrative and civil jurisdiction.

It is proposed that under the new Law on Administrative Disputes all law suits concerning administrative matters shall fall into the jurisdiction of the administrative courts. However, general acts (= regulations, e.g. zoning bylaws) have to remain excluded from the administrative jurisdiction, since Art. 128 of the Croatian Constitution exclusively reserves the right to decide about the legality of such acts to the Constitutional Court.

The proposed concept is not mandatory. The acquis communautaire only demands that a law suit can be filed against any administrative action. How this aim is reached is subject to discretion. It is not even mandatory that the judicial review of administrative actions falls into the jurisdiction of administrative courts. Instead, the legislator could choose to provide judicial review of administrative actions before a civil or any other court or independent tribunal.

The proposed concept will not lead to a substantial increase of law suits filed with the administrative courts. Almost all cases comprised by this concept under current law already fall within the jurisdiction of the Administrative Court. The concept was chosen because it has three indisputable advantages: First of all it guarantees full judicial protection against any administrative action, fulfilling the requirements of the acquis communautaire. Secondly, it concentrates all cases concerning administrative matters at courts specialized to deal with administrative law. And thirdly, this concept is easy to handle for citizens, administrative bodies and courts, since it avoids difficult questions of competence.

b) Full jurisdiction on facts and law

Art. 6 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the European Union demand that at least one tribunal deciding the case has full jurisdiction over law and facts. The current Law on Administrative Disputes is not in line with this requirement: According to Art. 39 Paragraph 1 of this law, administrative disputes are decided on the facts established in the administrative proceedings. If a relevant fact is doubtful or has not been established at all, the Administrative Court has to refer the case back to the administrative body. Only under closely defined circumstances may the Court establish the facts itself.

Since States do not have discretion regarding this aspect, the new Law on Administrative Disputes shall give administrative courts full jurisdiction over law and facts.

c) Oral hearings

According to Art. 34 Paragraphs 1 and 2 of 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 at all. This practice does not meet the standards set by the acquis communautaire. In principle, Art. 6 of the European Convention on Human Rights ("… everyone is entitled to a fair and **public** hearing …") requires at least one oral hearing before a court or an independent administrative authority, leaving States no room for discretion in this matter. However, there are two commonly accepted exceptions to this principle: An oral hearing is not necessary where the parties waive their right to such a hearing. Also, provided that an oral hearing has been held at the first instance level, the absence of such a hearing in a higher instance does not violate Art. 6 of the Convention on Human Rights as long as only questions of law are at stake and the case does not raise complex legal problems.

Furthermore, Art. 119 Paragraph 1 of the Croatian Constitution stipulates that court hearings shall be open to the public. It is doubtful, whether Art. 34 of the current Law on Administrative Disputes complies with this rule.

Under the new Law on Administrative Disputes, oral hearings before at least one court shall be mandatory. Exceptions shall only be made in line with the acquis communautaire.

d) Reformatory instead of cassatory decisions only

As a rule, the current Law of 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 annul the challenged act (= cassatory decision; cp. Art. 42 Paragraph 2) and return the case to the administrative body (Art. 62 Paragraph 1). Apart from a few exceptions, the Court is not competent to put a legal obligation on the administrative body to render the requested administrative act (= reformatory decision). As a result, some cases come back to the Court several times ("ping-pong effect").

A cassatory system does not in itself violate the acquis communautaire. However, in general a reformatory system is more efficient, since the court only has to deal with a case once. In addition to that, a cassatory system is more likely to conflict with the right to a decision in reasonable time. The relevant period ends with the final judgment. If a case is referred back to the administration and if the new administrative decision is challenged in front of the court

again, the whole time between the beginning of the administrative appeal proceedings and the final decision of the court will be taken into account. In a reformatory system, the average duration of proceedings is shorter, since the court can immediately decide a case and does not have to refer it back to the administration.

It is an accepted European standard that administrative courts are given the responsibility to take decisions in substance. In cases where the law confers administrative discretion the courts shall, however, have to respect the scope of discretion given to administrative bodies.

Because of the above arguments, the new Law on Administrative Disputes shall empower administrative courts to render reformatory decisions.

e) Decision of appropriate cases by a single judge

Under the current law on Administrative Disputes cases have to be decided by a chamber of three judges (Art. 3 Paragraph 2), in some cases even by a chamber of five judges (Art. 54). Many EU-member states (e.g. Germany, France, Poland) make use of single judges to increase the efficiency of the judiciary and to reduce judiciary related costs. However, this solution is usually restricted to first instance courts. The increased importance of higher instance decisions necessitates decisions to be taken by more than one person.

The acquis communautaire does not set standards for this issue, leaving States wide discretion.

In order to assure an efficient administration of justice, the new Law on Administrative Disputes shall – as a rule – restrict the size of chambers to three judges. In addition to that, chambers at first instance courts shall be competent to transfer cases – dependent on their complexity and/or importance – to one of its members. The alternative would be to assign either all first instance cases or all first instance cases concerning certain fields of law to a single judge. This solution does not consider the fact that first instance courts do not only decide easy cases, but also complex ones as well as cases of high importance to the public. The proposed solution is flexible and allows first instance chambers to distinguish between cases that can be decided by a single judge and cases that rather should be decided by the chamber. Experience in Germany shows that with the proposed solution up to 80% of first instance cases could be decided by single judges.

3. Reform of the existing court structure

As laid out before (cp. III.1 above), the acquis communautaire provides States with a wide margin of discretion regarding organisational matters. The following options exist:

a) Independent administrative jurisdiction or decision on administrative disputes through civil courts?
b) Judicial review of administrative decisions through independent administrative authorities?
c) Number of instances: One tier or multi tier administrative jurisdiction?

a) Independent administrative jurisdiction

Croatia, like the majority of EU-member states, possesses an independent administrative jurisdiction that is not part of the civil court system. This structure reflects not only the importance of the judicial review of administrative decisions but also the differences between administrative dispute and civil litigation and should therefore not be changed.

b) Independent administrative bodies

In this concept, independent administrative authorities replace the first court instance. In Austria for example, administrative decisions can be appealed before independent administrative authorities (unabhaengige Verwaltungssenate), which qualify as an independent tribunal in the sense of Art. 6 of the European Convention on Human Rights ("quasi courts"). The decisions of these independent administrative authorities can also be challenged; in this case a complaint to the Austrian Administrative Court (Verwaltungsgerichtshof) or the Austrian Constitutional Court (Verfassungsgerichtshof) can be lodged.

Under this concept, the acquis communautaire would not necessitate changes of the Law on Administrative Disputes as long as independent administrative authorities would be set up which (a) fulfil all requirements to qualify as an independent tribunal in the sense of Art. 6 of the European Convention on Human Rights and (b) whose procedure would meet all requirements set by the acquis communautaire especially regarding oral hearings and full jurisdiction on facts and law. Under these circumstances it would not be mandatory that the Administrative Court conducts oral hearings on a regular basis or that it has full jurisdiction over facts and law. As laid out before, it is sufficient that one independent tribunal fulfils these two requirements. However, changes of the Law on Administrative Disputes would still be necessary in order to increase the efficiency of judicial proceedings as well as for the reduction of the duration of proceedings and the reduction of the existing backlog.

To establish independent administrative authorities and to align their procedural regulations with the acquis communautaire would necessitate massive changes in the structure of the public administration as well as in the Law on General Administrative Procedure. The administrative bodies that currently decide on objections against administrative decisions (= second instance administrative bodies) do not fulfil the requirements to qualify as an independent tribunal. Civil servants deciding on objections are not independent, since they are bound by orders of their superiors and can be moved from their post anytime. If independent administrative authorities would be established, qualified independent quasi-judges with life time tenure or at least long term tenure would have to be employed. Special laws on procedure and organization would have to be enacted.

Besides, there is an additional disadvantage to this solution: It lacks a clear organisational separation between administrative bodies and independent administrative authorities as susceptible to favouritism and corruption.

Last but not least, it should be taken into consideration that the existing situation is widely felt to be unsatisfactory and there is a current discussion of reform in Austria. It is envisaged to replace the unabhaengige Verwaltungssenate by first instance administrative courts.

Because of the aforementioned arguments, this model is not suitable for Croatia.

c) Number of court instances

According to Art. 223 of the current Law on General Administrative Procedure administrative decisions in principle can be appealed before a second instance administrative body. The decision of a second instance administrative body can then be challenged by filing a lawsuit with the Administrative Court (Art. 7 of the current Law on Administrative Disputes).

If this organisational structure is kept, the procedural changes listed under III.2 a) to d) above would nevertheless be mandatory in order to align the current Law on Administrative Disputes with the acquis communautaire, to increase the efficiency of judicial proceedings and to reduce the duration of proceedings and the existing backlog. Regulations on decisions by single judges (cp. III.2 e above) do not harmonize with the present organisational structure. As laid out before, this solution should only be chosen for first instance courts.

In addition to procedural changes, a relevant number of judges, court advisors and supporting staff would have to be hired in order to enable the Administrative Court to reduce the existing backlog as well as the duration of proceedings. In spite of an efficiency gain as a result of procedural changes it will not be possible to increase the present workload for judges of 270 cases per year, since judges will need time for oral hearings and the establishing of facts.

EU-member states with an independent administrative jurisdiction (except Austria, cp. III.3 b above) have either two or three court instances. Smaller countries (population less than six million inhabitants, e.g. Finland, Lithuania, Slovenia) usually have two instances, while states with a bigger population tend to have three instances (e.g. Germany, France). Taking into account the size of Croatia's population, two instances with one Supreme Administrative Court in Zagreb and four regional first instance courts (e.g. one each in Osijek, Rijeka, Split and Zagreb) would be sufficient.

If this organisational structure is chosen, the procedural changes listed under III.2 a) to e) above would nevertheless be mandatory in order to align the current Law on Administrative Disputes with the acquis communautaire, to increase the efficiency of judicial proceedings and to reduce the duration of proceedings and the existing backlog. In addition to that, new courts would have to be set up and new judges, court advisors and staff would have to be hired.

The setting up of new first instance courts and the hiring of new personnel at a first glance seems to contradict the current Croatian policy to merge courts and not to increase the number of judges. Regarding this aspect, administrative jurisdiction and other jurisdictions (civil and penal, commercial and misdemeanour) have to be kept apart: The policy to merge courts mainly concerns small courts with few judges. Such "dwarf-courts" do not exist in the administrative jurisdiction. Furthermore, Croatia has a significantly lower number of administrative judges (32 posts for judges, among them five vacancies, plus 30 posts for court advisors) in proportion to its population than other European states.

Detailed recommendations for the implementation (e.g. location of the new courts, salary structure for judges and court advisors, organizational structures) have not yet been prepared, but the working group will do so after the new Law on Administrative Disputes has been drafted. However, it is obvious that the setting up of new first instance courts would need some time. Consequently a transition period between the passage of the new law on Administrative Disputes by the Sabor and its entering into force of at least 18 months is

needed. To facilitate the setting up of new first instance courts it could also be considered to make use of existing court structures and to set up special chambers for administrative disputes at county courts for a transitional period. The new law also has to provide transitional provisions how to deal effectively with pending cases taking into account the then existing backlog and the requirements of the rule of law.

The following arguments support a two tier structure:

- The most important argument is that the distance between citizens and administrative courts has to be reasonable in order to facilitate citizens' access to court. This argument gains importance, once mandatory hearings are introduced. If the present court structure is not changed, citizens (and their lawyers) from all over Croatia would have to come to Zagreb for oral hearings.

- The distance argument also applies to the establishment of facts. As laid out before, the acquis communautaire necessitates that at least one court has full jurisdiction over law and facts (cp. III.2 b above). If the present court structure would be kept, judges from Zagreb would have to travel far distances in order to go for site inspections which especially in building cases are often necessary. Also, witnesses from all over Croatia would have to come to Zagreb to give testimony.

- A two tier jurisdiction allows a more efficient deployment of judges. As laid out before, last instance decisions because of their authority should not be rendered by single judges. Because of this, single judges do not fit into the present court structure. But experience shows that single judges play an important role in increasing the efficiency of the judiciary.

- A two tier jurisdiction allows the second instance court to concentrate on complex cases and cases of high importance for state and society. This is important since administrative courts, as other courts as well, are not only responsible for the practical implementation of the law but also – in the form of legal interpretation – for the development of the law. This function of courts will become even more important, once Croatian courts have to apply complex EU law.

- The decentralization of the administrative jurisdiction would also complement the Croatian Government's decentralization policy.

In favour of the present one tier structure it could be argued that every additional court instance would prolong judicial proceedings, making it even more difficult to render a final decision in due time. This argument is only valid, if every case automatically will receive a full review in the second instance. This, however, would not be efficient, since not every case deserves a full second instance review. Therefore, an effective legal “filter” between first and second instance should be established. Under these regulations, a full second instance review would only be granted if certain requirements are met. These regulations would guarantee that most appeals can be decided in a short written procedure and that only complex and/or important cases receive a full second instance review.

In order to shorten proceedings it could also be considered to abolish the review of administrative decisions by second instance administrative bodies (cp. Art. 223 of the current Law on General Administrative Procedure). This step would not violate the acquis communautaire, but would require that Art. 18 Paragraph 1 of the Croatian Constitution is changed, since this regulation guarantees review by a second instance administrative body. However, the review of administrative decisions by a second administrative instance should not be abolished without need, since it gives the administration the opportunity to correct its mistakes itself and provides citizens with a cheap and often effective remedy.

Therefore, this remedy should only be abolished if in fact the combination of two administrative instances and two court instances should result in a further lengthening of proceedings that does not allow a decision in due time. To prepare this decision, the development should be monitored for a time period of at least three years after the entering into force of the new Law on Administrative Disputes.

IV. Further course of the project

After this strategy paper has been approved by the Croatian Government the working group will prepare drafting guidelines for the new ZUS. These guidelines will contain a short outline of the general concept of the new law as well as recommendations on further key issues. The guidelines then will be presented to stakeholders (e.g. ministries, law faculties, bar association, chamber of commerce) in a public hearing. Following this hearing, the guidelines will also be sent to the Croatian Government for approval. As a next step, the working group will draft the new ZUS based on the guidelines. Finally, the working group will assess the impacts of the new ZUS and make detailed recommendations for its implementation, especially regarding the new court structure. The project is scheduled to end in November 2008.

Contact:
Klaus Hage, RTA
c/o Upravni sud Republike Hrvatske, Frankopanska 16, 10000 Zagreb
fon: 00385-1-48 07 944, e-mail: khage@upravnisudrh.hr