

Brief overview of the shortcomings of the existing Law on Administrative Disputes (LAD)

After achieving independence, the Republic of Croatia has continued with the control of administrative acts through administrative courts because such control already existed before during the time when the Republic of Croatia was a part of former Yugoslavia. Back then as well as nowadays, this control was implemented by the Administrative Court of the Republic of Croatia (Administrative Court in the further text), which was established in 1977. Until that year the Supreme Court of the Republic of Croatia was in charge of handling administrative disputes.

The Law on Courts (Official Gazette, No. 150/05 and 16/07) stipulates that the Administrative Court decides law suits against final administrative acts (administrative disputes) and performs other tasks stipulated by law (Art. 23). Art. 3 Para. 1 of the Law on Administrative Disputes (LAD) also foresees that administrative disputes are handled by the Administrative Court.

The administrative dispute follows the provisions of the LAD that was incorporated into the legal system of the Republic of Croatia as was a number of other laws from former Yugoslavia (Law on the Incorporation of the LAD, Official Gazette, No. 53/91). During this process some provisions were deleted, some were changed or updated. After the incorporation of the LAD, it was changed twice (Official Gazette, No. 9/92 and 77/92).

Most of the procedural provisions of the LAD are good. In case the LAD does not contain procedural provisions the provisions of the Law on Civil Procedure are to be applied respectively (Art. 60 LAD). However, some provisions of the LAD are not in line with the *acquis communautaire*, especially Art. 6 of the Convention of Human Rights and Liberties (Official Gazette, International Treaties, No. 18/97, 6/99 – consolidated text 8/99, 14/02 and 1/06).

The following paragraphs give an overview over the shortcomings of the LAD.

Art. 6, 7 and 9 LAD

An administrative dispute can only be conducted against a final administrative act.

The LAD provides the definition of the administrative act and speaks about an administrative dispute against acts of an administrative body/organisation with public authority. An administrative act decides about the rights and obligations of a specific individual or organisation in an administrative matter (Art. 6 Para. 2 LAD).

The judicial control of the legality of individual acts poses no particular problems regarding the identification of such individual acts when acts of administrative bodies (meaning government and local government bodies) are in question, because the main task of these bodies is the direct implementation of rules in order to solve administrative matters regarding the rights and obligations of citizens and other subjects.

Problems arise when the legality of individual acts is questioned, which were issued by other government bodies/organisations, that is bodies which exercise public authority but are not

primarily responsible for the direct implementation of rules to solve administrative matters. In these cases, it has to be decided, which character these acts have. In case the lawsuit does refer to an individual act that cannot be defined as an administrative act, the court cannot question the legality of this act, but has to immediately dismiss the lawsuit (Art. 30 Para. 1 No. 2 LAD).

The LAD only defines the term “administrative act”, but not the term “administrative matter”. There is no general legal definition for the latter term. Thus, in disputable cases, the Administrative Court has to decide, whether the lawsuit concerns an administrative matter and whether the conditions for judicial protection before the Administrative Court are fulfilled or whether the law suit must be dismissed (Art. 30 Para. 1 No. 2 LAD).

Consequently, future legislative changes concerning the Law on General Administrative Procedure (LGAP) as well as the LAD should pay special attention to the definition of the term “administrative matter”, so that the entire judicial protection in these matters is improved.

While Art. 6 LAD defines the term “administrative act”, Art. 9 LAD clearly stipulates that an administrative dispute can not be conducted against acts in matters for which judicial control is provided outside of an administrative dispute. Although Art. 9 only refers to “acts” and not to “administrative acts” in the sense of Art. 6, it is not questioned in judicial practice, that Art. 9 LAD refers to administrative acts as defined in Art. 6 LAD.

An example for judicial protection against administrative acts outside of an administrative dispute can be found in the Law on Changes and Supplementations of the Law on Expropriation (Official Gazette, No. 114/01) that provides judicial protection against administrative acts concerning expropriation before the county courts (Art. 42.a.), which apply the LAD appropriately, if the law does not stipulate otherwise (42.b.). Until the changes of the above mentioned law, the judicial protection against administrative acts regarding expropriation was provided by the Administrative Court.

Art. 17 of LAD

The court has not had any particular problems regarding the implementation of the regulations in Art. 17 LAD. That applies particularly to Para. 2 that stipulates that at the request of the plaintiff, the body whose act is enforced or the body competent to enforce it, if it is an act of an organisation not authorised to enforce, shall postpone the legal effect of the decision or the enforcement of the decision until the final court judgment is taken, if the enforcement would cause irreparable damage to the plaintiff, if the law does not prescribe that an appeal does not delay the enforcement of the decision or the delay is not against public interest, and if the delay would not cause significant irreparable damage to the opposing party.

This is stated because the decision about the delay of enforcement of an administrative act, as stipulated by the above mentioned provision, is not taken by the Administrative Court but by the body whose act is enforced, meaning the body that was responsible for enforcement.

Thus, when controlling the legality of an individual administrative act, the Administrative Court, if it estimates that the enforcement of this administrative act before the final court judgment could cause irreparable damage to the plaintiff, has no possibility to suspend the enforcement of this act until the final court judgment (under the condition that the suspension

would not cause significant irreparable damage to the opposing party). The dispute is therefore reduced to the decision over the legality of this administrative act.

It should be considered to grant the Administrative Court, of course only exceptionally and with strict limitations, the ability to temporarily suspend the enforcement of individual acts whose legality is questioned, if their enforcement could cause severe and irreparable effects.

Art. 34 and Art. 39 LAD

Art. 34 Para. 1 LAD stipulates that the Administrative Court decides administrative disputes in sessions without public access. This regulation is not in line with European standards, especially not with Art. 6 Para. 1 of the Convention on Human Rights, that Croatia has ratified in 1997 (Official Gazette – International treaties, No.18/97). In compliance with article 64 of the Convention, a reservation regarding the holding of oral proceedings under administrative procedure was made.

Because of these provisions, the administrative dispute is reduced to a decision on the legality of an administrative act. The Administrative Court decides the dispute based on the facts determined during the administrative procedure (Art. 39 Para. 1). Only

- if the annulment of the administrative act and the reopening of proceedings before the competent body would cause irreparable damage to the plaintiff or
- if on the basis of public documents or other evidence in the case files it is obvious that the facts differ from those established during the administrative procedure or
- if in the same dispute an administrative act has already been annulled and the competent body has not acted completely in accordance with the judgment,

the court itself can establish the facts and render a judgement based on these facts (Article 39, Para. 3).

The Administrative Court mostly has not used these possibilities

There is no doubt that the lack of oral proceedings is not in line with Art. 6 Para. 1 of the Convention, which foresees (the text of Art. 6 was not translated).

The final conclusion is that the mentioned provisions are not only not in line with Art. 6 Para. 1 of the Convention, but that the lack of oral proceedings limits the ability of the Administrative Court to reduce the mistakes in administrative procedures, to improve the quality of administrative procedures as well as administrative acts and to accelerate administrative procedures.

Art. 62 LAD

If the Administrative Court annuls an administrative act, the responsible administrative body is obliged to issue another administrative act instead of the annulled one. In doing so the administrative body is bound by the legal opinion of the court and its comments concerning the violation of procedural rules, the so called “obligation of the court judgment”.

Though not a common practice, the number of cases in which administrative bodies do not accept the “obligation of the court judgment” is not insignificant. This means that based on

new administrative proceedings administrative acts are issued that contradict the legal opinion of the court or its comments concerning the violation of procedural rules. This practice will not only lead to a new lawsuit but also to an undesirable delay in administrative proceedings.

Art. 63 LAD regulates the powers of the Administrative Court concerning cases in which administrative bodies contradict the legal opinion of the court or its comments regarding the violation of procedural rules. If in these cases a new lawsuit has been filed, the Administrative Court may resolve the matter itself by judgment. Using its powers from Art. 63 Para. 2 LAD, the court also notifies the body responsible for the supervision of the administrative body, which did not respect the “obligation of the court judgment”.

However, this legal solution is not particularly effective. Legislative changes should be considered in order so assure that administrative bodies respect the legal opinion of the court and its comments regarding the violation of procedural rules when they are deciding about rights, obligations, legal interests of citizens and other subjects.

Art. 66 LAD

The Administrative Court does not control the legality of individual acts that are not administrative acts. However, such acts fall within the jurisdiction of the Administrative Court if it is argued that they violate rights and freedoms guaranteed by the Constitution.

According to Art. 66 LAD the court competent for administrative disputes shall rule on requests for the protection of rights and freedoms guaranteed by the Constitution, if these freedoms or rights have been violated by a final individual act and no other court protection is provided, by appropriate application of the LAD.

When the LAD was incorporated into the Croatian legal system (Official Gazette, No. 53/91) this regulation was deleted, but it was reinstated through the Law on Changes of the Law on the Incorporation of the LAD (“Narodne novine” num: 9/92).

The practice demonstrates doubts regarding the compliance of Art. 66 LAD and Art. 19 Para. 2 of the Croatian Constitution (Official Gazette, No. 41/01 – consolidated text). The question is, whether there was any constitutional reasoning, considering the regulations of Art. 128 of the Constitution, to reinstate Art. 66 into the LAD.

Art.128 of the Constitution determines the jurisdiction of the Constitutional Court and stipulates that the Constitutional court of the Republic of Croatia protects citizens’ human rights and basic liberties.

After Art. 66 was reinstated into the LAD and with regard to Art. 128 of the Constitution, there are two instances in these cases (cases that fall under Art. 66 LAD): At first the Administrative court decides on the protection of human rights. After this, the person whose demand for protections was dismissed, can bring a constitutional law suit before the Constitutional Court.

The Administrative court is always responsible to decide if a final individual act has violated constitutionally guaranteed human rights and liberties, regardless who issued this act if no other court protection is ensured. Therefore, there are doubts regarding the compliance of Art.

66 LAD with Art. 19 Para. 2 of the Croatian Constitution that guarantees judicial control of the legality of individual acts of administrative authorities and bodies that have public authority. The protection of constitutionally guaranteed rights and liberties directs in the domain of the Constitutional court.

Thus, it also should be considered whether this regulation (Art. 66 LAD) should be a part of the LAD.

CONCLUSION

It can be concluded that the LAD in principle is a good procedural law and that throughout its 30 years of practice the Administrative Court has done a very demanding job of solving administrative disputes. During this time it has provided an answer to almost all difficult issues. However, with regard to the Convention of Human Rights and Liberties, the existing model of the administrative judiciary will have to change. Those changes should be enacted in a serious and responsible manner, so that the structure of the administrative judiciary and its procedure are regulated with the aim to achieve an efficient and timely protection of the rights of citizens and other subjects.

Zagreb, 26 October 2007

Marina Kosović-Marković