CARDS 2004 Twinning Project

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

Drafting Guidelines for a new Law on Administrative Disputes

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I. The need to reform administrative court procedure

The current Law on Administrative Disputes is mainly based on the corresponding Yugoslav law from 1952, which was amended in 1965 and 1977. Though in many aspects this law keeps up with respective laws throughout Europe, it has to be revised as a whole in order to align it with recent developments, mainly:

- At present, Croatia is undergoing a substantial reform of its public administration system. The main aim of this reform process is to enhance the administrative capacity of public administration as well as its service orientation towards citizens and business. One of the main aspects of this reform is the modernization of administrative procedure. Because of the close connections between administrative procedure and administrative court procedure, changes of the first entail changes of the latter.

One important aspect in the modernization of administrative procedure is its flexibilisation to enable administrative bodies to better adapt to its varying and often complex tasks and to come to a decision in shorter time. The draft for a new Law on General Administrative Procedure which was prepared by an expert team of Croatian, German, Austrian and Slovenian experts under the CARDS 2003 Project “Support to the Civil Service and Public Administration Reform in Croatia” follows this approach: The draft restraints itself to the definition of basic procedural standards and leaves civil servants a wide margin of discretion how to conduct proceedings in individual cases. These changes require an effective judicial control whether the limits of the procedural margin of discretion have been respected.

- The rising number of incoming law suits as well as the increasing complexity of law suits (e.g. concerning big investment projects and/or environmental law) necessitates a more efficient use of judicial resources. Efficiency gains can not only be realised through a more efficient deployment of personnel (cp. II.5) but also through changes in the court procedure (cp. II.2, II.4, III.3 and III.6, 7 and 9).

- And last but not least, Croatia’s upcoming accession to the European Union also requires a revision of the Law on Administrative Disputes since this law does not meet all standards set by the EU acquis communautaire (for a detailed analysis of this issue please refer to the working group’s strategy paper, annex 1).

The draft for a new Law on Administrative Disputes will be prepared by a working group of Croatian, German and Austrian experts from various judicial backgrounds (judges, profes-

sors and civil servants). While drafting the new law, the working group will put an emphasis on the following main objectives:

- Alignment of the Law on Administrative Disputes with the acquis communautaire, especially Art. 6 of the European Convention of Human Rights

- Increased efficiency of judicial review

- Reduction of the duration of proceedings (currently: three years and four months on average) and reduction of the backlog (currently: about 37.500 cases)

The proposals of the working group will change some basic concepts the current Law on Administrative Disputes is based on (cp. II). In addition, new legal instruments are introduced (cp. III). Therefore, the working group decided to draft a new law rather than to amend the current one. However, the working group intends to adopt many well proven legal solutions from Croatian law. First of all, exactly as in the existing Law on Administrative Disputes, the draft law will only contain provisions regarding the characteristics of administrative court procedure that distinguish it from civil court procedure. For all other issues that are already regulated in other laws, the method of cross-referencing (cp. Art. 60 Law on Administrative Disputes) will be used.

II. Basic principles for a new Law on Administrative Disputes and future structure of the administrative jurisdiction

The working group proposes to base the new law on Administrative Disputes on the following basic principles. For a detailed analysis, including all options to the proposed principles and an analysis of pros and cons, please refer to the strategy paper (annex 1).

1. Legal Protection against all administrative actions

The new draft law shall provide legal protection against all administrative actions, regardless of their form (e.g. administrative acts, factual acts, non-observance of administrative contracts). Moreover, all law suits concerning administrative matters shall fall into the jurisdiction of the administrative courts. However, general acts (= regulations, especially bylaws, 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.

2. Full jurisdiction on facts and law

Under the new draft law, administrative courts shall have full jurisdiction over facts and law. This means that the existing restrictions for the administrative courts to establish facts on their own will be omitted (cp. also III.1).

3. 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 draft law, oral hearings before first instance courts in principle will become mandatory. For exceptions please refer to III.7.

4. Reformatory instead of only cassatory decisions

The new draft law not only shall grant administrative courts the competence to annul unlawful administrative acts (cassatory decision) but also empower 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 an exception please refer to III.5.

5. Decision of appropriate cases by a single judge

In order to achieve a more efficient deployment of judges, the new draft law shall restrict the size of chambers to three judges. In addition to that, chambers at first instance courts shall be competent to transfer cases – cases of lesser complexity and/or importance – to be decided by one of its members.

6. Future structure of the administrative jurisdiction

The working group proposes that Croatia keeps its independent administrative jurisdiction that is not part of the civil court system. However, the present structure with one administrative court as first and last instance shall be expanded to a two tier structure with four regional first instance courts (e.g. one in Osijek, Rijeka, Split and Zagreb) and a Supreme Administrative Court in Zagreb. However, not every case deserves a full second instance review. Therefore, an effective legal “filter” between the first and the second instance is needed (cp. III. 9)

III. Further key issues for a new Law on Administrative Disputes

In addition to the above listed basic principles, the working group decided on about 80 further key issues. Most of these concerned mere technical issues like time limits for law suits, the minimum content of a lawsuit or the connection or disconnection of law suits. The most important key issues are the following:

1. Establishment of facts ex officio

In case that facts have not been established in a sufficient manner the administrative courts shall be obliged to do so ex-officio (European standard). A respective motion by a party is not necessary. If parties put forward a motion to take evidence, this motion does not bind the courts.

2. Standing to sue

Basically, three concepts for the access to administrative proceedings and administrative court proceedings exist: The first concept would give anybody the right to challenge any administrative action without further requirements (actio popularis). This very wide concept is not found among EU member states. The second concept demands that the plaintiff has a qualified legal interest to challenge an administrative action. This concept is followed by the case law of the European Court of Justice. Under the third concept, access to court is only granted, if an infringement of subjective rights is claimed.

For the new draft law, the concept of qualified legal interest is proposed. This concept not only corresponds to EU law but also to the draft Law on General Administrative Procedure. Access to administrative proceedings and access to administrative court proceedings should in principle be regulated in the same way.

3. Assuring full cooperation of parties

In some cases, parties of a legal conflict have an interest to delay proceedings, especially if administrative acts that contain an obligation are challenged. In other cases, parties loose the interest in their law suit. In both cases, parties frequently do not comply with court orders or even deliberately try to prevent the court from taking a final decision. In order to allow judges to quickly and efficiently handle such cases, the new draft law shall provide for respective legal provisions:

a) Exclusion of late pleadings – Judges can set parties a time limit to state facts or provide evidence. If this time limit is not kept without valid excuse, the court is entitled to disregard new facts or evidence if their admission would delay the course of justice, provided the parties have been instructed about the consequences of failing to keep the time limit.

b) Non-appearance for oral hearing – If a party/both parties fail(s) to appear for an oral hearing, the court can nevertheless choose to take a final decision provided that the summons to the hearing was delivered in accordance with the law and that the parties have been instructed about the consequences of failing to appear in court.

c) Ficticious withdrawal of a law suit – If a plaintiff fails to pursue his lawsuit (e.g. answering questions by the court, sending required documents etc.) for a certain time (e.g. for two months) despite a respective court order, the court is entitled to treat the lawsuit as withdrawn and end the proceedings, provided the plaintiff has been instructed about the consequences of failing to pursue his lawsuit.

4. System of actions

The proposed system of actions is congruent with the system of legal remedies under the draft Law on General Administrative Procedure (cp. Art. 87 Para 2, 102 Para 2).

5. Review of discretion

Under the new draft law, courts shall, as a rule, take a decision on the merit of a case (cp. II.4). However, this concept is subject to limitations if the law grants administrative bodies discretion. Discretion entitles administrative bodies to choose between several legal options. The working group proposes that due to the principle of separation of powers, administrative courts shall be restricted to examine the legality of administrative actions but shall not be entitled to also control their expedience. This concept restricts the judicial review of an administrative body's discretionary decisions to the examination whether the discretion was exercised properly. If the court comes to the result that this was not the case it may not replace this decision by its own discretionary decision but has to annul the challenged act and refer the case back to the administrative body.

6. Relevance of procedural errors in proceedings before administrative bodies

The annulment of an administrative act solely because of procedural errors constitutes a dubious victory for plaintiffs. Regardless whether they applied for the issuance of an admin-

istrative act or whether they challenged an administrative act putting an obligation on them, they will not get a decision on the merits of the case. In practice, the administrative body will in most cases replace the annulled act by a new one, deciding the matter with the same result as before so that plaintiffs would have to file another lawsuit. For this reason, it is – even from the position of the plaintiff – more effective to restrict the impact of procedural errors for the outcome of a lawsuit in order to reach a decision on the merits of the case.

Therefore the working group proposes that procedural errors, as a rule, will not be considered, if it is obvious that such an error has not influenced the material decision. This particularly applies to cases in which administrative bodies do not possess discretion. If the aforementioned requirements are met, the court will have to decide on the merits of the case.

However, it has to be prevented that administrative bodies systematically disregard procedural provisions for lack of sanctions. Therefore, an administrative body should in principle bear the costs of proceedings, if its decision contains procedural errors that do not lead to the annulment of an administrative act.

7. Final decision without oral hearing (first instance courts)

The acquis communautaire requires at least one oral hearing before a court (for details cp. III.1 and III.2c of the strategy paper). However, the right to an oral hearing can be waived. Based on this legal principle, the following exceptions are proposed:

a) First instance courts can decide without oral hearing, if the parties have consented in written form before the final decision is taken.

b) The prior consent of the parties shall not be necessary, if the facts of a case are established and if this case does not feature difficult legal questions. After the decision has been delivered, the loosing party shall have the choice whether to request an oral hearing before the first instance court or whether to lodge an appeal. If the second option is chosen, the party has knowingly waived its right to an oral hearing.

8. Second instance as appeal instance

The working group proposes to set up the Supreme Administrative Court as an appeal court that – if necessary – can establish facts like a first instance court. Otherwise the Supreme Administrative Court would have to refer all cases in which the facts have not been properly

established back to the first instance courts, leading to an unnecessary delay of proceedings. However, in exceptional cases that would require an extensive hearing of evidence the Supreme Administrative Court shall have discretion to refer the case back to the first instance.

The principle of mandatory oral hearings (cp. II.3 and III.7) shall not apply to the Supreme Administrative Court. In order to fulfil the acquis communautaire it is sufficient that one court instance conducts an oral hearing. However, compliance with the acquis communautaire requires an oral hearing, if the Supreme Administrative Court bases its decision on new facts or on new significant legal aspects.

9. "Filter" between first and second instance

Not every case deserves a full second instance review. In order to not unnecessarily prolong proceedings in uncomplicated cases, an effective "filter" between the first and the second instance is necessary. The working group proposes a leave to appeal model which has proven itself as an effective "filter" between instances (e.g. in Germany). Under this model, the Supreme Administrative Court – based on the law which will strictly define respective requirements – shall decide in preliminary proceedings and without oral hearing whether leave to appeal is granted. If leave to appeal is not granted, the first instance decision would become final. If leave of appeal is granted the challenged decision would become subject to a full second instance review. In which cases leave to appeal shall be granted has yet to be decided in detail.

10. Costs of litigation

As a rule, the losing party shall bear the costs of litigation. If parties win and lose partially, costs shall be split.

11. Enforcement of judgments

Decisions concerning the payment of money or the restitution of (movable) objects shall be enforced according to the Law on Enforcement regardless whether the enforcement is directed against a person or an administrative body.

If an administrative body does not adhere to a decision which obliges it to render an administrative act, the court, upon a motion by the plaintiff, shall impose a penalty payment on the administrative body. This step can be repeated without limitation. Additional measures (per-

sonal summons of responsible officers or head of administrative bodies to the court, personal fines against responsible officers, heads of administrative bodies or heads of superior administrative bodies, appointment of an external commissioner to render the administrative act) have still to be discussed in detail.

12. Suspensory effect and summary proceedings

According to the current draft for a new Law on General Administrative Procedure, an objection against an administrative act suspends the legal consequences of this act. However, the administrative body is entitled to abolish the suspensory effect of an objection. In this case, any party whose rights or legal interests are affected can file a motion before an administrative court to restore the suspensory effect.

This provision grants effective temporary protection against the enforcement of an administrative act that puts an obligation on a person, but does not apply to other cases in which temporary protection is also required. Therefore, this provision shall be complemented by a provision that allows administrative courts to order interim measures (provisional injunctions) to secure the position of a party until a final court decision on its case will have been taken (e.g. a provisional injunction that prohibits the sale of an expropriated piece of land that is claimed back).

13. Electronic communication

Under the condition that administrative courts fulfil the respective technical requirements, the new draft law shall allow electronic communication between parties and courts as well as the use of electronic files.

IV. Outlook

After these guidelines have been approved by the Croatian Government the working group will draft the new Law on Administrative Disputes. Pending on a prolongation of the project by three months which would move the project's end from November 2008 to February 2009, the presentation of the draft is scheduled for mid-November 2008. As a last step, the working group will assess the impacts of the new Law on Administrative Disputes and make detailed recommendations for its implementation, including the preparation of transitional provisions regarding the new court structure as well as the handling of law suits that were filed before the new law enters into force.

Annexes:

Annex 1: Strategy paper for the drafting of a new Law on Administrative Disputes

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