Administrative Justice in Europe: The EU Acquis, Good Practice and Recent Developments

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The present paper gives a broad overview of several key building stones of administrative justice in Europe. Current developments are strongly driven by European standards: The procedural guarantees of Art 6 of the European Convention on Human Rights and the EU's *acquis communautaire*. Although their scope of application is limited, both require administrative courts to provide for effective protection of the rights of individuals and give effectiveness to the rule of law. Nevertheless, states still enjoy a large degree of autonomy regarding the organisation and procedure of administrative courts, allowing for a variety of models of administrative justice. Individual elements will be discussed under the premise that the existing systems are neither rigid nor closed models, but that European standards of administrative justice can also be met through combining features from different models, as long as the individual features of organization and procedure, together with administrative procedure and the jurisdictions of other courts, form a consistent system.

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I. Introduction

A. The Purpose of the Paper**

Administrative justice plays a crucial role in the application of EU law. To a large extent, EU legislation concerns administrative law, and authorities lacking the quality of a »court« in the meaning of Art 234 ECT and Art 35 EUT cannot cooperate with the European Court of Justice (ECJ) in Luxembourg. The accession of a state to the Union depends *inter alia* on its ability to fully implement and apply the large block of legislation found in the *acquis communautaire*. The Twinning Project »Support to more efficient, effective, and modern operation and functioning of the Administrative Court of the Republic of Croatia« seeks to support Croatia's accession to the Union in this crucial matter.

The purpose of the present paper lies in a broad outline of several key corner stones of administrative justice in Europe. On one hand, it shall address recent developments throughout Europe. On the other hand, an overview of the EU *acquis communautaire* concerning administrative justice, especially administrative courts' procedure, shall be given. To a large extent, similar issues will have to be addressed from both angles, as the two most important developments are the adaptation of administrative justice to meet the requirements of Art 6 ECHR and the EU *Acquis*.

B. Method

It is beyond the scope of this paper (and the ability of any individual author) to describe trends in the development of all 27 member states of the

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Union. Such an endeavour would also suffer from a degree of detail and complexity that would render it almost useless for the task at hand. There is, however, one feature of administrative justice shared by the member states as well as the EU law in the field: The importance of a consistent system of administrative procedure and administrative justice far outweighs that of individual features of the respective systems. Therefore, we can look at such individual features from the point of view of larger systems. I will primarily focus on the English, French and German systems of administrative justice and deal with the more specific issues from that perspective. This approach also falls in line with the peculiarity of the EU *acquis communautaire* in this field, which mostly requires a consistent and effective system rather than detailed provisions.

C. Overview

At the beginning, the author will address the scope and role of administrative justice in the rule of law and in the constitutional balance of powers (II.). This is a necessary step before dealing with the EU »*Acquis*« in the field (III.). On this basis, the organisation of administrative justice (IV.), the scope of jurisdiction (V.) and several questions of procedure (VI.) will be investigated. The findings will be summarized in the final chapter »Summary and Conclusions« (VII.).

II. The Scope and Role of Administrative Justice

A. The Scope of Administrative Justice

At first glance, the term »administrative justice« may appear clear enough. There are, however, several phenomena that may or may not be included, depending on the respective context. The processes of administrative review by the administrative authority of higher tier usually fall beyond the scope of administrative justice. Such review through an independent authority that does not fully qualify as a court, however, must be considered in the context of the broad meaning of »court« in Art 234 ECT and 35 EUT, and to some extent even under Art 6 ECHR.[1] Furthermore, there

[1] Cf infra III.

may exist a special jurisdiction of constitutional courts (e.g. fundamental rights complaints) or other (criminal or civil, e.g. state liability) courts that may subject the »administration«[2] to the judicial process of review. Finally, several means that do not fit in the standard idea of administrative justice have been developed, such as Ombudsmen or mediation procedures.

In line with the purpose of the twinning project, this paper will use a narrow definition of administrative justice as the organisation, powers and procedures of the courts that carry the bulk of control over »administration« by legal standards. The means mentioned above deserve consideration in that context, but they will not be in the centre of attention.

B. Position in the Separation of Powers

Administrative justice seems to unite judicial and executive powers. To some extent, it is characterized by overlapping functions from both branches of government; administrative courts are part of the judiciary in a formal sense, but the material object of their powers is the executive branch. This special situation is reflected in the typical problems arising from it, for example, the review in cases of administrative discretion or in any case when administrative courts may issue administrative acts in certain situations.

The relationship with the legislative branch is somewhat less problematic due to the clear hierarchy involved, as administrative justice is subject to the law. Tensions may arise from the role of administrative courts in the systems that subject the laws passed by Parliament to constitutional review or from the issues of political responsibility of the executive branch to Parliament.

C. Concepts

According to English law, administrative justice is part of the competences of the ordinary courts; there are no specialised administrative courts. This »Anglo-Saxon« solution avoids problems that may arise between the two systems within the judiciary. Due to the concept of parliamentary sovereignty, the courts are also clearly subject to Parliament; since the

[2] This term is used as the concrete object of review, usually »administrative acts«; cf infra V.A.

Human Rights Act, they have been empowered to review parliamentary legislation, but can only issue a declaration of incompatibility,[3] which does not affect the legal force of the act in question. The relationship with the executive branch is shaped by a general judicial self-restraint.

France, on the other hand, has a three-tier, specialised system of administrative courts with the *Conseil d'État* as its supreme institution. The *Conseil Constitutionnel* has little impact on administrative justice since its control over laws is only exercised *ex ante* and courts cannot interact with it. The administrative courts are bound by law, although to a certain extent, the standards applied result from other sources (namely general principles of law; »principes généraux«). The intensity of control varies, but generally speaking, preserving the ability of the executive branch to fulfil its duties enjoys respect.

In Germany, administrative justice is applied by a three-tier,[4] specialised system of administrative courts. There are several peculiar features in comparison with France or England, as well as with most other European countries. Several special branches of administrative courts have been established, namely for tax law and social law. The control of the executive branch is rather detailed and the courts leave a relatively small space for discretion. The issue of constitutionality of laws can be referred to the Federal Constitutional Court. Furthermore, decisions by the administrative courts can be challenged through a special complaint (Verfassungsbeschwerde) to the Federal Constitutional Court. In some cases, the detailed scrutiny applied by the latter has lead to criticism of it becoming a fourth tier of administrative justice. Overall, the German system is characterized by the far reaching constitutionalization of the entire legal system.

In other European countries, administrative justice shows considerable similarities to the three examples shown above, notwithstanding the inevitable peculiarities that arise from history, legal culture or constitutional and political background. In Austria, for example, the powers of the Constitutional Court create problems similar to those in Germany, despite considerable differences in the overall balance between the courts. Nevertheless, certain judicial self-restraint can be found, which seems closer to French or English practice.

[3] Section 4 Human Rights Act 1998.

[4] The following refers to the federal level; administrative justice at the state level may differ in some aspects.

D. ECHR Dimension

Administrative procedure and administrative justice are strongly influenced by the guarantees of the European Convention on Human Rights (ECHR), especially through the procedural guarantees under Art 6 ECHR. Although the guarantees only apply to procedures concerning »civil« and »criminal« matters, both fields have been subject to an extensive interpretation through the Strasbourg institutions. They clearly apply to a variety of administrative matters such as certain aspects of expropriation, or of the regulation of professions. It is quite difficult to draw a line separating the cases that are subject to Art 6 ECHR from those that are not.[5] Under the EU *Acquis*, the separation has been set aside by the ECJ.[6]

E. EU Dimension

National judges have been described as »Community judges« insofar as they can be considered part of the decentralized judiciary of the European Community and, later, the European Union. As the role of administrative justice is quite limited in the third and second pillars,[7] the focus on the first pillar expressed by the term »Community judge« is still justified. The following considerations will also deal mostly with Community law.

The key functions of »Community judges« are the application of directly applicable Community law granting precedent over national law, the interpretation of national law in conformity with Community and Union law, and under certain circumstances the reference of questions for preliminary ruling to the ECJ. In this capacity, the administrative judge does not differ from the criminal or civil judge.

[5] Cf for example van Dijk/van Hoof/van Rijn/Zwaak (eds), Theory and Practice of the European Convention on Human Rights[4] (2006) 514–557; Grabenwarter, Verfahrensgarantien in der Verwaltungsgerichtsbarkeit (1997) 35–107.

[6] Cf infra III.D.

[7] For a short explanation of the EU's pillar structure see http://europa.eu/scadplus/glossary/eu_pillars_en.htm

III. The EU »*Acquis*«

A. The *Acquis* Communautaire Concerning Administrative Justice

EU law does not entail a general set of detailed rules on administrative procedure or administrative justice, neither for the EU judiciary in Luxembourg (ECJ, Court of first instance, chambers) nor for the national courts in their capacity as »Community judges«. Special rules may exist, but they do not follow a general or extensive system.

As a consequence, general principles of law have been identified by the ECJ to fill in this void. Nevertheless, national courts (for the definition see B.) are constituted by their national laws on organisation. They apply their domestic laws of procedure within their domestic scope of jurisdiction. General principles of law may modify or even extend national provisions, but they do not supplicate for them. The most important principles are those of non-discrimination and effectiveness of administrative justice (C.) and fundamental procedural rights (D.). In some areas, the case law of the ECJ or secondary Community law have provided for rules that are more detailed. Some examples will be addressed under E.

B. The Definition of »Court«

In the context of the *acquis communautaire* in administrative justice, the term »court« can take on different meanings. Under Art 234 ECT and Art 35 EUT, a »court« that can refer to the ECJ for a preliminary ruling is defined as broadly as any formally independent authority deciding in a dispute based on legal standards.[8] Under Art 6 ECHR and the fundamental procedural rights of EU law, to a large extent inspired by Art 6 ECHR, a »court« or »tribunal« can be described as any independent authority deciding in a dispute and meeting further guarantees of independence, such as sufficient duration of office or lack of any appearance of partiality. Finally, the scope of courts as defined under national law is usually, but not necessarily,[9] narrower than both »European« definitions. Independent ad-

[8] Cf for example ECJ case C-54/96, *Dorsch Consult*, ECR 1997, I-4961.

[9] For example, a national court may be considered partial in a specific case under Art 6 ECHR and therefore not qualify as an independent tribunal.

ministrative authorities at the national level may qualify as courts in the meaning of Art 234 ECT and Art 35 EUT as well as Art 6 ECHR.

The rules contained in the *Acquis Communautaire* apply to all »courts« in the sense of Art 234 ECT and Art 35 EUT. The following considerations will focus on the usually narrower meaning of »court« in the national legal order. The fact that there are various other independent authorities, however, should be remembered as a side note.

C. The General Rule – Non-discrimination and Effectiveness

According to the settled case law of the ECJ, national law governs the application of Community law by national authorities in so far as it does not discriminate against Community law, and as it guarantees an effective application of Community law.[10] Both criteria allow for a large space for interpretation. As a general rule in Community law, discrimination should be construed broadly to include indirect discrimination. Effectiveness does not equal perfect effectiveness, but exceptions like time-limits on claims should be narrowly defined and well reasoned.

Another doctrine closely related to the effectiveness of Community Law is the broadly defined position of a party to administrative or judicial procedure. In contrast to those legal systems that demand a more clearly defined subjective right, in Community law a qualified interest in the outcome of the respective procedure is sufficient. Therefore, national law may have to grant broader access to Community law procedures than to those solely under national law. A similar result of the effectiveness doctrine can be found in the area of interim relief or injunctions; the provisional protection of rights under Community law or of Community interests are awarded a prominent role in the case law of the ECJ and may go beyond national law.[11]

An example for some of these effects can be found in the national provision(s) providing for a time-limit or broad effects of *res iudicata* on demands for the repayment of unlawfully obtained government funds.[12] It may ap-

[10] Cf for example ECJ joint cases C-430/93 and 431/93, *van Schijndel and van Veen*, ECR 1995, I-4705; Dörr/Lenz, Europäischer Verwaltungsrechtsschutz (2006) 116–140.

[11] For a very far-reaching decision see ECJ Case C-97/91, *Borelli*, ECR 1992, I-6313.

[12] Cf, for example, ECJ Case C-24/95, *Alcan*, ECR 1997, I-1591; ECJ 18th July 2007, Case C-119/05, *Lucchini*.

ply equally to national and Community cases. Considering the crucial role of repayment of aids granted in violation of the Community's state aid regime, this particular national rule might be seen as an indirect discrimination. It most certainly renders Community law inefficient to a degree that the ECJ would not tolerate. Furthermore, a third party – the competitor of the enterprise receiving the aid – must be granted a right to pursue the full application of state aid law.[13] Depending on the national legal system and tradition, this may amount to considerable challenges.

D. Fundamental Procedural Rights

The general rule of non-discrimination and effectiveness is further expanded by fundamental procedural rights as part of EU primary law (namely Art 6 EUT, general principles of law). These rights are binding not only on the Union, but also on the member states insofar as they act for the Union. In that regard, again national law governs the application of Community law unless it is superseded by Community law.

Fundamental procedural rights consist of several rights. At their core is Art 6 ECHR, enhanced through Art 13 ECHR. According to the case law of the ECJ, its guarantees are not limited to civil rights and criminal charges, but apply to all procedures. The most important effect stemming from this doctrine is that for the Community legal order, administrative procedure and administrative justice are fully subject to the guarantees of Art 6 ECHR.[14]

The substance of fundamental procedural rights can be summarized as follows:[15]

- The right to a decision by an independent and impartial tribunal; if the tribunal (or tribunals) decides (decide) as the superior instance over non-tribunals, at least one tribunal must have full jurisdiction over law and facts;
- The right to have access to the information necessary to present his or her position, the right to be heard and public access to procedures; to some extent, granting information and hearing the

[13] For example ECJ Case C-144/91, *Demoor*, ECR 1992, I-6613.

[14] ECJ Case C-185/95 P, *Baustahlgewebe*, ECR 1998, I-8417.

[15] Cf, for example, Winkler, Die Grundrechte der Europäischen Union (2006) 474–509 and 557 (english summary).

party's position can take place in administrative procedure, but at least the possibility to do so must be maintained for the process of administrative justice. The right to be heard and the guarantee of public procedure are best served by and will usually require oral hearings before at least one authority with the status of a tribunal;

- Respect for the principles of equality of procedural rights; this right plays a particularly important role in administrative justice as the roles usually change from administrative procedure to judicial process, as the administrative authority becomes a party before the administrative court. This peculiarity of administrative justice may require special rules to ensure a balance between the parties with regard to their procedural position;
- The right to legal advice, defence and representation, when necessary supported by legal aid, as well as the confidentiality of legal advice: Since not all administrative systems do or can provide access to qualified legal representation, it must be maintained within the realm of administrative justice;
- The right to a decision within a reasonable time; according to ECJ, the reasonableness must be judged for the time between the initiation of an administrative procedure and its judicial review.[16] Problems often arise from complex systems of review where one or more levels of administrative review are followed by one or more levels of judicial review. If the latter relies strongly on cassatory decisions, the problem becomes exacerbated, as the case will return to a lower level, from where another time-consuming review may begin;
- The right to be given the reasons for a decision. The reasons serve two purposes: to avoid arbitrary decisions, and to rationalize the review of decisions. The reasoning of the deciding authority forms the starting point of the process before administrative courts.

The above-mentioned guarantees can be fulfilled by different concepts of administrative procedure and administrative justice. They allow for some extent of flexibility due to open wording (e.g. »reasonable« time) and by looking at the entire chain of decisions on a case. Furthermore, the sheer variety of potential disputes ranging from, for example, small fines over building permits to highly complex planning acts in zoning or environmen-

[16] ECJ Case C-185/95 P, *Baustahlgewebe*, ECR 1998, I-8417.

tal protection requires a system that can adapt to those varying circumstances while respecting fundamental rights.

As a final note, special guarantees in criminal matters should be mentioned. In so far as administrative courts review administrative sanctions, the presumption of innocence for every accused and the principle of *ne bis in idem* will apply, at least in principle.[17]

E. Examples

Community law does not entail general rules for administrative justice in the member states beyond the broad principles laid down above. The only legal act providing detailed (although sectoral) rules of procedure is the Community Customs Code which compiles the rules and procedures applicable to goods traded between the Community and third countries.[18]

Scattered procedural rules may be found in various acts of Community legislation, or they may have been developed in the case law of the ECJ. Apart from the examples in state aid law mentioned above, two other prominent examples shall be mentioned: The directives on public procurement[19] do not only provide for a detailed set of rules for the procurement process, but also for the effective review of decisions taken by the contracting authorities and entities. Art 2 Directive 89/665/EEC contains *inter alia* the following provisions that can be considered a rough outline of the administrative justice system:

[17] The case law of the ECJ seems to maintain a less rigid approach towards what it considers administrative sanctions; cf for example Case C-210/00, *Käserei Champignon*, ECR 2002, I-6453.

[18] Council Regulation (EEC) 2913/92 establishing the Community Customs Code as last amended by Regulation (EC) 1791/2006.

[19] Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts as amended by Directive 92/50/EEC; Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors as amended by Directive 2006/97/EC.

- Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given;
- Provision must be made to guarantee procedures of judicial review or review by another body that is a court or a tribunal within the meaning of Article 234 ECT independent from both the contracting authority and the review body;
- The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary;
- At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary;
- The independent body shall take its decisions following a procedure in which both sides are heard.

In a similar though less intrusive way, some directives concerning regulation of certain markets provide for authorities and procedures. For example, Art 4 Directive 2002/21/EC[20] deals with a »Right of appeal« against the decisions of a national regulatory authority. The appellate body must be independent and shall have the appropriate expertise available. If the appellate body is not judicial in character, its decision shall be subject to review by a court or tribunal within the meaning of Art 234 ECT.

These examples show that secondary legislation may require special organisational or procedural measures at the national level, depending on the system of administrative justice in place. While it is not possible to meet all requirements in a general manner, it is easier to adapt a system where most requirements have already been met.

IV. Organisation

A. Independent Authorities and Courts

The first decision on organisation has to decide on the role of independent administrative authorities as part of the review system which will usually

[20] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive).

acquire the quality of »courts« under Art 234 ECT and Art 35 EUT and often that of a tribunal under Art 6 ECHR. In theory, the entire review system could consist of independent administrative authorities, but the common European standard shows a clear preference for courts with full judicial guarantees and the formal quality of a court in the meaning under national law.

However, this does not exclude a certain role for independent administrative authorities. The establishment of such authorities is an option in certain areas, like the above-mentioned procurement law and telecommunication law. For those authorities, the legislature may also provide for different rules of *judicial review*; for example, in a two-tier system of administrative courts, direct appeal to the higher court may be granted.[21] Nevertheless, such authorities can give rise to problems since they constitute a hybrid branch of government that is neither judicial nor fully administrative in nature.[22]

B. Centralised or Decentralised

Only the smaller EU member states have established centralised administrative courts. In the medium size states, there are usually two tiers of administrative justice and in the larger ones often three.[23] One exception is Austria, which as a medium-size country only has one administrative court (for federal and state matters). However, the lack of lower administrative courts is compensated for by various authorities enjoying a quasi-judicial status through their organisation, procedure and *res iudicata* quality of their decisions.[24]

[21] The highest esteem for certain independent administrative authorities is expressed in Austria, where appeal to the (sole) administrative court is completely excluded, leaving only appeal to the constitutional court. This peculiarity is, however, often viewed as an undue limitation of judicial protection.

[22] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 31.

[23] Cf for details and exceptions from the broad rule Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 24–29.

[24] Essentially in the Independent Administrative Senates; cf Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 26 and 31. Reform projects to establish a second level of administrative justice have been pursued for several decades, so far with very limited results.

The relationships between the various levels of administrative justice system differ considerably;[25] in this aspect of internal organisation, the ECHR, the EU *Acquis* and usually the national constitutions leave a lot of leeway. The crucial issue of the appeal system will be dealt with under VI.F.

C. Federal and Regional Systems

Federal organisation of or regional autonomy within a state is reflected in its judicial system, though often just as modifications of an overall system (e.g. Germany, Austria, Italy).[26] Therefore, this issue does not warrant further consideration.

D. Specialization

The system of administrative justice is usually a unitary one, notwithstanding the possible competences of ordinary or constitutional courts. In Germany, different branches of administrative justice have been established for matters of general administrative law, tax law, and social law. However, this formal difference should not be overestimated; most countries deal with a requirement of specialisation within the unitary structure by specialisation within the courts and through the distribution of cases.[27]

E. The Selection of Judges

The selection of judges is a question of internal organisation and therefore usually beyond the harmonizing effects of the ECHR and EU law. Therefore, a wide variety of recruitment systems can be found among EU member states.[28] The only requirement and general standard is the quality

[25] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 24–29.

[26] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 27–28.

[27] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 21–22 and 37.

[28] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 37–41.

and the independence of the administrative courts. Judges are overwhelmingly (though not exclusively) jurists with varying degrees of experience. They may be specifically trained within the system of administrative justice or share training and recruitment systems with the entire judiciary. As an alternative, administrative judges may also be recruited form various (usually law related) professions (essentially attorneys, jurists from various administrative positions, university professors).

F. Lay Participation

The role of laypersons is quite limited in most European court systems with the exception of penal law. In the absence of a jury system, lay judges may form the deciding senate with professional judges (for example in Germany). The participation of lay judges requires decision by a senate. Furthermore, lay participation may play a certain role in special administrative (especially independent regulatory) authorities where technical and economic knowledge is required.

G. Collegiality or Single Judge

Decision by a senate of several judges (collegiality) is often reserved for important or appeal cases; it can also be due to the desired participation of lay judges. Senates may provide better results through internal deliberation and the contribution of differing views, but they also require specific rules for decision-making (which can be a source of errors) and require more human resources. Due to the increasing importance of economic considerations, the trend for multi-tier systems is to increase the role of the single judge in the first tier,[29] while appeal decisions appear to be still reserved for senates.

H. The Role of Other Courts

Special administrative judiciary interacts with other courts and requires a definition and separation of jurisdiction. In this regard, European legal

[29] E.g., an option for the Verwaltungsgericht in Germany, for most cases of less importance for the *Tribunal administratif* in France.

systems again show a high degree of diversity often rooted in constitutional provisions and legal traditions. There are, however, several typical points of friction.

Where a constitutional court exists, it may also exercise a control of administrative justice[30] or directly of public administration,[31] acting as a specialised administrative court. Review or parallel powers often result in conflicts.[32]

With regard to the ordinary (criminal and civil) courts, the problem is concentrated in parallel powers. They usually arise in cases that have a dual nature, like state liability, the penal law consequences of administrative malfeasance or the civil law aspects of matters such as the compensation for expropriation. Social insurance law may also be of dual material nature (partly public, partly civil); civil and administrative courts may share jurisdiction or it may be given exclusively to one tier of the judiciary.

V. The Scope of Jurisdiction

A. Acts Subject to Review

The core function of administrative justice is the review of administrative acts. This general description still allows for a large variety of the concrete national provisions.

The classic administrative act is based on public authority and affects the legal position of individuals. Such acts may be individual or general, normative (namely administrative decision) or merely factual (for example the stopping of a car for control). Such administrative acts must be under the review of administrative courts. From a procedural perspective, there are, however, different options to effectuate such a review (cf infra VI.B.).

The question of cases that are not simply administrative in nature has already been touched in the context of the role of other courts. The administration may act in the form of contracts, which may again belong to either public or civil laws. The provision of services (especially services of

[30] E.g. in Germany, Art 93 Basic Law.

[31] E.g. in Austria, Art 144 Federal Constitutional Law.

[32] For a broader view, cf Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 32–33.

public interest) and payments (welfare, stipends, pensions, etc.) may be based on administrative decisions or on contracts under public or civil laws. Whether these are subject to the review of administrative justice depends on their legal basis and the relationship of administrative courts to other courts. A similar issue arises with state liability.

B. Matters of Fact and Law

The primary focus of judicial review is to ensure the adherence of the executive branch to the rule of law. Regarding the review of the facts established by the administrative authorities, there are two options: The administrative court makes sure that an administrative authority has lawfully established the facts, without power to investigate the facts on its own, or the administrative court has the power to investigate the facts and put its own findings in the place of those established by an administrative authority.

Fundamental procedural rights require a review of the facts by a tribunal. Though not impossible, it is notoriously difficult to meet that requirement under the first option described above.[33] Furthermore, it will often lead to a cassatory decision as the administrative authorities will have to re-establish the facts.

The second option, empowering the courts to investigate the facts, still allows for varying degrees of scrutiny depending on a variety of circumstances. Matters to consider are whether the law of administrative procedure provides for detailed rules on establishing the facts, the questions raised before the administrative court or simply a legal tradition concerning the trust of courts into the quality of the procedures performed by administrative authorities.

C. The Scope of Decisions-making

Administrative courts may follow the principle of cassation or the principle of reformative decision. Under the first, the courts will only repeal admi-

[33] Art 6 ECHR allows for a somewhat reserved position of the courts on the review of facts, depending on the circumstances; cf for example van Dijk/van Hoof/van Rijn/Zwaak (eds), Theory and Practice of the European Convention on Human Rights[4] (2006) 561–562.

nistrative acts; if need for a new act arises, the matter has to be referred back to the respective administrative authority and that act may then be challenged in court again. Under the latter, administrative courts may not only repeal, but also change an administrative act.

The reformative system has clear advantages, especially when it comes to respecting the need for a decision in reasonable time. The only reason for the system of cassation can be found in considerations of the separation and balance of powers. The reformative system further emphasises a de facto superiority of the judicial over the executive branch, which may be considered inappropriate within legal and constitutional traditions with a high regard for the standing of the executive branch, like Austria.

D. The Margin of Appreciation

Similar arguments apply to the question of how far administrative courts should respect a margin of appreciation exercised by the administrative authorities. This issue can be addressed from a formal or from a material perspective.

From the formal perspective, administrative law may explicitly grant margins of appreciation to be exercised solely through the executive branch. The respective decisions have to stay within the margin set by law, but they are not fully determined by law. The choice of one of the possible decisions within the established margin is subject to the political responsibility of the executive branch. When administrative courts have to confront the issue, only a system based on the principle of cassation offers a simple answer: the court will only review whether the margin of appreciation has been respected. If not, the decision will be reverted to the administrative authority. Under a reformative system, two solutions exist: the court can either act as court of cassation in this specific regard (as an exemption), or the court can itself exercise appreciation (following the general rule).

Under a material perspective, the problem is more general: Every legal provision suffers from the lack of absolute precision that is inherent to language. Hence, there is always some room for interpretation. In this regard, administrative courts usually exercise some judicial self-restraint in review. In contrast to the cases of an explicit margin of appreciation, however, this restraint is not a question of black or white, but just of a certain shade of grey depending *inter alia* on the prevailing idea of the separation of powers as well as legal and constitutional traditions.

E. Protection Against Administrative Inaction

Protection against administrative inaction is a standard responsibility of administrative courts; it is also required under the EU *Acquis*. In its concrete solution, the questions addressed above reappear: What is the role of courts *vis à vis* the executive branch? From the perspective of the administrative authorities, the least intrusive solution is a judgment that only decides on the unlawfulness of inaction and requires the administrative authority to act; the ECT provides for a solution after this model in its Art 232. In the more complex administrative system of the member states, however, courts often have power to act in the place of the administrative authority. They either act directly or after the first judgment has not been followed.

If administrative justice follows the principle of reformation, there is no specific problem with the court acting in place of an administrative authority; the only problematic areas are those (as in general) where administrative law explicitly grants margins of appreciation.

F. Law and Constitution

Finally, there are differing models for the role that administrative courts play in the constitutional judiciary; the latter has to be understood broadly and refers to courts deciding on constitutional issues, irrespective of whether they are termed »constitutional« court.

Where special constitutional courts are established (e.g. Germany, Italy, Spain, Austria), the issue usually becomes one of the relationship between the courts. Then, there are systems where all judges are also constitutional judges (Scandinavia, to some extent Great Britain), or where essentially no powers of a constitutional judiciary exist (e.g. the Netherlands). Here, the issue will follow more or less the general rules. Finally, special situations may arise when a body making decisions on constitutional issues is not a court or has only a rather limited competence, like the *Conseil constitutionnel* in France or the *Cour d'arbitrage* in Belgium.

Whether and to what extent administrative courts will apply constitutional law also depends on whether administrative law clearly determines administrative action or whether it just provides the legal framework. In the first case, constitutional law will be mostly mediated through administrative law, in the second case it will play a larger role.

VI. Procedure

A. Standing to Sue

In Europe, there are essentially two concepts defining the access of individuals to administrative procedure and/or administrative courts. The broader of the two belongs to the French tradition of administrative law and it is based on a qualified interest of an individual *(intérêt pour agir)*. The requirement of a qualified interest differentiates this concept from one of *actio popularis*, which is not to be found among the EU member states.[34] While depending on concrete interpretation, it usually provides for a relatively wide involvement of individuals including, for example, competitors of an entrepreneur receiving favourable treatment or interest groups in planning law (zoning, protection of habitats, etc.).

The narrower concept is based on the German tradition of administrative law and requires the existence of a more or less explicitly granted and defined subjective right. While in theory, such rights could be granted generously, in practice this is often not the case. For example, in the two areas of law mentioned above (competitors, planning law), the access of individuals to administrative procedure and/or administrative courts is in general much more narrowly defined.

The concept based on a qualified interest has also been incorporated into EU law through the case law of the ECJ. A national system based on the same concept will more easily comply with the EU *Acquis*, although the rights-based concept is flexible enough to meet the requirements; it will just lead to a certain dichotomy between purely national cases and cases under EU law.

B. Specific Actions or General Clause

Access to administrative justice can be based on specific actions, namely for review of administrative acts or a category of administrative acts, against administrative inaction, for payments or services etc. Alternatively, a general clause may provide broad access to administrative justice, possibly with certain exemptions. In both approaches the limits of administrative justice have to be defined, mostly against other courts; hence, the chosen

[34] Observatory for Institutional and Legal Changes of the University of Limoges, Administrative Justice in Europe (2007) 50–52.

approach will also depend on the overall position of administrative courts within the judiciary.

C. Oral Hearings

Fundamental procedural rights include a right to be heard. In most cases, this will require oral hearings before at least one instance of tribunal quality, usually the first instance of the administrative court system. Oral hearings may not be required in special situations, namely for purely legal arguments.[35] To ensure that oral hearings are not unduly refused, they should be obligatory unless the parties agree to waive their right.

D. Rationalization

Certain rules are designed to simplify, streamline and rationalize the procedure before administrative courts, such as *de minimis* rules for appeals, deadlines for appeals, time-limits for claims, effects of *res iudicata* etc. The introduction of such measures is first and foremost a political decision, only limited by fundamental procedural rights. Art 6 ECHR allows, however, for a wide variety of measures to guarantee the proper functioning of the courts as long as access is maintained in principle.[36]

E. The Role of Internal Administrative Review

Administrative justice and internal administrative review are closely connected. An encompassing internal review adds an additional instance and increases the risk of delays (and of a violation of the right to decision in reasonable time). For this reason, the structure and procedural law of administrative courts have to take any internal administrative review mechanism into account. For example, the centralized single administrative court in Austria reflects a complex internal administrative review that usually encompasses one or two instances, often through independent administrative authorities. In contrast, Germany's two to three-tier system

[35] Cf for example van Dijk/van Hoof/van Rijn/Zwaak (eds), Theory and Practice of the European Convention on Human Rights[4] (2006) 589–591.

[36] Van Dijk/van Hoof/van Rijn/Zwaak (eds), Theory and Practice of the European Convention on Human Rights[4] (2006) 569–578.

of administrative justice is only accompanied by an internal administrative review (*Widerspruchsverfahren*) that is essentially integrated into the judicial proceedings.

F. The Review of Lower Administrative Courts

In a multi-tier system of administrative justice, there exist several options to decide the relationship between higher and lower courts. The key question is in how far lower court judgments are subject to appeal. Fundamental procedural rights require only one level of tribunals.[37] Therefore, the if and how of any appeal process is mostly a political decision. Several considerations may contribute to shape this decision, like the speed and efficiency of administrative justice, the proper functioning of the supreme administrative court or the importance of cohesive case law and practice of judgments.

G. Enforcement

Under the rule of law, administrative authorities should follow the judgments of administrative courts without reserve or delay. Swift and unconditional compliance is also required to avoid violations of the principle of effectiveness of EU law and of fundamental procedural rights. Some problems of effectiveness, however, can never be ruled out completely.

Their importance is reduced under a system following the principle of reformation. Apart from that, the general discipline of public service should support the effectiveness of administrative court judgements to some extent; possible sanctions include disciplinary measures, sanctions under criminal law (abuse of office, etc.) or a possible invocation of state liability. These instruments can be reinforced by giving administrative courts the power to issue sanctions against officials for non-compliance. Beyond that, special rules of enforcement may be enacted like those existing for civil procedure.

[37] Van Dijk/van Hoof/van Rijn/Zwaak (eds), Theory and Practice of the European Convention on Human Rights[4] (2006) 564–567.

VII. Summary and Conclusions

As the member states still enjoy a large degree of autonomy regarding the organisation and procedure of administrative courts, there are only few overarching tenets of administrative justice. Broad access to and comprehensive protection through administrative courts are required by the EU ***Acquis*** entailing fundamental procedural rights as well as the principles of effectiveness and non-discrimination.

Within their autonomy, the member states have established a variety of systems of administrative justice. While a general grouping into French, German and English traditions is possible, these are not to be seen as rigid and closed models. A good and modern system of administrative justice can be based on any of the models or combine features from different models. The most important aspect is internal consistency: the individual features of organization and procedure must be harmonized, and they must take due consideration of administrative procedure and the jurisdictions of other courts.

ADMINISTRATIVE JUSTICE IN EUROPE: THE EU ACQUIS, GOOD PRACTICE AND RECENT DEVELOPMENTS

Summary

Administrative justice plays a key role in the implementation of EU law. To a large extent, EU legislation concerns administrative law. In this area of law, the most important are the administrative courts acting as »Community judges« cooperating with the European Court of Justice (ECJ) in Luxembourg. As the accession of a state to the Union depends inter alia *on its ability to fully implement and apply the large block of legislation found in the* acquis communautaire, *a system of administrative justice fulfilling the EU standards is an important precondition for accession.*

The purpose of the present paper lies in a broad outline of several key building stones of administrative justice in Europe. Recent developments throughout Europe concerning administrative justice, especially administrative courts' procedure, converge to a large extent because of the adaptation of administrative justice to the requirements of Art 6 ECHR and the EU acquis.

As the member states still enjoy a large degree of autonomy regarding the organisation and procedure of administrative courts, there are only few overarching tenets

of Administrative Justice: Broad access to and comprehensive protection through administrative courts are required by the EU Acquis *entailing fundamental procedural rights as well as the principles of effectiveness and non-discrimination. Within their autonomy, member states have established a variety of systems of Administrative Justice. While a general grouping into French, German and English traditions is possible, these are not to be seen as rigid and closed models. A good and modern system of Administrative Justice can be based on any of the models or combine features from different models. The most important aspect is internal consistency: the individual features of organization and procedure must be harmonized, and they must take due consideration of administrative procedure and the jurisdictions of other courts.*

Key words: *administrative justice, administrative court,* acquis communautaire, *community judge, Art 6 ECHR, fundamental procedural rights, (principle of) effectiveness of Community law, (principle of) non-discrimination under Community law*

UPRAVNO SUDOVANJE U EUROPI: ZAJEDNIČKA PRAVNA STEČEVINA, DOBRA PRAKSA I NOVIJI RAZVOJ

Sažetak

*Upravno sudovanje ima ključnu ulogu u primjeni prava Europske Unije. Zakonodavstvo Unije u velikoj se mjeri odnosi na upravno pravo. Na tom pravnom području najvažniji su upravni sudovi koji djeluju kao »sudovi Zajednice« surađujući s Europskim sudom pravde (ESP) u Luksemburgu. Budući da pridruživanje neke države Europskoj uniji između ostalog ovisi o njezinoj sposobnosti da u potpunosti primijeni veliki dio zakonodavstva koje čini dio zajedničke pravne stečevine EU (*acquis communautaire*), sustav upravnog sudovanja koji ispunjava europske standarde jedan je od važnih preduvjeta za pridruživanje.*

Rad opisuje nekoliko ključnih čimbenika upravnog sudovanja u Europi. Noviji razvoj upravnog sudovanja, posebice upravnosudskog postupka širom Europe u velikoj mjeri konvergira zbog prilagodbe upravnog sudovanja zahtjevima članka 6. Europske povelje o ljudskim pravima i zajedničke pravne stečevine.

Budući da države članice još uvijek uživaju visok stupanj autonomije u pogledu organizacije i postupanja upravnih sudova, postoji samo nekoliko obvezujućih postavki upravnog sudovanja. Zajednička pravna stečevina nameće široku dostupnost i sveobuhvatnu zaštitu pred upravnim sudovima, a time i određena

temeljna postupovna prava te načela učinkovitosti i nediskriminacije. Države članice su oslanjanjem na vlastitu autonomiju ustanovile različite sustave upravnog sudovanja. Premda ih se može klasificirati u francusku, njemačku i englesku tradiciju, ne treba ih gledati kao zatvorene modele. Dobar, moderan sustav upravnog sudovanja može se temeljiti na bilo kojem od spomenutih modela ili pak kombinirati pojedine karakteristike svakoga od njih. Najvažniji aspekt sustava je unutarnja dosljednost: individualne značajke organizacije i postupka moraju biti usklađene i moraju uzeti u obzir upravni postupak i nadležnost ostalih sudova.

Ključne riječi: *upravno sudovanje, upravni sud, zajednička pravna stečevina EU, sudac Zajednice, članak 6. Europske povelje o ljudskim pravima, temeljna postupovna prava, načelo učinkovitosti europskog prava, načelo nediskriminacije u europskom pravu*