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On the manifold interlinks between law and public administration

The respective IPAR special issue has been carefully designed to present selected trends and outcomes of participants' research within the "Law and Public Administration" as a permanent study group of the European Group of Public Administration (EGPA) in Brussels. This study group in particular and EGPA in an umbrella support aim at fostering interdisciplinary study of the practice and theory of law in public administration, administrative science and policy on national and European (including EU) perspectives. The group intends to be a meeting place for scholars and practitioners from different fields: lawyers, sociologists, policy analysts, economists and IT experts, working in academia and public institutions, as well as civil servants working in national and supranational institutions and NGOs.

The Law and Public Administration study group is a unique place in European scientifically environment where law and public administration specialists from very different backgrounds (professional, academic or geographic) can meet, discuss and share their work. In the last years the group met in Rotterdam (2008), Malta (2009), Toulouse (2010), Bucharest (2011), Bergen (2012), Edinburgh (2013) and will meet again in Speyer (2014). Scholars or practitioners from over 12 countries regularly attend the panel.

Beyond the presentation and the discussion on members' papers, the group is also a platform for research on law and public administration. Up to now, several participants have presented research projects (among others on the topics of ombudsmen, on the effectiveness of proceedings in administrative courts, adjudication in administrative procedures and on systems of allocation of limited rights), looking for the involvement of other interested group members. These projects lead to joint activities and, eventually, joint publications. Besides, study group members regularly apply for research grants or visiting scholarships within the study group's network.

In 2011, the Group "Law and Public Administration" organized in Vienna, the 4th Trans European Dialogue (TED) involving the two key professional organizations of public administration in Europe – EGPA and NISPAcee. The dialogue tackled a topic neglected for a long time: Law vs. Public Management

Revisited, bringing together managers and lawyers to discuss issues of common interest.

At annual EGPA events, proposed, accepted and presented papers are available on the conferences' website. As a next step in fostering the cooperation among members and opening up to other contributors, the group is interested in an active policy towards publication of the papers. This will enhance the group visibility and the impact of each paper. Thus, in 2009, the Study group published a special issue of the Transylvanian Review of Administrative Sciences (guest editors B. Thompson, D. C. Dragos, and B. Neamtu). In 2012, the Proceedings of the Study Group Law and Public Administration (Editors: D. C. Dragos, F. Lafarge, P. Willemsen) were edited, covering a large span of Law and PA subjects written by lawyers, PA specialists, and political scientists, selected following a blind review process. In 2013, the Utrecht Law Review dedicated a special issue to the group (Volume 9, Issue 3, July 2013), on the theme of Theory and Practice of Law in Public Administration and Administrative Justice (guest editors D. Dragos, F. Lafarge, P. Willemsen). The contributions identify problems and suggest solutions concerning important aspects of public administration in various European countries, both from an internal and an external perspective. Again, the papers were fully subjected to a blind peer review process.

Finally, continuing this tradition, the papers presented at the EGPA 2013 conference in Edinburgh have been assessed in a double-blind review process and significantly reworked in order to be included in this special issue of the IPAR as scientific articles. The papers in this issue cover a large area of subjects, but all converge towards the relation between - prevailing administrative procedural - law and public administration.

Remač, in its contribution on the coordination between Ombudsman and the judiciary, part of his PhD thesis published recently at Intersentia, analyses a fast evolving institution in modern democratic states. The article highlights the main findings and recommendations of a comparative legal research carried out in the area of mutual interrelations of ombudsmen and the judiciary in the Netherlands, England and the European Union.

Transparency in public administration with its many facets is one of the main themes of this special issue. Thus, Kovač tackles the procedural aspects of the right to information, from a comparative perspective, emphasizing thus also participatory approach. Based on an analysis of several jurisdictions (USA, Ireland, Sweden, Austria, Germany, Slovenia, Croatia) the author highlights the importance of time limits and of an appeal to an independent body or judicial review, which can contribute to a significantly higher level of implementation of the rights of information. Brink and Marseille continue exploring participatory issues, presenting the findings of a research project on participation of citizens in pre-trial hearings, in selected fields - social security and the civil

service. The data indicate that the New Case Management Procedure has the potential to improve the quality of the case treatment. A second article falling within the theme of transparency is written by Dragos, Neamtu and Capraru, and discusses public participation in environmental decision making in Romania, based on the Aarhus convention. The article presents the manner in which the participation pillar from the Aarhus Convention was transposed into the Romanian legislation and how its provisions were applied to a highly controversial case. The environmental issues with special focus on integrated permits in the Netherlands are analyzed by Tolsma, who shows that integration of legislation in the field of environmental law is a growing trend, however questioning whether this specific concept of integrated environmental permitting can be achieved within the constraints of Dutch administrative law.

Two articles coming from the Czech Republic deal with issues that are central to the alternative dispute resolution in this country. The first one by Kadečka, Hejč, Prokopová and Venclíček discusses the effectiveness of non-binding Instruments of Protection against Administrative Acts. They show that such tools can have a limited impact due to the absence of devolutive effect and of the independence of the review bodies. In the second article, Skulová, Potěšil and Hejč, dwell on the specifics of the remonstrance procedure against decisions made by central administrative bodies. The authors verify the hypothesis whether the institution of remonstrance does reflect the principle of two instances in its entirety, and propose the transformation of remonstrance committees into administrative bodies or administrative tribunal issuing binding acts.

A new concept that has received great attention lately, the mediation in public law, is discussed firstly by Goes. He addresses development of legal framework relating to ADR in Belgian public law as a follow up of a more partnerships and consensus oriented relationship between administration and citizens, characterized by reciprocity and dialogue, however with some systemic restrictions within administrative relations. The article by Veny, Carlens, Verbeeck and Warnez in the context of Belgian law refers to specific instances: municipal administrative sanctions and urban planning, presenting additionally to theoretical framework applicative dimensions of the topic.

The article concluding the special issue is dedicated to the reform of public administration in Croatia, the newest member of the EU. Đulabić discusses the General Administrative Procedure Act (GAPA), which introduced several novelties in the regulation of general administrative procedure. The author concludes that despite changes to the legal text, the empirical data show that the new GAPA has not resulted in actual changes in everyday public administration.

The guest editors would like to express their gratitude to all contributors to the special issue, and in particular to the reviewers that took the time and effort to assess the submitted papers, as well as to participants to the debates, and to the editors of IPAR for hosting our group's contributions. Special thanks from Dacian Dragos and Francois Lafarge to our colleague Polonca Kovač for her unrelenting efforts towards the realization of this publication.

Guest editors: Dacian C. Dragos
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contents / vsebina

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Coordinating Ombudsmen and the Judiciary?

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ABSTRACT

An ombudsman institution is one of the most rapidly developing institutions in modern democratic states. Ombudsmen can be characterised as individual and impartial investigators of administration and its conduct. They act as dispute resolution mechanisms between the state and individuals and sometimes also as solvers of problems of individuals. In order to assess the quality of administrative conduct they use normative standards against which they assess this conduct. However, all these matters are primarily in the hands of the judiciary. The judiciary, notably administrative courts are the most important dispute resolution mechanisms in modern states that assess the administrative conduct against certain normative standards. Thus ombudsmen and the judiciary can be often seen as institutions having relatively similar competences in a relatively similar area, despite retaining numerous differences. They both are approached by the individuals and they can express their opinions about administrative justice. This paper highlights the main findings and recommendations of a comparative legal research carried out in the area of mutual interrelations of ombudsmen and the judiciary. On the examples of three different legal systems (the Netherlands, England and the European Union) the research discusses the possibility of coordination of relations between the ombudsman and the judiciary in connection with the position of these institutions, with their jurisprudence and ombudsprudence and with normative standards they use in their work.

Key words: *ombudsmen, judiciary, administrative procedures, coordination*

JEL: *K23, K40*

1 Introduction

An ombudsman institution is one of the most rapidly developing institutions in modern democratic states.[1] Nowadays, only a minor fraction of all states do not have this institution on a national or, at least, on a local level. Usually, they represent the ”prolonged hand of national parliaments” in the state administration. In this connection they individually and impartially investigate

1 This paper, as well as the book, uses the term ombudsman also for women working at this post. They do not want to discriminate them but they do it for the sake of consistency of the text. For the same reason they do not use the terms as ”ombudswoman”, ”ombudsperson”, ”ombudsbody” or ”ombuds”.

the conduct of the administration. While investigating the conduct of the administration they apply normative standards against which they assess this conduct. Generally, they can assess the compliance of administrative conduct against various normative concepts including the law, general concepts such as good administration, proper administration or human rights (Remáč, 2013). Ombudsmen also act as dispute resolution mechanisms between the state and individuals. However, they are not the only state institutions that resolve the disputes of discontented individuals. Most countries have other traditional mechanisms that primarily resolve these disputes. These traditional mechanisms are courts and tribunals or, in general, the judiciary. Compared to these traditional mechanisms, ombudsmen generally have several specific competences ("ombudsmen extras") such as own initiative investigations, the ability to make legally non-binding recommendations or the ability to identify and address structural problems within the administration.

Relations between ombudsman and the judiciary are nowadays relatively under-researched. One can observe some attempts to investigate these relations in some individual countries (Dragoş, Neamtu, & Balica, 2010), but comparative research does not really exist.[2] Until now, that is. This was one of the reasons for a PhD research that was carried out between October 2009 and October 2013 at the Montaigne Centre of the Utrecht University. The research was carried out in three completely different legal systems. It includes the legal system of England (common law), the legal system of the Netherlands (continental law) and the legal system of the European Union and specifically the following ombudsman institutions:

- the Dutch National Ombudsman,
- the UK Parliamentary Ombudsman,
- English Local Government Ombudsmen and
- the European Ombudsman.

The research answered three research questions directly connected with the coordination between ombudsmen and the judiciary, namely:

- how are the relations between ombudsmen and the judiciary as state institutions coordinated in the researched systems and what is the content of this coordination?
- what is the mutual significance of the reports and the judgments and their content for the other researched institution and what are their interrelations? and
- what is the mutual significance of the normative standards of ombudsmen and the judiciary in the researched systems and what are the interrelations between these normative standards?

2 There is comparative research on the ombudsmen included in Kucsko-Stadlmayer (2008) but this particular research compares the ombudsman institutions between themselves and not with the judiciary.

In order to answer these research questions in a systematic manner, the research assessed several written sources:

- academic writings and articles written about ombudsmen and the judiciary in the researched systems;
- presentations and speeches of the researched ombudsmen;
- written law, including statutes establishing ombudsmen and their competences;[3] statutes establishing the judiciary,[4] and sub-statutory rules dealing with the powers of ombudsmen or the judiciary.[5] In connection with the part of the research dealing with the European Union the major treaties were researched;
- jurisprudence of the courts and tribunals included into the research. In this connection a limitation was adopted as only court decisions from 2005–2013 were closely researched;[6]
- ombudsprudence of the researched ombudsmen. A time limitation was adopted also in connection with the ombudsprudence as only the "decisions" of ombudsmen from 2005–2013 were closely researched;[7] and
- other documents adopted and developed by the ombudsmen (annual reports and collections of their normative standards).

In order to provide also an empirical direction to the research, a number of interviews were carried out. The interviewed persons were all (at the time of the research) incumbent ombudsmen, various judges from national courts and tribunals and from the Court of Justice of the European Union and various professionals working directly with the researched institutions.

From a methodological perspective the research was a combination of traditional legal (desk) research and empirical research, as part of the data was received through interviews or questionnaires. In general, the research used three different systems of ombudsmen-judiciary relations as three different case studies.[8] This paper points to the main findings and the conclusions of the research. The validity and accuracy of the individual findings were, among others, ensured by a substantive and comprehensive check of the parts dealing with the different legal systems by academics with an in-depth knowledge of each legal system included in the research. The findings were also presented before an international academic public on several occasions.

3 For example, Dutch 1982 Wet Nationale ombudsman or UK 1974 Local Government Act.
4 For example, Dutch 1975 Wet op de Raad van State or the UK 1981 Supreme Court Act.
5 For example, the UK Civil procedure rules or the UK Pre-Action protocol for judicial review.
6 In some cases, for example, when dealing with the normative coordination between ombudsmen and the judiciary, the research also takes into account older court decisions.
7 In some cases, for example, when dealing with the normative coordination between ombudsmen and the judiciary, the research also takes into account older court decisions.
8 In order to see a complete methodology of the research see, Remáč, 2014, pp. 11–24.

The findings included in this paper are based on a comparative research of the relations in three legal systems included in the research (England, the Netherlands and the European Union) and they represent a set of final findings of a PhD research published by the publishing house Intersentia in 2014.

2 Coordination between ombudsmen and the judiciary?

Generally, ombudsmen and the judiciary exist alongside each other. First of all, the judiciary and ombudsmen are state institutions. They exercise state powers provided for them by the legislator through the law. They exercise these powers in a similar sphere - the sphere of administrative justice.[9] If one perceives their roles in a broad fashion it is possible to see that the judiciary and ombudsman exercise their functions as dispute resolution mechanisms between individuals and the (state) administration. In connection with the original relation between individuals and the administration the ombudsmen and the judiciary are both in a secondary position. The judiciary here stands as a traditional dispute resolution mechanism while the ombudsmen are one of the alternative dispute resolution mechanisms.[10] Based on this presumption, the dispute resolution function of ombudsmen has an alternative and subsidiary character as regards the dispute resolution function of the judiciary. However, it is not just an alternative, as ombudsmen can approach a different aspect of the conduct of the administration or approach the same conduct by the administration while applying different methods and techniques to those of the judiciary, such as informally approaching the administration, trying to mediate the dispute or trying to reach a friendly settlement between the parties to the dispute. Despite the differences between these institutions one cannot overlook their potential similarities and overlaps. These matters then raise several questions relating to the desirability of coordination between these institutions.

When applying the basics of Minzberg's organisational theory[11] to the relations between ombudsmen and the judiciary one has to take into account two fundamental and opposing requirements of this theory: the division of labour into the various tasks and the coordination of these tasks accomplishing the goal.[12] If we look at the state as a big "organisation" these two requirements are also visible. Coordination, according to Mintzberg, is based on several mechanisms that should be considered as the most basic

9 The comprehensive definition of "administrative justice" was (until August 2013) applied by the Administrative Justice and Tribunal Council (England) according to which administrative justice includes the procedures for making administrative decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions. See, Principles for Administrative Justice (2010).

10 See, for example, Reif (2004, p.16).

11 See *Organisation theory* is used to explain tendencies that drive effective organisations to structure themselves as they do. See, Mintzberg (1983, p. 3).

12 Ibid.

elements of the structure, the glue that holds organisations together. These mechanisms include mutual adjustment, direct supervision, standardization of work processes, standardization of output, standardization of skills and standardization of norms (Mintzberg, 1979, p. 3). Thus, coordination within this meaning is not perceived as coordination which is only included in formal and legally binding norms. In line with this theory, in this book coordination between ombudsmen and the judiciary is perceived as the managing of cooperative or competitive dependencies between ombudsmen and the judiciary in order to reach common goals.

The research recognises three different levels of the coordination of ombudsmen-judiciary relations: the level of institutional coordination, the level of case coordination and the level of normative coordination. The first level (institutional coordination) is the broadest as it covers coordination between ombudsmen and the judiciary as state institutions. This level is connected with the doctrine of the division of powers and the doctrine of checks and balances between the ombudsmen and the judiciary. The second level (case coordination) covers coordination between ombudsmen and the judiciary as dispute resolution mechanisms and institutions that stand between individuals and the state. It is connected with the perception of ombudsmen and the judiciary as checks and balances against executive power. The third level (normative coordination) is the narrowest one. It is only connected with the normative standards applied and developed by these institutions both within and outside their proceedings. It can be perceived from the position of law and morality and law and good administration.

The research of these three levels of coordination led in the thesis to several research-based findings and several analyse-based recommendations.

2.1 Institutional coordination

On the level of institutional coordination the research led to the findings connected with the institutional organisation of ombudsmen and the judiciary. Similar to the other two levels of coordination these findings are based on an analysis of ombudsmen-judiciary relations in the Netherlands, England and the EU. The findings presented here are also explained. However, in comparison with the original text of the book the explanations of these findings are more general and do not refer back to the particular legal system or systems where they were found. For more precise and more comprehensive findings, see the findings included in the text of the thesis itself.

The first finding on this level is rather obvious. It states that despite their similarities, the ombudsmen and the judiciary are different bodies and that ombudsmen are not only dispute resolution mechanisms. The powers of the judiciary are in principle well known. The judiciary solves disputes between parties in formal procedures that lead to legally binding judgments. The judiciary assesses compliance with the law by using codified or uncodified

legal norms. General knowledge concerning ombudsmen is not that extensive. Although they have been around since at least the 1960s one can see that there is a tendency for ombudsmen to reiterate their powers and to underline their independence. Ombudsmen are traditionally perceived as alternative dispute mechanisms in addition to the courts. The research shows that the term "alternative" does not only mean only that a dispute can be solved by ombudsmen or by the judiciary, but also that ombudsmen have some additional competences that distinguish them and their dispute resolution from that of the judiciary. These additional strengths include their own-initiative investigations; the possibility to make non-binding recommendations; the ability to address structural problems of the administration and to highlight them; the potential to develop norms of conduct and guidance for administrative conduct; and, last but not least the discretion of ombudsmen to approach the problem between the individual and the (state) administration in any way that can potentially lead to a solution of the core of this problem. The existence of these powers and their application by ombudsmen points to the fact that they are not identical to the judiciary. These powers are also a sign that an ombudsman institution is not a kind of inferior court. Of course, one should not see ombudsmen as a panacea for all administrative problems (Remáč, 2014, p. 331).

The second finding is also rather obvious and shows that the legislator only formally establishes a general institutional framework with powers and competences for the ombudsmen and the judiciary. In the researched systems, ombudsmen were established within the system of a working judiciary. The judiciary as one of the traditional bearers of state powers was provided with the power to resolve disputes between individuals and the (state) administration. It resolves these disputes in connection with the normative concepts of lawfulness or legality.[13] The researched ombudsmen, however, resolve these disputes in connection with the normative concepts of good (proper) administration. Different normative concepts of the ombudsmen and the judiciary are determined by the legislator as the general framework where these state institutions exercise their competences and powers. This finding shows that the legislator plays an important role in the existence of these institutions and the division of their powers as well as in setting their frameworks (Remáč, 2014, p. 332).

The third finding on the level of institutional coordination reveals that the protection and dispute resolution of the judiciary often limit the protection and dispute resolution of the ombudsmen while the protection and dispute resolution of the ombudsmen do not, in principle, limit the protection and dispute resolution of the judiciary. The three researched systems show that

13 The ombudsmen included in the research belong into what can be traditionally described as the "second generation of the ombudsmen". They assess the compliance of the administration against the general concept of good administration, proper administration or they discover maladministration or malpractice in the work of administration. See, Remáč (2013).

formally the protection offered by ombudsmen is somewhat limited if the judiciary exercises or has already exercised its protection functions. The ombudsmen are often required to halt their investigations (or not to start them at all) if the substance of the complaint has previously been dealt with by the judiciary or is at the time of the investigation currently being resolved by judiciary. Thus despite the different normative frameworks of ombudsmen and the judiciary, they cannot deal with the same substance of the cases simultaneously. Conversely, if the ombudsmen have assessed the substance of the case, the judiciary can generally deal with the case from the position of lawfulness. The research shows that ombudsmen occasionally have discretion to investigate complaints even if their substance has already been assessed by the judiciary, although these situations are not very common.[14]

A further finding shows that the interaction between ombudsmen and the judiciary follows, almost identically, the framework designed by the legislator and the interpretation of the courts. Beyond this framework, any (formal or informal) interaction between these institutions is only marginal and occurs on an *ad hoc* basis. Although ombudsmen and the judiciary provide an independent and impartial dispute resolution and for that reason they stand between individuals and the administration, their interaction is very limited, indeed it is almost non-existent. Formally, these institutions stick closely to their spheres of interest and general frameworks. Only rarely do legal provisions expressly enable some form of cooperation between ombudsmen and the judiciary. Because of this, formal interplay and cooperation between them are rather uncommon. So is their informal interplay. The existing communication or cooperation only takes place on an *ad hoc* basis. It is by no means premeditated. The practice of informal interaction can range from unofficial meetings between judges and ombudsmen at conferences to the official meetings between the presidents of the courts and ombudsmen. This limited interaction is usually explained by different competences, different normative concepts and different working methods. One can also discover a tendency to underline the necessity of complete institutional independence.[15]

The last finding on the level of institutional coordination shows that the courts sometimes explain their ability to review the legality of the reports or actions of ombudsmen and that even if they deduce that they have these powers, they generally respect the competences of the ombudsmen. In some systems the courts review the legality of ombudsmen's actions and decisions. This power is usually not provided on the basis of statutory law but the courts derive it from the character of such a legality review. The research shows that the courts are careful when making use of this competence. Nonetheless, if a court can judicially review the actions of an ombudsman the character of their relationship thereby changes. While exercising their functions ombudsmen must then take into account "the court behind their shoulder". Interestingly

14 Ibid., p. 333.
15 Ibid., p. 334.

enough, this power of the courts cannot be understood as an appeal against the reports or any other decisions of the ombudsmen. A judicial review is usually only connected with assessing whether an ombudsman, while reaching his decisions, has acted in a lawful manner. Sometimes the possibility to assess the legality of an ombudsman's actions is connected with cases of the ombudsman's responsibility for non-contractual damage.[16]

2.2 Case coordination

The level of case coordination is directly connected with institutional coordination and with the fact that both institutions act as dispute resolution mechanisms. It covers the possible coordination between the formal results of the deliberating and decision-making processes of ombudsmen and the courts, i.e., the reports and judgments.[17] Here the research demonstrates the following findings.

The first finding on this level is that relations between ombudsmen and the judgments of the judiciary as well as the judiciary and the ombudsmen's decisions are regulated only marginally. The legislator only determines the "field of play" for ombudsmen and the judiciary as well as the general rules. Any interconnection between reports and judgments is overlooked although the legislator often limits an ombudsman's ability to control court judgments. The legislator often lays down rules on what type of evidence can be taken into account by the courts while deciding a case. The reports of the ombudsmen are not excluded. Conversely, in the case of ombudsmen this is usually left to the ombudsmen's discretion (Remáč, 2014, p. 339.).

The second finding argues that when necessary, ombudsmen, while drafting their reports, make cross-references to the case law of the courts (and the law in general). Conversely, however, while drafting their judgments, the judiciary only rarely makes cross-references to the reports of ombudsmen. Neither the ombudsmen nor the judiciary exist in a normative or societal vacuum. In all three researched systems it was possible to discover cases where ombudsmen make cross-references to judgments or to the judiciary. The reasons for such practice can be connected with a need to inform the readers of the reports about the facts of the case; to explain the applicability of the judgment in the ombudsman's investigation or to use the rule previously adopted by the court and by that to support his own findings. Ombudsmen do not assess the quality of the judgments or the findings of the courts. Also the judiciary sometimes makes cross-references to ombudsmen or their reports. The reasons for this are very similar. They either try to inform the readers of the judgments about the facts of the case; to explain the applicability of the report or the powers of the ombudsman in general. Exceptionally, they use the rule previously

16 Ibid., p. 335.

17 Although the report is not the only possible result of the ombudsman investigations, it can be perceived as a general term for the results of these investigations whether they are called investigation reports, draft recommendations or decisions etc.

applied by an ombudsman or use his report to support their own findings. In cases where the courts can assess the legality of ombudsmen's actions they make assessment statements about these actions. In general, this practice is *ad hoc* and it is not premeditated. In this case one can observe a difference in the inquisitorial approach of ombudsmen and the mainly adversarial approach of the judiciary.[18]

The next finding explains that ombudsmen acknowledge the applicability of judgments for their investigations/inquiries. Sometimes they consider them to be decisive in an investigated case. The judiciary does not ignore the existence of ombudsmen's reports in its proceedings. However, it does not consider them to be decisive for its judgments. This shows that ombudsmen are aware of the judgments of the judiciary. They are aware of them in the same way as they are aware of the statutory law. If necessary, the jurisprudence of the courts (and statutory law) is taken into account. If the court, while assessing the lawfulness of an administrative action finds unlawfulness of this action, it is possible that ombudsmen will find a breach of good administration standards in a substantively similar case. This depends, however, on the connection between lawfulness and good or proper administration. On the other hand, one cannot say that the judiciary is ignorant of the reports of ombudsmen, although it uses them only rarely. The reports of ombudsmen do not have any special status among the evidence submitted to the courts. A report by an ombudsman is in principle not enough for the court to find a breach of law or to award damages.[19]

The last finding on the level of case coordination reveals that an individual can rely on ombudsmen's reports in court proceedings and on judgments during an ombudsman's investigation/inquiry. Nonetheless, it is the ombudsmen and the judiciary themselves who decide what authority judgments or reports have in connection with a particular case. The research showed that individuals often rely on ombudsmen's reports in court proceedings and on judgments during investigations by ombudsmen. A priori neither statutory law, nor secondary legislation or the practice of these institutions reject the possibility for individuals to rely on these documents. If such documents are submitted to them, they take them into account. If they are important for the investigation of an ombudsman or the court proceedings these institutions will refer to them. If a report or a judgment is not applicable, the courts or the ombudsmen will explain this. There is a general rule that a judgment which finds that there has been a breach of the law does not directly lead to a report which finds maladministration or improper administration and, vice versa, a report finding maladministration or improper administration does not directly lead to a judgment which finds that there has been a breach of

18 Ibid., p. 340.
19 Ibid., p. 341.

the law. A judgement or a report is but one piece of evidence that should be weighed by the ombudsmen and the judiciary.[20]

2.3 Normative coordination

The third level of coordination, normative coordination between ombudsmen and the judiciary, is connected with the normative standards that they use when assessing the administrative action in question. The basis for the normative coordination is the institutional coordination between ombudsmen and the judiciary and the overlapping character of the normative concepts used by ombudsmen and the judiciary – lawfulness and good (proper) administration.

Firstly, the legislator acknowledges the existence of different normative concepts of ombudsmen and the judiciary. The coordination of this matter is left to their practice. In connection with normative coordination the legislator is rather passive. Still, here it does play a certain role as it is the legislator that divides competences between ombudsmen and the judiciary and expressly decides that the judiciary assesses compliance with the law and ombudsmen assess compliance with a general normative concept such as good or proper administration. Although the legislator decides what is law (in a legislative process) it only rarely explains what is good (proper) administration or maladministration. The contents of these terms are left to the practice of the ombudsmen. Only rarely does the legislator or the jurisprudence "help" ombudsmen with the meaning of these terms. Similarly, the legislator is silent on the relationship between normative concepts such as good (proper) administration and lawfulness. It leaves this issue to the mutual practice of ombudsmen and the judiciary and, naturally, to academic interest.[21]

The second finding on this level reveals that ombudsmen and the judiciary develop their normative standards separately. Nonetheless, during the development of these standards inspiration can be drawn from other, already existing standards. Ombudsmen, as well as the judiciary, have normative functions. Generally, the judiciary can discover new legal principles. These new legal principles can remain as unwritten law or they can be codified in statutory or even constitutional law. The general principles of law are then used as normative standards of the judiciary. The normative function of ombudsmen is connected with the necessity to explain the content of general normative concepts as good/proper administration. This explanation is connected either with the development of the requirements of good/proper administration, i.e. individual principles of this concept, or with the development of general guidance and recommendations on good/proper administrative conduct. It is evident that ombudsmen actively approach their normative functions through the development of lists of requirements

20 Ibid., p. 342.
21 Ibid., p. 346.

for good (proper) administration and the publishing of general guidance documents on good (proper) administrative conduct.[22]

The third finding has found that one can distinguish a formal and substantive overlap between some normative standards of the ombudsmen and the judiciary. Some of the normative standards of these institutions, however, do not overlap at all. Although the normative standards of ombudsmen and the judiciary have developed independently, one can discover some similarity between these normative standards. This similarity has two different layers. There is formal similarity that is connected with the wording and denomination of the individual standards. And there is substantive similarity that is connected with the content of individual standards. It seems that the majority of these normative standards developed and discovered by the judiciary are in one way or another reflected in the normative standards of ombudsmen. One cannot say that the normative standards of ombudsmen are merely reproductions of judicial or legal principles. The overlap does not stem from the binding power of the standards but from the value that is protected by them. The research proves that these substantively overlapping normative standards protect the same (or at least very similar) general values. The value is included in the general societal ethos. Depending on the importance of certain values, some of them are protected in a "hard way" by the judiciary as well as in a "soft way" by ombudsmen. Still, some of the normative standards do not overlap at all, i.e. the value is protected only by ombudsmen or by the judiciary. This shows that the normative standards of ombudsmen are not entirely identical to the normative standards of the judiciary. They can protect values that remain unprotected by the courts.[23]

Another finding shows that a breach of the normative standards of the court can be evaluated by ombudsmen as a breach of their normative standards. Despite a substantive overlap between these normative standards, a breach of the ombudsmen's normative standards is only rarely identified by the courts as a breach of their normative standards. The normative standards of ombudsmen and the judiciary differ. Despite their substantive similarity, breaches of these standards do not have the same consequences. A breach of the normative standards of the courts is necessarily a breach of the law and can be enforced. A breach of the normative standards of ombudsmen does not include any such penalty. The difference between these standards is underlined by the fact that a breach of the normative standards of one institution does not always lead to a breach of the normative standards of the other institution. This possibility is however not entirely excluded. In the ombudsprudence one can discover cases where a breach of a legal norm also leads to a breach of an ombudsnorm. However, a breach of an ombudsnorm only rarely directly leads to a breach of a legal norm. This is connected with the character of the normative concept that is protected by ombudsmen.

22 Ibid., p. 347.
23 Ibid., p. 348.

Concepts such as good (proper) administration are more flexible and more comprehensive than lawfulness. These concepts usually cover compliance with the law (including human rights) and compliance with good (proper) administration requirements in a strict sense. In all the legal systems studied it is possible to distinguish between the concept of good/proper administration and the concept of lawfulness. This leads to four different situations in which the administrative conduct in question can be either:

Administrative conduct	**Good or proper**	**Maladministrative or improper**
Lawful	Lawful and proper (good)	Lawful but improper (maladministrative)
Unlawful	Unlawful but proper (good)	Unlawful and improper (maladministrative)

This scheme [24] shows that there can be a difference between compliance with the law and compliance with ombudsnorms. They are parallel concepts. The conduct of the administration should comply with legal principles as well as with ombudsnorms (Remáč, 2014, p. 349.).

The last finding reveals that in the case of a substantive overlap, the normative standards of ombudsmen can potentially have a different application than the normative standards of the judiciary. A substantive overlap between the normative standards of the ombudsmen and the judiciary does not mean that the application of these normative standards is the same. In the practice of these institutions one can see that the normative standards of ombudsmen can be applied in a similar fashion as the standards of the courts. In this case the normative standards of the judiciary (legal norms) generally determine a minimum standard of administrative conduct. Theoretically, if an institution is going to act in accordance with this minimum standard, its conduct will be (in this connection) lawful and proper (good). However, one can also discover that the substantively overlapping normative standards can be applied by ombudsmen in a different, more lenient fashion that those of the judiciary. Then the ombudsnorms determine a minimum standard for conduct, at least for the ombudsmen. Then, theoretically, if an institution acts in accordance with the legal standard its actions may not satisfy the requirements of the ombudsman.[25]

3 Recommended Changes of Existing Designs

The research shows that the systems of the ombudsmen and the judiciary as it is designed nowadays work. This however does not mean that these systems cannot work better. An analysis of the findings has led to several general recommendations that can potentially improve the mutual work

24 The scheme used in this research has its basis in so called *"Ombudskwadrant"* developed by the Dutch National Ombudsman. See, Nationale ombudsman (2006, p. 16).

25 Ibid., p. 351.

of these institutions but also the chances of individuals in disputes with the administration. In connection with institutional coordination the analysis has led to the following recommendations:

1. The statutory bars barring ombudsmen from investigating complaints if they cover the same facts as applications to the judiciary should be removed.
2. The judiciary should have the competence to refer a case to the ombudsman if it clearly involves maladministration (improper administration) falling short of unlawfulness. At the same time the judiciary should have the competence to inform the ombudsman about possible structural administrative problems. In both cases the ombudsman should have the discretion to investigate these cases.
3. There should be a communication forum where ombudsmen and the judiciary can discuss certain issues connected with improving the protection offered to individuals, their own roles, their different points of view or other matters connected with their functions.

These recommendations can lead to a possible improvement in the protection offered to individuals and to the full use of the potential of the judiciary and ombudsmen. First of all, ombudsmen offer additional protection compared to the courts. They assess compliance with a different normative concept than the courts. Because of this they should have the possibility to deal with the substance of the problem from the position of good (proper) administration if the court is already dealing with the substance of the problem from the position of lawfulness. Furthermore, if the judiciary and the ombudsmen were able to refer a part of the problem that is directly connected with a different normative concept to the other body, the problem could be solved from both perspectives (lawfulness and good administration). Clarification concerning the positions of these institutions (especially the powers of the ombudsmen) can lead to a better understanding but also to a better exercise of their powers as well as offering complete protection for individuals.

In connection with case coordination the analysis has led to the following recommendations:

1. The judiciary should not *a priori* reject the facts found by ombudsmen during their investigations. If they are relevant for the pertinent legal question, the judiciary could take them as a starting point in its assessment unless proved otherwise during the proceedings.
2. The judiciary and the ombudsmen should pay more attention to the explanation concerning the importance of the findings of the other institutions for their own proceedings or investigations, if these findings have been raised by one of the parties to their procedures.

The results of ombudsmen's investigations and the proceedings of the judiciary, i.e., the reports and judgments, are a formal expression of their

work. The reports and their findings are based on the facts that are assessed by meticulous investigations by the ombudsmen. The findings of the ombudsmen are not *a priori* positive for individuals as ombudsmen try to be impartial and independent. Because of that the facts proven by ombudsmen, if they are referred to during court proceedings, should not be immediately rejected by the judiciary merely because it was only an ombudsman who found them. Individuals often rely on the reports of ombudsmen in proceedings before the court and on judgments during an ombudsman's investigation. For an individual it is often difficult to see (without an explanation) the difference between a report and a judgment. Because of the fact that individuals support their contentions with reports or judgments, the ombudsmen and the judiciary should explain the reasons for their application or conversely their rejection.

In connection with normative coordination the analysis has led to the following recommendations:

1. Ombudsmen should constantly (re)develop and apply their normative standards in practice. They should do this for the benefit of the administration, for the sake of clarity and to uphold their standards and for the sake of protecting individuals and society as a whole.
2. Ombudsmen should always refer to and explain the applied and breached normative standards in the findings and/or conclusions of their reports.
3. When developing normative standards which overlap with written law, ombudsmen should follow the meaning of written law.
4. When developing normative standards which overlap with unwritten legal principles, ombudsmen should do this freely; however, their development should take into account the general value that is protected by unwritten legal principles.
5. The judiciary should not overlook the normative standards of ombudsmen, as they may potentially have a positive impact on the development of the law. It is thus necessary for the judiciary to be aware of the normative standards of ombudsmen.

The normative standards of ombudsmen and of the judiciary are a manifestation of their normative function. In this area, ombudsmen are more active than the judiciary. This is connected with the flexibility or rather the vagueness of their normative concepts. Because of that they should clearly explain what the content of such a normative concept is. As shown by all three case studies, the development and application of normative standards by ombudsmen and the judiciary is relatively independent. One can imagine that ombudsmen develop and apply their normative standards in a more lenient fashion than the judiciary, i.e. differently. On the one hand, it is necessary for ombudsmen to apply and develop their principles in a more lenient and more flexible way because they evaluate compliance with a general

normative concept that is not identical to lawfulness. On the other hand, this normative concept often requires the administration to act in compliance with the law and legal principles. Especially this second point can be used in order to question an ombudsman's leniency. An over-lenient approach by the ombudsman to a normative standard overlapping with written law can lead to uncertainty about the contents of this standard. Ombudsmen as state institutions are naturally bound by the law. Ombudsmen have greater flexibility when developing standards which overlap with unwritten principles of the law. For the sake of clarity concerning their normative concepts, they should refer in their findings to the normative standards used and breached. As the development of the law or of good (proper) administration is far from complete ombudsmen and the judiciary should also pay attention to the normative standards of the other institution as they can be an inspiration for the further development of these normative concepts.

4 Conclusions

This article does not give as much information as the book can give, but it provides with findings and recommendations included in the thesis that was published at the beginning of 2014. Nonetheless, it shows that ombudsmen and the judiciary are two different state institutions with their own competences, their own work, their own working methods and their own normative concepts and standards. Despite these differences, they have in common the fact that they resolve disputes between individuals and the administration. They both add to the protection of individuals. They try to solve the problems of the administration (legal or otherwise) and inevitably they add to the trust of individuals in the state.

While they exercise their functions one can discover a place for their potential coordination. One can see that there is institutional coordination that rules the competences and roles between these institutions. Here it is not possible to overlook the role of the legislator that actively sets the framework for the work of ombudsmen and the judiciary. The design of the institutional coordination predestines any other type of coordination between these institutions. Because of that, case coordination, coordination linked with the findings of the ombudsmen and the judiciary and normative coordination, coordination of their normative standards are directly connected with their competences.

One can imagine a further coordination of the actions of ombudsmen and the judiciary in the sense of mutual cooperation. Such coordination may allow the judiciary and the ombudsmen to use their powers more comprehensively. It can also bring more clarity to their normative standards and enable mutual coordination during their development. Last but not least, it can lead to a better understanding of the different types of protection afforded to individuals and can provide them with a complete assessment of their

disputes with the administration. Thus, cooperation between ombudsmen and the judiciary can influence the fulfilment of their roles, the protection of individuals, the development of normative concepts and standards and dispute resolution as such. Ombudsmen and the judiciary as state institutions have their strengths and weaknesses. First of all, the protection of individuals and the dispute resolution provided by the judiciary are often not enough. If this were so, there would not be any need for an ombudsman in the first place. However, individuals often need more than just formal confirmation that they were right and that the administration was wrong. They need their problem to be solved. Ombudsmen can provide additional dispute resolution. They can react to the particular problem and if the administration is willing to cooperate, they can work on its swift and informal removal. Their informal methods of dispute resolution and their non-legally binding problem-prevention recommendations can add to the legally binding assessments of the judiciary. Ombudsmen also have specific powers that can push them beyond the mechanism for solving disputes. For instance, their own-interest investigations and their non-binding recommendations provide a considerable addition to the protection of individuals. They are not only dispute resolution mechanisms. At the same time, one must understand that ombudsmen are not a panacea for the administration. They cannot heal or prevent all its problems. Undoubtedly, they can bring a more "moral" sense to the administration but they can only do this within the limits and competences given to them.

Generally, ombudsmen and the judiciary understand that their different roles and different powers allow them to approach disputes from different perspectives. They should however try to understand that only one way of solving disputes is often not enough to solve the problem between an individual and the administration in a comprehensive manner. The first step in this understanding can be reached through broader communication. Such communication can perhaps show that they are not mutual competitors but that they can work together towards general goals within the competences that are given to them. It is not enough to say we do something else and that is why we do not need to cooperate. It is more challenging to say we do something else, but we also keep in mind that our general goals can bring us closer and help us to work better and in the interest of individuals, the administration and society as a whole.

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POVZETEK

1.01 Izvirni znanstveni članek

Usklajevanje varuhov človekovih pravic in sodstva: boljše možnosti za posameznike?

Ključne besede: ombudsman - varuh človekovih pravic, sodstvo, upravni postopki, usklajevanje

Institucija varuha človekovih pravic je ena od najhitreje razvijajočih se institucij v sodobnih demokratičnih državah. Varuhe človekovih pravic lahko označimo za posamične in neodvisne preiskovalce uprave in njenega ravnanja. Delujejo kot mehanizmi za reševanje sporov med državo in posamezniki, včasih pa tudi kot reševalci težav posameznikov. Za oceno kakovosti ravnanja uprave uporabljajo normativne standarde, katerih izpolnjevanje preverjajo. Vendar pa so vse te zadeve primarno v pristojnosti sodstva. Sodstvo in predvsem upravna sodišča so najpomembnejši mehanizem za reševanje sporov, ki ocenjuje upravno ravnanje v primerjavi z določenimi normativnimi standardi. Tako lahko varuha človekovih pravic in sodstvo pogosto označimo za instituciji z relativno podobnimi pristojnostmi na razmeroma podobnem področju, čeprav med njima obstajajo številne razlike. Na oba se obračajo posamezniki in oba lahko izražata svoje mnenje o upravni pravičnosti. V članku so poudarjene glavne ugotovitve in priporočila primerjalno-pravne raziskave, ki je bila izvedena na področju medsebojnih odnosov varuhov človekovih pravic in sodstva. Raziskava na primerih treh različnih pravnih sistemov (Nizozemska, Anglija in Evropska unija) obravnava možnosti usklajevanja odnosov med varuhom človekovih pravic in sodstvom v povezavi s položajem obeh institucij, z njuno prakso in normativnimi standardi, ki jih uporabljata pri svojem delu.

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Significance of and Comparative Trends in Procedural Regulation of Right to Information

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ABSTRACT

Any legal right is (more) efficiently pursued if sufficient procedural regulation supports its substantive setting. This article is dedicated to an analysis of procedural regulation of right to information (RTI) since its significance is increasing in terms of developing good governance and good administration within contemporary transparent, open and collaborative society. The comparative analysis of selected countries (USA, Ireland, Sweden, Austria, Germany, Slovenia, Croatia) included herein proves that selected procedural institutions, such as time limits and an appeal to an independent body or judicial review, contribute to a significantly higher level of implementation of the RTI in practice as also indicated by several international studies. In conclusion, the author recommends certain good practices, especially significance of RTI implementation in relation to different authorities in the context of administrative procedure guaranteeing constitutional and supranational transparency principles.

Key words: *RTI, transparency, comparative analysis, procedural law, administrative procedure, time limit, appeal*

JEL: K23, K41

1 Introduction

The right to information (RTI) has been gaining importance over time. RTI in fact enables the application of two key concepts of modern society, the state, and administration. First, serving as a foundation of the rights of defense of weaker parties against the authorities, access to information contributes to the development of the rule of law as it restricts authoritative power and provides constitutional guarantees to the addressees of the norms. Second, by developing good governance and good administration RTI enables, on the one hand, the establishment of a dialogue between the rulers and the ruled, i.e., partnership and the participation of the latter in designing and implementing public policies and, on the other, the transparency and accountability of the bearers of public authorities. However, typically the principle of transparency and/or openness is difficult to categorize, since

it emerges in different perspectives and legal or policy frameworks and papers as a classical safeguard or/and modern standard (cf. Savino, 2010, pp. 21–30). The modernization of public administration into cooperative open administration is thus both a tool and a target whereby and towards which the state changes the course of public affairs governance from mere administration to integral governance and social progress.[1]

RTI is regulated in almost half of the countries in the world at the constitutional level and implemented by means of a special law known in most cases as the Freedom of Information Act (FOIA) or – generally speaking – RTI law, following the first examples in Sweden (1776), Finland (1919), the USA (1966), etc. According to the Global Right to Information Rating (GRTI), 93 countries had special RTI laws in as of 2013. Furthermore, RTI is recognized as a fundamental right by several international documents, including the UN Universal Declaration of Human Rights (1948), Article 10 of the European Convention on Human Rights (ECHR, 1953), Council of Europe (CoE) Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities (1977) and Resolution (81)19 on the Access to Information Held by Public Authorities, the EU Ombudsman's Code of Good Administrative Behavior (2005), and Articles 41 and 42 of the EU Charter of Fundamental Rights (2010). However, the above legal acts do not fully concur and differ as to the understanding and regulation of RTI. Resolution 81(19), for instance, underlines that in order to exercise RTI, the necessary means and ways should be provided, namely that RTI should be granted within a reasonable period of time, refusal reasoned and the applicant must be guaranteed judicial protection. This resolution was updated with Rec (2002) 2 on Access to Official Documents, which provided that RTI is to be decided by an independent body and it is necessary to carry out a »public interest override« and »harm test« (Šturm et al., 2011, p. 608). In the event of diverging interests, the burden of proof is on the person opposing disclosure ("reverse FOIA"). Exceptions are allowed, yet not in absolute terms.

The article addresses theoretical overview of procedural functions in order to realize RTI as a fundamental human right. However, it is emphasized that procedural regulation inevitably enhances implementation of legal interests pursued by supra- and national substantive law. Even more, certain procedural institutions prove to be a necessity, such as in a case of RTI (de)formalization of applications and acts, time limits set and in particular an administrative-judicial protection of claimants. In order to examine the significance of these elements of RTI, a comparative analysis was carried out in selected countries of different legal traditions (Anglo-Saxon vs. German vs. Central Eastern Europe). Hence, the main research question addressed herein is the

1 For more on good and open administration and related concepts, cf. Nehl, 1999, pp. 13–26; Kovač, Rakar, & Remic, 2012, pp. 26–61; Kovač, 2013, pp. 2–4. The concept of "freedom of information" as a base in the field is broader than the RTI mostly dealt with herein, since RTI laws imply also the obligation to publish specific public information (proactive transparency) and the re-use of information.

significance and impact of certain procedural institutions to a (higher) level of implementation of RTI in practice. Taking into account legal theory and empirical findings of comparative analysis, finally, several conclusions and general recommendations on RTI de lege ferenda, irrespective of individual countries, are drawn.

2 The Procedural Regulation's Significance for the Exercise of RTI

2.1 General on the functions of procedure

Substantive law alone does not suffice for any right to be fully implemented. Hence, most countries address the procedural aspects of RTI in specific laws, many of them even with additional subsidiary use of the relevant (General) Administrative Procedure Act (APA). The latter certainly makes sense. Namely, an access to public information as such is by definition an administrative matter since individuals, while asserting the right to access data, actually wish to exercise a positive right in their relations with public authorities.[2]

The importance of procedural regulation or procedural law in general has changed over time, in both theory and practice. The once narrow understanding that procedure – in terms of its content or substantive law – has a merely auxiliary or instrumental nature has indeed been overcome, although even under Roman law only a specific form was given a proper substantive weight. Administrative procedure is specifically a tool for balancing collisions between the public interest and the individual rights and legal interests of the parties. However, specific *de iure* procedural rights are perceived in procedural and constitutional law as autonomous components of the subject of procedure. Formal legality is therefore necessary to achieve predictability and thus legal certainty and transparency, and administration's awareness of respect for the legitimate expectations and personal dignity.[3]

As the method affects the result – even in the social sciences despite the limited objectification of scientific verification – one cannot claim that legal procedure as a fact finding and evaluation method is not of crucial importance for the validity of the outcome, i.e., the substance of the decision. The procedure has no a priori determined outcome; at the time it is initiated, the goal is not yet clearly defined as it is influenced over the course of

2 Different countries define administrative relations, procedure, and acts more or less broadly. The German-oriented countries mostly refer to individual administrative decisions or adjudication. Under such doctrine, the main focus in the German circle is on the principle of the administrative act (Hoffmann-Riem et al., 2008, pp. 493, 614). In other countries, e.g., the USA, or at the EU institutions, administrative relations and acts refer to any action by administrative authorities even if it involves rule-making (administrative regulations; cf. Galligan et al., 1998, pp. 17–26; Rose-Ackerman & Lindseth et al., 2011, pp. 336–356).

3 Cf. On evolvement of (administrative) procedure in Rose-Ackerman & Lindseth et al., 2011, pp. 350–354; Hoffmann-Riem et al., 2008, p. 499; Schmidt-Assmann in Barnes, 2008, p. 52; Künnecke, 2007, p. 138; Androjna & Kerševan, 2006, pp. 816–822; Peters & Pierre, 2005, p. 270; Statskontoret, 2005, p. 73; Nehl, 1999, pp. 22, 70; Harlow & Rawlings, 1997, p. 497.

the procedure by several unpredictable interactions between the parties and procedural actions (Hoffmann-Riem et al., 2008, p. 488). Hence, the purpose of the procedure is to mitigate the uncertainties regarding the objective, considering that uncertainty is a component of any problem-solving procedure. If the legislature guarantees a public law entitlement, there is no reason not to also provide for a suitable procedure to ensure its effective protection and direct legitimacy, as well as at least indirect pursuit of the public interest (Androjna & Kerševan, 2006, p. 67). The awareness that procedural principles and rules are important for the enforcement of a(ny) right is indeed present. Experience shows that contrary there might be unacceptable paradoxes, such as making a party theoretically entitled to a certain measure, regardless of whether they will in fact enjoy such treatment. As stated by Nykiel et al. (2009, pp. 34–40), procedural issues are "of paramount importance with a view to turning a theoretical entitlement to a measure into an actual right that may be effectively enforced." Indeed – only procedural elaboration of a substantive law right enables the actual enforcement thereof.

2.2 Substantive and procedural aspects of RTI

Procedure thus serves the goal it pursues in the sense of implementing the substantive law right that is the subject of procedure. However, in the context of the development of public law, RTI is understood not as a tool but rather as a target of the procedure per se. Administrative procedure, also in the case of RTI, is thus a tool that, on the one hand, enforces the aim of a substantive regulation, while on the other it indicates the manner in which such aim can be achieved. The necessary level of legal regulation of the relations and of the authoritativeness of the cogent law is in fact thought to be a consequence of the expected conflictuality of relations and the scope of interference with the legal status of individual participants, which is why the regulation and the corpus of parties' rights are not necessarily the same in all relations with the administration (cf. Harlow & Rawlings, 1997, pp. 504, 516; Galligan et al., 1998, p. 44; Künnecke, 2007, p. 46). Procedural rules are intended to guarantee that decisions are correct in terms of content and consistent with substantive law, as well as to protect specific fundamental human rights. However, it needs to be considered that not all procedural guarantees, principles, and rules have the same weight as regards the subject of procedure. The relevance of administrative law institutions is inevitably linked to the right that is the subject of procedure: either (according to Schmidt-Assmann in Barnes, 2008, p. 47) situation-based rules or rights that are independent of concrete occasions, such as RTI. To conclude, a necessary "reasonable balance" (Nehl, 1999, p. 11) is to be maintained between the progressive development of procedural constraints and the administrative leeway needed for efficient policy implementation.

In such context, importance is also placed on the ratio between the substantive and procedural nature of the rights of parties in procedures. Such a problem

is particularly notable in the case of RTI since different legal environments (supra- and national) define RTI sometimes as a substantive right and in other cases as (only) a procedural right, although of the rank of the constitution or international law. Understanding whether the right is considered protected under procedural or substantive law is particularly important when substantive law cannot be properly determined in terms of content (Peters & Pierre, 2005, p. 284). The need for procedural rules is directly proportional to the lack of substantive rules or to the degree of indetermination and discretion (Rose-Ackerman & Lindseth et al., 2011, p. 342). Experience as well as German and Anglo-Saxon theory reveals that it is better to focus on ensuring the correctness of decisions by means of procedure, since the growing complexity of social life and thus the indeterminateness of substantive law are unavoidable and will most probably continue to rise. As a result, procedural rules are being increasingly applied as substantive rules, and the lines between the substantive and procedural nature of the norm are becoming more and more blurred (Galligan et al., 1998, p. 29). In a consequence, some traditional principles and rules of a procedural nature are being subsumed by constitutional or sector-specific administrative substantive law as substantive principles and rules, giving them double or greater protection. These aspects are significantly influenced also by European and national case law.[4]

Both in the Anglo-Saxon environment and in the EU, RTI began to develop first in terms of rights in individual procedures and APA or sector-specific administrative regulations (in the EU particularly in relation to competition and antidumping, cf. Nehl, 1999, p. 43). Parallel thereto, it acquired considerable constitutional significance as a special and independent right to access general information intensified. The latter served as the basis for the growing importance of procedural safeguards in administrative procedures, mainly in terms of judicial activism. Nevertheless, a distinction needs to be drawn between most often substantive RTI, on one side, and the procedural right to access files in concrete and individual administrative relations on the other. These two rights can be understood either as existing in parallel or overlapping. On the other hand, particularly in Scandinavia and at the EU level, a single unified "right to know" is emerging, including all rights to information (Banisar, 2006, p. 6; Savino, 2010, p. 5; Gotze, 2012, p. 4). What prevails is thus a system where RTI is regulated: 1) by the constitution and RTI law, and parallel thereto 2) by APA, in connection with the constitutional provisions

4 Cf. for instance the ECJ cases *Tradax, Cement, and Soda Ash* (Case 64/82 *Tradax Graanhandel BV v. Commission* [1984] ECR 1359. CFI, Joined Cases T-10/92 and *Others, SA Cimenteries CBR and Others v. Commission* [1992] ECR II-2667. CFI, Cases T-30/91, T-31/91, T-32/91 (Solvay v. Commission), T-36/91 and T-37/91 (ICI v. Commission), [1995] ECR II-1775, II-182, II-1825, II-1847, and II-1901; cf. Nehl, 1999, pp. 28–31, 45–55). See also Schmidt-Assmann in Barnes (2008, p. 52), regarding the ruling of the German Federal Administrative Court of 2003 on a constitutional RTI as guaranteed for any potential participant in a procedure, independent of his/her procedural position and standing. For Slovenia, see Kovač, Rakar & Remic, 2012, pp. 45–47, the relevant constitutional-judicial cases are (Nos U-I-16/10 and Up-103/10, 20 October 2011) acknowledging the right of access as the one deserving, despite procedural grounding (only), an independent judicial review.

on the equal protection of rights and effective legal remedies.[5] The US and Sweden model is different: based on the Constitution, RTI is regulated by the FOIA (1966), which is a constituent part of APA (1946) or in Sweden the relevant laws comprise the Constitution itself. However, the second model implies a lack of procedural provisions and a usually relatively low quality rating of RTI Law (Mendel, 2008, p. 101; Banisar, 2006, p. 141; Statskontoret, 2005, pp. 35–43). Given all aspects analyzed we may draw a conclusion: the definition of procedural guarantees in RTI Law or APA is thus an advantage to implement RTI effectively, provided that the formality of the regulation is not too detailed.

3 Comparative Analysis of the Procedural Regulation of RTI in Selected Countries

3.1 Selection and characteristics of countries included in comparative research

In order to examine the importance and level of impact of detailed procedural regulation of RTI on the exercise of the right as a subject of procedure, a comparative analysis of several countries was carried out indicating the specifics of national regulations in terms of the openness and quality of regulation in relation to RTI, as assessed by various international organizations. The analysis is based on the assumption that the regulation of procedural issues on time limits and legal protection (appeal) contributes significantly to the implementation of RTI in practice. The analysis thus covers selected countries with different historical and societal backgrounds:

- USA and Ireland – the Anglo-Saxon model with a long tradition of openness;
- Sweden – the Scandinavian model with long acknowledged transparency;
- Germany and Austria – the central model with Rechtsstaat and public interest protection;
- Slovenia and Croatia – the post-socialist heritage upgraded following the German model.

Mostly two countries within the same group were analyzed to check internal factor of differences, too.

5 Austria applies Article 20 of the Constitution, *Auskunftspflichtgesetz* (Austrian RTI Law, Gazette No. 287/1987 and amend.) and the *Allgemeines Verwaltungsverfahrensgesetz* AWG (Austrian APA, Gazette No. 51/91 and amend.). Slovenia applies Article 39 of the Constitution and *Zakon o dostopu do informacij javnega značaja* (the Slovene RTI Law, Official Gazette RS, No. 24/03 and amend.) and *Zakon o splošnem upravnem postopku* (Slovene APA, Official Gazette RS, No. 80/99 and amend.). The main Croatian regulations include Article 38 of the Constitution, *Zakon o pravu na pristup informacijama* (Croatian RTI Law, Official Gazette RC, No. 25/13, and the previous law 2003) and *Zakon o općem upravnom postupku* (Croatian APA, Official Gazette RC, No. 47/09).

Table 1: Characteristics of selected countries and national legal acts on RTI

Country	*USA*	*Ireland*	*Sweden*	*Germany*	*Austria*	*Slovenia*	*Croatia*
Population in mio	303	4.5	9.2	82	8.3	2	4.4
RTI regulated by Constitution	Yes, strong protection of freedom of expression	Only general rights (equality, etc.), no RTI	Yes (the entire Freedom of the Press Act, RTI Law part of the Constitut.)	Yes, yet a passive aspect of RTI, Art. 5/1	Yes, Art. 20	Yes, 1991, Art. 39/2 (freedom of expression), depending on legal interest by law	Since the 2010 amend. (prior only the press), Art. 38/2 (freedom of expression)
RTI Law	Part of APA, FOIA since 1966 & amend.	FOIA 1997 (amend. 2003)	Part of the Constitut.	RTI Law 2005, only 15 articles	RTI Law 1987 & amend., 8 articles	RTI Law 2003	RTI Law 2003, and a new Law in 2013
Application of APA in RTI	FOIA is part of APA	No	No	Yes	Yes	Yes, upon written request	Yes
GRTI 2012/ 93 countries	40th	37th	29th	89th	93rd	3rd	9th
Ask Your Gov!/80 countries	/	/	/	15th	/	12th	11th
Democracy 2012/ 200 countries	21st	2nd	13th	14th	12th	27th–28th	50th

Hence, in terms of good administration four traditions of administrative law may be identified in Europe and broadly: 1) the individual-centered tradition, as in the Ireland, and the USA, 2) the German-Austrian legislator-centered Rechtsstaat, 3) the ombudsman-centered tradition, as in Scandinavia, and 4) additionally, post-communism and some other heritages to be taken into account. The study however has limitations since the RTI implementation depends on a series of other factors, from the general regional culture on openness to RTI tradition in a specific environment.[6]

3.2 A comparison of time limits and legal protection of RTI regulation

Following the initial assumption that procedural regulation contributes to the rate of implementation of RTI, the key aim of the research was to identify whether time limits and legal protection and as key procedural issues to enhance substantive legal right are (more) relevant. Time limits are typical procedural institution (cf. the saying: justice delayed, justice denied), being even a constituent part of the rights to a fair trial and good administration under Article 6 of the ECHR and Article 41 of EU Charter. The requirement

6 Several models or classifications of social and legal environments are relevant in this sense (cf. Schwarze, 1992, p. 1182 etc.; Galligan et al., 1998, pp. 19–25; Peters & Pierre, 2005, p. 260; Statskontoret, 2005, pp. 74–76, etc.). See in particular on administrative culture as a RTI framework in Savino, 2010, p. 13. Due to lack of relevant data central administration-centered group (with France) was not analyzed too.

of timeliness is deriving not only from the goal of the efficacy, but also from the Constitution itself (cf. Mendel, 2008, pp. 101, 127; Nykiel et al., 2009, p. 27; Kovač & Virant, 2011, p. 232). Moreover, particularly in the absence of the right of appeal to an independent body, individuals cannot really be said to have a right, but merely a right to have their requests considered (Mendel, 2008, p. 38). Or as put forward by the ruling of the German Constitutional Court of 1969 (Schmidt-Assmann in Barnes, 2008, pp. 52) effective legal protection "constitutes a significant element of the fundamental right as such".

An indisputable requirement for the actual implementation of RTI is also a clearly regulated procedure, particularly when the body does not give the applicant access to the information to which the applicant is entitled. The comparison of *de iure* regulation reveals a significant degree of convergence as regards the type of procedural institutions regulated by procedural rules in relation to RTI. However, in various countries, the material content and especially the implementation of the rules vary significantly as analyzed by a set model of crucial elements, evident in Table 2.

4 Main Findings

4.1 Significance of RTI procedural regulation and its detail rate

Procedural regulation in principle contributes to the implementation of RTI. This conclusion can also be drawn from even the rather restricted German and Austrian RTI laws with only 8–15 articles, but with subordinate application of the APA, which substitutes for the lack of procedural rules in RTI law. However, it can be observed that the same degree of formalization is seen as an incentive in one country and an obstacle to the development of open society and RTI implementation in another. But at least in the initial decades, the development of RTI was and still is marked by inverse proportionality – if the procedure was more non-programmed, the legal protection of the weaker parties was or is lower.

At several levels, particularly in terms of (endeavors for) membership in international organizations and global comparisons, a convergence may be observed as regards the regulation, the procedure, and RTI implementation. Finally, the countries may be grouped as:

1. traditionally open countries with loose legislation (Anglo-Saxon and Scandinavian);
2. legalistically driven countries with consistent implementation (Central European); and
3. legalistically driven countries with best practices, yet with problems in implementation (transitional Eastern European).

Table 2: A comparative analysis of selected procedural aspects in national RTI laws

	1a	*1b*	*2a*	*2b*	*2c*
Key procedural RTI aspects	***Decision deadlines and possible extensions***	***Consequences of administrative silence***	***Administrative appeal***	***Appeal body and independent status thereof***	***Access to court***
USA	20 + 10 days, possible an urgent procedure, special extension in "exceptional circumstances"	Lack of a timely response deemed a refusal, but an appeal only by the specific regulations	Non-devolutive appeal to head of body asked for information, then direct suspensive court action	Partly, with the amendment to APA, the Government Information Office	Various courts, according to FOIA/APA, only upon action by applicant within two years
Ireland	Confirmation of receipt in 10 days, decision in 20 + 20 days, in 15 days on appeal	Fiction of refusal and consequent legal protection	Non-devolutive appeal to the body itself, then appeal to the IC and direct suspensive court action	An independent IC also as an ombudsman and environmental IC and covering data	
Sweden	No. only "forthwith, or as quickly as possible", practice is correct	N/A, problems with deadlines in practice	No, directly to court	No	Administrative court, a special provision that decisions are to be issued "promptly
Germany	One month/20 working days, 2 months for accessory participants	no RTI Law, APA yes	Yes	Federal IC for RTI in data protection, decisions and opinions not legally binding	Special administrative dispute
Austria	8 weeks without unnecessary delay	no RTI Law, APA yes	Indirectly according to APA	N/A	Indirectly administrative dispute according to APA
Slovenia	20 + 30 working days in exceptional circumstances, executability of a decision not prior to the finality	Appeal when deemed a refusal, over 60% of appeals on such grounds	Yes, appeal and court action are suspensive	Non-governmental IC, separate from the ombudsman, covering RTI and data protection	Administrative dispute (Art. 31) (also based on court action by the liable body) and constitutional complain
Croatia	15 +15 days, deadline for a decision on appeal 30 days, in some cases 60 or 90 days	Appeal when deemed a refusal	Since 2012, to an independent body (previously only non-devolutive appeal to the head of the silent body)	Since 2013 IC, separate from the ombudsman, covering RTI and data protection	Administrative dispute and an administrative complaint, deadline for a decision 90 days from action

Thus, the regulatory framework appears to be a necessary and stimulating yet not sufficient factor of development of open and good administration. Some authors (e.g., Mendel, 2008, p. 144) argue on the other hand that precisely as regards procedural guarantees, RTI laws in different countries demonstrate a high degree of consistency – in our case only the in USA and Sweden. But the provisions on the procedure present even more differences than the substantive law definitions of information and exceptions, namely in terms of the formalization of the procedure as a whole, and even more so in terms of the time limits, the requirement that acts be issued in writing, etc. As expected, procedure is more formalized in continental states than in

the USA and Scandinavia. This indicates that the impact of legal tradition on the implementation of the law and procedures is very important, not only in the sense of the post-transition gap in the implementation of laws and reforms in the countries of Eastern Europe, but also when comparing the Scandinavian and American openness and sufficiency of general standards with the German-Austrian and EU striving for legalism.

4.2 On importance of time limits set for RTI to be granted or refused

Some provisions are particularly important for the implementation of RTI, time limits being at the top of due process doctrine and case law. As regards the deadlines for decisions, thus the regulation in general is rather formalized and practice has shown that setting a time limit is a basis for enforcing a right. For such reason, all RTI Laws, with the exception of the Swedish one, devote considerable attention to time limits and extensions. It is evident on the other hand that these rules develop over time depending on the extent of requests and movement of indicators, such as the number of granted and refused requests within specific time periods. For example, approximately 600,000 applications per year were filed in the USA in 2010–2012 (OIP reports, 2012), yet a significant share thereof were refused owing to various exceptions, which points to the need for more unified regulation in general. Croatia, for instance, amended its law to introduce a special IC because of the low culture among public bodies, which often fail to decide on a matter, with 60% of appeals due to administrative silence.

In certain cases there is only a "promptly" or "without undue delay" rule, but in most cases time limit to reveal data requested is 20 days with possible extension in the event of objective circumstances (but should not exceed 30 days, cf. Savino, 2010, p. 30). All the respective countries apply a negative fiction that allows for eventual judicial protection (cf. more in Mendel, 2008, pp. 127, 152; Kovač, 2013, p. 11). The increase in requests and appeals related to RTI is growing, and a good third (e.g., USA, Slovenia) to a half (e.g., Ireland) thereof are granted in all countries despite different regulations and cultures; approximately a third are partially granted, while the ratio between the number of requests and appeals is around 1 % (e.g., around 11,000 v. 600,000 in the USA and 500 v. 51,000 in Croatia). This in particular points to the significance of the procedural regulation of RTI, if one compares the otherwise similar USA and Ireland. The Irish law provides a clear definition of the entire procedure, which leads to as many as 58 % of requests being granted (with an additional 19 % partially granted), while the insufficient procedure in the USA leads to only 37 % of requests being fully granted (with an additional 27 % partially granted).

4.3 On significance and forms of effective legal protection in a case of RTI

Practice in various countries reveals that legal remedies are the very essence of RTI law as well as a tool for enforcing such right. In general, several systems of legal protection of applicants are known throughout the world, either in a formal sense with direct appeal to the court or with an administrative appeal to an independent state body (the Information Commissioner or some other non-governmental agency), or through a (more) non-formal devolutive objection to the head of the body at issue or via the ombudsman (cf. Banisar, 2006, p. 23). Overall, review should be independent, centralized and specialized (Savino, 2010, p. 41). Most countries have formalized legal and judicial protection enshrined in RTI law as well as parallel protection through the ombudsman, or the level of RTI is considered to be very low (Austria). So called non-formal protection can be "afforded" only in countries with a long and solid tradition of openness (such as Sweden). On the other hand, particularly where following the (Eastern European) transition, transparency and other institutions of democracy are yet to be fully implemented in practice (cf. Savino, 2010, p. 4), either as regards legal protection in general or in the event of appeals to an independent body.

As regards legal protection, it primarily needs to be underlined that the experience of several countries are more inclined toward administrative than direct judicial protection, provided that the objection procedure is conducted by the body that is to disclose the information (Ireland) or – as a rule – a body that is independent (from government), since it is far more accessible and cheaper to people than the courts and has a proven track record with regard to being an effective way of ensuring RTI. The reasons for an appeal are generally rather broad, from the refusal of an application to the request to submit another one as provided, from excessive costs on. The countries have similar, if not the same, reservations regarding disclosure both in terms of the regulation and administrative and court practice, which is also demonstrated by a large share of appeals on grounds of administrative silence in the USA, Ireland, Slovenia, and Croatia.[7] Likewise, it is advisable to consider RTI and exceptions thereto, such as personal data protection (e.g., in Ireland, Slovenia, and Croatia through the same non-governmental appellate body) as directly correlated.

7 Therefore, a major provision of various RTI Laws is that the burden of proof in a dispute is on the public bodies rather than on applicants. Cf. legal protection and separately the status of the appeal body in Bugarič, 2003, p. 120; Mendel, 2008, p. 38; Kovač, 2013, p. 13. However, it should not be disregarded that in view of the separation of powers, practice also shows that only courts really have the authority to set standards and ensure a well-reasoned approach, especially regarding controversial areas and difficult disclosure issues.

5 Conclusion

The major guarantee of respect for RTI is a combination of the circumstances in a country or supranational community. Among them, particular importance is attributed to the culture and tradition of transparency in the society, open and good public administration and to adequate regulation of RTI. An accurately prescribed procedure on RTI, setting the rules of the game for applicants and public bodies, is an inevitable aspect of the effectiveness of the implementation of this fundamental right in particular. However, the application of APA, where RTI law does not provide otherwise, appears to be useful both in view of covering all relevant procedural aspects and given the fact that public bodies know such rules and easily observe them. This shows that also the sample countries, such as the USA and Sweden, usually countries considered as most transparent, have problems with openness in practice given the regulatory deficiencies of their generalist legislative approaches (e.g., the lack of an independent appeal body or deadlines).

Moreover, in a complex society as ours, there is a need to have a trade-off between different interests, in particular by means of public interest override and harm tests, which are by the nature of the matter possible only in a procedure that is at least partly formalized. The initial hypothesis of this paper that procedural institutions contribute to a higher level of implementation of RTI in practice is therefore confirmed, especially as regards timely decision-making and legal protection in the event RTI is refused or restricted. Procedural principles and rules are thus among the foundations that contribute to enforcing the importance of RTI in terms of personal dignity and the democracy of modern society.

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POVZETEK

1.01 Izvirni znanstveni članek

Pomen in primerjalni trendi procesnopravne ureditve pravice do informiranja

Ključne besede: pravica do informiranja (RTI), preglednost, primerjava, procesno pravo, upravni postopek, roki, pritožba

Vsaka pravica se (bolj) učinkovito uveljavlja, če njeno vsebinsko pravno ureditev podpirajo učinkovita postopkovna pravila. Članek je posvečen analizi procesnopravne ureditve pravice do informiranja (RTI), saj se njen pomen povečuje pri razvoju dobrega vladanja in upravljanja znotraj sodobne pregledne, odprte in sodelovalne družbe. V članku vključena primerjalna analiza izbranih držav (ZDA, Irska, Švedska, Avstrija, Nemčija, Slovenija, Hrvaška) dokazuje, da izbrani postopkovni instituti, kot so roki in pritožba neodvisnemu organu ali sodni nadzor, prispevajo k znatno višji stopnji izvajanja RTI v praksi, kar navaja tudi več mednarodnih študij. V zaključku avtorica priporoča določene dobre prakse, zlasti pomen izvrševanja RTI s strani različnih organov oblasti v upravnem postopku, ki zagotavlja ustavna in nadnacionalna načela preglednosti.

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UDK: 347.99(492) 1.02 Review article

Participation of Citizens in Pre-Trial Hearings. Review of an Experiment in the Netherlands.

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ABSTRACT

In 2011 the Dutch Central Appeals Tribunal, the highest Dutch court of appeal in legal areas pertaining to social security and the civil service, started consulting the parties of a dispute at an early stage in the procedure, in order to include them in the decisions about the procedural steps to be taken in the settlement of the appeal. One of the underlying rationales is that the involvement of the parties will lead to more acceptance of and contentment with the result. Since the acceptance of court decisions is considered as a criterion for the quality of the procedure, this approach should result in a better quality of the case treatment. In this article the initial results of this new case treatment are presented in the light of expectations from the literature on citizen participation in policy processes of public agencies. The data indicate that the New Case Management Procedure at the Central Appeals Tribunal can lead to an improvement of the quality of the case treatment, by inviting citizens to discuss with the judge about the case treatment. However, the procedure itself does not guarantee this increased quality.

Key words: *new case management procedure, community involvement, Dutch Central Appeals Tribunal, final dispute resolution*

JEL: D73, K40

1 Interaction Between Public Institutions and the Public

For a few years, the administrative judges in the district courts in the Netherlands have dealt with their cases in accordance with the so called New Case Management Procedure: judicial review cases are put down for hearing as quickly as possible. At the hearing the judge discusses with the parties how the case can best be handled. Ideally, it should be dealt with in a way that is in keeping with the interests of the parties concerned, meets the demands of procedural justice and brings the dispute between the parties to a timely, satisfactory and final resolution.

In the fall of 2011 the Dutch Central Appeals Tribunal, the highest Dutch court of appeal in legal areas pertaining to social security and the civil service, started an experiment to consult the parties of the dispute at an early stage in the procedure, in order to include them in the decisions about the procedural steps to be taken in the settlement of the appeal. One of the underlying rationales is that the involvement of the parties will lead to more acceptance of and contentment with the result. Since the acceptance of court decisions is considered as a criterion for the quality of the procedure, this approach should result in a better quality of the case treatment.

In this article the initial results of this new case treatment are presented in the light of expectations from the literature on citizen participation in policy processes of public agencies. First we introduce the Dutch New Case Management Procedure. Before proceeding with a description of the results of the experiment at the Central Appeals Tribunal, we first examine the literature on participation, in order to explore the plausibility of the rationale behind the procedure. Lastly, we explore the initial results of this new case treatment.

2 Participation in Administrative Law Procedures

Over the past decade views on the role of administrative courts in the Netherlands have changed. The legal rules have been altered very little if at all, but they are now applied in a different way.

Appeals to the administrative court against decisions are made by administrative bodies. Since the General Administrative Law Act (*Algemene wet bestuursrecht*) came into force in 1994, administrative courts have given judgment on the basis of the notice of appeal. The court's main focus is on the reasons why the appellant disagrees with the decision, and its review of the lawfulness of the contested decision responds to the arguments the appellant has put forward. Aspects of the decision which the appellant has not referred to in the notice of appeal are not considered in the review.

The fact that the General Administrative Law Act requires the administrative court to focus on the appellant's grievances when considering the contested decision has made the court more attentive to other interests of appellants. One primary interest of which the court has become more aware is speed. A person who brings an appeal benefits from a prompt decision by the court. For the past ten years or so administrative courts have taken timely decision-making very seriously. The result is that appeal cases at district courts are now processed in nine months on average. At Appeal Courts it is clear that cases can be processed even more quickly.

In addition to speed, the courts also became interested in final dispute resolution. The aim was for its judgment not only to contain a judgment about the lawfulness of the contested decision, but also to make it as clear

as possible what decision would apply in the future. This provides more legal certainty for parties. Powers under the General Administrative Law Act which make it possible to achieve the ideal of final dispute resolution are used more and more frequently (De Graaf & Marseille, 2012).

Next, administrative courts became interested in the concept of a dispute, which had traditionally been defined as "a difference of opinion between the parties regarding the lawfulness of the decision being appealed". Due to the rise of alternative dispute resolution, administrative courts increasingly came to realize that parties involved in proceedings before an administrative court may have differing opinions about more than just the contested decision, and that it is quite possible that the actual dispute between the parties is not about the decision on which the court has been asked make a judgment, but about something else altogether. The realization that the "contested decision" and "the dispute between the parties" are not always identical led to the courts becoming interested in alternative solutions for disputes between parties.

The focus on speed, combined with the discovery of the range of options for dispute resolution, made administrative courts realize that even though every appeal is against a decision, not every appeal should be dealt with in the same way. Depending on the nature of the decision and the dispute about it, the court should choose in each case which of its powers it should and should not use. The best way for it to make this choice is to involve the parties. Then it can take their wishes into account. Some cases benefit from a thorough preliminary inquiry, others from comprehensive discussion at the hearing, and in other cases the most important thing is to put the parties themselves to work, by giving them the opportunity to provide evidence for their statements, or to give them a chance to consider together whether they can resolve their dispute.

As a result of all this, the courts developed the New Case Management Procedure. This method of case management is based upon the underlying rationale that the chance the procedure will result in a final resolution of the dispute between the parties will be greater if the parties are involved in decisions about how the case is managed. If the parties play an active role in discussions about the best way to deal with their case, the court's decisions will be better adapted to the wishes and needs of the parties. Consequently, the parties will be more satisfied with the result, thus increasing the chance that a final settlement of the dispute will be attained.

3 Objective of Participation

The last decennia public agencies have actively experimented with the involvement of citizens in public procedures. This interest is most apparent in the public administration literature. Although community involvement can have different connotations, in general it comprises the involvement of citizens in the development or implementation of policies. It means the public

agency actively invites citizens and other stakeholders to explore problems and their solutions in a transparent process and, by doing so, on the basis of equality, influence the final decision (Van Peppel, 2001, p. 34).

Interaction with the community is not a novelty. However, the areas in which people are involved have increased and the modes in which they are involved have changed over the last decades (Stephan, 2005, p. 662).

The involvement of the community comes with various promises. On the level of specific programmes, the involvement of the community is believed to lead to an "increasing transparency of public policy implementation" (Stephan, 2005, p. 663). This could then increase the public support for the concerned policy.

De Graaf (2007) studied this relation between community involvement in a policy process and the support for the results. He argues that the involvement of people in decision making processes will provide participants with information, allowing them to judge the quality of the decision. In other words, people will come to an informed judgment (De Graaf, 2007, p. 50). An informed judgement will be favourable for the support for the decision and will therefore, subsequently, increase the support for the decision (Teisman et al., 2001, p. 37).

According to De Graaf, support can be divided into contentment with the process and contentment with the result. Support can be seen as the sum of both. Van den Bos, however, identifies a causal relation between the two. When citizens experience a just procedure, they will then use this knowledge to evaluate the final decision, resulting in an increase of the support for the decision (Van den Bos, 2007, p. 189). In other words, not only the transparency is important. The availability of information enables people to judge the procedure, and this judgement influences the judgement of the final outcomes.

An increase in the support for a decision could lead to a decrease of the costs of the process, because people will not oppose or obstruct the decision making. However, research does not provide evidence for this relation (Urving & Stansburry, 2004, p. 57). If this relation exists, it could prove to be very attractive for policy makers to include citizens when it is expected that people will not easily accept the potential outcome. It could also lead to shorter procedures, since the acceptance of a certain decision might lead to less resistance when the policy is implemented. However, the literature is not clear about this relation either: empirical data show that community involvement can both expect to lead to faster procedures and to delays (Van Peppel, 2001, p. 39).

4 Conditions for Successful Participation

The involvement of people in policy making does not necessarily result in an increase in support for the policy. A growing body of evidence shows the conditions under which community involvement can lead to successful participation, which would lead to more support for the results of the process. A condition for a successful participation trajectory seems to be the access to accurate information. Accurate information would lead to a (positive) judgement of the procedure. The literature on community involvement specifically mentions importance of informing the participants beforehand on the expected contribution of the various participants. If this is unclear at the start, unrealistic expectations can arise, which can lead to less support (Pröpper, 2009, p. 162). Nevertheless, also other requirements are found, both on the side of the people to be involved as the side of the public agency.

Policy processes tend to be complex. Not only due to the complicated processes, also because policy programmes can be based on (advanced) technical knowledge. In order to participate, people need a certain degree of knowledge and skills. Another selecting requirement is the available time to be involved (Stephan, 2005, pp. 674–675). The public agency on the other hand, can facilitate the process by taking into account the way the community learns to participate. Time is therefore also a necessary resource for the agency: the participation trajectory needs to be based upon the time demanded for the adaption (Taylor, 2007). In order to adjust the procedure to this timescale, the organisation requires resources (knowledge and financial resources) to enable this transition (Pröpper, 2009, p. 61). The organisation also needs to be willing to do this: it demands a constructive relation between the various participants (ibid., p. 56). This is not only dependent on the individual involved, but also on the existing work culture within the organisation. It is therefore important to not only adapt the processes of community involvement to the pace of the people, but also to the work processes of the organisation (Bekkers, 2012, p. 186).

Specifically for judicial procedures, Van den Bos adds further elements: people have expectations based on own experiences and experiences of others with similar procedures. They want to be treated according these constructed ideas. This emphasises the importance of a consistent procedure over time and between people. Also, participants need to feel they have been given the opportunity to participate sufficiently, equal to the contribution of others. Therefore, within the process, courts need to strive for representation within the process, whereby all stakeholders have the chance to be heard (Van den Bos, 2007, p. 189).

5 The Experiment at the Dutch Central Appeals Tribunal

5.1 Different Kind of Appeals; Specialisation

The Central Appeals Tribunal decides on appeals concerning decisions of public authorities about the application/execution of different laws. Almost all of the appeals are concerned with legislation covering civil servants, invalidity benefits, social assistance, social support, unemployment benefits and sickness and maternity benefits.

Most judges working at the Central Appeals Tribunal are specialised in one these six fields. As a consequence, a judge that handles cases about civil servants does not handle cases about invalidity benefits, a judge that handles cases about social assistance does not handle cases about unemployment benefits.

5.2 Differences Between "Regular" Procedures and the New Case Management Procedure

In a "regular" procedure, the judge concentrates his attention on the juridical dispute between the citizen and the public authority. Basically he is only interested in the question: is the disputed decision (un)lawful?

In the New Case Management Procedure, the judge is supposed to be interested not only in the juridical point of view of the parties of the dispute, but also in their interests. As a consequence, he is supposed to investigate whether the parties of the dispute are involved in a conflict that goes beyond their juridical dispute – and if so, whether it would be helpful to them to talk with each other to try to resolve that conflict. Additionally, the judge is supposed to give the parties of the dispute comprehensive information about the possibilities and limitations of the procedure. As a consequence, it is expected that the judge regularly decides to reopen the preliminary enquiries, granting the parties of the dispute the opportunity to substantiate their arguments concerning the relevant facts.

In a "regular" procedure, a case is assigned to a three-judge section. Only if these three judges think the case is very simple, they will refer it to a single judge.

In the New Case Management Procedure, cases are assigned to a single judge, who has to decide whether or not to refer it to a three-judge section.

5.3 Participation by the Parties of the Dispute

The New Case Management Procedure, as implemented in the experiment at the Central Appeals Tribunal, aims at giving the parties of the dispute more influence on the course of the procedure.

This influence concerns three different choices the judge (in the experiment it is always – and contrary to the normal situation in appellate cases – a single judge) has to make at the end of the hearing.

1. The judge has to decide whether the preliminary inquiry has to be reopened. There are two main causes / reasons for reopening:
   - The parties of the dispute want to try to settle their dispute. By reopening the preliminary inquiry, the judge gives them the opportunity to try to settle their dispute. If they do not succeed, the procedure will be resumed.
   - One or both parties want to substantiate their arguments concerning the relevant facts. By reopening the preliminary inquiry, the judge grants them that opportunity. After they have collected evidence, the procedure will be resumed.
2. The judge has to decide whether he will come to a decision as soon as possible after the hearing, or that the parties of the dispute have to get a chance to argue their case at a second hearing.
3. The judge has to decide whether the decision on the appeal will be made by himself (a single-judge) or by a three-judge section.

The New Case Management Procedure aims at granting the parties of the dispute influence on these three decisions. At the hearing, the judge has to consult the parties about these three choices he has to make. He will decide, but – intentionally – only after consulting the parties.

6 Researching the New Case Management Procedure

The research project to evaluate the New Case Management Procedure at the Central Appeals Tribunal consisted of four parts.

1. We collected data about the course of 248 procedures in which the New Case Management Procedure was applied. 35 concerned legislation covering civil servants, 47 invalidity benefits, 65 social assistance, 27 social support, 21 unemployment benefits and 43 sickness and maternity benefits, 10 other legislation. The data that were collected concerned i.e. the length of the hearing, the degree in which the preliminary inquiry was reopened, the outcome of the procedure, the proportion of the procedures in which a second hearing was organized, the proportion of the procedures in which the decision was taken by single-judge or by a three-judge section.
2. We attended twelve hearings.
3. We interviewed the eleven judges that took part in the New Case Management Procedure.
4. We interviewed (by telephone) parties of the dispute: 21 citizens, 65 representatives of citizens, 57 representatives of administrative bodies.

7 Results

7.1 Hearings

We attended twelve hearings by four different judges, so we only got an impression of the way judges conducted the hearings. However, we noticed remarkable differences between the hearings of an 'unemployment benefits' judge and the hearings of a "social assistance" judge.

The hearing of the "unemployment benefits" judge was "traditional": he seemed to be only interested in clarifying the juridical aspects of the case. He hardly consulted the parties of the dispute about the decisions he had to take regarding the continuation of the handling / management of the case. After an average of 20 minutes, the hearing was over. The hearings of the "social assistance" judge took far more time: on average more than an hour. Besides, this judge extensively discussed with the parties about the way the procedure should be continued after the hearing.

Judging by the hearings we attended, different judges give different interpretations of the function of the hearing and of their task with regard to the management of the case and the degree in which the parties of the dispute are to be involved by the decisions about the management of the case after the hearing.

7.2 Interviews with Judges

We interviewed eleven judges that took part in the New Case Management Procedure. The interviews showed substantial differences between these judges. They specifically addressed the understanding of their duty as a judge in a higher court.

Some of the judges we interviewed were of the opinion that one of the most important tasks of higher courts is the development of jurisprudence. They therefore argued that most of the appeals must be decided by a three-judge section, regardless of the preference of the parties of the dispute.

Other judges we interviewed stressed that the preferences of the parties of the dispute should prevail, thereby giving less importance to the development of jurisprudence. As a consequence, if the parties of the dispute prefer a decision by the single judge that dealt with the case during the hearing, they will be granted that request, even if the case is important with regard to the development of jurisprudence.

Another noticeable difference between judges deals with the understanding of their job. Some of them indicate that, being a judge in administrative law, they are only interested in the question whether the disputed decision is (un) lawful, because their task is to judge the lawfulness of decisions of public

authorities. Other judges argue that, as a judge, they are interested in what exactly divides the parties of the conflict, because their task is solving conflicts.

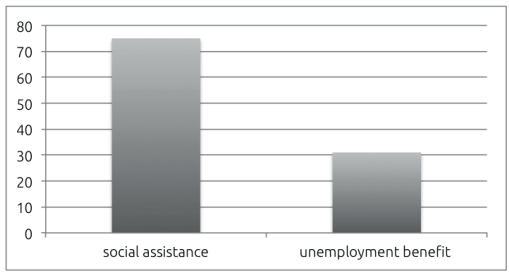
It was striking that judges that handle social assistance cases were far more positive about the New Case Management Procedure and their role as "mediator" than the unemployment benefit judges that we interviewed. These judges stressed that their task was constricted to judging the lawfulness of decisions of public authorities.

7.3 Case Management

We were curious whether the differences we observed at the hearings we attended, and the different opinions of the judges we interviewed about how they see their job, especially between the social assistance judges and the unemployment-benefit judges, would also be visible by examining the proceedings of the case[1].

We show four figures about different aspects of the proceeding of the case, in which we distinguish between the social assistance and the unemployment cases. The first figure shows the length of the hearing.

Figure 1: Length of the hearing (minutes)

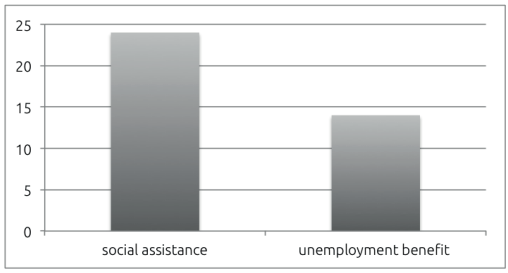


The figure shows a substantial difference. The average length of a hearing in an unemployment benefit case is 31 minutes, in a social assistance case 75 minutes.

The second figure shows to what degree the preliminary inquiry is reopened after the hearing.

1 Because of the relatively small amount of unemployment cases (21, against 65 social assistance cases), the results presented in this section give an indication of the differences between the two categories. However, we didn't examine whether the differences we found are statistically significant.

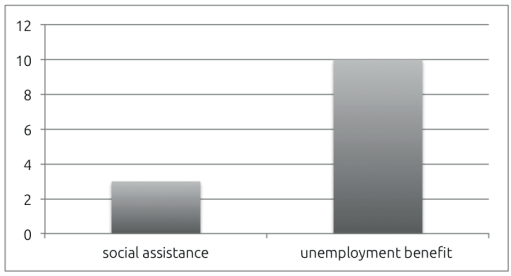
Figure 2: Reopening preliminary enquiry (%)



Again, the figure shows a notable difference. In 14 % of the unemployment benefit cases the preliminary inquiry is reopened after the hearing, in 24 % of the social assistance cases.

The third figure shows how often the judge decides to organize a second hearing.

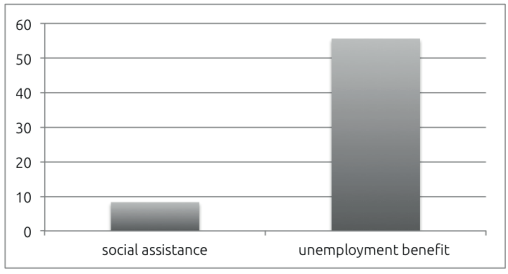
Figure 3: Another hearing? (%)



Again, the figure shows a considerable difference. In 10 % of the unemployment benefit cases a second hearing is organized, in only 3 % of the social assistance cases.

The fourth figure shows how often the judge decides to refer the cases to a three-judge section to take the decision on the appeal.

Figure 4: Judgment by a 3-judge section



Again, the figure shows a substantial difference. In social assurance cases, if the outcome of the procedure is a decision by the court, only in 8 % it is a

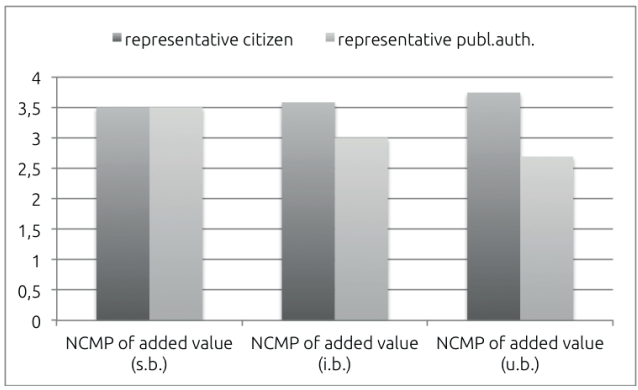
decision by three-judge section. In unemployment benefit cases, in 56 % the decision is taken by a three-judge section.

7.4 Satisfaction of the Parties of the Dispute

Do the parties of the dispute appreciate the New Case Management Procedure? We interviewed (by telephone) parties of the dispute about their experiences. We were especially interested in the differences between the hearings concerning different fields of administrative law. Because we only interviewed 21 citizens, we can only make a comparison between the representatives of citizens (65 interviews) and the representatives of administrative bodies (57 interviews). We show two figures that indicate two relevant differences between these two groups.

The first figure (figure 5) shows how the representatives react to the following proposition: "The hearing of the New Case Management Procedure is of added value compared to a 'regular' hearing at the Central Appeals Tribunal." If the respondent fully agreed, he scored a '5', if he fully disagreed, he scored a '1'. In the figure, we compare between sickness and maternity benefits (s. b.), invalidity benefits (i. b.) and unemployment benefits (u. b.).

Figure 5: Reaction to proposition: NCMP is of added value

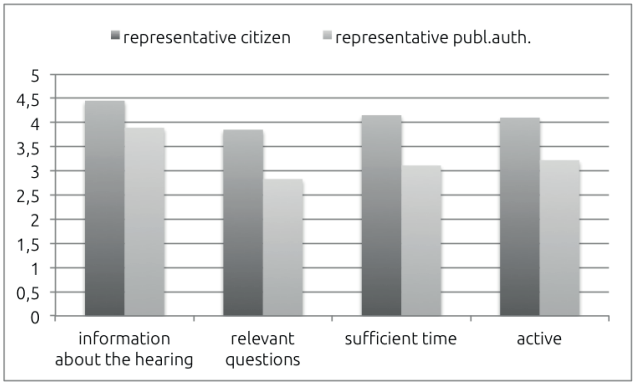


The figure shows that it depends on the field of administrative law whether the two groups differ. With regard to sickness-benefits cases, both groups fully agree: they think the hearing is – marginally – of more value in the New Case Management Procedure. With regard to social assistance cases, the representatives of the citizens disagree with the representatives of the public authorities: the representatives of the citizens score a 3.74, the representatives of public authorities a 2.69.

The second figure (Figure 6) is concerned only with social assistance cases. We asked representatives of citizens and representatives of public authorities whether they were satisfied with certain aspects of the "management" of the hearing by the judge. Did they think the information of the judge about

the formal aspects of the hearing was sufficient, did they think the judge asked relevant questions, did he give the parties of the dispute sufficient time to explain their points of view, was he active and involved in the case?

Figure 6: Reaction to proposition about the "management" of the hearing by the judge



On all these aspects, the representatives of citizens were more positive than the representatives of the public authorities.

8 Conclusions

Our research leads us to three conclusions about participation of the parties of the dispute in procedures at administrative law courts.

First, even when a court decides to grant parties more possibilities to participate, the attitude of individual judges can be a serious obstacle for the realization of participation. A project in which the judge consults the involved parties and then decides which procedure should be followed, implies the judges have the willingness, knowledge and skills to do so.

At the Central Appeals Tribunal, the judges that took part in the experiment agreed to let the parties of the dispute participate in the procedure. However, only about half of the judges stood by that agreement. This attitude has influenced the approach they took during the case treatment. This research does not show whether skills and knowledge are important factors for the success of the procedure.

Second, participation has an effect on the course of the procedure. When judges consult parties about the choices to be made, decisions on the course of the procedure are influenced. In contrast to the normal procedure, during the New Case Management Procedure, activities of the parties of the dispute take the centre stage. In terms of the theory of development of community involvement, this is an example of the involvement of the public: parties are invited to participate and thereby have a chance to influence the court

decisions. Since this is an example of involving the public, we could theorise this approach can lead to an increase in the support for the process and the result. The data shows that this is the case for the citizens.

Third, not all the parties of the dispute are enthusiastic. The (representatives of) citizens are more positive than the representatives of public authorities. There are various possible explanations. First, the chance to get involved gives citizens higher expectations about their chances to win the procedure. Another explanation is that the involvement of citizens has the effect described in the literature: involvement leads to an informed judgement of the procedure and the result, which has a positive effect on the judgement of the results. The effect does not occur for representatives of public authorities: their access to information does not depend on the procedure that is followed. This research has not looked into the resources and competences of the participants. The literature shows that this could also be an element of the explanation of the discrepancy.

In conclusion, the data gives an indication that the New Case Management Procedure at the Central Appeals Tribunal can lead to an improvement of the quality of the case treatment, by inviting citizens to discuss with the judge about the case treatment. However, the procedure itself does not guarantee this increased quality. In this paper different conditions that can influence the outcome of the procedure have been indicated.

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POVZETEK

1.02 Pregledni znanstveni članek

Udeležba državljanov v predhodnih postopkih. Pregled poskusa na Nizozemskem.

Ključne besede: novo upravljanje postopkov, udeležba in vključitev skupnosti, nizozemski Osrednji pritožbeni tribunal, pravnomočna rešitev spora

Leta 2011 je nizozemski Osrednji pritožbeni tribunal, najvišje nizozemsko pritožbeno sodišče za pravna področja, ki se nanašajo na socialno varnost in sistem javnih uslužbencev, v zgodnji fazi postopka začelo svetovati strankam v sporu, z namenom da bi jih vključilo v odločitve o postopkovnih korakih pri reševanju pritožbe v smislu poravnave. To utemeljuje s pričakovanjem, da bo vključitev strank pripeljala do boljšega sprejetja in večjega zadovoljstva z izidom. Ker je sprejetje sodnih odločitev merilo kakovosti postopka, bi posledica tega pristopa morala biti kakovostnejša obravnava primera. V članku so predstavljeni prvi rezultati tega novega načina obravnave v luči pričakovanj iz literature o udeležbi državljanov v procesih obravnave javnih politik. Ti podatki kažejo, da novi postopek upravljanja primerov Osrednjega pritožbenega tribunala, ki državljane povabi k razpravi o obravnavi primera s sodnikom, lahko pripelje do izboljšanja kakovosti obravnave. Kljub temu sam postopek ne zagotavlja večje kakovosti.

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Public Participation in Environmental Decision Making in Romania

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ABSTRACT

This article researches the manner in which the participation pillar from the Aarhus Convention was transposed into Romanian legislation and how its provisions were applied to a highly controversial case. Thus, the paper will firstly address the general legal framework concerning participation in environmental matters as well as the challenges for the implementation of Aarhus Convention, followed by requirements for effective participation and NGOs involvement in the process. The main conclusion drawn is that public participation is generally seen only as a bureaucratic requirement that both authorities and the developer must meet before the project is adopted. In this context, the NGOs play a crucial role by acting as a real watchdog in identifying deficiencies in the application of the Convention. In order for enhancing implementation the authors emphasize the more proactive role that public authorities should have both with regard to the quality of environmental reports and with applying sanctions coupled with a stronger cooperation with the NGOs in the field.

Key words: *Aarhus Convention, public participation*

JEL: *K32, L31*

1 Overview of the legal framework

In Romania, the UNECE Aarhus Convention on Access to Information and the transposal of the Environmental Impact Assessment (henceforth EIA]) and Strategic Environmental Assessment (henceforth SEA) Directives have been completed through the adoption of various legal norms. The very first of these was Order no. 619/1992 on the procedure for establishing the minimum content of the studies and the environmental impact assessment which also envisaged requirements for public information and consultation.

These improvements regarding the provisions for SEA/EIA are all the result of transposing the EU directives in this field.[1] Later on, with the signing and ratification of the Aarhus Convention, Law no. 86/2000[2] entered into force. However, despite these changes, it was only in 2012 that all the provisions concerning SEA and EIA were fully transposed.

The process of openness and transparency in government was further developed with the adoption of Law no. 52/2003, which is the framework law regulating participation to the decision-making process of public bodies and Law no. 554/2004 on the review of administrative acts. The latter one has undergone numerous changes, the last being in 2012 concerning remedies, which reflected various influences originating in the evolution of doctrine of Courts' practice and of European law.

During the following years, starting with 2006 there were several legislative efforts of creating a Code for administrative procedure, which was considered highly needed in light of the legislative instability. Among the proposals for the new code there was also one to include the procedural aspects of transparency, or to put it differently to abrogate the transparency law and to maintain only FOIA as special legislation. However this proposal has encountered great criticism from the non-governmental organizations (henceforth NGOs) who consider these two laws of paramount importance for the promotion of democracy and transparency in Romania and that they should remain separate from the general procedural law.

2 Challenges for the Implementation and Application of Aarhus Convention in Romania

2.1 General remarks

There are several provisions which regulate environmental policy in Romania as well as various agencies, which administer and enforce law in this field. The main authority is the Ministry of Environment and Forests, which is in charge of, among others: national environmental and water management policy-making, coordination and supervision of other authorities in connection with environmental protection activities, representation in connection with the achievement of Romania's obligations under the environmental protection related EU and bilateral/regional/international requirements. Moving onwards, the National Environmental Protection Agency, which has several regional and county subsidiaries, and the Administration of "Delta Dunării" Biosphere Reservation are in charge of environmental law implementation mainly regarding coordination of environmental permitting procedures. The environmental law enforcement authority, dealing mainly with verifying

1 SEA Directive 2001/42/EC, EIA Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC.

2 Published in the Official Journal of Romania no. 224, 22 May 2000.

compliance with environmental regulations is the National Environmental Guard with its subordinated local units. Actually many other authorities (e.g., other ministries, water management authorities, public health authorities, local public administration authorities, police authorities) depend on the environmental protection areas and activities.

In this context, one of the greatest challenges for the implementation of the provisions of Aarhus Convention is represented by the attitude of the public institutions which consider, especially regarding technical matters that technocrats know best what needs to be done, rejecting in this manner ideas from outside. However, the interaction with NGOs and media representatives, especially in highly publicized cases is slowly bringing a change in public authorities' approach. In Romania, NGOs are in fact the main actors which interact with public institutions in accessing environmental information and exercising their participation rights.[3] Moreover, many times they are the ones interested and able to mobilize citizens.

Another problem in the mentality of the public authorities is that they don't see environmental laws as a mean towards protecting the environment. The public authorities' attitude towards solving environmental matters is perfectly illustrated by the actions taken in closing down garbage dumps that do not comply with the EU legislation requirements. In rural area, public authorities, which, most of them, lack financial resources and expertise, are silently encouraging citizens to deposit garbage on vacant plots at the outskirt of the communities instead of providing a new dumping facility and applying sanctions to people who do not comply with environmental regulations.

The above mentioned aspect is very much connected with another one which hinders implementation – weak administrative capacity at different levels. Administrative capacity is considered by various authors when discussing policy implementation challenges. Thus, administrative capacity at various levels, understood as all different types of resources, human, material, mentalities (Honadle, 2001), is considered the basic step in insuring effective implementation. Concentrating exclusively on the development of the legal framework, the premises for a "strained transparency or openness" are created – inability to cope with transparency and free access to information due to an absence of resources or a misunderstanding of information (Pasquier & Villeneuve, 2007).

In the context of European integration, Central and Eastern European countries focused during the public policy making process more on the adoption of the best legislation rather than on its implementation and adaption to the national context. Thus, a "missing link" of the process appeared (Dunn, Staronova, & Pushkarev, 2006). Furthermore, the distance between stated policy goals and

3 According to the statistics of the National Agency for the Protection of the Environment, the majority of persons applying for access to environmental information are NGOs.

the realization of such planned goals due to inadequate human and material resources, lack of continuity in government policies and corruption lead to an implementation gap.

Furthermore, most of the reforms in the former communist countries took place in a context guided by international actors who provided the principles for good governance and "exported" models of best practice regarding democratic governance, transparency, and citizen participation. Hence, most countries in transition saw the reforms as meeting the requirements of international organizations or the EU in the case of new candidate countries and less as a means toward achieving a more efficient government (Frost, 2003). In Romania this is perfectly illustrated by the manner in which the provisions of EU Directives, including the ones in environmental matters, were transposed into the national legislation, by mimics, although most of the times an adaption to national context would have been required. This leads to highly general and/or unclear legal provisions, which leaves room for discretion and implicitly for abuse from public authorities.

2.2 EIA Procedure and its application

The EIA procedure entails some mandatory phases stated in the G.D. no. 918/22 August 2002.[4] Article 3 of the G.D. states that purpose of the Environment Impact Assessment, which is about establishing manners of reducing or avoiding the negative effects on the environment of the project assessed, and it determines the decision whether to approve or reject the project.

The Environment Impact Assessment procedure has three phases: (a) framing of the project in the EIA procedure; (b) defining the evaluation area and writing the EIA report and (c) analyzing the EIA report. The EIA is to be conducted with the help of the Technical Assessment Committee which is a non-permanent structure of experts designated by the central public authority for environment.

Firstly, the author must submit to the local environment authority a Project Presentation Report, containing the description and characterization of the area where the project is to be conducted and the description and the characterization of the project. This triggers the first phase - the framing phase. Based on this project presentation report, the competent authority decides whether they have to proceed with a complete EIA or if the project is small and harmless, they decide that such a measure is not needed and they grant the permit right away. The author has the obligation to inform both the authority and the public about his intention, and the public can make written observations and send them to the environmental authority responsible.

4 G.D. no. 918/22 August 2002 regarding establishing the framework-procedure for evaluating the impact on environment and approving the list of public projects which could be subjected to this procedure.

If the authority decides that they do have to go on with the procedure, they enter the second part. This decision can be contested by the public. The public authority, through the Committee, must offer the author of the project a collection of suggestions based on which they should carry on with the EIA study. This is comprised in the second part. Basically, the authorities state which are the most important concerns and the biggest threats, and they ask the project owner to put emphasis on these areas. The author proceeds to create an EIM Report, on the structure offered by the Committee, incorporating all the necessary information. In this report, they must answer the questions that the public addressed during the initial stage of the procedure. When the author submits this report, this second procedure is finished.

The last stage entails the review of the report. Here, it is necessary to consult the population, usually using public consultations and debate, but also written comments or complaints. Also, independent expert commissions can create their own report. Finally, it is up to the central environmental authority to assess the quality of the report and to reject it or accept it. If the report is rejected, it must be redone, and of course this entails that the project will not receive the environmental permit. If the report is accepted, the Ministry of Environment must state its decision concerning the environment permit, and make it public both to the author and to the public.

3 The Right to Participation in Environmental Matters

3.1 Legal framework for procedural rules applicable to public participation in environmental matters

It should be mentioned from the very beginning that there is an important difference with regard to participation rules applicable to normative instruments, plans and programs, and to specific projects. The difference lies in the consultation of the public. While in the classical case of a public authority issuing plans and programs, the authority is also responsible for conducting public participation procedures by itself, in the case of a plan or a project both the initiator and the developer are compelled to obtain feed-back from the public. Furthermore, NGOs have been constantly asking to replace the developer in organizing debates since the developer lacked interest in obtaining the public's feedback according to them.

There are three basic regulations which cover the procedural rules applicable to public participation in environmental matters. The first one is Law no. 52/2003 which is a framework law on transparency in the decision-making process of public administration bodies. This law deals both with the publicity rules to be followed during the adoption/drafting of administrative normative acts and the public participation to public debates organized by public administration bodies. One example of the latter is represented by regular proceedings of the local councils or public debates organized in order

to discuss various issues, including the draft of a normative act. Secondly, there is Governmental Decision no. 1076/2004 concerning the environmental evaluation for plans and programs and last Governmental Decision no. 445/2009 concerning the evaluation of the environmental impact of certain public and private projects,[5] both which transpose the provisions of the EU Directives on SEA and EIA procedures.

These three regulations may work together, though with a different purpose. If, according to SEA rules, the environmental assessment is conducted during the drafting/preparation of the plan or program and is finalized before its adoption, the public body must comply with the publicity and participation rules which are generally requested before the adoption of an administrative act if the adoption is done by the government or a ministry. Hence these are procedural participatory rules concerning the SEA procedure and refer explicitly to determining the environmental impact of the program or plan before its adoption. Thus, the applicable rules concern the discussion of the act in its entirety and not just with reference to its environmental impact.

3.2 Requirements for effective participation

In Romania, the absence of a compensation mechanism turned public debate into an adversarial confrontation between the supporters of the developers and the public/NGOs. Furthermore, most cases of public participation are seen only as a requirement that both the authorities and the developer are compelled to meet before the project is adopted. The limits of this approach will be further seen when discussing the case study.

One step towards improving the participation and implicitly the quality of the debate and the outcome of the consultation is on one hand improving the quality of the environmental reports and of the accredited technical experts hired by the developer. As previously discussed developers are not generally interested in public participation and thus have no incentives in producing high quality environmental impact assessments. Hence, they hire an expert who facilitates the issuing of the development permit and not necessarily the one who does the best job in terms of assessing the environmental impact. Furthermore, according to the legislation in the field, all experts, once accredited enjoy the same level of recognized qualification.

Another step should be improving the quality of the environmental report drafted by the public authorities and their greater in-depth scrutiny for the protection of the environment. There are cases when studies do not meet the requirements envisaged by law but they still pass the evaluation done by public authorities. Thus, there is a need for increasing the quality of the entire

5 This last mentioned Governmental Decision is accompanied by a Joint Ministerial Order from 2012 concerning the approval of the implementing methodology.

assessment process in order for public participation to go beyond defense and consultation.

3.3 NGOs participation

As previously discussed in chapter two, NGOs, either national or in partnership with Green Peace, tend to be more active than citizens. This could be explained by the lack of participatory culture among community members, apathy and distrust in public authorities. The legislation in the field of environmental protection offers NGOs various possibilities to exercise their participation right.

According to national legislation and practice, associations, organizations or groups may form the public who, according to SEA legislation, can participate. Moreover, G.D. no. 564/2006[6] regarding the establishment of the framework for the public's participation to the drafting/adoption of certain plans and programs concerning the environment gives NGOs broad participation rights during the SEA process by granting the decision-making public authorities the competence to identify the relevant public for participating in taking a certain decision. The criteria for this identification, with explicit reference to NGOs, are: their mission and representativeness (e.g. from a geographic point of view) in connection with the plan or policy. Public authorities have tried to limit NGOs' participation registered in one county to the SEA procedure taking place in a different region motivating the lack of concern in that respective matter.

EIA procedures make a distinction between the "public", defined above, and the "interested public" defined as to include the public affected or potentially affected by the assessment of the environmental impact and which has an interest in the said procedure.[7] In the field of environment protection NGOs are considered to have an interest.

3.4 Timeframes for participation

Timeframes are of great importance when discussing participation for at least two reasons. On one hand, if a stage in the process of consultation is very lengthy the number of NGOs and individuals interested and implicitly involved in the case will decrease. On the other hand, very short timeframes (e.g. when impact upon a certain species is assessed) lead to incomplete evaluations. Thus, it is necessary to have reasonable timeframes for public participation. This subchapter aims at analyzing firstly the number of days/weeks the public has for participation in different phases and secondly the total length of various stages. Henceforth, a selection of provisions concerning various timeframes for public participation from both the framework law

6 Published in the Official Journal of Romania, no. 405, 10 May 2006.
7 According to G.D. no. 564/2006.

on transparency in decision-making in public administration and the specific national legislation on EIA and SEA procedures is presented, in order to see whether or not the timeframes can be deemed as reasonable.

Transparency in the decision-making of public administration bodies [8]

Every time public administrative authorities draft normative acts/instruments, a notice regarding their intention should be communicated to the public, with at least 30 days prior to its discussion and adoption. The notice should also include the possibility of the public to respond – it is necessary to allow at least 10 days for receiving written recommendations from the public. If public debates are organized during the adoption of the normative act, they should take place in no more than 10 days from the moment of the publication of notice comprising the place/date for the public debate.

Environmental Impact Assessment Procedure [9]

During the screening stage the competent public authority for the protection of the environment needs to identify the interested public within 15 days from the date when it was approached with a request for issuing the environmental agreement[10] by the developer of the project, through publication on its website and on the premises of its main building. In three days after a decision is reached with regard to the screening of the project, the public authority posts on its website the draft of the decision and informs the developer about the obligation to inform the public. In its turn, the developer of the project has 3 days to publish the announcement in the local and/or national press, to place it in a public space at his headquarters as well as in the public authority's main building, and to post it on his webpage. The public has then 5 days to make comments concerning the draft project of the screening stage.

During the quality analysis of the environmental report stage, the notice regarding the opportunities for the participation of the interested public is posted on the websites of the public authorities responsible for the protection of the environment and those responsible for issuing the approval for development and placed in a visible spot at their headquarters with at least 20 days prior to the date when the public meeting is scheduled. The developer, in its turn, needs to publish

8 Law no. 52/2003 on participation in decision making.

9 Governmental Decision no. 1076/2004 concerning the environmental evaluation for plans and programs and last Governmental Decision no. 445/2009 concerning the evaluation of the environmental impact of certain public and private projects.

10 In Romanian *acord de mediu* – administrative act issued by the competent authority for the protection of the environment in which the conditions and/or the measures for the protection of the environment that need to be followed upon the development of the project are outlined.

in 3 days upon receiving the notice mentioned earlier, in the national or local press, to post it on his website/at his headquarters or the headquarters of the authority for the protection of the environment, and/or on the billboard placed at the project's site. The interested public can make recommendations up until the date of the public meeting (the public has at least 20 days). There are also shorter deadlines for the public to respond during this stage – 5 days to make comments regarding the notice for the granting of the environmental agreement to the developer.

Strategic Environmental Assessment Procedure[11]

During the screening procedure, the initiator of the plan publishes in the mass media, twice, at a 3 days interval, and posts on his website the initial version of the plan, its nature, the starting of the screening procedure, the place/hour where the initial version can be found, and the possibility to make comments in writing at the headquarters of the authority for the protection of the environment, no later than 15 days from the date of the last/second notice. The competent authority for the protection of the environment also notifies the public about the starting of the screening phase by a post on its website and the possibility to make comments in the 10 days following the posting of the notice. The final decision is notified to the public by posting it on the website of the competent authority for the protection of the environment and by its publishing by the initiator of the plan in mass media (in no more than 3 days after the decision is made).

During the completion stage of the plan and the drafting of the environmental report, the initiator of the plan publishes in the mass media, twice, at a 3 days interval, and posts on his website the draft plan, the completion of the environmental report, the place/hour where the public can review them and the possibility for the public to issue written proposals to both the initiator's and the competent authority's headquarters in 45 days from the date when the last notice was published. The initiator has the same publicity obligations as described previously with regard to organizing a public debate on the draft plan, including the environmental report. The debate cannot be held any sooner than 45 days (60 if the plan has a trans-boundary effect) from the moment the notice is published.

The above excerpts from national legislation reveal a relative correlation between the various timeframes for publicity and public participation in relation to environmental matters. Thus, according to all three, public institutions, competent authorities for the protection of the environment,

11 Governmental Decision no. 1076/2004 concerning the environmental evaluation for plans and programs and last Governmental Decision no. 445/2009 concerning the evaluation of the environmental impact of certain public and private projects

the initiator of a plan/program and the requester of an environmental agreement for certain projects have short deadlines to comply with publicity obligations. Hence, they usually have three days to notify the public with regard to a certain decision made or to post a draft version of a specific document on their webpages and at their headquarters. On the other hand, the public usually has fifteen days and in certain cases ten days to make comments. Furthermore, public debates are announced between twenty and forty-five days in advance.

There are also studies, conducted at the national level, which looked at the total number of SEA procedures conducted from 2004 to 2010 (UNDP) Table 1 and Table 2 below summarize this information.

Table 1: Number of SEA procedures with a time period greater than one year (for each development region, which at their turn include 4–5 counties)

Length	Bucuresti	Cluj	Bacau	Craiova	Pitesti	Galati	Sibiu
>1 year	4	9	8	13	11	46	39
>2 years	0	0	1	1	3	5	11
>3 years	0	0	0	0	0	0	3
>4 years	0	0	0	0	0	0	2

Source: UNDP, pp. 26–27.

Table 2: Mean values for the time periods necessary for the completion of different stages in the SEA procedure

Stages	Average number of days								
	Bucuresti	Bacau	Cluj	Craiova	Galati	Pitesti	Sibiu	Timis	National
From notification to public debate	337	196	320	283	201	216	263	290	263
From public debate to environmental approval	33	67	42	62	78	33	87	40	55,7
The entire procedure	370	264	362	345	272	253	348	297	314

Source: UNDP, pp. 27.

For EIA procedures, a sample of authorities and projects was examined by the same authors and the results were similar (UNDP, p. 30). Thus, the average duration for completing the EIA procedure from notification to the issuance date of the environmental permit is 237. For specific projects, the shortest timeframe was 37 days, at the regional branch of the National Agency for the Protection of the Environment Bacau, which also registers the project with the highest duration of EIA, 766 day. The highest average duration was registered

in Bucharest with 311 days. However, these timeframes are relevant only if compared with what happens in other countries. Hence, Romania generally has timeframes shorter than the average EU 27.

Stakeholders have formulated various opinions on the length of these procedures. On one hand, developers usually complain that they take very long. On the other hand, NGOs argue the same with the exception of cases when the impact upon certain species is assessed. For this later case NGO representatives consider longer timeframes necessary. In the end, no matter how big or small, the timeframe should allow a thorough evaluation of the environmental impact.

4 Case Study: the Rosia Montana Mining Project

Rosia Montana represents (McGrath, 2013) "[…] the story of the small village that has triggered Romania's biggest uprising since the demise of communism in 1989 - with protesters out on the streets in 75 cities worldwide: from Bucharest to London, New York to Shanghai." Furthermore, the decisions adopted in this case and its final resolution will definitely have a great impact on future cases such as shale gas, which is another project under discussion in Romania. In an article from The Guardian, one of the leaders of the protest against the Rosia Montana gold exportation, declared (Ciobanu, 2013) "Rosia Montana is the battle of the present and of the next decades […] People today […] ask for an improved democratic process, for adding a participatory democracy dimension to traditional democratic mechanisms."

4.1 General context

Rosia Montana[12] gold exploitation has been a highly controversial development project in Romania due to the degree of toxicity of the substances which shall be used in the process of extracting gold (Justice and Environment, 2011) by Rosia Montana Gold Corporation (RMGC), the current developer.

The project started in 1995 and is still in its preliminary phase of approval because of serious opposition from the civil society. The process has been a very lengthy one and involved a series of stakeholders both from the side of the developer and that of the NGOs. A short presentation of the actions taken by both parts will provide a general overview of the matters.[13]

In 1995, the Romanian public company Minvest and the Canadian private company Gabriel Resources Limited formed the partnership called Rosia

12 Rosia Montana area comprises 4 mountains and several villages from the communes Rosia Montana and Bucium in Transylvania, Romania.

13 For drafting this brief chronology the following sources were used: (1) Alburnus Maior (2) Gabriel Resources Project (3) the open letter "*The Romanian State – captive at Rosia Montana?*" which a group from the Economical Sciences Academy wrote to the President, Parliament and Government. For the period 2008–2012 information were gathered using the press monitoring technique.

Montana Gold Corporation for exploiting the old mine and leftover gangs from the Rosia Montana area. In 1999, Minvest received a license for exploiting the old mine at Rosia Montana and one year later it transferred the license to RMGC, action which was contested since a state-owned company cannot transfer the license to a private company. In the same year, the NGO Alburnus Maior[14] was formed and in 2003 it started its first court action against Minvest for illegal drilling in the Carnic Massif, being also supported by the Romanian Academy, which declared itself against the mining project, and Greenpeace which began its protests.

In July 2002, the Local Council adopted the General Urbanism Plan (PUG) and the Zoning Urbanism Plan (PUZ), both documents being necessary for RMGC to initiate the procedures for starting the project. These documents were deemed illegal in 2005 by the Alba Iulia Tribunal and in 2008, 2010 and 2012 by the Alba Iulia Court of Appeal after the Local Council or the County Council repeatedly granted new certificates to RMCG.

Furthermore, in March 2004, the Environment Protection Agency from Alba issued an archaeological discharge certificate for the Carnic Massif which was challenged in court by Alburnus Maior and found illegal by Alba Iulia Court in 2005 and irrevocably annulled by Brasov Court of Appeal.

In 2005, RMGC submitted the Project Presentation Report for the Rosia Montana Mining Project to the Environmental Protection Agency in Alba. This triggered the initiation of the Environment Impact Assessment procedure. Around 120 NGOs and individuals expressed their intentions to participate in the EIA. In February 2006, Alburnus Maior issued a document entitled "Undermining Rosia Montana?" accusing the state authorities of favoritism in this project. In April, the Romanian Minister for Environment Protection met the EU Commissioner for Environment and, at this occasion declared that the EIA procedure in the Rosia Montana project was suspended, the reason being that the PUG and PUZ were not valid. Only a month later RMGC submitted its EIA report. In the following period, several public consultations occurred both in Romania and Hungary and Alburnus Maior presented its own version in an Independent Expert Analysis. In 2007, Alba Iulia court declared the illegality of 192 drilling points in the Rosia Montana and Bucium Communes.

In 2012, the Government announced that any decision about the Rosia Montana Project will be postponed until fall of 2012, after the parliamentary elections. In 2013, the Government tried to initiate in Parliament a Law for the sole purpose of this project, but due to street manifestations the adoption was postponed. The solution envisaged now is to deal with the project within a more general Law of the mining industry.

14 Alburnus Maior is in fact the name of Rosia Montana during the Roman Empire, when it was founded as a mining town.

What is striking however about this entire process is the lack of participation of the general public in the decision making of the government regarding the Rosia Montana mining. Hence, there were no consultations regarding finding the best-agreed solutions on this issue. Even since 2003 two different sides, which confronted each other, were established. On one hand, there were NGOs and environmental activists, who gradually gathered more and more supporters from the public. They have continuously protested against the mining project by taking matters to various Courts and organizing massive street protests. On the other hand, there were politicians and mining companies, who were advocating job creation, financial investment and above all the lack of negative effect of the mining process.

In this confrontation, the media was used by both parties to promote their views. International media reported this process as: "through aggressive PR and media campaigns the parties set to profit are doing all they can to pacify, oppress, and deceive opposition to the mine" (McGrath, 2013) and that "protesters […] have skillfully kept the public informed and engaged via Facebook".[15]

4.2 Legal provisions applicable to the Rosia Montana case

The main law in force at the beginning of the Rosia Montana Mining Project Assessment was the Environment Protection Law no. 137/1995. This law clearly states in Article 8(6) that public or private projects which may have a significant impact on the environment must pass through the EIA procedure. Furthermore, Article 12(3) states that consulting the public in such projects is mandatory. The legal documents which regulate the EIA procedure in Romania are the Government Ordinances no. 863 and no. 864 of 26 September 2002, issued by the Ministry of Environment. One of the ordinances approves the EIA procedure and the other approves its methodology.

In 2003, the law on transparency of decisions in public administrations, Law no. 54/2003, was issued and represented another very important tool for citizens. This piece of legislation clearly states that citizens have the right to ask for any public information and they should be given an answer in an appropriate timeframe. Another important piece of legislation was the Governmental Decision establishing the procedure of environment evaluation for plans and projects.

All these were active in December 2004, when RMGC submitted the necessary documents for starting the EIA procedure. In July 2005, another very important Governmental Decision was added to the current legislation, which basically transposes the provisions of the Aarhus Convention, by stating that the public has the right to be informed and to receive information when they request it, concerning the state of the environment and the effects of

15 Ibidem.

different projects with impact of environment. The most interesting part about the Romanian environment legislation is the fact that this document that applies the Aarhus Convention actually holds no provision whatsoever on the right of the public to participate in decision making. The document that does contain provisions connected to that is the Minister Order no. 864 of 26 September 2002 approving the EIA procedure. Nevertheless, a lot of focus is placed on the transborder interested parts and less on the citizens of the country. Thus, the way the Aarhus Convention was translated to national legislation has been flawed. A more refined regulation concerning the EIA emerged in 2004 – the G.D. no. 1076/2004.[16]

4.3 Abiding by the provisions of the Aarhus convention

As previously stated, the mechanism that controls whether the Convention was respected or not is the Aarhus Convention Compliance Committee (ACCC).[17] A complaint was filed to this body by Alburnus Maior on the 5th of July 2005 and it was solved by the Committee on the 16 April 2008 (Compilance Committe, n.d.).

According to this document two of the three pillars of the Aarhus Convention were breached, namely access to information and participation of the public in decision-making. The right to participate was breached on three accounts. Firstly, when the EIA procedure began, the competent authority failed to inform individually all the participants that subscribed to the process. They only published the documentation on their website. According to the Convention, all the interested parties should have been duly notified especially since some of the parties do not speak Romanian, they could not get the necessary information from the website. Secondly, Alburnus Maior contested the fact that the written complaints in the scoping phase were not included in the inquiries for the applicant. Third, the organization complained about the quality of the public debates. The biggest shortcomings of these debates were that they were not conducted in all affected localities (for example in the Bucium commune), that the moderators were not impartial, that the timeframe for a speaker was insufficient and that the author simply did not answer the questions for the floor, just trying to make propaganda for the project. Also, the organization complained that the minutes of the meetings were taken incorrectly by the Ministry of Environment and by RMGC and these discrepancies can be noticed if one compares the videos with the written reports. The last complaint was again that some of the questions addressed by the participants in the public debates were not answered or even acknowledged later on by the author of the project.[18]

16 The Governmental Decision no. 176/2004.

17 The entire documentation of the process, as well as the rulings can be found on a webpage of the Aarhus Convention.

18 All of these accusations and complaints can be found in the document Alburnus Maior (2007).

5 Final Considerations

The research has provided an overview of the importance granted by each stakeholder to environmental matters. As stated in the beginning of this article the public authorities view participation as a hassle, something they need to comply with by doing the minimum required by law. Implicitly, the quality of their work (e.g. drafting environmental reports, organizing debates) is in most cases very low. The debates unfolded at Rosia Montana has also been about economic interests over environmental matters, an aspect which is very often in seen in developing countries, where environmental matters are very often considered secondary in relation to economic development opportunities. Furthermore, the research has once again reinforced the idea of NGOs' importance in public participation and decision making and the decisive role played by them in mobilizing citizens and taking concrete actions.

Thus, in order for enhancing the implementation of Aarhus Convention, the authors emphasize the more proactive role that public authorities should have both with regard to the quality of environmental reports and with applying sanctions coupled with a stronger cooperation with the NGOs in the field.

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POVZETEK

1.02 Pregledni znanstveni članek

Udeležba javnosti pri okoljskih odločitvah v Romuniji

Ključne besede: Aarhuška konvencija, udeležba javnosti

Članek raziskuje, kako je bil steber sodelovanja javnosti iz Aarhuške konvencije prenesen v romunsko zakonodajo in kako so bile njene določbe uporabljene v zelo spornem primeru. Članek najprej obravnava splošni pravni okvir sodelovanja v okoljskih zadevah kot tudi izzive uvajanja Aarhuške konvencije in zahteve za učinkovito sodelovanje in vključenost nevladnih organizacij v proces. Glavna ugotovitev je, da se na sodelovanje javnosti na splošno gleda samo kot na birokratsko zahtevo pred sprejetjem projekta, ki ji morajo zadostiti tako organi oblasti kot nosilec projekta. Tukaj imajo nevladne organizacije ključno vlogo, da delujejo kot dober nadzornik pri identifikaciji pomanjkljivosti uporabe konvencije. Avtorji poudarjajo, da bi bila za izboljšanje izvrševanja konvencije potrebna bolj proaktivna vloga javnih organov glede kakovosti okoljskih poročil in izvajanja sankcij ter boljšega sodelovanja s področnimi nevladnimi organizacijami.

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Improving Environmental Permitting Systems: Integrated Permits in the Netherlands

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ABSTRACT

Environmental law originally developed in a fragmented way (sectoral legislation protecting water, soil or air). This fragmented approach towards environmental protection caused problems. Citizens and businesses applying for a permit are confronted with a range of procedures with a variety of different time limits, assessment criteria and legal remedies. Comparative law research shows that the integration of legislation in the field of environmental law is a growing trend. Policymakers feel the necessity to integrate decision-making in order to optimise the protection of the environment. The first part of this article contains a brief overview of the concept of an integrated process for the granting of environmental permits. The second part discusses the idea of environmental model 4 permit, which has been put forward in the Netherlands. It is questionable if this specific concept of integrated environmental permitting can be achieved within the constraints of Dutch administrative law.

Key words: *environmental permitting, integrated approach, integrated environmental permit, rule of purpose-specific powers*

JEL: K23, K41

1 Introduction

Integrated environmental permits is a topical issue in many countries such as Germany, Belgium and the Netherlands. In the Netherlands, the General Act on Environmental Permitting introduced in October 2010 radically changed the legal framework of environmental permits.[1] Until then, environmental permits were split up over a variety of laws and regulations. Citizens and businesses seeking a permit were confronted with a range of procedures entailing a variety of different time limits, assessment criteria and legal remedies. The GAEP is intended to address these problems through the *procedural* integration of permits. One step further is the idea of a so-called

1 In Dutch: *Wet algemene bepalingen omgevingrecht* (Wabo), Stb. 2008, 496.

"model 4" permit system which refers to a single integrated assessment framework.[2] An advantage of one single integrated assessment framework is that the competent public authority will be able to consider various aspects of the law (such as the environment, nature conservation and spatial planning) in their totality, unimpeded by the constraints of a variety of different assessment frameworks. This would be in line with the "integrated approach" of the Industrial Emissions Directive at EU level.

A number of legal problems have been identified in the literature in relation to this permit model.[3] In the first place, it is assumed that an integrated framework will have undesirable consequences in terms of judicial review. The integration of various aspects of environmental law in a single assessment framework will probably result in a fairly broad formulation of the aspects (such as "protection of the physical living environment") under which light a permit application will have to be evaluated. Such a vague, general formulation of the public interest to be protected will give rise to considerable constraints for the courts when reviewing decisions on permit applications. Reduced judicial review also entails the risk that the granting of permits will become more arbitrary. Public authorities will acquire more freedom to use their own discretion, and this could make it easier to ignore certain specific aspects that have been integrated in the broad assessment framework. In the third place, integrated permitting might adversely affect legal certainty. If public authorities have more discretion when balancing interests, it becomes more difficult to determine in advance what weight will be given to which interests, and this is undesirable from a legal protection point of view.

These legal problems relate to the Dutch rule of purpose-specific powers (*specialiteitsbeginsel*), comparable to the German *Bestimmtheitsgebot*.[4] This fundamental principle of public law requires that the legislator should formulate precise substantive norms as to content and purpose of administrative authority. The central question is: Can integrated environmental permits (the idea of "model 4") be achieved within the conditions of the Dutch rule of purpose-specific powers? In the first part the discussion on integrated environmental permits in Germany, Belgium and the Netherlands will be presented. This comparative law study will provide knowledge about the extent to which the (proposed) law provides for substantive integrated environmental permits (Section 2). In the second part the permitting model 4 will be evaluated in the light of the Dutch rule of purpose-specific powers (Section 3–4). The article concludes with some final remarks (Section 5).

2 *Kamerstukken II,* 2004–2005, 29 383, nr. 18. Four models are described in this letter to the Lower House.

3 For example: Schlössels (2006, pp. 153–169).

4 The rule of purpose-specific powers also means that a public authority may only exercise a power in the framework of the legislation on which that power is based. This principle is therefore also comparable with the principle of conferred powers, a general principle of Union Law.

2 Concept of Integrated Environmental Permitting

This section contains a brief overview of (proposed) legislation in the field of integrated environmental permits at the EU level and in Germany, Belgium and the Netherlands. This part of the research will give insight into the concept of integrated environmental permits and, in particular, the "model 4" environmental permit considered in the Netherlands.

2.1 EU: Industrial Emissions Directive

An integrated system of prevention and control of pollution was recommended in the early '90s because of the recognition that regulation over the release of substances into one environmental medium (e.g. air, land, water) can result in shifting the substance to another medium. The fragmented approach in law and policies towards pollution control (focusing on each medium separately) was considered both ineffective and inefficient. At the EU level, the IPPC Directive (96/61/EC) marks a shift from single-medium to multi-media legislation by implementing an integrated approach towards pollution control. The preamble states in recital 9: "[…] this Directive establishes a general framework for integrated pollution prevention and control; whereas it lays down the measures necessary to implement integrated pollution prevention and control in order to achieve a high level of protection for the environment as a whole; whereas application of the principle of sustainable development will be promoted by an integrated approach to pollution control."

In 2010 the IPPC Directive is rearranged with six other Directives into the Directive on Industrial Emissions (Directive 2010/75/EC). Chapters I, II and VII of the IE Directive correspond to a large extent to the content of the IPPC Directive. On the whole there are no major changes with regard to the integrated approach. The core of the integrated approach is regulated in chapter II of the IE Directive. The IE Directive prescribes an integrated approach to the prevention and control of activities listed in Annex I to the directive (such as energy industries, chemical industry and metal industry). The integrated approach is realised through a permit. Member States must take the necessary measures to ensure that no installation or combustion plant, waste incineration plant or waste co-incineration plant is operated without a permit (Article 4 IE Directive).

Article 14 and 15 of the IE Directive require the application of emission limit values and/or equivalent parameters or technical measures based on BAT (Best Available Techniques) in combination with case-specific considerations which account for the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. These requirements imply a process of weighing and balancing environmental interests in order to achieve an integrated decision (technology based approach). The substantive integration can be achieved through case-specific trade-offs (BAT – requirements against site – specific technical, geographical

and environmental factors) and generic environmental trade-offs (BAT – based emission standards and environmental quality standards) (Bohne & Dietze, 2004, pp. 200–201). Information on BAT is exchanged between Member States and Industries through BAT reference documents published by the Commission (Article 13). The BAT conclusions in these documents are the reference point for setting the permit conditions (Article 14(3)).[5] If the BAT conclusions do not cover all potential environmental effects, the competent authority has the task of determining the BAT itself for the specific case on which it bases the permit. Public authorities may deviate from emission levels associated with the best available techniques as laid down in BREF documents (Article 15 (4)). However, the possibility of taking specific circumstances into account is limited. Deviation is only allowed in specific cases, on the basis of an assessment of the environmental and economic costs and benefits taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions.

It is important to note that the IE Directive does not require that Member States combine sectoral environmental laws or integrate sectoral permits in a single environmental permit. In order to guarantee an effective integrated approach Member States shall take the measures necessary to ensure that the conditions of, and the procedures for the granting of the permit are fully coordinated where more than one competent authority or more than one operator are involved or more than one permit is granted (Article 5(2) IE Directive).

2.2 Germany: Integrierte Vorhabengenehmigung

In Germany, the idea of creating a comprehensive Environmental Code (Umweltgesetzbuch, UGB) persisted for a long time.[6] A centerpiece of this Environmental Code would be the integrated project authorisation model (integrierte Vorhabengenehmigung, iVG). After years of preparation (starting in the 1970s) a draft proposal was presented to parliament in 2008. However, the Federal Government was ultimately unable to agree on a common draft (Scheidler, 2009, pp. 173–176). Eventually only a reduced reform of environmental law took place and currently the idea of an Environmental Code is no longer on the political agenda (Müggenborg & Hentschel, 2010, p. 961). However, for the purpose of this research it is relevant to discuss the proposed integrated project authorisation model.

The intended result of the integrated environmental permit was to end the many differences of permit proceedings. Proceedings are combined, harmonised and simplified. According to the explanatory memorandum the permit proceeding will become more transparent, clear and simple

5 Compared to the IPPC Directive, the IE Directive establishes a stronger legal role for BAT conclusions.

6 See for a description of the development of the UGB for example Knopp (2009, pp. 121–125).

(Begründung des Entwurfs zu E-UGB-I, p. 22). The integrated project authorisation model is regulated in Chapter 2 of the UGB I.[7] The integrated project authorisation model contains elements of substantive integration with regard to the immissionrechtliche and wasserrechtliche permit. The integrated project authorisation model provides for procedural integration of permits that have nothing to do with the protection of the environment (such as the building permit). The assessment frameworks for these permits are separated (no single assessment framework). The procedural integration of these permits follows from § 59 Abs. 1. UGB I. § 59 Abs. 1. UGB I: "*Die Genehmigung schließt andere das Vorhaben betreffende behördliche Entscheidungen ein, insbesondere öffentlich-rechtliche Genehmigungen, Zulassungen und Verleihungen mit Ausnahme von planerischen Genehmigungen, die in einem Verfahren mit Öffentlichkeitsbeteiligung erteilt werdern, Planfeststellungen, Zulassungen bergrechtlicher Betriebspläne und behördliche Entscheidungen auf Grund atomrechtlicher Vorschriften*".

2.3 Belgium: omgevingsvergunning

On 19 April and 19 July 2013 the Regional Government of the Flemish Region of Belgium approved a draft Act to introduce an Environmental Permit (*omgevingsvergunning*). Before this approved draft there had already been proposals to integrate the permit dealing with the operation of activities and installations that can potentially have an impact on the environment and the building permit in one integrated environmental permit. The objective of these proposals was to improve the functioning of the procedural link (*koppelingsmechanisme*) in practice between these two permits. The former proposals were intended to integrate the assessment of the building permit within the proceedings for an environmental permit.[8] The result of this integrated proceeding was that there was one decision yet resulting in two legal permits. However, none of the earlier proposals were adopted by Parliament. The approved draft first will go to the legislative section of the Council of State and is expected to be adopted by Parliament in 2014.

According to the explanatory memorandum (Mvt. Voorontwerp van decreet betreffende de omgevingsvergunning, p. 5), the integration of proceedings means the organisation of a permit system in which a global assessment of the environment (milieu), planning and building takes place in one integrated proceeding (one application, one public examination, one piece of advice and

7 See E-UGB-I. The UGB 2009 consist of five books and an introduction Act: *Allgemeine Vorschriften und vorhabenbezogenes Umweltrecht* (UBG I), *Wasserwirtschaft* (UGB II), *Naturschutz* (UGB III), *Nichtioni-sierende Strahlung* (UGB IV), *Handel mit Berechtigungen zur Emission von Treibhausgasen – Emissi-onshandel* (UGB V) *Einführungsgesetz zum Umweltgesetzbuch* (EG UGB).

8 Voorstel van Decreet Stuk 2181 (2003–2004) – nr. 1 and Voorstel van Decreet Stuk 688 (2005–2006) – nr. 1. Both proposals bear a close resemblance. Earlier, in the eighties of the last century, the integration of both permits was also discussed as a result of a draft proposal. However, the final draft the proposal of an integrated permit was dropped. One of the arguments in discussion against the integration was "the different nature of these permits" (both proposals contain explanatory remarks which refer to this history).

one permit). The main advantage of an integrated assessment is, according to the explanatory memorandum that it leads to more efficiency in the decision-making process and better permits in terms of quality (Mvt. Voorontwerp van decreet betreffende de omgevingsvergunning, p. 10). From the Articles 4 and 5 of the draft it follows that the Environmental Permit integrates the permit dealing with the operation of activities and installations that can have an impact on the environment (milieuvergunning), the building permit (stedenbouwkundige vergunning) and an allocation permit (verkavelingsvergunning). The draft proposal is designed in a way that the scope of the Act can be broadened with the use other permits.

It has to be noted that only procedural rules are integrated. The substantive rules will not be integrated into one assessment framework and therefore will remain sectoral. The substantive sectoral rules can be found in the spatial planning act (*Vlaamse Codex Ruimtelijke Ordening*) and the general rules environmental policy Act (*decreet algemene bepalingen milieubeleid*).

2.4 Netherlands: omgevingsvergunning

In 2010, the Dutch General Act on Environmental Permitting introduced the single environmental permit. In the legislative process four models of environmental permitting were described in a letter to the Lower House (Kamerstukken II 2004/05, 29 383, nr. 18). Models 1 and 2 were based on coordination of different permits. Models 3 and 4 are directed at integrating various permit systems. The main difference is that within a model of integration, one public authority is ultimately responsible. The legislator gave its preference to a model of integration. A system of integrated permit is not totally new in the Netherlands. With the adoption of the Dutch Environmental Management Act in 1993, five permits and two exemptions had already been integrated into a single environmental management permit. Yet the scope of this Environmental Management Act was quite limited, as not all possible permits in the field of environmental law were integrated. The environmental management permit has been absorbed by the GAEP. The environmental permit of the GAEP applies to the demolition, construction, establishment or use of a physical facility. The activities that fall within the scope of the GAEP are typically location-specific projects, which have an impact on physical environment (air, water, soil, wildlife, biodiversity, landscape and cultural and historical elements). It concerns permits such as derogations from obligations of the land-use plan, planning permissions on the Dutch Spatial Planning Act and permits to modify or demolish a protected building under the Dutch Monuments and Historic Building Act 1988. Also, a number of permits required under provincial and municipal by-laws such as advertising display permits and permits for construction, using or changing street access are integrated in the GAEP. Not all the 25 integrated aspects have to be assessed if an application is filed. The scope of the assessment depends on the specific

activities that the permit is applied for. Most of the environmental permits are included, but not all. The water permit, for example, is still not included.

Model 3

At present, the GAEP provides a model 3 permit system. The difference between the model 3 and 4 system is the way the assessment framework is shaped. Model 3 has also been referred to as "integration with partitions". This means that the competent public authority evaluates an application for a single environmental permit on the basis of an assessment framework that consists of the sum of the individual, separate assessment frameworks in the various permit systems that have been incorporated in the new permit system. For example, a person wants to build a house and therefore needs a building permit and a derogation from obligations of the land-use plan. In this case, the assessment framework of the single environmental permit contains the sum of the two former assessment frameworks that are now incorporated in the GAEP. This means that the assessment itself is the same as before. The modernisation of the permit system will not introduce new or different standards.

Model 4

During the legislative process of the GEAP the government's intention was to realise a model 4 permit system in the near future. Model 4 refers to a single integrated assessment framework. An advantage of one single integrated assessment framework is that the competent public authority will be able to consider various aspects of the law (such as the environment (*milieu*), nature conservation and spatial planning) together, unimpeded by the constraints that having a variety of different assessment frameworks brings. The assumption is that separate assessment frameworks lead to sub-optimal decisions from the perspective that the environment should be seen and protected as a whole. The legislator did not elaborate the idea of the model 4 environmental permit in the legislative process. It can be said that the details of this concept are rather hazy (Tolsma, 2012, pp. 82–89). There are, for example, no practical cases that illustrate the problem that can be solved with a model 4 environmental permit. One of the few examples given in literature runs as follows: A plant is located in a building that is indicated as an ancient building on the basis of the Monuments Act. The building needs to be adjusted as a result of changes in the production process of the plant. The rules to protect ancient buildings form an obstacle for the requirements on the basis of environmental legislation. Currently, the environmental permit has to be declined as now the assessment frameworks (protection of monuments and protection of environment) are strictly separated. A model 4 could be shaped in a way that the public authority has power to weigh and balance the aspects of protection of monumental building and environment and decide what is best in the light of "protection of the physical living environment".

A trade-off between monumental protection and environmental protection could be possible.[9]

The government's intention of introducing one integrated assessment framework has been welcomed by industry and even by environmental groups (Van den Broek & Rutteman, 2005, pp. 546–549). Some authors have even argued in favour of more far-reaching integration with other aspects, such as water (Van den Broek, 2006, pp. 136–140). There was also support for a model 4 permitting system in the Dutch Lower House. A motion has been adopted in which members of the Lower House have requested that the government present proposals on the substantive integration of assessment frameworks, in a single assessment framework, to the Parliament at that time.[10] At this moment the model 4 environmental permit is still under discussion. The government is now working on a fundamental system change by restructuring Dutch environmental, spatial and planning law into one Environmental Planning Act. A first draft legislative proposal will be delivered in 2013.[11] According to the current plans the government has no intention to realise a model 4 environmental permit.[12] However, scholars still argue in favour of the model 4 environmental permit (Backes, 2012).

2.5 Comparison

A comparison between the models of integrated environmental permits described in the sections 2.1–2.4 leads to the following observations:

1. The scope of the Industrial Emissions Directive is limited to the installations listed in Annex I of the directive and by the emissions released into air, water or land during normal operation or through accidents at the installation. The focus is on prevention and control of pollution from these major installations. This means that the construction of installations as well as environmental effects not resulting from emissions (e.g. interference with nature and landscape, impairing the functioning of eco-systems) are not subject to the integrated approach under the IPPC Directive. A model 4 permit has a much broader scope; aspects such as spatial planning and nature conservation are included in a single assessment framework. There are many interests with different natures that need to be protected by the environmental permit.
2. The scope of the proposed substantive integration in the *integrierte Vorhabengenehmigung* in Germany is in line with the Industrial Emissions

9 This example is based on the tekst of Uylenburg, 2007, p. 59.
10 *Handelingen II* 2007/08, nr. 34, p. 2618; *Kamerstukken II* 2007/08, 30 844, nr. 24 (motion members Koopmans en Vermeij).
11 Coalition agreement *Bruggen slaan* 29 October 2012, p. 38.
12 Toetsversie Omgevingswet, 28 February 2013.

Directive and therefore limited compared to the idea of the model 4 permit in the Netherlands.

3. The current integrated environmental permit in the Netherlands (model 3) as well as the proposed legislation in Germany and Belgium contains a procedural integration of permit applications in the field of spatial planning or building requirements. The decision-making process results in a single permit, but the assessment frameworks (the substantive rules) remain separated.

To sum up, the idea of realising a model 4 environmental permit can be qualified as highly ambitious. This is due to the broad intended scope of the single integrated assessment framework. The single assessment framework is not limited to industrial effects on the environment (such as waste, air pollution and noise) but also concerns spatial planning, nature conservation etc.

3 The Model 4 Permit Discussed in Dutch Literature

The integration of various aspects of environmental law in a single assessment framework will probably result in a fairly broad formulation of the aspects (such as "protection of the physical living environment") in which a permit application will have to be reviewed. The public authority will have more freedom in weighing the interests involved and the variety of different assessment frameworks no longer forms an obstacle to such an integrated assessment. The question is how such a broad assessment framework exactly relates to the Dutch rule of purpose-specific powers. This fundamental principle of Dutch administrative law requires of the legislator that it sufficiently specifies the authority conferred on the administration by providing substantive norms. Schlössels has listed a number of arguments to underpin the necessity of this rule (Schlössels, 1998, pp. 127–132):

- it serves the legislator's prerogative to legislate;
- legitimises administrative authority;
- provides a guideline to the judiciary when testing the legality of administrative action;
- enhances the transparency of administrative organisation and the effectiveness of the decision-making process.

Some scholars take the view that the introduction of a vague and broad formulation of the assessment criteria of the environmental permit (such as "protection of the physical living environment") leads to irresponsible adverse effects in the light of the rule of purpose-specific powers. The safeguarding aspect of this principle will come under pressure (Schlössels, 2006, pp. 153–169; Uylenburg, 2006, pp. 155–166; Blomberg, Michiels, & Nijmeijer, 2005, p. 5). They point out a number of legal problems such as reduced judicial control, arbitrariness in the balancing of interests by public authorities

and diminished legal certainty for individuals and businesses. Other scholars (Backes, 2012, Chapter 3; Van den Broek, 2012, pp. 134–145; Van Hall, 2000, pp. 138–159) are of the opinion that a model 4 permit is in line with the rule of purpose-specific powers, under the condition that the assessment criteria in the light of which a permit application will have to be reviewed, are sufficiently concrete. Various solutions to the possible legal problems are conceivable. For example, an explicit, detailed assessment framework would clearly indicate which aspects should be taken into consideration, and to what extent, in a decision on an application for an environmental permit. This would make it easier to ensure that certain aspects were not ignored. To ensure greater legal certainty and predictability, it would also be possible to lay down further criteria with which a public authority would have to comply when exercising its powers.

4 Review in the Light of the Dutch Rule of Purpose-specific Powers

4.1 Assessment framework

The question arises how to examine whether or not a model 4 permit leads to irresponsible effects on the safeguarding function of the rule of purpose-specific powers. What kind of method of legal research should be used? In the Dutch literature concerning the model 4 permit, I could not detect a clear approach. In my view a normative assessment framework is necessary in order to review model 4 in the light of the rule of purpose-specific powers.

The rule of purpose-specific powers is directed at the legislator. In the Netherlands there is, however, no constitutional law that contains a duty for the legislator to give account to the amount of specificity of administrative powers. The Dutch rule of purpose-specific powers, directed to the legislator, is not codified and is not subject of judicial review.[13] Compliance with this rule can therefore not be enforced. It is here where the Dutch system differs from German law. The German constitution contains the so-called Bestimmtheitsgebot in Art. 80 (1) of the Grundgesetz. This provision, that sets substantive criteria, can be judged by the Bundesverfassungsgericht and runs as follows: "*Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden. Die Rechtsgrundlage ist in der Verordnung anzugeben. Ist durch Gesetz vorgesehen, daß eine Ermächtigung weiter übertragen werden kann, so bedarf es zur Übertragung der Ermächtigung einer Rechtsverordnung.*"

13 It has to be noted that rule of purpose-specific powers also implies that a rule of administrative law may only be applied within its own well-defined scope and, as a result, may not be used to achieve objectives outside that scope. This element of the rule of purpose-specific powers is subject of judicial review. By virtue of Art. 3:3 of the General Administrative Law Act (*Algemene wet bestuursrecht*) a public authority may not use its power to make a decision for any other purpose than that for which the power has been given.

It should be noted that the case law of the *Bundesverfassungsgericht* does not provide a framework with clear detailed standards that can be used for judicial review. From an analysis of the case law only some very general guidelines can be discerned. For example, the deeper the infringement of the administration upon people's rights and freedoms, the more specific the formulation of administrative authority should be (Schlössels, 1998, pp. 119–122).

A research question that examines whether or not a model 4 permit is in line with the rule of purpose-specific powers is not very useful. This kind of a question is difficult to answer because of the nature of legal principles in general. What are the exact borders of this rule of purpose-specific powers? How compartmentalised should administrative law be precisely? Principles have a certain legal weight or value, but this legal weight or value is not something that can be objectively defined.[14] In general it can be said that the broader the public authority's assessment of permit criteria are, the more the safeguarding function of the rule of purpose-specific powers will decline (less legal certainty, less judicial review). When we apply this simple rule, we can conclude that a model 4 permit will definitely lead to adverse effects on the safeguarding functions of rule of purpose-specific powers. Are these effects also irresponsible? To answer this normative question I will use the concept of the *democratische rechtsstaat* as an assessment framework. This concept is closely related to the *Rechtsstaatsprinzip* and the principle of the rule of law.

The assessment framework of the *democratische rechtsstaat* (hereafter referred to as "democratic constitutional state") is elaborated by Schlössels & Zijlstra (2010) in their handbook of Dutch administrative law. The democratic constitutional state consists of different principles, including the rule of purpose-specific powers. It is the government's duty to optimise all principles of the constitutional state. When principles collide, the government has to look for an option made up of the best mixture of those principles. In that case the government needs to consider if compensation for potential negative effects is possible.

The Dutch rule of purpose-specific powers has led to a divided and compartmentalised administration. In the field of environmental law this means that in some instances several permits are required for one single activity (several proceedings, different sets of rules to follow and sometimes even several competent public authorities). This is not only inconvenient for the public, but also for the administration. It must be noted that in the Netherlands the problem of compartmentalised administration also occurs in other fields of law, such as social welfare. According to the legislator,

14 See the well-known distinction between principles and rules, made by Dworkin. Rules have a nature of all or nothing. When a juristic fact occurs, and a rule is valid, the legal effect automatically follows. Legal consequences do not automatically follow from a principle. There is room for consideration. This also means that when two principles are conflicting, it is not clear witch one should prevail in a certain case. It depends on the facts. See Dworkin (1977, pp. 31–39).

the solution is more discretion for public authorities to decide on a case by case basis. Obviously, the same legal questions related to the rule of purpose-specific powers arise in this field of law.[15] In practice, the effects of the rule of purpose-specific powers seem to be colliding with the principles of efficiency and effectiveness.[16] This leads to the following question in need of an answer: are the potentially negative effects on the safeguarding functions of the rule of purpose-specific powers, that result from the model 4 permit, necessary for reaching an optimal balance in relation to the principles of efficiency and effectiveness?

4.2 Review of Model 4 Permit

Is an environmental model 4 permit a more efficient and effective means necessary for reaching a better system of environmental permits in the Netherlands? In my view the need for a model 4 permit has not been established by the legislator or in literature. It is not clear to me what problem needs to be solved. There is for example no empirical data (an analysis of practical cases) underpinning the necessity of this permit model. The main goal of the GEAP is to make it easier for citizens and businesses to obtain permits. Other aims mentioned as a reason for integrating permits are to reduce the administrative burden and promote cooperation between and within public authorities. With the current model 3 permit system in the GEAP, which provides for procedural integration, proceedings already are combined, harmonised and simplified.

The model 4 permit seems to be based on the holistic idea that the environment should be seen and protected as a whole. The assumption is that a high level of environmental protection can be reached with an integrated approach. Looking at the experiences with the IPPC Directive, it is questionable as to whether we really need these substantive integrated assessment frameworks. Although there is a lack of empirical data on the practical implementation of the IPPC Directive, there are signs that permits involving trade-offs between different environmental media are rare. Bohne's research shows (Bohne, 2008a, pp. 30–33) that national permit systems' potential for substantive integration is relatively low. He concludes that therefore substantive integration is likely to occur even less in actual permit decisions. Another outcome of his research (Bohne, 2006, p. 550) is that the problem of pollution shifting from one medium to another is not often experienced in the practice of decision-making. Public authorities only deal with it from time to time.

The same conclusions can be found in earlier research (Castelein et al., 1998) on the environmental permit of the Environmental Management Act in the Netherlands. One possible explanation given at that time was that there were

15 See Vonk & Tollenaar (2012, Chapter 1).

16 Schlössels and Zijlstra underline that efficiency and effectiveness also can be qualified as principles of the democratic constitutional state. This view clarifies to their opinion that these aspects also form a part of the normative assessment of government's measures.

no general criteria available for public authorities to make a cross-medial assessment. Another possible explanation could be that the public authorities are just not capable of making an integrated assessment followed by a decision (Osterhuis, Peeters, & Uylenburg, 2007). In the Netherlands the public authority usually uses general environmental guidelines (*milieurichtlijnen*) to set the permit conditions (Leemans, 2008). These guidelines are mostly provided by the government to provide technical and scientific knowledge. Standardisation is another motive for providing model conditions. As a consequence, case-specific considerations will not be taken in to account in the evaluation of a an application.

Bohne states (Bohne, 2008b, p. 327): "It seems that the intellectual fascination of resolving cross-media pollution problems, and the political drive of the British Government to export its previous Integrated Pollution Control (IPC) system to Europe rather practical needs explain to a large extent why holistic integrated permitting is so high on the political agenda in the EU, and only of marginal practical relevance for national permitting authorities."

As long as there is no empirical data to underpin the necessity of a model 4 permit, the undermining of the safeguarding functions of the rule of purpose-specific powers cannot be justified.

Furthermore, it is interesting to note that the first empirical data on the permitting model 3 in the Netherlands show that in practice most applications for an environmental permit concern only a single activity. The impression that is given by this research is that applications for a single permit for multiple activities are rare. One possible explanation is that citizens and businesses seeking a permit still have to get used to the new model 3 permit, introduced in 2010 (Uylenburg, 2012, pp. 54–56). Another reason might be that for some projects it is difficult to prepare an application for a single permit for several activities (Borgen et al., 2012). Development of complex projects takes place in different phases over a period of time. Therefore, the preparation of an application for one single permit for the whole project is neither realistic nor useful. These findings from empirical research conflict with the original starting point of the GEAP which is to make applications easier for citizens and businesses. These first experiences with model 3 permits give rise to the question of whether or not we even need a model 3 permit. More in-depth empirical research is necessary to gain better insight in the reasons why citizens and businesses seeking a permit seem to prefer separate permits instead of one single permit. In my view the Netherlands is not ready for a model 4 permit system given that it is questionable whether even the procedural integration of permits (model 3) leads to a more efficient and effective system of environmental permits.

5 Conclusion

Environmental law developed originally in a fragmented way. As a result, citizens and businesses applying for a permit are confronted with a range of procedures with a variety of time limits, assessment criteria and legal remedies. It is assumed by policymakers that the fragmented approach in law and policies is both ineffective and inefficient. An integrated approach is necessary in order to achieve a high level of protection for the environment as a whole. At EU level the integrated approach towards pollution control is implemented by means of permits. A comparison of integrated environmental permit models at EU level, Germany, Belgium and the Netherlands leads to the observation that the idea of a so called "model 4" permit system can be qualified as highly ambitious. This permit model considered in the Netherlands refers to a single integrated assessment framework with a much broader scope when compared to the integrated approach of the Industrial Emissions Directive (which is focused on prevention and control of pollution from major installations). The single assessment framework of the model 4 permit contains many interests with different nature that need to be protected by the environmental permit (aspects such as spatial-planning and monumental protection are included).

The question discussed in Dutch literature is how such a broad assessment framework relates exactly to the rule of purpose-specific powers. This fundamental principle of administrative law requires of the legislator that it sufficiently specifies the authority conferred on the administration by providing substantive norms. A single assessment framework with a fairly broad formulation of the aspects in the light of which a permit application will have to be reviewed, will definitely have an adverse effect on the safeguarding elements of this principle. A normative legal question is however, whether or not model 4 will have adverse effects on the safeguarding of the rule of purpose-specific powers. In this article I use the concept of the d*emocratische rechtsstaat* as an assessment framework, which is comparable to the principle of the rule of law and the *Rechtsstaatsprinzip*. The democratic constitutional state consists of different principles, including the principle of the rule of purpose-specific powers. It is the government's duty to optimise all principles of the constitutional state. When principles collide, the government has to look for an optimum combination of those principles. An adverse effect on one of the principles can be justified when this leads to a better balance with other principles. In practice, the effects of the rule of purpose-specific powers seem to be colliding with the principles of efficiency and effectiveness.

Are the adverse effects on the safeguarding functions of the rule of purpose-specific powers that result from the model 4 permit necessary for reaching an optimal balance in relation to the principles of efficiency and effectiveness? Looking at the experiences with the IPPC Directive, it is questionable as to whether we really need these substantive integrated assessment frameworks.

Furthermore, the first experiences in the Netherlands with the current model 3 permit, introduced in 2010 (one application, one competent authority, one single permit) gives the impression that citizens and businesses seeking a permit are not using the possibilities of one single permit and still seem to prefer separate permits. Currently, the need for a model 4 permit has not been established by the legislator nor in literature.

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POVZETEK

1.01 Izvirni znanstveni članek

Izboljšanje sistemov okoljskih dovoljenj: združena dovoljenja na Nizozemskem

Ključne besede: okoljska dovoljenja, pristop združitev, združeno okoljsko dovoljenje, pravilo sektorske pristojnosti

Okoljsko pravo se je prvotno razvijalo razdrobljeno, s sektorsko zakonodajo, ki je ščitila vodo, zemljo ali zrak. Takšen pristop k varstvu okolja povzroča težave. Državljani in podjetja, ki uveljavljajo dovoljenja za posege v okolje, se srečujejo z vrsto postopkov z različnimi roki, merili presoje in pravnimi sredstvi. Primerjalno-pravna raziskava kaže, da se zakonodaja na področju okoljskega prava vedno bolj združuje oziroma povezuje. Oblikovalci politik čutijo potrebo, da bi povezali postopke odločanja zaradi optimizacije varstva okolja. Prvi del članka vsebuje kratek pregled koncepta združenega postopka za izdajo okoljevarstvenih dovoljenj. Drugi del obravnava zamisel o okoljskem modelu 4 za dovoljenja, ki je bil predlagan na Nizozemskem. Vprašanje je, ali je ta specifični koncept izdajanja okoljevarstvenih dovoljenj mogoče izvesti v okviru omejitev nizozemskega upravnega prava.

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UDK: 342.9:343.155 1.02 Review article

Dispositional Instruments of Protection against Administrative Acts (not in Legal Force) and their Effectiveness

This Article resulted from specific research project of Masaryk University No. MUNI/A/0896/2012 "Effectiveness of Instruments of Protection against Administrative Acts which are not in Legal Force"

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ABSTRACT

Public administration is often implemented through the issuing of public acts of a unilateral and binding character. Within public administration, however, legal instruments by which those for whom the administrative acts are binding can defend themselves against any illegality or irregularity of the mentioned administrative acts, are also (must be) provided. The existence and proper effectiveness of these legal instruments can be regarded as a necessary part (sine qua non) of the democratic rule of law. The paper is concerned with the so-called dispositional legal instruments of protection against the administrative acts which are not yet in legal force and their effectiveness. Article's major finding consists in fact, that the effectiveness of dispositional instruments of protection could be limited by absence of devolutive effect, or guarantee of independence in organizational arrangement between first and second instance administrative bodies.

Key words: legal remedy, appeal, remonstrance, comments, objections

JEL: K41

1 Foreword

It is important to reflect the split of public administration (PA) into two basic branches:

- Non-authoritarian (care) administration is performed in the same (private law) legal forms as private administration. The public authorities performing non-authoritarian administration are in the same, respectively equal, position as private individuals.
- On the other hand, authoritarian administration is performed in typical forms of public law and its results are mainly acts of public authority, respectively administrative acts, which have a unilateral and binding character. This arrangement expresses the superiority of the administrative authorities over the addressees of these authoritarian acts. It is a typical manifestation of the authoritarian character of PA (Průcha, 2007, p. 60 and subsequent).

It is the nature of "authoritarian" administrative acts that they interfere with the rights and duties of individuals independently of their own will (it is an unequal relationship). It is therefore essential to ensure the protection of individuals whenever these acts suffer from defects requiring their amendment or cancelation. Hence, PA (administrative law) offers (must offer) various means of protection to persons whose individual rights could be endangered through defective administrative acts.

This paper deals only with those means of protection against "authoritarian" administrative acts that are at the exclusive, claimable disposal of their addressees. That is especially because precisely these means of protection and their standards are essential for the protection of individual rights and its effectiveness, which can be regarded as a necessary part (sine qua non) of the democratic rule of law. It is also important that those means of protection described above are constructed to correct defects in administrative acts before they come into force and before their enforceability. They can be submitted against issued administrative acts and, in some cases, against administrative acts before they are issued (against proposed content).

The outlined means of protection in the legal order of the Czech Republic are called

- appeals,
- remonstrances,
- objections and
- comments

and their application primarily depends on the concrete legal form of the (challenged) administrative act:

- appeals and remonstrances against individual administrative acts;

- objections and comments against hybrid administrative acts.

The main goal of this paper is to analyse, individually and also through comparison, the outlined means of protection (of subjective public rights) and their effectiveness. This analysis is focused generally on these means and also specifically on their application by the PA section of State Monument Care (SMC) in the Czech Republic. The main reason for this is that there are significant disputes in this sector of PA between public interest in the protection of cultural heritage and the private interests of individuals, especially in terms of free disposal with their property. PA in the section on SMC causes significant and unilateral cases of interference in individual rights and duties. These cases, established through "authoritarian" administrative acts, can be extreme, particularly if they are directed against owners of real estate. For all these reasons section of SMC includes all mentioned means of protection and therefore it is ideal for highlighting our conclusions. The outlined means of protection play an important role in the protection of individual rights and it is necessary to ensure their operational capability and effectiveness.

The article works with hypothesis that outlined means of protection lack principle of independence, which lower their effectiveness. For the verification of this hypothesis the empirical method and theoretical methods of description, analysis, synthesis and comparison have been used.

2 Appeal and/or Remonstrance Against Individual Administrative Acts

No PA system can be considered perfect. It is therefore the task of the legislation to create, and of PA to apply, a sufficiently effective system of protection from administrative decisions that exceed the outlined limits. If such a failure in PA occurs, it is necessary to avoid or minimize any negative impacts on specific individuals and public interests as quickly as possible. [1] In practice, this assumes the existence of some sort of system that allows public bodies to be alerted to their errors, and that also imposes corresponding obligations. This task can be fulfilled in many ways and the Czech concept of appeal (remonstrance) is just one of them.

2.1 Appeal in Czech legislation and practice

Appeal is a broadly applicable means of protection. It mainly targets the merits of a decision but, with certain exceptions, also procedural decisions. The Czech Administrative Procedure Code (APC) generally states that

1 If administrative protection does not lead to redress, appellant is usually entitled to bring a legal action to administrative court. However, exhaustion of remedies, which offers PA, is necessary condition for judicial review. Exhaustion of remedies is contrary to English legal system, rather absolute, than discretionary bar to the jurisdiction of administrative courts (BIBBY, 1995, p. 11).

a participant may lodge an appeal against a decision except when otherwise provided by statute.[2] It is evident that the conditions for appeal are not restrictive. However, the possibilities of appeal are limited by the fact that new proposals and evidence can be used in an appeal procedure only if they could not be applied in the first instance, without any fault of the appellant.[3]

Due to the principle of legal certainty, an appeal can only be submitted before a decision comes into force (this is why it is labelled an ordinary means of protection). Submitting an appeal has two major effects:

- Suspensive effect means that a challenged administrative decision cannot acquire legal force or enforceability until the end of the appeal procedure. A person who defends himself against an administrative decision achieves short-term protection merely by submitting an appeal. At this moment, the public authority that issued the challenged decision can reconsider its opinions regarding whether it will comply with the opinion of the appellant in full. Such a possibility is particularly useful when the administrative body realizes that it made a mistake, meaning that it will not be necessary to carry out the appeal procedure.
- Devolutive effect means that the appellate administrative authority is usually the immediate superior public authority to the one that issued the challenged administrative decision.[4]

It is important to highlight that an appeal reviews not only the legality of an administrative decision, but also the correctness of the discretion embodied in such a decision. This review can be conducted even beyond the objections expressed by the appellant, but in some cases it is only possible in cases concerning a public interest (Skulová, 2012, p. 249).

One issue directly connected to research into effectiveness is the question of how an appellant public authority can deal with an appeal. We have to mention in particular the possibility of amending the original administrative decision (unless it is a decision by a self-governing entity). The appellant public authority can also revoke the original decision, return the whole case for new proceedings, and express a binding legal opinion. The question is whether this unduly prolongs the proceedings, especially if the case is returned more than once. Although such cases are probably rare, they cannot be excluded. Moreover, the appellant public body cannot change an administrative decision to the detriment of an appellant, unless there is another appellant with differing interests.

2 Section 81(1) Act No 500/2004 Coll., Administrative Procedure Code (of the Czech Republic).

3 This principle is inapplicable in proceedings imposing administrative punishments. Such an exemption is necessary because Czech PA deals with administrative proceedings, which mean criminal charges according to Article 6 of the European Convention on Human Rights. It is highly desirable to establish higher standards for this kind of proceedings, including the possibility to submit new evidence at any time.

4 Section 89 Act No 500/2004 Coll., APC.

2.2 Problems relating to appeal

The outlined Czech appeal system presents some specific problems.

Firstly, the Czech appeal authorities cannot be considered as independent or somehow semi-independent.[5] There are many interconnections between the appellant public authority and public authorities of first instance, the existence of which is in many cases just an expression of the vertical deconcentration of state powers. Although this arrangement usually does not arouse any doubts in the Czech legal environment, there are significant differences in comparison to the common law approach to appeal tribunals (Morgan, 2012, p. 161).

We assume that the independence of the appellate authority is one of the important factors that may affect the overall effectiveness of this means of protection. It cannot be considered as effective if the legal organization of the appellant system allows the exertion of any pressure from non-legitimate interests on the decision-making authority. We defined the efficiency of the appeal system according to the quickness and helpfulness of its protection to an individual's rights and public interests. Yet if the appellant authority is not independent, it is significantly harder to say that there is no prejudice, and even when only these questions arise, a smooth process cannot be presumed. In addition, the appellant process is not even remotely effective if there really is prejudice and illegitimate means of review, because it cannot lead to any intended solution. [6]

Unfortunately, the Czech Constitutional Court refuses to acknowledge any deeper importance of public authorities' independence and states: "[...] for the decision-making process of public authorities it is logical to presume impartiality, not independence."[7] We suppose that the lack of independence causes disruption in terms of equality of weapons, and public interests take precedence during decision-making at the expense of individuals' rights. We believe that the principle of two-instance proceedings is genuinely meaningful, but it has to be organised with proper care. It is obvious that the PA cannot be substituted by administrative courts, especially if there are some parts of administrative decisions that are outside judicial review.

We asked regional Czech offices for information about appellant proceedings. We were able to collect relevant data from more than half of the respondents

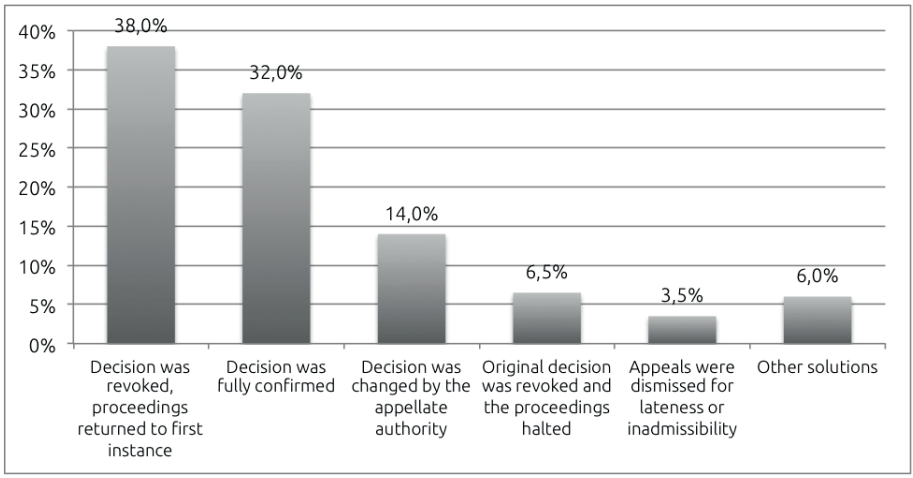
5 In English legal system appeals to tribunals belong between mechanisms which permit individuals to pass their matters to independent third party (Elliot, 2011, p. 454). In Czech legal system appeal cannot be considered as one of these mechanisms, but there is access to judicial review and also ombudsmen, both with real guarantees of independence.

6 "Thus, in the planning field effective appeal procedures are essential if appellants and objectors are to feel that their case has been fairly considered." (Neil, 1988, p. 5)

7 Decision of the Czech Constitutional Court from 25/6/2009, No II. ÚS 1062/08.

in the area of cultural monument care, representing about 500 appeals.[8] In approximately 38 % of cases the original decision was revoked and the proceedings were returned to first instance. In another 32 % the challenged administrative decision was fully confirmed. In less than 14 % of all cases the decision was changed by the appellate authority. In 6.5 % of all cases the decision was revoked and the proceedings halted. The other ways of dealing with appeals remained marginally represented (see Graph 1.

Graph 1: Results of appeal proceedings

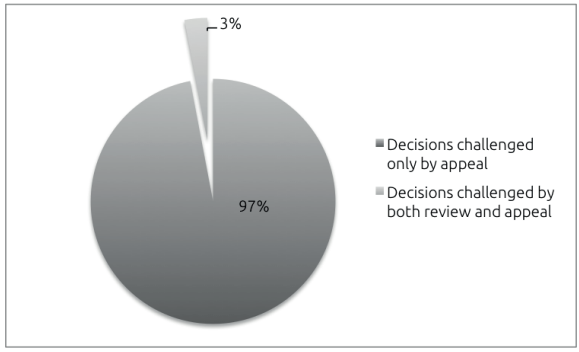


Source: Data obtained upon request from regional offices of the Czech Republic.

Unfortunately, we could not yet collect sufficient data that would allow meaningful comparisons of appeal with other Czech means of protection. There were only about 3 % of cases subject to appeal and afterwards also by review, which is one of the extraordinary Czech means of protection (see Graph 2). 10 % of these cases were revoked by review despite a previous appellant procedure (see Graph 3). However, we also found out that in these cases the appeals were dismissed because of their lateness or inadmissibility. There was only one case in which a public authority revoked its own decision despite it being previously confirmed in an appellant procedure. The authority did so after the complainant submitted an action to an administrative court. The number of submitted actions was very low, yet applicants were successful in fifty per cent of these cases.

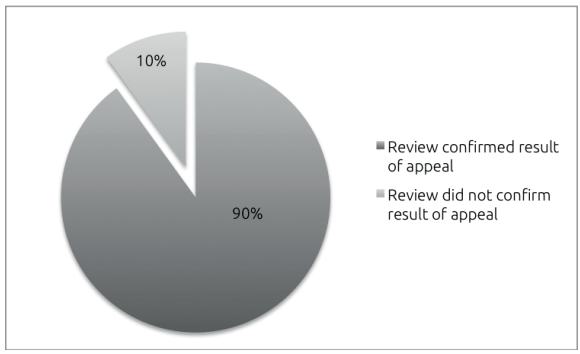
8 Unfortunately, respondents were not able to provide data about the whole amount of first-instance decisions. We consider this fact as a significant problem of Czech public administration, which lowers possibility of outer control. These data are necessary for recognising share of challenged decision. Hence we were not able to research efficiency of appeal in this regard. But we were able to research effectiveness according to the manner of resolving appeal (the same applies to remonstrance in next chapter).

Graph 2: Decisions challenged by review after appeal



Source: Data obtained upon request from regional offices of the Czech Republic.

Graph 3: Appeal vs. review



Source: Data obtained upon request from regional offices of the Czech Republic.

The obtained data show the following conclusions:

1. Appellate administrative authorities confirmed first-instance decisions in about 32 % of all cases.
2. At the same time it was not shown that means of protection other than appeal provide significantly different results.
3. It was shown that if the appellant public authority reveals some failure it returns it for a new procedure twice as frequently as it changes it. Yet it has to be noted that appellate administrative authorities probably do not have the capacity to change all undesirable decisions.
4. According to the opinion of the appellant public authority, first-instance decisions are defective in almost 60 % of all challenged cases.
5. According to the opinion of administrative courts, second-instance decisions are defective in almost 50 % of all challenged cases. If the 50 % success rate for actions against administrative decisions was also confirmed in a larger sample of data, it would surely be a warning sign

that the appeal system in the Czech Republic is not very efficient and produces a large amount of defective decisions.

2.3 Remonstrance in Czech legislation and practice

A special means of protection against decisions by public authorities at the central level of state administration in the Czech legal environment is called remonstrance. It also can be applied against an administrative decision that is not in force and it has a suspensive effect, however it has some necessary specifics.

The nature of the matter means that it is not possible to delegate the decision-making process about remonstrance to some higher authority, simply because there is none. It requires other solutions for many procedural questions, which are otherwise based on the devolutive effect. This is the main reason why Czech legislation distinguishes between appeals and remonstrances. Remonstrance is exclusively decided on by the head of the central authority that issued the challenged decision. This fact practically excludes the principle of two-instance proceedings at the central level of state administration.[9] On the other hand, remonstrance proceedings include the obligatory consideration of the case in front of a remonstrance commission that should consist mostly of professionals not employed by the affected central public authority.

The remonstrance method combines reconsideration and appeal. The Czech APC also expressly states that provisions about appeal should be proportionally used for remonstrance (Hendrych, 2012, p. 389). Proceedings in front of remonstrance should also be proportionally conducted according to the provisions of the APC on proceedings in front of a collegial authority, even if the remonstrance commission cannot be considered as an administrative authority in the true sense. The opinion of the remonstrance commission is not binding and is only a kind of recommendation for a head of a central administrative authority. A commission meeting can only be attended by its members and record keeper. According to law, practice establishes its own procedure and it became usual for a person with knowledge of the first-instance proceedings to refer to the members of the remonstrate commission, which starts its proceedings after this person leaves the room (Mates, 2007).

Nevertheless, a non-binding opinion from the remonstrance commission is obligatory and it should primarily act by force of their arguments (Jemelka, 2013, p. 520). Whether the head of the central administrative authority decides to respect the opinion of the remonstrance commission or not, proper justification of the decision must be provided.

The APC provides several ways for dealing with a submitted remonstrance, largely based on the application of provisions about appeal. However,

9 Decision of the Czech Supreme Administrative Court of 15/1/2001, No 6 A 11/2002.

some possibilities are controversial, as is the power to return a case for new proceedings, because it is sometimes considered contrary to the sense of remonstrance.

2.4 Problems relating to remonstrance

The first problem to point out is that the remonstrance commission cannot be considered independent even if it includes an element of professionalism. The appointment, but also recall, of individual members of this commission is the exclusive power of the head of the central administrative authority and can be performed without any significant restrictions. Therefore it is questionable to what extent the final opinion of the remonstrance commission reflects the true opinion of its members. Maintaining the independence of the remonstrance commission could be quite a difficult task. We appreciate the legislators' effort at professionalization. On the other hand, the Czech APC does not propose anything more than that the members of the commission should be "experts". Yet there is no mention about the specialization of these experts or any other interpretation regarding this provision, so the choice of the head of the public body can be quite broad.

The main question asked is whether remonstrance could be considered a full means of protection. We believe that this is at least controversial without major requirements relating to the independence of the remonstrance commission. As mentioned above, administrative courts cannot substitute for PA, especially if their power to review "factual findings" is very limited. Although it is not possible to establish a clear boundary between the review of "factual findings" inside of discretion and between the legality of decisions, this only emphasizes the need for the effective investigation of administrative decisions by PA.[10] It means that deficiencies in the area of review by PA cannot be ignored just because there are still administrative courts present (Macur, 1992, p. 50).

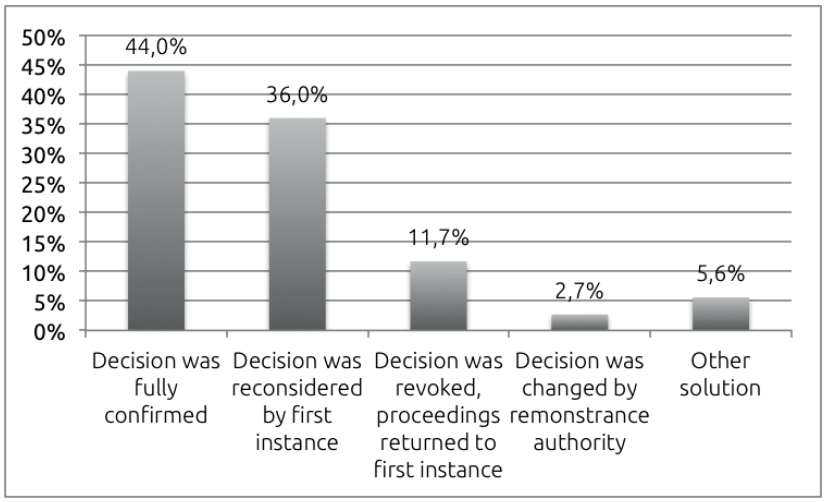
It is obvious that two-instance administrative proceedings are of significant importance. However, the Czech Constitutional Court has the following opinion: "[...] the absence of a two-level procedure is not in and of itself unconstitutional [...]."[11]

10 Czech approach to importance of dividing matters of law and facts is to some extent similar with English approach. (Griffith, 1973, p. 146) We also believe that PA bodies are usually more appropriate for dealing with factual findings than courts. However, Czech PA system did not develop organized system of some administrative tribunals, which could combine independence and fast, cheap, informal and expert mass administrative justice. (Craig, 2012, p. 231) In Czech constitutional system it is not possible to establish fully independent administrative appeal tribunals. Similar tribunals could be established as a part of executive, but not a part of PA. It means that in Czech legal system these tribunals cannot be named as „administrative". Potential establishment of these tribunals outside PA would cause double-tracking, which is criticised by some Czech (or Slovak) legal scientist.

11 Decision of the Czech Constitutional Court from 26/4/2005, No Pl. ÚS 21/04.

For the purposes of our research we asked the Czech Ministry of Culture to provide information about remonstrance proceedings in some areas of cultural monument care. The obtained data show that remonstrances were applied against 1.3 % of more than eight thousand administrative decisions issued by the Ministry of Culture. The Ministry of Culture resolved 36 % of all applied remonstrances through reconsideration. The second instance confirmed the decision of the first instance in 44 % of all remonstrance proceedings.

Graph 4: Results of remonstrance proceedings

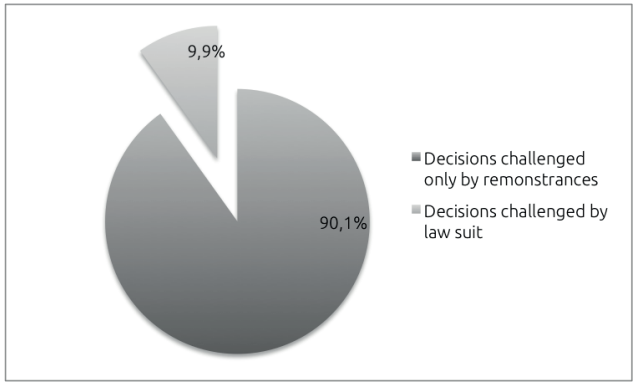


Approximately 12 % of all decisions were revoked and returned for further proceedings. Decisions were changed in less than 3 % of all remonstrances.

Source: Data obtained upon request from the Czech Ministry of Culture.

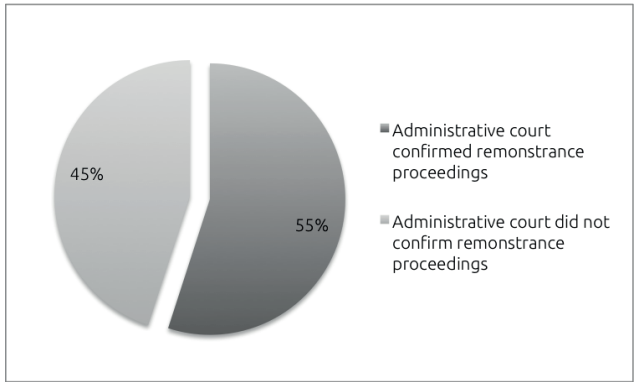
A decision was revoked after review proceedings in only one case, despite the fact that it had earlier been challenged by remonstrance. However, remonstrance was declined because of lateness or inadmissibility. Only 10 % of all decisions challenged by appeal were afterwards also challenged by actions in administrative courts (see Graph 5). Applicants were successful in about 45 % of these cases (see Graph 6).

Graph 5: Decisions challenged by law suits



Source: Data obtained upon request from the Czech Ministry of Culture.

Graph 6: Remonstrances vs. law suits



Source: Data obtained upon request from the Czech Ministry of Culture.

First-instance decisions are confirmed more often in remonstrance proceedings than in appeal proceedings. However, administrative courts did not confirm ministry decisions in more than 45 % of all cases.

The obtained data also show that the Ministry of Culture used reconsideration in more than 30 % of all cases, or more than three hundred times more often than it was used by offices in appeal proceedings. This strange situation could be caused by interdependence between first and second instance in remonstrance proceedings. In the Czech remonstrance system it could be very easy for the first-instance officials to harmonize their legal opinion with second-instance officials, who usually work in the same ministry building. However, these connections are evidence of a really low level of independence.

A decision is revoked and the proceedings returned to the ministerial first instance in almost twelve per cent of all cases, or about four times more often than a change of decision. Other cases are only marginally represented.

3 Objections and Comments Against a Hybrid Administrative Act

To understand the position and importance of objections and comments as the dispositional instruments of protection, it is necessary to clarify the position and importance of the hybrid administrative act against which the objections and comments are designed.

The hybrid character of measures of a general nature lies in their definitional characteristics: a measure of a general nature is situated between an individual administrative act and a normative (abstract) administrative act. The criterion for the dividing line between an individual and normative act is the level of specification or abstraction of the regulated matter and the addressees stated in the act. A normative administrative act is abstract for its generically designated subject and an indefinite number of addressees. An individual administrative act is specific for its specific subject and its addressees identified by name (Hendrych, 2009, pp. 78, 82). A measure of a general nature is a hybrid administrative act because it has the characteristics of both mentioned groups – it is neither a normative administrative act nor an individual administrative act, and this is related to the instruments of protection of public rights infringed by this act. Judicial decisions and doctrine show that "in national law a measure of a general nature is the only administrative act that has a generically defined subject and specifically defined addressees."[12]

This is the reason why a measure of a general nature is a hybrid administrative act in the field of individual and normative administrative acts. Hybrid administrative acts are known in various forms in many European countries[13] and they can be considered as a "*legislative response to doubts as to whether the present two forms of administrative activity – normative and individual administrative acts – are sufficient for the effective fulfilment of PA tasks*" (Hendrych, 2005, p. 231.).

One of the main goals of a measure of a general nature as a hybrid administrative act is to ensure that "aggrieved persons have a guaranteed minimum of procedural rights even in a case when an act of an administrative

12 Decision of the Czech Supreme Administrative Court from 27/09/2005, No 1 Ao 1/2005.

13 An important source for conception of Czech legal regulation of a measure of general nature is German law. German general order is defined in sec. 35 Administrative Procedure Act (Allgemeinverfűgung) as »administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large«. The general order is a special kind of an administrative act and it must fulfil default characteristics of administrative acts, thus it regulates individual case with respect to time, place and other circumstances of certain (specific) facts. (Erbguth, 2009, pp 107–109), particularized object of and specifically captured (fixed) situation (Ipsen, 2007, pp 108, 129–131). Swiss law understands general orders in more narrowly way than the German law. Swiss general orders regulate »only« specific object in relation to the general group of addressees (see judgment of the Federal Court from 28th May 1975 in Case »Association nationale suisse pour le tourisme équestre and Mitbetieligte vs Constitutional Court in Zurich Region«, BGE 101 IA 73, pp. 74–75).

body relates to their interests yet the addressees cannot be designated specifically."[14] Undoubtedly this is a response to the impossibility for aggrieved persons to affect the current legislative process, controlled as it is by rules for issuing normative administrative acts. The possibility of aggrieved persons participating in the issuing of measures of a general nature is enabled by the comments and objections.

3.1 Comments and objections in Czech legislation and practice

The comments and objections that allow public participation in the issuing of a hybrid administrative act can concurrently be considered as the dispositional instruments of protection against a measure of a general nature. This is because the content of a measure of a general nature can be changed through the application of comments and objections by aggrieved persons.[15]

However, in contrast to the above-mentioned dispositional instruments of protection against individual administrative acts, they are not an instrument of protection against an issued administrative act. They are rather an instrument of protection applied during the actual process of issuing a measure of a general nature, meaning against its draft, the content of which will be the content of the issued measure of a general nature.

When an illegal act is being issued in the form of a measure of a general nature, it is necessary to prevent or minimize the negative effects on its addressees as fast as possible. In the case of the comments and objections there is room for remedy for the addressees even before the issue of such a hybrid administrative act. Therefore there is no suspensive effect, in contrast to appeals and remonstrances, however a measure of a general nature may not come into legal force until the comments and objections are properly settled.

The basic difference between a measure of a general nature and an individual administrative act is the addressees, i.e., how they are defined. This difference is reflected in the difference between appeal and remonstrance against an individual administrative act on the one hand, and the comments and objections against a measure of a general nature on the other. The individual administrative act "knows" its addressees, although their number may be even higher (dozens of people), yet a measure of a general nature does not "know" who its addressee is specifically. Thus the decisive fact is not the number of addressees of these administrative acts, but their definition. If you

14 The explanatory report on the draft of Act No 500/2004 Coll., APC, from 06/02/2004.

15 The German general order can be challenged by regular remedy with suspensive effect within one month from the date of notification (§ 68 Code of Administrative Court Procedure - Verwaltungsgerichtsordnung). After that the general order can be subject to judicial review by administrative court. The subject-matter of the action shall be the original administrative act in the shape it has assumed through the ruling on an objection, or the notice on a remedy or ruling on an objection if this contains a grievance for the first time (§ 79 Verwaltungsgerichtsordnung).

can specifically identify the addressees, it is an individual administrative act; a measure of a general nature defines its addressees indefinitely.

The initiation of proceedings to issue a measure of a general nature is connected to the publication of its draft on the official board of the administrative body issuing the act. The content of the official board is also to be published in a way that makes remote access possible (via the internet). This way of initiating and providing notification of a procedure leading to the issue of a measure of a general nature is logical because it would be very complicated to deliver the information to the unknown addressees other than by a public notice. The purpose of the publication of the draft of a measure of a general nature is to enable everyone to become familiar with the draft and eventually to protect their individual rights through the comments and objections.

Comments against a measure of a general nature may be presented by any person whose rights, duties or interests can be directly affected by the measure of a general nature. The administrative body is obligated to deal with the comments only as grounds for the measure of a general nature, and is obligated to settle them in the reasoning for the measure of a general nature. Yet there is no separate decision by the administrative body about the comments.

The legal regulation of the objections is more formalized, and in this regard probably more effective for the addressees because the administrative body makes a decision about each objection separately. The decision regarding the objections comprises its own reasoning. The reasoning for the decision regarding the objections has to comply with the same requirements as the reasoning for individual administrative acts.[16]

This makes the objections the dispositional instruments of protection of individual rights approximating a decision on an appeal or remonstrance. The legal regulation expressly excludes filing an appeal or remonstrance against a decision on objection, but this decision can be subject to *ex officio* review proceedings by a superior administrative body and the objection proceedings can also be renewed. The decision on an objection can also be subject to judicial review by administrative courts[17] similarly to a decision on an appeal and remonstrance (Skulová, 2012, p. 360). The importance of a decision regarding the objections is also highlighted by the fact that an alteration or discharge of a final decision regarding the objections may be reason for an alteration of the measure of a general nature.

3.2 Problems relating to objections and comments

In relation to the filing of objections and comments there is no devolutive effect because the administrative body making the decisions about objections

16 Decision of the Czech Supreme Administrative Court from 24/11/2011, No 1 Ao 5/2010.
17 Decision of the Czech Supreme Administrative Court from 07/01/2009, No 2 Ao 1/2008.

is the body issuing the contested act. Therefore it is a similar situation as in the case of remonstrance. Moreover, according to current legal regulation, in the case of the objections and comments there is without doubt no place for the principle of two instances (in contrast to the appeal and the doubtful remonstrance). This leads to similar doubts about the effectiveness of the comments and objections as mentioned in connection with remonstrance. The fact that the administrative body that published its own draft of a measure of a general nature reviews this draft (with respect to the comments and objections) may be problematic.

The mentioned method for settling the comments of aggrieved persons may lead to a change to the draft for an issued measure of a general nature, i.e., the comments can fulfil their purpose as an instrument for the protection of rights. However, the fact that there are no separate proceedings or separate decision on the comments reduces the effectiveness of the comments as an instrument for rights protection.

On the contrary, the method for settling objections is close to a decision on an appeal or remonstrance, and therefore its effectiveness is increased. On the other hand, however, the level of rights protection provided by objections is significantly weakened by the fact that the objections are only available for owners of real estate whose rights, duties or interests linked to the exercise of proprietary rights, can be directly affected by the measure of a general nature (and/or other persons, when determined by the administrative body). The objections can only be lodged by a privileged group of people.

4 State Monument Care in the Czech Republic

For a better description of the means of protection of public subjective rights in the Czech Republic we decided to focus on one of the PA sections: State Monument Care. It is defined by Czech law as a set of activities, measures and decisions through which the official bodies and the professional organizations f SMC shall, in conformity with the needs of society, provide for the conservation, protection, access to and appropriate use by society of, cultural monuments.[18] In this PA section there are both individual administrative acts and hybrid administrative acts.[19]

The fundamental individual administrative acts that form the basis of the SMC in the Czech Republic are the decisions proclaiming an object as a cultural

18 The State Monument Care (SMC) legislation is fundamentally concentrated in the Act on State Monument Care No 20/1987 Coll. The main objective of monument care is the preservation of culturally significant objects, and in the Czech Republic it is based on the responsibility for the condition of the cultural monuments being transferred from the state to the owners of the monuments. SMC is a public interest that significantly affects the private sector and is guaranteed by state administration as well as local administration. Similar principles can be seen even on the international level, or in other countries' national legal codes (Forrest, 2010, p. 19).

19 There are also normative administrative acts applied, but according to the topic of this article – they will not be mentioned further.

monument[20], by definition individual administrative acts made by a central administrative body in the area of cultural administration – the Ministry of Culture. The proclamation of an object as a cultural monument is a significant intervention in proprietary rights because it means limitations in terms of the disposal of property. This proclamation is the most frequent form of cultural heritage protection in the Czech Republic and it is a decision made *ex officio* in the public interest. The remonstrance is a dispositional instrument available for purposes of these decisions. The second group of individual administrative acts made by central administrative bodies that are a part of SMC consists of decisions made in administrative proceedings initiated by an application, mostly from the owners of cultural monuments or affected organizations.[21]

The major administrative procedures performed by the Ministry of Culture are the proclamation of an object as a cultural monument, authorization to perform certain activities relating to monument care, and granting financial support to monument owners.[22] The Ministry of Culture hears and decides a lot of proceedings that are either applied for or decided *ex officio*. The number of proceedings concerning proclamation of cultural monuments is around 213 per year,[23] where remonstrances were applied for in approximately 8% of cases[24]. The decisions were fully confirmed in more than half of the cases where the remonstrance was submitted. A similar tendency can be seen in the cases of authorizations to perform archaeological research. Since 2009 the Ministry of Culture has dealt with 17 cases, while it granted authorization to perform archaeological research in only 5 of them. The rest of the decisions were negative. In two cases a remonstrance was submitted, but in those two cases the original decision was also fully confirmed. In these cases of decision-making by the Ministry of Culture the protection instruments – the remonstrance – were used, but the original decisions were fully confirmed anyway.

20 Proclaiming an object as a cultural monument is one of the forms of monument care in the Czech Republic. Other forms are the Proclamation of an Object as a National Cultural Monument, Monument Reservation Status and Monument Zone Status, but the proclamation of those is not an administrative decision and most of these forms are not decided by the Ministry of Culture. More in: Varhaník, 2011. The state proclaims an object a cultural monument or gives an area a certain protective status (Zone or Reservation) which means additional duties for the owners of these objects or property in these areas and these duties can be enforced by the state using variety of administrative acts.

21 This means persons or organizations applying for authorization to perform archaeological research or a permission to restore cultural monuments etc.

22 Thus the foundations of SMC in the Czech Republic are a selection of objects that should be protected and the duties of the owners to protect these monuments at their own expense. There is an option to apply for a financial reimbursement (contribution) for these expenses. These reimbursements are provided by state and local authorities, but there is no legal claim to them.

23 For example in 2009 there were 173 proceedings concerning proclamation of a cultural monument, where 23 decisions (ca. 13%) were negative. In 2009 there were 140 objects proclaimed cultural monuments, but since then the amount of cultural monuments proclaimed per year has slowly risen.

24 In 14 % of the cases the case was decided in front of an administrative court, and those cases were mostly decided in favour of the plaintiff.

Exactly the opposite could be seen in the area of state financial support for the renewal of cultural monuments.[25] 38 remonstrances have been submitted against decisions by the Ministry of Culture since 2009, but only a minimum of the original decisions have been confirmed.[26] In the majority[27] of these remonstrance cases there was a decision in favour of the applicant by the Ministry before the remonstrance proceedings started.

There were significant differences in the results of these remonstrance proceedings. In the case of proclaiming an object a cultural monument the point is that it is an act that imposes certain requirements (like legal duties) on the owners of such objects. It is only logical that these would be the cases where the means of protection would often be used, yet in addition where the chances of success of these remonstrances are not high. In the cases of the authorizations to perform archaeological research, remonstrances should be applied as well, yet statistics show that the percentage is lower. Unlike in those cases, the case of financial support from the state differs completely. The effectiveness of remonstrance in cases of financial support is extremely high, though the rectification of the decision is performed even before the remonstrance proceedings starts through the full satisfaction of the applicant. The question is how much this corresponds to the quality of decision-making by the Ministry of Culture, the effectiveness of the legal framework and administrative practice in this area, and what role is played by the fact that there is no legal claim to financial support for cultural monuments.

The important information is that the number of remonstrances against decisions made by the Ministry of Culture is increasing: there were 37 remonstrance cases in 2007 and that number has increased through the years to 75 cases in 2012. The ratio of legal actions against the remonstrance cases on the other hand has decreased, as well as the number of the Ministry's decisions that were revoked in these legal proceedings. These tendencies could lead to the conclusion that the effectiveness of decision-making by the Ministry of Culture has improved in first-instance proceedings as well as in the remonstrance cases.

In SMC there are also individual administrative acts provided by non-central administrative bodies at regional and municipal level. In this case the proper dispositional protection would be an appeal. The regional authority, or the municipal authority of a municipality with extended competence, has a crucial role in monument care, like in producing the binding opinions required by law in the case of the restoration of cultural monuments or national cultural monuments. If the owner of a cultural monument wants to perform alterations, reconstruction work, etc., he/she should request a binding

25 This financial support is provided by the state from the state budget. Decisions about provision of this support are also taken by the Ministry of Culture. More in: Pek, 2009.

26 In the cases where the remonstrances were submitted, only four original decisions were confirmed.

27 This tendency occurred in 34 cases.

opinion, which is an independent decision in administrative proceedings.[28] This is one of the most important regulations in SMC because it allows it to control and adjust the administration of monument care for the monuments that are not its direct property.

Another field that includes decision-making by a regional and municipal authorities, is the financing of SMC. The law provides the possibility of providing a financial benefit to the cultural monument owner but with no legal claim. These financial contributions are provided by regional and municipal authorities from their own budgets.[29] Regional and municipal authorities also take administrative decisions about actions to protect cultural or national cultural monuments. These proceedings enforce the public interest and take place if the owner does not fulfil his/her duties in terms of the protection of the monuments.[30]

Another legal form used in monument care in the Czech Republic is a measure of a general nature which got into SMC legislation only as Plans for Protection of Monument Reservations or Monument Zones that could be used to protect and preserve cultural values in a specific area. These measures of a general nature replaced the legislative rules[31] that were used before and that strengthened the protection of subjective rights, because dispositional instruments of protection are not usable against legislative rules. However, issuing measures of a general nature in this case is only optional.

Every person whose rights, duties or interests can be directly affected by a measure of a general nature may present comments against that measure of a general nature. The Plans for Protection establish the conditions and requirements for enforcing SMC in these areas, which directly affects rights and duties only of the owners of the immovable property located in these areas.[32] Objections against measures of a general nature can also only be used by the owners of the immovable property in these areas, the subjects of these means of protection merge, and although the application of comments cannot be excluded, it is highly improbable that they will ever be used.

28 The binding opinions given through the Act on SMC are administrative decisions that state the conditions for monument maintenance, repair, reconstruction and restoration and are independent. SMC also acknowledges a binding opinion that is an expert opinion of administrative bodies and is only a dependent part of another administrative decision. An appeal should be aimed against the merit of the decision, but could be in fact aimed against the content of the binding opinion.

29 The Ministry of Culture provides this financial contribution if there is an extraordinary interest for society in conserving a cultural monument.

30 These proceedings are either applied for or carried out ex officio. It is a guarantee that the rules are complied with.

31 Legislative rules in the Czech Republic are represented by legal norms issued based on delegation by law.

32 One of these affected obligations is, for example, the obligation to request a binding opinion about construction, reconstruction etc., in a protected area.

SMC in the Czech Republic is based on the transfer of responsibility for the condition of cultural objects from the state to the owners, where the state also controls compliance with stipulated duties, and has the right to intervene in the case of a breach of these duties. But this approach requires adequate motivation from the state or a compensation for the limitation of the proprietary rights of the owners of the monuments. This is not well provided for in the Czech Republic, and this can be demonstrated using the example of the aforementioned financial contributions. This results in a situation in which proclaiming an object a cultural monument may mean a significant burden for the owner, who in turn wishes to protect him/herself from such an administrative decision, even though the proclamation is an act of protection of cultural heritage. The question is to what extent the state provides real protection for the monuments and how effective this protection is from the point of view of the use of the dispositional instruments of protection against administrative acts.

5 Conclusions

Appeals and remonstrances as means of protection against individual administrative acts are constructed in a significantly different way than objections and comments as means of protection against hybrid administrative acts.

Appeals and remonstrances may be submitted by an appellant against individual administrative acts that have already been issued. Also, the appellant is a party to the prior proceedings and he/she is also advised by a public authority as to how to proceed with the appeal. On the other hand, objections and comments may be submitted against measures of a general nature (hybrid administrative acts) that have not yet been issued. These means of protection are submitted by persons who think that their individual rights could be affected. The principle of two instances does not apply to this legal construction.

Czech appellant and remonstrance authorities lack guarantees of independence. This fact is generally accepted by the Czech legal environment but could cause uneasiness in other countries that have established independent appellate tribunals. Moreover, a review of administrative decisions should be able to protect public interests as well as individual rights. A lack of independence could cause an unbalance between these values to the detriment of individuals or, worse, to the detriment of both public interests and individuals. As we showed above, some errors cannot be redressed by administrative courts. Czech legislation misses some fundamental goals connected with means of protection. Administrative means of protection cannot be considered only as a lower degree before judicial proceedings. Administrative means of protection should provide necessary standards such as independence.

We think that the effectiveness of appeal and remonstrance is decreased by the absence of real guarantees of independence in appellate and remonstrance proceedings, but we also have to point out that for the same reason the effectiveness of remonstrance is much lower than the effectiveness of appeal. Proceedings conducted by a remonstrance authority cannot be considered as independent second instance. This means that Czech PA differentiates between two types of individual administrative acts depending on whether they were issued by central public authorities or not. There is no guarantee that administrative decisions issued by central authorities are of higher quality, yet the addressees of these acts have lower levels of protection for their individual rights. At the same time, there is no real policy stating which proceedings should or should not be conducted at the central level of public government.

Objections and comments do not provide such a high level of protection against hybrid administrative acts as appeals and remonstrances against individual administrative acts. To some extent this is due to the fact that measures of a general nature lie somewhere between individual administrative acts and normative administrative acts. This means that a measure of a general nature cannot be enforced as directly and immediately as an individual administrative act.

However, comments and objections are not means of protection that are a priori unable to avert the negative impacts of defective measures of a general nature. They are means of protection that can actually solve disputes within PA without relying on the administrative judiciary. They act against a proposed measure of a general nature, meaning that potential defects could be corrected before it is issued, unlike appeals and remonstrances, which can only be submitted after the issuing of an individual administrative act. On the other hand, the effectiveness of objections and comments could be decreased by the absence of the devolutive effect in the proceedings.

Comments are more effective than objections in that they are available to a wider range of persons. Objections are more effective than comments in terms of the manner of the proceedings. These differences are based on the assumption of more possibilities of intervention against the legal sphere of people entitled to submit objections than the legal sphere of people who can "only" submit comments.

The effective use of remedies, whether appeal, remonstrance, objection or comment, depends on many factors such as the knowledge held by the addressees or the construction of the material and procedural legal regulation. We think that the effectiveness of means of protection is directly connected with the effectiveness of PA as a whole.

We verified the outlined conclusions on a chosen section of PA (SMC) which is appropriate for the case study mainly because of the contrast between the

public and private interests or the high level of individuality of the specific types of proceedings. As mentioned before, in these proceedings there is high potential for disputes and the use of measures of protection.

As a result of our research into the chosen section of PA, we revealed that measures of protection against the most common decision processes, especially the proclamation of objects as cultural monuments or the issuing of binding opinions, indirectly point out problems in the PA section relating to monument care as a whole. The fact that many decisions were cancelled in the appeal process and returned to first instance, or changed by the appellate authority, indicates problems with the subjectivity and individuality of particular cases where it is necessary to consider cultural values and where there are high demands placed on the owners of the cultural monuments. Most of the issued decisions respect public interests, yet these are in sharp contrast to the interests of private persons. At the same time, the state is unable to compensate for all private losses. It is therefore possible to say that the analysed means of protection in the PA section on monument care are effective in terms of the protection of the rights of owners of cultural relics or objects of cultural value. On the other hand, the effectiveness of the remedies also indicates the problematic and often flawed decision-making of first-instance authorities. This fact could be caused by specifics and the professional demands of the PA section on monument care, where professional consideration is performed by the National Heritage Institute which, although it performs technical consideration, is still a different authority from the public authorities that perform the actual decision-making.

Hypothesis described in foreword of this article was not fully verified, because the lack of data, which are not continuously gathered by Czech public bodies. We were not able to make direct link between lack of devolutive effect, or independence in organizational arrangement between first and second instance administrative bodies and inefficiency of described means of protection. Still, obtained data did not disprove outlined hypothesis and it showed some partial inefficiencies (e. g. share of cancelled decisions by courts), which could be linked with our hypothesis in future (with enough data).

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POVZETEK

1.02 Pregledni znanstveni članek

Dispozitivna sredstva varstva zoper upravne akte (pred izvršljivostjo) in njihova učinkovitost

Ključne besede: pravno sredstvo, pritožba, ugovori, pripombe

Javna uprava se pogosto izvaja prek izdajanja javnih aktov enostranske in zavezujoče narave. Vendar so (in morajo biti) v javni upravi zagotovljeni tudi pravni instrumenti, s katerimi se lahko tisti, za katere so upravni akti zavezujoči, branijo pred nezakonitostjo in nepravilnostjo teh upravnih aktov. Obstoj in primerno učinkovitost teh pravnih instrumentov lahko razumemo kot nujni del (*sine qua non*) demokratične pravne države in načela zakonitosti. Članek obravnava tako imenovana dispozicijska pravna sredstva, ki omogočajo varstvo pred še ne izvršljivimi upravnimi akti. Glavna ugotovitev članka je, da bi odsotnost devolucijskega učinka ali zagotovitve neodvisnosti organizacijske ureditve med prvo in drugo stopnjo upravnih organov lahko omejevala učinkovitost teh sredstev.

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Remonstrance Against Decisions Made by Central Administrative Bodies in the Czech Republic

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ABSTRACT

The remonstrance is traditional standard (ordinary) remedial measure which can be (only) applied after the first instance decision has been issued by central administrative body. The article is heading to verify the hypothesis whether the remonstrance does reflect the principle of two instances in entirety. As the finding of the research it can be pointed out that the remonstrance represents relative exclusion of the principle of two instances, which is applied only in a modified form, as the remonstrance is not decided by any higher, independent administrative authority, but by the identical central administrative body, namely by its head, not by its remonstrance committee, which issues "only" recommendations/advices. We concluded that possible solutions are either transformation remonstrance committees into administrative bodies/tribunals, or rules providing the central administrative bodies do not make first instance decisions.

Key words: remonstrance, appeal, administrative procedure, central administrative authority, legality, effectiveness

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1 The General Introduction

1.1 The principle of two instances and administrative proceedings

Administrative proceedings[1] are based on the common principle of two instances. However, this principle is not expressly stipulated. Nevertheless, it is possible to fairly reliably infer (Skulová, 2012, pp. 38, 68) the existence of mentioned principle from the contents of the legislation and as such it has been traditionally recognized. And therefore we can find the institution of remonstrance.

The conclusions of the Constitutional and Supreme Administrative Court's jurisprudence are hardly surprising with regard to the specific absence of the stipulation of the two-instance principle for administrative proceedings in legislation. Even though it admits the existence of this principle or directly refers to it, especially in cases where this principle has been violated, it does not accept its nature as a fundamental principle. As the Constitutional Court[2] has expressly stated, "The Charter of Rights and Freedoms or the Convention for the Protection of Human Rights and Fundamental Freedoms does not guarantee the fundamental right to two or multi-stage decision-making in administrative proceedings." In accordance with this, the Supreme Administrative Court[3] has concluded that "the fundamental principles of decision-making pertaining to the rights and obligations of physical or legal entities by administrative bodies do not include two-stage decision-making."

We can conclude that cases of administrative proceedings are admissible without the application of the principle of two instances at all (absolute exclusion) or with its application, but only in a modified form (relative exclusion). And in our opinion, remonstrance can be placed exactly under this specific form and the relative exclusion of the principle of two instances. It needs to be pointed out that, no matter whether absolute or relative, the exclusion of the principle of two instances usually occurs in cases when the first-instance decision has been made by central administrative bodies. Remonstrance is an ordinary remedial measure that is applied against first level decision that was made by the central administrative bodies (see below).

1 The legal definition of administrative proceedings is provided in Section 9 of the Act no. 500/2004 Coll., the Rules of Administrative Procedure, as amended (hereinafter referred to as the "Rules of Administrative Procedure"). According to this provision, "Administrative proceedings are any procedure of administrative body, the purpose of which is to issue a decision which in particular cases establishes, changes or revokes the rights and obligations of specifically designated entities or which in particular cases states that the entity has or does not have given rights or duties."

2 In accordance with the Constitutional Court judgment dated 19 October 2004, file no. II ÚS 623/02.

3 Cf. the judgment dated 27 October 2005, ref. no. 2 As 47/2004 – 61, published under no. 1409/2007 Coll. of the Supreme Administrative Court.

1.2 Central administrative bodies

The organization of the Czech public administration is rather complicated. However, the apex of the system of administrative bodies (leaving aside the specific position of the government and president) is represented by the central administrative bodies. The central administrative bodies are not only those which are explicitly identified by law, but also those which have the conceptual features of such a body.[4]

The conceptual question is whether these administrative bodies should be directly part of the decision-making processes and make specific decisions in specific individual cases relating to individual entities. After all, according to Act no. 2/1969 Coll. governing the establishment of ministries and other central state administration bodies of the Czech Republic, as amended,[5] the role of these bodies lies elsewhere.[6] In our opinion, however, mentioned duties do not necessarily ensure a direct review of specific decisions made by other administrative bodies.

If the central administrative bodies are entrusted with direct decision-making activities, this constitutes, in our opinion, a shift in the role of the central administrative bodies which has not been anticipated by the law, as they are forced to deal with individual cases instead of maintaining a comprehensive and holistic point of view. Nevertheless, practice has shown that these decisions are often not major or extremely difficult or requiring the extensive expertise and experience which can be expected at the central level, but they could be assigned to any other administrative authority at a lower organizational level and, as evidenced by the statistics, most cases require quite extensive decision-making activity.[7] The practice described thus occupies the capacity of the central administrative bodies which is necessary for their primary mission, i.e. their analytical and conceptual activities.

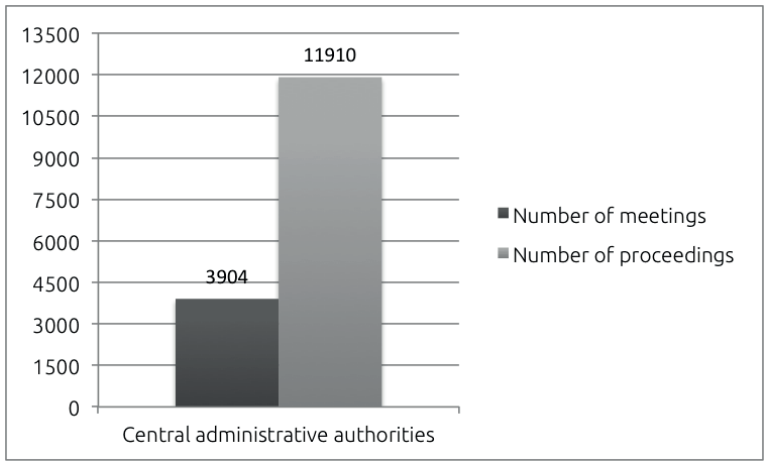
4 Cf. the Constitutional Court's resolution dated 30 November 2010, file no. Pl. ÚS 52/04, according to its material concept "it is necessary to define the body which meets the following criteria as a central state administration body: the performance of state administration represents an essential (albeit minor) part of the description of the body's activities, the administrative body has a nationwide jurisdiction and it is not directly subject to any other central state administration body. (Other criteria, such as the regulatory power or monocracy of the administrative body are not unequivocally accepted in scientific literature and as far as these are concerned, we can talk about characteristics which are prevailing, but not absolutely necessary)."

5 This Act provides a basic list of the central administrative bodies. There are 14 ministries (cf. Section 1) and 11 other central state administration bodies (cf. Section 2). The list is not exhaustive, as shown in Note no. 4.

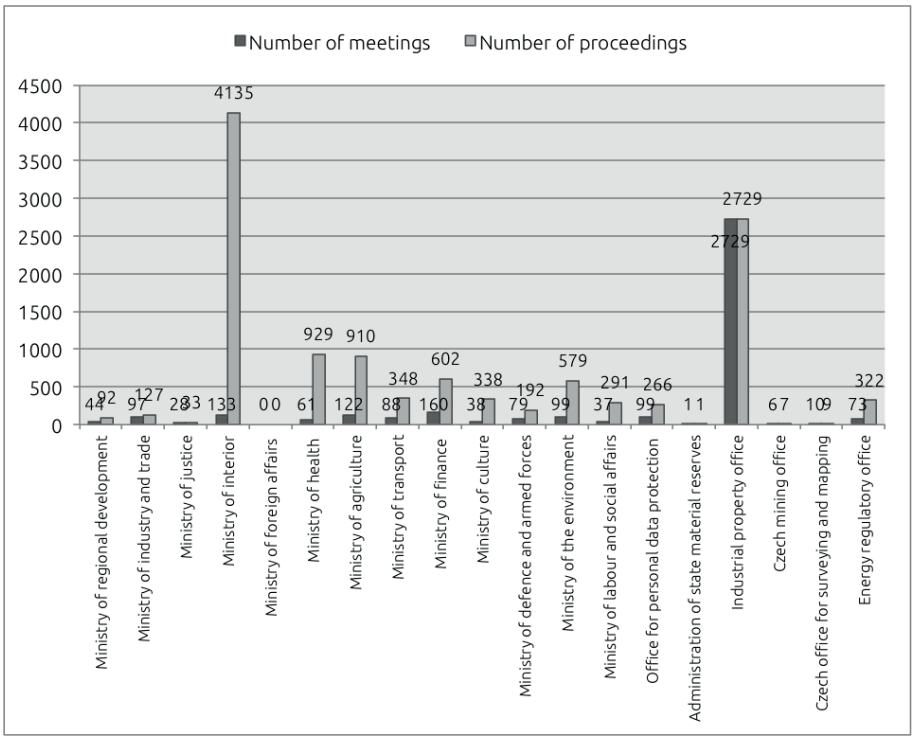
6 They are obliged to undertake the conceptual and analytical activities in the public administration sector which have been entrusted to them (Section 22). For this purpose, they are also involved in the preparation of budgets and legislation in the field of public administration, as well as the supervision of the observance of legality (Section 23 and 24).

7 See the data in Graph 1 and Graph 2. Please note, however, there are also some administrative authorities which have refused to provide information to the authors, and this fact in itself has a certain explanatory value. From these data it is obvious that the agenda of the remonstrance is not a marginal matter. On the contrary it may be very burdensome for central administrative bodies. It fully confirms the suitability of mentioned considerations for the future.

Graph 1: Number of meetings of remonstrance comittee and proceedings 2007–2012 (in total) - summation



Graph 2: Number of meetings of remonstrance comittee and proceedings 2007–2012 (in total) – according to departments



The mentioned role of the central administrative bodies in the administrative proceedings, which we consider to be problematic in itself, can be identified as a twofold activity within the context of the principle of two instances.

Firstly, these bodies represent the second stage which decides on the standard remedial measures. In this sense, central administrative bodies represent the final administrative instance (if we ignore the possibility of extraordinary remedial and supervisory measures). Here, the central administrative bodies fully implement the principle of two instances.

Apart from this, however, there are a large number of cases which cannot be ignored, where central administrative bodies conduct the proceedings and make the direct decisions in the first instance. As such, the proceedings start and end with them in the first instance. We focused on this example.

In relation to or traditionally with respect to the principle of two instances, it is therefore necessary to ensure the possibility of applying the standard remedies in such cases. Such example is the remonstrance, as will be explained. In addition, however, there are also allowable exceptions as stated above, because the principle of two instances is not a fundamental principle, but only a "simple" principle. Therefore, the two-instance model of administrative body decision-making is undergoing certain modifications in those cases where the central administrative bodies decide in the first instance and it is even completely denied in extreme cases.

There are cases where the administrative body makes the decision in the first and at the same time in the last stage with no admissible standard remedy against its decision. The principle of two instances is thus completely excluded.[8] The reason leading to such a legal solution is usually the absence of a superior administrative body and this could be solved by applying the institution of remonstrance, as is the case with the other central administrative bodies. Such a solution often hides the reluctance of the administrative body to have its decision reviewed by another (higher in instance) administrative body, thereby admitting its inferiority. This can be a practical problem in the case of some so-called independent administrative bodies where one of the attributes of independence is the absence of a superior administrative body. [9]

In this case, the review of the administrative decision is then transferred to the court. It is therefore appropriate to ask whether such a solution sufficiently protects the rights of the individuals concerned. Similarly, one can also ponder whether it is not more appropriate to use the institution of remonstrance

8 For example, no standard remedial measure is allowed against the decision of the Ministry of Interior on the merits of international protection (asylum) and one can file an action with the administrative courts against such a first-instance decision (cf. Section 32 of Asylum Act no. 325/1999 Coll., as amended). The same applies to decisions made by the Council for Radio and Television Broadcasting (cf. Section 66 of Radio and Television Broadcasting Act no. 231/2001 Coll., as amended).

9 In addition to the already mentioned Council for Radio and Television Broadcasting, there are also other such independent administrative bodies – the Office for Personal Data Protection and the Office for Protection of Competition. In the case of the Council, there is an absolute exclusion of the principle of two instances, with the stress on its independence. In the case of the aforementioned Offices, however, the principle of two instances is reflected in the possibility of applying for remonstrance. Therefore, we can ask whether these bodies are less independent than the Council and whether the legislation is truly conceptual.

or administrative tribunals[10] in these specific cases before the case comes to court. In any case, it is questionable whether entrusting the court with the possible remedy is an appropriate and conceptual solution.

2 Remonstrance as a Standard Remedy

2.1 The origin, nature and context of the institution of remonstrance

In the Czech legal context, despite its relatively brief existence in comparison with appeal, remonstrance is largely perceived and treated as a "traditional" standard claimable measure for protecting rights in administrative proceedings. In this respect, it is fully equivalent to an appeal.[11]

Under previous legislation (1967) the authority deciding on the remonstrance reasonably applied the provisions concerning any appeal. The amendment or reversal of the contested decision were possible outcomes, as were the dismissal of the remonstrance and confirmation of the contested decision. It should be noted that the principle of uniformity in administrative procedures was fully respected and this formed a procedural unit at the level of the first and second instance proceedings, including the merits of the case, until the final decision on the case came into legal force. For remonstrance proceedings, similarly as for appellate proceedings, it was permitted to use *error coram nobis* under the normal conditions of full compliance with the remonstrance and the integrity of rights or the consent of other parties. An appropriate and necessary companion to the classic two-instance model was also the principle of appeal, especially due to the absence of a judicial review (generally prevailing until 1991). The institution of remonstrance, established in this way, was widely used and deeply internalized in the following decades, when the main reason distinguishing remonstrance from an appeal as a standard remedial measure consisted of relativization, but rather in the factual absence or inability to assume the devolutive effect which was reflected in the delegation of the decision-making to the head of the central administrative body based on the recommendation of a special committee established by the person in question.

10 The case when the legislator has to some extent approximated the establishment of a tribunal is the field of law concerning immigration and aliens. There is a specialized committee attached to the Ministry of the Interior which decides on the merits of the aliens' residence (cf. Section 170a of the Act no. 326/1999 Coll. governing the residence of aliens in the territory of the Czech Republic)

11 Remonstrance was only introduced with the adoption of the Act no. 71/1967 Coll., the Administrative Procedure Act (hereafter also simply referred to as the "old administrative procedure" or "administrative procedure of 1967"), within the application of the new concept, given, inter alia, by the consistent implementation of the principle of a second level of review (Vopálka, Šimunková, & Šolín, 2003, p. 192).

2.2 Current legislation on remonstrance and its (partial non/mis-) interpretation

The legal context of remonstrance after the revolutionary changes of 1989 significantly changed. The key factor in this regard can be seen in the restoration and gradual completion of the judicial review of administrative decisions.[12]

Similarly, the legal regulation of administrative proceedings proper underwent significant changes with the adoption of the new Rules of Administrative Procedure (Act no. 500/2004 Coll.), including the explicit incorporation of the fundamental principles of good governance[13] and the inclusion of the requirements of due process in its individual provisions governing administrative proceedings. The changes also affected the specific regulation of remonstrance (Section 152).

These conceptual changes, as well as the specific new legal regulation, were not in our opinion adequately accepted because there is currently a certain traditional view of the institution of remonstrance which has persisted and survived to some extent. At the same time, there is also a certain ambiguity[14] or incompleteness in the accepted solutions or ideas in some issues and cases (see e.g. example mentioned sub 1.1).

Only a change in the constitutional and international foundations[15] manifested primarily by the establishment of judicial review,[16] could trigger the question as to whether the previous regulation could be seamlessly applied under these new conditions in the same manner as before, in particular with regard to the procedural rights of the parties to the proceedings, as well as in relation to the effectiveness of the procedure. An express change in legislation was not a matter of chance or even misunderstanding.

12 Restored in 1992 (by Act no. 519/1991 Coll.) and fully developed effective as of 1 January 2003 by the implementation of administrative justice headed by the Supreme Administrative Court (Act no. 150/2002 Coll., Code of Administrative Justice, hereafter also referred to as the "Code of Administrative Justice").

13 See Sections 2 to 8 of the applicable Rules of Administrative Procedure, including the fundamental principles of the administrative body's activities.

14 Some authors (cf. e.g. Mikule, 2005, pp. 171–172; Žáčková, 2005, pp. 173–176, in the collection of papers from the colloquium held soon after the adoption of the new Rules of Administrative Procedure), applied practice and partly the jurisprudence have shown a specific approach to the interpretation of the applicable regulation in question.

15 The explanatory report states that the bill complies with the requirements of the announced international treaties, by which the Czech Republic is bound, especially the Convention for the Protection of Human Rights and Fundamental Freedoms and confirms the compliance with the European standard of administrative procedure, mainly included in the documents of the Council of Europe (listed and headed by the Resolution of the Committee of Ministers of the Council of Europe (77) 31 on the protection of individuals with regard to the decisions of administrative bodies).

16 With its specific division into two branches: to review matters of a so-called "public nature" in administrative law and matters of a private nature which are decided on by the administrative authorities under the civil justice system (see more e.g. Skulová, 2011, pp. 331–347).

The legislators significantly narrowed the power of the central administrative body's head. The decision-making power of the body is set out similarly as it is in general for *coram nobis* in appeal proceedings, although, unlike for *coram nobis*, (only) another operationally relevant unit of the central administrative body makes the decision. However, it needs to be taken into consideration that this involves the same administrative authority when viewed by the party to the proceedings, and also in general (in terms of the substantive and territorial jurisdiction). From this perspective, the analogy with *coram nobis* does not seem inappropriate.

If the party to the proceedings which filed the remonstrance is not fully satisfied,[17] the proceedings governing the remonstrance cannot reach any other decision than to dismiss the remonstrance. The unsatisfied party then has no other choice but to go to court.[18] [19] The path to judicial review has thus been simplified in comparison with the previous regulation. This is particularly so in comparison with the previous, aforementioned practice, where it was generally accepted that the remonstrance was decided in such a way that the decision was reversed and the case went back to the first instance body for further proceedings, thus pushing the possibility of judicial review considerably further away. Under the current legislation, such an option is completely impossible according to our opinion. In this conclusion we differ from the views presented in the respected comments on the Rules of Administration Procedure.[20] This option is still (traditionally or rather stereotypically?) used quite frequently in practice and jurisprudence generally accepts it. [21]

The regulation of remonstrance decision options is included as a special provision at the very end of the relevant provisions (Section 152, subsection 5 of the Rules of Administrative Procedure). At the same time, it also defines

17 I.e. not partially satisfied, similarly as for *coram nobis* in the appellate procedure (Section 87), as this would violate the essence and purpose of the institution.

18 The explanatory report to the remonstrance regulation states: "The peculiarities of remonstrance consist of the fact that the devolutive effect of the standard remedial measure is basically relativized […] Materially, this decision-making is limited to the aspects of […] *coram nobis* . In other cases, it will be possible to seek protection from the court".

19 Similar solutions can be found even in the German legislation, specifically at first instance decision making by the Federal Central body at the federal level (Bundesbehörde), eg. by Ministry, when it is not necessary to lodge objection against the decision of the central administrative body, but it is possible to bring an action before appropriate administrative court immediately (Cf. KOPP, 2012, p. 825; Maurer, 2011, p. 268).
The solution - waiving of an standard remedial measure (Widerschpruch), has been applied to certain types of proceedings in some provinces (Rhine-Westphalia, Lower Saxony and Bavaria), and views on this solution are not uniform (Cf. Schmitz, retrieved 5 April 2014; Maurer, 2011, p. 266). In Austria, where the situation has changed significantly from 1 January 2014, by establishing one instance administrative proceedings (with the exception of certain administrative proceedings by municipalities), the judicial review is only remedial measure also for decision issued by central administrative body in first instance (Cf. Explanatory report, retrieved 5 April 2014).

20 Cf. Vedral, 2012, p. 867–869; Jemelka, Pondělíčková, & Bohadlo, 2011, pp. 559–560.

21 For more see the Supreme Administrative Court judgment dated 27 June 2012, ref. no. 3 As 28/2012 – 21, stating that a decision on remonstrance reversing a decision issued in the first instance and returning the case for reconsideration or merely reversing the contested decision is not a decision which would be subject to judicial review (i.e. meritorious), but a decision procedural in nature, for which judicial review is excluded.

the powers of the head of the central administrative body who decides on the remonstrance.[22] These provisions are preceded by subsection 4, which for the purposes of the remonstrance proceedings refers to the application of the provisions on appeals, unless excluded by the merits of the case.

Given the uniqueness of the express provisions as well as the scheme for the inclusion of both the rules, it is hard to accept the view that those provisions confer the option of broadening the powers of the head of the central administrative body by means of the other options included only in the scope of the decision options for the appeal (which reflects the nature of the appeal as a standard remedial measure based on a full review in relation to the principle of two instances). However, it does not reflect the nature of remonstrance, if we ignore the fact that it contradicts the text of the statutory provision. In this regard the authors therefore disagree with the aforementioned authors' views on this issue, as well as with the currently prevailing jurisprudence of the administrative courts.

No decision options other than those mentioned in the Rules of Administrative Procedure can apply to remonstrance under and in compliance with the aforementioned facts. In addition to the arguments above, the authors also argue (using systematic interpretation) that, if the legislators did not consider remonstrance to be a specific institution different from that of appeal, they would have had no reason to include it in Part III of the Rules of Administrative Procedure entitled "Special Provisions on Administrative Proceedings" as well as in Chapter VII entitled "Special Provisions on the Review of Decisions". [23]

To sum up the above, the authors believe that remonstrance in the existing legislation clearly does not "only" represent the institution of appeal adapted to the conditions of the central administrative bodies' decision-making, as was the case under the previous regulation and in the previous legal context. We base our view on the undisputed interpretation of the relevant provisions of the Rules of Administrative Procedure (Section 152), in linguistic, logical, systematic, and also teleological interpretation.

If a decision on remonstrance were to be made which was different from the current practice (as well as the jurisprudence and partly also the expert sources) in its fundamental aspects, the authors are of the opinion that it would be necessary to adopt an adequate legal framework which would be based on a different concept or on the concept of this institution and proceedings pertaining to it, rather than on the current concepts. The authors do not consider the other ways to be sufficient, even though they fully comprehend

22 Which must be provided for by law with due regard for the principle of legality and must also be sufficiently clear with regard to the principles of good governance (cf. the preamble to the Recommendation of the Committee of Ministers of the Council of Europe No. (2007) 7 on good governance).

23 Different setting of power for review under the ordinary remedial measure in general and also for decision making by central (supreme) administrative body is reflected also by german sources (cf. note no. 20).

the motivation to find a sufficiently broad remedy for administrative decisions issued at the central level in the first instance. However, legitimate motivation or earlier regulation and long-term practice do not represent a sufficient basis for the lawful and proper exercise of public authority.[24]

2.3 Decisions pertaining to remonstrance

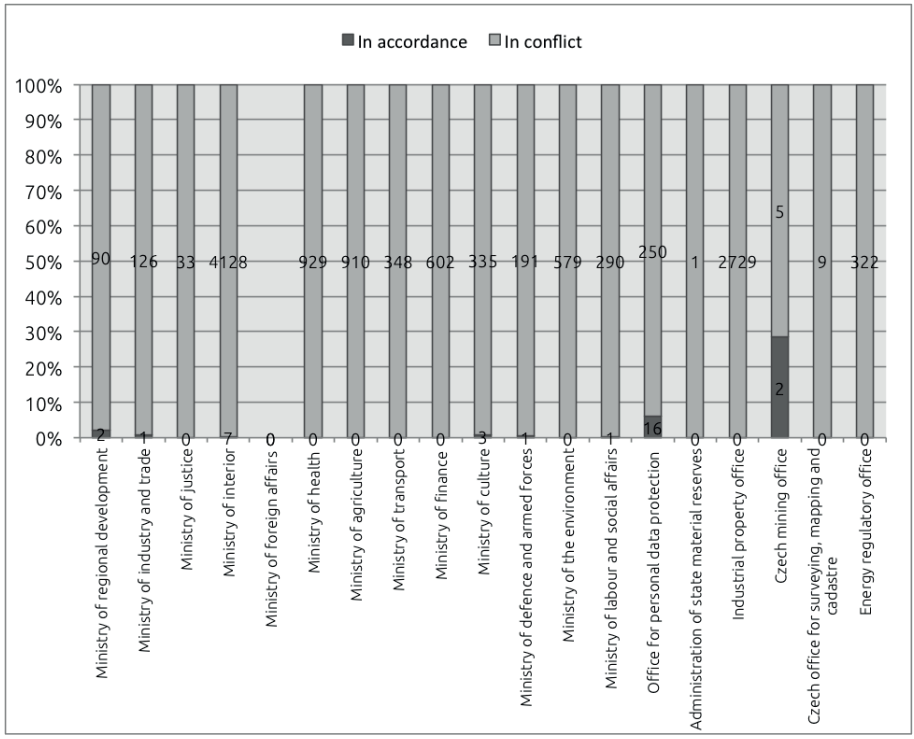
The crucial question is who and in what position actually decides. This is closely related to the internal organization of the central administrative body. The head (minister) decides on the remonstrance in accordance with Section 152, subsection 2 of the Rules of Administrative Procedure.

Even this can be quite problematic in itself, as the person at the head of the central administrative body which decided in the first instance is now required to review the decision of his/her" body and "his/her" colleagues, i.e. to a great extent "his/her" own decision. The factor which is supposed to trigger a greater degree of objectivity involves the requirement of the establishment and proper performance of a Remonstrance Committee. The committee submits proposals or recommendations on how to decide. However, the head of the central administrative body is not bound by these proposals in any way, despite the fact that the minister or the head establishes the Remonstrance Committee and appoints its members. Despite this, or perhaps because of this, the available statistics show[25] that in the majority of cases the head of the central administrative body has accepted the recommendations of the Remonstrance Committee. Out of more than 11,800 decisions issued by some central administrative authorities between 2007 and 2012, the head only reached a decision different from the recommendation of the Remonstrance Committee in 33 cases. Most often these involved cases from the Office for Personal Data Protection, which had 16 such different decisions, i.e. almost half the total amount!

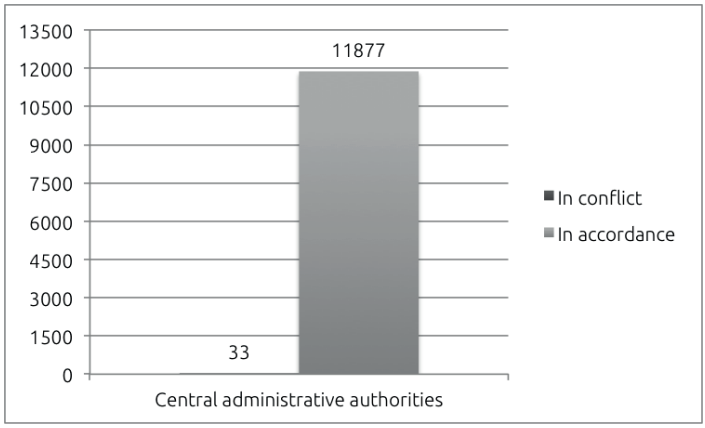
24 After all, "the problem of the Czech Republic is not the lack of remedial measures, but rather their unclear meaning and confusing nature which significantly extends proceedings and lengthens the individual's path to a decision in his case and rather provides an opportunity for the intellectual exhibitionism of judges in procedural matters."(Molek, 2012, p. 112). The stated situation is illustrated by the resolution of the Constitutional Court dated 2.4.2013, file no. Pl. ÚS 30/09, which dealt with the application of Section 14, subsection 6 of the Rules of Administrative Procedure which excludes the application of the institution of exclusion due to bias in the case of heads of central administrative bodies for the requirements of remonstrance proceedings. According to the Constitutional Court, this provision is "applied in the sense that it is not applied" by the administrative court and, when finding reasons for exclusion, the court must examine whether this fact has been reflected in the unlawfulness of the decision or in any other defects of the proceedings based on the need to take into consideration the cautels which directly result from the constitutional order (Article 36, paragraph 1 of the Charter of Fundamental Rights and Freedoms),...

25 Compare Graphs 3 and 4.

Graph 3: Decision of head of central administrative authority (its compliance with recommendations of remonstrance committee) 2007–2012 (in total) – according to departments



Graph 4: Decision of head of central administrative authority (its compliance with recommendations of remonstrance committee) 2007–2012 (in total) – according to departments



Nevertheless, the practice shows that there may be more striking cases which reveal the non-conceptual nature of remonstrance in full. As Section 152, subsection 1 of the Rules of Administrative Procedure adds, remonstrance

can also be applied in cases where the administrative decision in the first case was issued directly by the head (minister) of the central administrative body. However, Section 152 subsection 2 applies here too, under which the minister or head of the central administrative authority decides on remonstrance.

Even though it might seem absurd, the legislation entrusts the decision-making in first-instance administrative proceedings directly to the minister or the head of the central administrative authority in a number of cases.[26] Based on the aforementioned provisions of the Rules of Administrative Procedure, the minister or the head then decides again on remonstrance applied against such a decision. Proceedings and decisions in two stages have therefore been practically concentrated in one and the same person, which is definitely not in compliance with the principle of good governance. Is such a remedy unnecessary? Basically, it contradicts the meaning and importance of remonstrance, as well as the whole principle of a second level of review. The fact that the minister or the head of the central administrative body should take individual procedural steps which are impossible and unthinkable in practice is also quite questionable. As the literature states, "the role of the minister or the head ... is practically reduced to only that of a signature ... of a decision which he or she is presented" (Vedral, 2012, p. 1187). The managerial, controlling and conceptual role of the head of the central administrative body then changes into the role of a "normal" officer.

It is traditionally stated that decisions on remonstrance fall within the exclusive competence of the official who is at the head of the central administrative body. Therefore, this individual cannot delegate it to any other entities, although it may be more appropriate to do so in practice.[27] The fact that the head decides on the remonstrance is indicated by the jurisprudence as being not an objective, but a functional[28] jurisdiction pertaining to the proceedings and decision. It is therefore an expression of a functional position within an internal organization. The head who decides on the remonstrance, however, does not constitute an administrative authority. In this way, the administrative proceedings are carried out in both instances at the same central administrative body. Only the people, who decide on the matter, may change. This is also significant with regard to the follow-up judicial review, because the minister or the head is not the defendant.[29] This therefore merges the defendant who decided on the matter at the final level and the one who decided in the first instance. As such, the fulfillment of the principle of two instances dissolves.

26 With regard to the same foundations of legislation, similar problems can also be found in the case of the regulation of remonstrance in the Slovak Republic (cf. more in Vačok, 2009).

27 Cf. the judgment of the High Court in Prague dated 30 September 1998, file no. 6 A 202/95.

28 For this, cf. the judgment of the Supreme Administrative Court dated 15.1.2004, ref. no. 6 A 11/2002 – 26.

29 For this, cf. judgment of the Supreme Administrative Court dated 31 October 2008, ref. no. 7 Afs 86/2007 – 107, published under No. 1775/2009 Coll. NSS.

The mentioned legislation and judicature solution has deeper, even fundamental connections and consequences; let us add that it is minimally problematic in itself from the perspective of a party to the proceedings, to whom the situation might seem somewhat confusing, when in fact there is an externalization of the internal relationship which exists within a single administrative body and the superiority of the review body is only fictional.

2.4 The Remonstrance Committee – an advisory or decision-making body?

As follows from Section 152, subsection 2 of the Administrative Code, the head of the central administrative body decides on the remonstrance. This solution has been subjected to critical analysis which suggests that it essentially and implicitly contains a violation of the principle of two instances. The provisions of Section 152, subsection 3 of the Rules of Administrative Procedures stipulate several conditions for the decision on remonstrance in order to achieve the illusion of the objectivity of the remonstrance and the fulfillment of the principle of two instances.

There is an obligation to establish a Remonstrance Committee which assesses the case and submits proposals for the decision on the remonstrance. The head of the central administrative body must not make decision without having submitted the case to the Remonstrance Committee for consideration. Otherwise, any such decision would be illegal. However, the committee's assessment is not binding, which is in contrast with the obligation to bring a case to an appellate committee in terms of content and function.

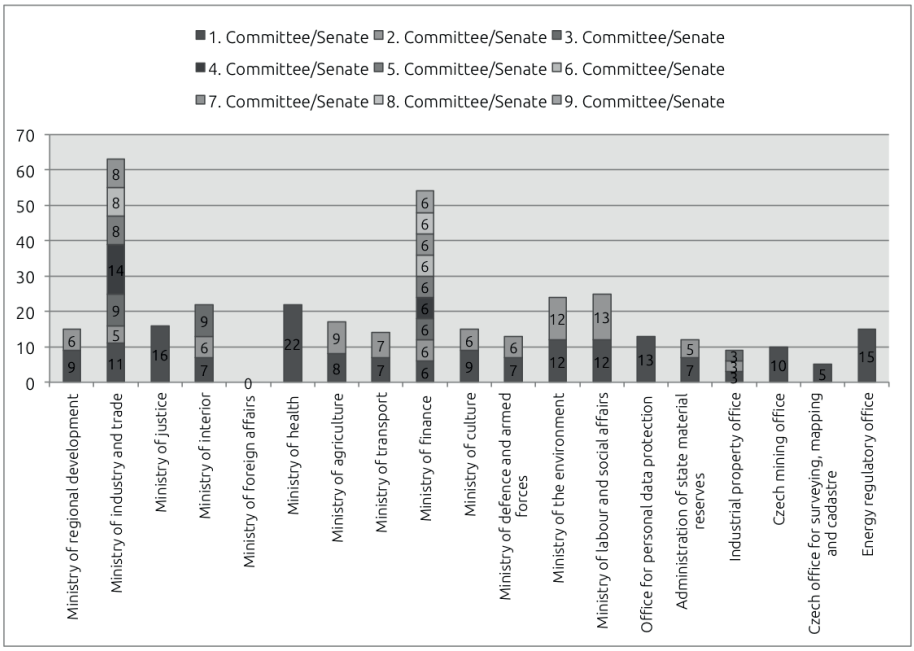
The Remonstrance Committee is a collegial body. It should have at least 5 members. Most of its members should be experts who are not employees of the central administrative body. So far, it might seem that the objectivity and expertise of the decision, as well as the principle of the second level of review, might still be guaranteed within the proceedings and the decision on the remonstrance. However, the legislation does not specify the term "expert" and does not impose any requirements on the expertise of the members of the Remonstrance Committee, either in factual or legal terms. The legislation's weakness lies in the fact that these members are appointed directly by the head of the central administrative body. He or she therefore selects the particular people who then assess (often also his own) decisions and give him or her recommendations. Therefore, the selection is not limited in any way with regard to the vague concept of expertise. Anyone, whom the head of the central administrative head considers to be an expert or appoints as an expert, can become a member of the Remonstrance Committee.

The Remonstrance Committee is not a decision-making administrative body, but merely an advisory body. Proposals concerning decisions are not binding upon the head of the central administrative body and so he or she may decide differently than has been suggested and recommended by the Remonstrance

Committee. It is apparent from available statistics, as presented above, that the assessment of the Remonstrance Committee anticipates the final decision in the majority of cases. The question is whether the head of the central administrative body respects the findings and recommendations of independent experts or whether the "experts" provide such recommendations which are easy for the head to accept because they are in the head's favor and in line with the head's previous views.

The legislation accepts that the Remonstrance Committee may be divided into individual panels, probably with regard to specialization. The majority of these panels should also consist of the category of "experts". The vast majority of the Remonstrance Committees at the central administrative bodies have been divided into several panels.[30] The members of the Remonstrance Committees or their panels usually number about 10 people,[31] which seems to be reasonable, both with regard to the pluralism of opinions and the quorum.

Graph 5: Number of members of remonstrance committees or senates of remonstrance committees (June 2013)



The intensity of the use of remonstrance as a remedy, due to which the function of Remonstrance Committees or their panels is activated, is suggested by the detected data, according to which there were almost 12,000 proceedings at selected central administrative authorities from 2007

30 The Remonstrance Committee at the Ministry of Finance has the most panels; it has 9. See Graph 5..

31 Ibid.

to 2012 and the Remonstrance Committees held almost 4,000 sessions at which remonstrance was assessed.[32]

The Remonstrance Committees are permanent by nature; the *ad hoc* establishment of Remonstrance Committees is very rare. This implies the possible stability of its members, which we can only agree with. However, the question of their expertise and integrity remains. That is to say, whether they are able to objectively assess the decisions of the head of the central administrative body (who has appointed them) and point out any possible flaws? The fact that these experts need not be employed by the central administrative body is a certainly not insignificant factor. Indeed, it is a desirable requirement from the point of view of objectivity and impartiality. However, this is closely related to the question of the remuneration of the Remonstrance Committees, including whether the amount of remuneration provided is proportionate to the fact that these are leading experts. From our own experience, we would add that the participation in advisory bodies for the government or central administrative bodies or Remonstrance Committees is usually seen as an honorary, rather than profitable position. On the other hand, the question of the prestige connected with the membership in the committee might also play important role, as it may motivate them to maintain their membership in the committee at the expense of an increased level of loyalty to the competent central body or directly to the minister or head.

3 The effectiveness, limits of remonstrance and prospects for remonstrance

As is evident from the available data which has been described above, remonstrance is a remedial measure which is used relatively frequently. The number of 12,000 cases, which constitutes incomplete data, represents a significant burden for the central administrative authorities. Whether remonstrance is a truly effective measure for the protection of the rights of the parties to the proceedings cannot be clearly stated; nevertheless, we can see its limits as lying in who decides on it and what the role of expert and independent Remonstrance Committees is.

Proceedings before the court do not constitute a continuation of administrative proceedings and as such they are not so strictly limited by deadlines for issuing decisions. The matter is therefore dealt with faster in public administration than in the court. However, the application for remonstrance is a prerequisite for the consequent filing of an action,[33] even when the party to the proceedings subjectively believes that the remonstrance will not help. However, we cannot ignore the fact that a review of the decision by the court provides a much greater guarantee of a truly impartial and

32 See Graph 1 and Graph 2.I

33 Cf. Section 5 and Section 68 a) of the Code of Administrative Justice.

independent assessment in comparison with the institution of remonstrance, whose objectivity we can reasonably doubt.

Indeed, remonstrance is a remedy, to which one is legally entitled, like an appeal, but it is not decided upon by any higher, independent administrative authority, but by the identical (central) administrative body, even though it is now represented by its head (minister). However, the head, as already stressed in section 2.3, decides under specific conditions.

Another source of doubt is the question of the fulfillment of the procedural rights of the party to the proceedings, who amongst other things does not even have the right to attend the Remonstrance Committee's hearing and is therefore limited in the extent of the openness of the proceedings in comparison with appellate procedure; the element of transparency and immediacy with regard to the party is weakened. These are just some of the differences that pertain to remonstrance proceedings and which display the lack of equivalence with regard to possible applications and the protection of the party's procedural rights.

Another important aspect is the question of the method of gathering evidence which is not immediately carried out by the head of the central administrative body. The position of the Remonstrance Committee in terms of the implementation and evaluation of the evidence needed to prepare a proposal on the basis thereof is therefore another problematic issue from the point of view of fulfilling the principle of material truth and the free evaluation of evidence. How should the right of the party to the proceedings to be present during the gathering of evidence be realized in practice?[34]

If the method of decision-making and the options of decision-making pertaining to remonstrance were to approximate or equal the options of decision-making pertaining to appeal, it would be necessary, in our opinion, to ensure that the parties to the remonstrance proceedings had the same index of application and protection of their procedural rights which is reflected in the possibility and level of protection of material rights in the appellate proceedings.

From the more general view of the protection of the rights of the parties, it is then logical and practical to ask whether the current prevailing practice is really a better, i.e. more effective, more accessible or faster solution for the parties. From the perspective of the state or the public authority, the aforementioned approach can be seen to be more effective and this is apparently the case. The aforementioned fact, however, cannot by itself remove the doubts concerning the legality of such a solution, as well as the fulfillment of the constitutional principles, including the equality of the procedural rights of the parties, as outlined immediately above.

34 Cf. Section 51, subsection 2 of the Rules of Administrative Procedure.

Anyway, skepticism against the current concept of remonstrance seems appropriate. This does not inevitably suggest that it would be appropriate or necessary to completely abandon this type of remedy. If the decisions will be issued in the first instance by central administrative bodies with no superior administrative body above them, then it is appropriate to ensure judicial review in compliance with the existence of the principle of two instances. We believe that to subject the first-instance decision directly to subsequent judicial review would not be adequate or right.

4 Conclusion

In the contribution the authors focused on the specific nature of an ordinary remedial measure in such administrative proceedings when central administrative bodies make first instance decisions. This ordinary remedial measure is the remonstrance. At first sight the remonstrance could create the impression that fully satisfies the requirement of principle of two instances and thus it could be an effective instrument of protection of rights of parties to the proceedings. However, after closer approximation of relevant legislation and practice there are reasonable and substantial doubts about the possibility of positive answers to the two questions. Thus, the remonstrance can be considered as an example of relative exclusion of the principle of two instances.

As mentioned in the text the application of this institute is not only specific to the Czech legislation. Despite, or perhaps because of this fact, range of problems caused by the remonstrance is similar.

The authors find the following question to be pressing in the current legal context and legislation: whether the aforementioned and prevailing traditional or rather traditionalist or even stereotypical perception of remonstrance with its specific effects on the decision-making practice can be considered to be legitimate (or even legal), especially from the point of view of the requirements of due process or the protection of the rights of the parties to the proceedings and its effectiveness.

It is quite possible to consider the addition of bodies to the system – bodies outside the administrative authorities (but not the public administration) with the appropriate degree of independence, objectivity and expertise – i.e. specialized tribunals.[35]

However, there is also a broader, logically related question which needs to be examined, i.e. that of the effectiveness of the set-up of the entire system for reviewing administrative decisions (acts). Current jurisprudence, application practice and some conclusions of judicature serve to underscore the urgency of these questions. The preparation of adequate answers will, however,

35 As to the possibilities, advantages and disadvantages of different kinds of recourse see more, e.g., in Galligan, 1996, pp. 402–406.

require thorough research supported by a rather large expert and information base, including the available data and qualified analyses thereof.[36] Such steps require adequate social support and a will which should ideally be directed towards the necessary revision of the current legislation.

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36 Chapter VIII ("Options for Actions") from monograph Langbroek, Buijze & Remac, 2012, pp. 153–155, may be useful as inspiration for the methodology of formulating the objectives, analyses, working with data, checking any pilot projects and formulating recommendations for legislation.

POVZETEK

1.02 Pregledni znanstveni članek

Ugovor zoper odločitve centralnih upravnih organov na Češkem

Ključne besede: ugovor, pritožba, upravni postopek, centralni upravni organ, zakonitost, učinkovitost

Ugovor je tradicionalno redno pravno sredstvo, ki se lahko (izključno) uporablja po izdani odločitvi centralnega upravnega organa. Namen članka je preveriti hipotezo, ali ugovor v celoti odraža načelo dvostopenjskega odločanja. Glede na ugotovitve raziskave lahko ugotovimo, da pomeni ugovor relativno izključitev tega načela, ki se uporablja samo v omejeni obliki, saj o ugovoru ne odloča neki višji, neodvisni upravni organ, temveč isti upravni organ, ki je izpodbijani akt izdal, čeprav je njegov predstojnik; ne pa pritožbena komisija, ki izdaja ''samo'' priporočila/nasvete. Ugotovili smo, da sta mogoči rešitvi preoblikovanje pritožbenih komisij v upravne organe/tribunale ali sprejetje pravil, po katerih centralni upravni organi ne bi bili pristojni za odločanje na prvi stopnji.

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UDK: 342:316.485.6(493) 1.02 Review article

Legal Framework relating to Alternative Dispute Resolution in Belgian Public Law

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ABSTRACT

The application of alternative dispute resolution is increasing in Belgian administrative law hand in hand with the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. The specific character of public law is the cause of specific legal problems and limitations. This paper examines these restrictions and their opportunities as a contribution to the creation of a theoretical framework for alternative dispute resolution in administrative law and serves in an international context as an overview of this theme.

Key words: *alternative dispute resolution, legal problems and restrictions, procedural administrative law*

JEL: K23

1 Introduction

A wide variation of applications of alternative dispute resolution (ADR) can be found in an increasing number of domains in Belgian public law. Nevertheless to this day, a general and uniform conception of ADR in Belgian administrative law has not been conceived. Within the large field of alternative dispute resolution, the particular aspect of mediation in public law has been underexposed in Belgian legal doctrine.[1]

The current evolution and practice of ADR raises several legal questions: how does ADR relate to administrative procedural law and is the main objective of administrative action to serve the general interest, affected by the bilateral nature or the reciprocity, characteristic for ADR?

Furthermore, the administration is bound by a compulsory public law framework designed as a safeguard for citizens based on the unilateral and imperative nature of the powers invested in the administration. How do

1 At present the most exhaustive research in this field is still the doctoral dissertation of Lien De Geyter (De Geyter, 2006). For this reason, this paper adopts in part the structure of the thesis.

the general principles of sound administration and the principle of legality, among others, impact the possibility to apply ADR in administrative conflicts?

This paper examines these issues in order to help create a theoretical framework for alternative dispute resolution in Belgian administrative law. In doing so it presents an overview of the scope of the subject for the international audience.

2 Alternative Dispute Resolution in Belgian Administrative Law

2.1 Definition of ADR

2.1.1 In general

Alternative dispute resolution has been defined as follows:

- ”ADR consists of a mixture of techniques to resolve disputes that are situated outside the courts and who allow parties to resolve their disputes, while maintaining communication or dialogue.” (D’Huart, 2002, p. 5)
- “ADR are the methods to resolve legal disputes that can only be used when parties agree and that result in a solution that is not imposed by one of the parties. They are consensual and egalitarian.” (Richter, 1997, p. 4)
- “ADR are the extra-judicial procedures to resolve conflicts which are conducted by a neutral third party, with the exception of actual arbitrage.” (Europese Commissie, 2002, p. 6.)

The more definitions one examines, the more variations can be found. Even the applied terminology displays a wide variation (Beeldens, 2010, p. 260). These definitions have many aspects repeated by different authors; nevertheless there are divergences. The foremost important task is to bring these together in order to distinguish the essential constituent parts of ADR.

2.1.2 Non - decisive elements

One or many? It should be clear that ADR cannot be limited to just one specific method or procedure. The majority of the definitions given to ADR are in agreement that this should be viewed as a collective name for a variety of methods (De Geyter, 2005, p. 754).

These can find their origin in laws or regulations as well as the developed legal practice or doctrine.

Therefore, mediation, arbitrage, consultation, negotiation and hybrid forms such as *mini-trage* can be considered as current methods of ADR.

Resolution? Immediately the most relevant question arises. A variety of methods, to do what? What is the ultimate objective of ADR? In English the acronym stands for Alternative Dispute Resolution. In Dutch, the translation of the term "resolution" generates a legal question to which the answer determines largely the scope of the object under study.

In the Belgian doctrine the word "resolution" has been translated as "beslechting" which is closer to "settlement" or "completion", when translated back into English. This could be interpreted as if ADR in Dutch legal doctrine is limited to only the methods that will definitely bring the dispute to a settlement or completion. This is the case when both parties agree to bind themselves to the result of a method or procedure, before it has started.

Such a point of view would exclude all methods which have the potential but not the guarantee to resolve the dispute. Practically this would exclude all forms of consultation, mediation,[2] negotiation and the procedure before the ombudsman.

It is clear that in such an interpretation the scope of ADR would not only be too limited, it would even neglect the most important constituent part of ADR: to give a solution to the dispute, as efficiently as possible (Straetmans, 2000–2001, p. 381).

Although the term "resolution" has been translated as "beslechting" ("settlement"), this is not to be interpreted as if ADR is limited to only the "settlement of disputes" but actually as all methods that can bring about a "solution" of the dispute.

Binding or non-binding conflict resolution? In the doctrine all possible positions have been taken (Demeyere, 1996–1997, p. 524; De Wit Wijnen, 2000, p. 42). There are authors that make the distinction between binding and non-binding procedures and argue that only the binding, or inversely, only the non-binding procedures can be considered as ADR.

Author of this paper considers this distinction not relevant for the definition of ADR. The ultimate finality is to resolve disputes. Including binding as well as non-binding methods the scope of ADR creates for administration and citizen alike a greater and more versatile toolbox, which in turn contributes to the application of the best fitted method for each different dispute given its origin, nature and circumstances.

Intervention of a neutral third party? This aspect causes even more disagreement in the doctrine. To some scholars the presence of a third party is essential to be under the scope of ADR. Others do not consider it to be a constituent part of the definition.

2 With exception of mediation where both parties agree on forehand to consider themselves as bound by the outcome of the mediation.

The administration can, in principle, not transfer the powers attributed to administrate. The power to decide (how a dispute will be resolved) can, in principle, not be transferred; nor by giving the power to decide to a third, neither by agreeing to be bound by the outcome of a certain procedure.

Excluding every method where some power to decide is given to a third party or where the administration is to some extend bound by the outcome, would be a too narrow scope of study. As will be seen further it is precisely by the exploration of the limit of this principle and thus the determination of what is an actual "transfer of power" that a field of effective, balanced and legal methods for conflict resolution can be created.

For that reason, the fact of including a neutral third party into the scene should be no decisive element to fall under the scope of ADR (Beeldens, 2010, p. 260).

2.1.3 Constituent elements

Procedure not before a judge. The doctrine is unanimous in the characteristic that ADR offers a possibility to resolute a dispute by means of a procedure that does not take place before a judge, which is to be interpreted in the sense of art. 6 E. T. R. M.[3] Note that the formulation is not "without a judge" or "without the intervention of a judge". ADR can be applied when a judge transfers a case to a third party or a judge – mediator.

Contractual and voluntary base. Only an agreement can initiate ADR. This can happen when the dispute arises or already at the time the parties engaged in the original contract (Osman, 2010, pp. 69–71).

Confidentiality. Unless when parties agree otherwise, all methods of ADR are confidential in each aspect: the course, the exchanged information and the outcome. Any potential third party is bound by the same confidentiality. This heightens the possible effectiveness of ADR because parties can be more open about their interests, goals and potential concessions, without having to fear abuse (Europese Commissie, 2002, p. 8; Lodder, 2004, p. 836; Straetmans, 2000–2001, p. 381).

Flexible. Parties are free to choose if they will apply ADR, which procedure they will follow, which person or institution will be appointed as a third party, if any and, with exception of arbitration, remain master of the outcome.

2.1.4 Essence of ADR

The analysis of the different definitions allows to obtain the essential aspect of ADR. To this end, its final objective needs to be taken into account. Choosing for ADR means that the parties wish to cooperate, not only in order to put

3 This means not only civil and administrative judge but every organ attributed with judicial powers.

an end to the conflict, but as well to establish a modus vivendi to avoid new conflicts and thus securing their relationship for the future, or at least trying to do so (Smets-Gary & Becker, 2012, p. 30).

The definition that poses the least constrictions will offer the most possibilities for citizens and administration to find a method appropriate for the specific circumstances of the parties and the conflict. So, ADR can be described as: "resolving conflicts by other methods than a judicial procedure".

2.2 ADR in administrative law

2.2.1 Reasons for ADR in administrative law

The rise of ADR in administrative law (Beeldens, 2010, p. 260) has been initiated and backed by an increasing horizontal nature of the relationship between citizen and administration. Instead of a strict vertical relationship there are more and more contractual and bilateral relations (Hubeau, 2000–2001, p. 414; Beeldens, 2010, p. 261). This needs a creation of shifted mindset in which reciprocity gains value. In this view negotiating with the administration about administrative actions instead of simply undergoing them becomes conceivable, acceptable and with time normal.

Application of ADR in the run-up of an administrative action has multiple advantages. Consultation and negotiation strengthen the effectiveness of the decision because it contributes to a decision that is more in tune with the concrete circumstances, which in turn helps the acceptance and compliance (De Geyter, 2005, p. 802). As a result less conflicts are to be expected afterwards.

Success of ADR is due as well to a diminishing faith and legitimacy of the judiciary as conflict resolving institution. ADR can also be seen as an attempt to avoid and diminish the overcharge of and the congestion in the courts. Furthermore, judicial procedures are time-consuming, expensive and the trust in the expertise of the judges has eroded (Hubeau, 2000–2001, pp. 414–415; Beeldens, 2010, p. 262).

Specifically relative to ADR in administrative law, the nature of administrative procedural law stimulates the use of ADR. In principle the administrative judge will examine and evaluate the administrative actions separately and not in their interconnectivity (De Geyter, 2005, p. 774). The regularity of the action will be the criterion whilst it is not possible to consider the possible alternatives or the examination of the action in the context of a global project.

In general the choice for ADR instead of judicial or administrative appeal constitutes a choice against head-on confrontation and for dialogue, cooperation and a sound mutual relationship in the future. While the development of ADR is a result of the increasing horizontal nature of the relationship between citizen and administration, ADR has in itself the effect

of facilitating and improving this reciprocal relationship because dialogue, communication and mutual understanding are stimulated.

2.2.2 Evolution

The concrete ADR methods that can be found in Belgian administrative law have not been the product of a general or unified theory, rather they are a patchwork of specific and limited procedures developed each time to face a specific problem (Hubeau, 2000–2001, p. 442).

ADR can be found in the regulations concerning local administrative sanctions, fiscal disputes, the right of education, environmental protection, urban development, social protection, housing, institutional consultation structures between the federal and regional authorities.

The development has carried on without a firm doctrinal base to answer fundamental questions concerning the compatibility between ADR and the specific principles governing the administrative law.

In contrast, concerning the methods of ADR in consumer related fields of commercial disputes, Belgium has led the way in developing "*Belmed*" which stands for "Belgian Mediation" (Voet, 2011, p. 1439). This is an online platform for the promotion and accessibility of Alternative Dispute Resolution and Online Dispute Resolution. It is not only aimed at helping individual consumer and entrepreneurs remedy their disputes by steering them to an appropriate method of ADR. In doing so the platform generates statistical information useful to identify domains in which requests for ADR are frequent, while no specific procedure is in place. Furthermore, numerous similar requests can indicate the existence of a collective problem.

In an intertwined process the strengthening of the theoretical base of ADR in administrative disputes can support the creation of a "sister-platform" for administrative disputes, while such a platform and the information that it generates will help to further develop the doctrine. It can contribute to the identification and development of best practices, the quantification of actual usage of ADR in public law and the deepening of the understanding of how this impacts the traditional conception of the relation between state and citizen.

2.2.3 Compatibility of ADR and administrative procedural law

ADR in administrative law

The application of ADR in private law is widely accepted in Western European countries; it is based upon the following principles: the autonomy of the parties in civil procedures, the agreement between parties to apply ADR, the fact that only the concerned parties are bound by the outcome, ADR doesn't diminish the legal protection of the citizens and there is a certain amount

of control by the civil judge over the course and outcome of the ADR (Pront-Van Bommel, 1997, p. 22).

The main objective of administrative procedural law is to offer legal protection to the justice seeking citizen. Both parties have and keep their autonomy. The citizen decides freely whether or not to initiate a judicial procedure, to stop or continue the procedure, what the object is of the procedure and if he chooses to appeal against the rendered decision (Pront-Van Bommel, 1993).

The administrative body keeps the competence to choose its action after an administrative judicial procedure. Even the annulment of the original decision doesn't impose a determined course of action to the administration. The administrative judge has no task in controlling or imposing his judgments.

In many cases the objective can be obtained without the intervention of a judge. Rarely the objective is obtained solely by a judgment and a new administrative action is needed. This means that the administrative judge has a secondary position, which is the reverse of the autonomy of the parties.

The secondary position of the judicial administrative procedure is emphasized by the fact that administrative jurisprudence can only take place after an administrative action has been taken and conditional to the completion of the organized administrative appeal procedure, if any provided (Veny et al., 2009, p. 521; Mast et al. 2012, pp. 1136–1137).

In essence there is only a role to play by the administrative judge when the realization of the legal claim by the citizen is depending on an action by an administrative organ that refuses the necessary cooperation (Pront-Van Bommel, 1997, p. 32).

The secondary nature of the administrative jurisprudence leads to the permissibility of ADR relating to administrative conflicts. Parties that are free to decide upon their judicial position must be considered to be free to choose other courses of action than those offered by the administrative jurisprudence.

Impact of the specific nature of administrative procedural law

Administrative procedural law is characterized by the unilateral nature of the legal protection, the specific protection of third party interests and the importance of legal certainty.

The unilateral nature of the legal protection is demonstrated by the fact that only citizens with a personal and direct interest can appeal against an administrative action (Van Mensel, 1997, p. 122). The administrative body as a defendant cannot introduce a counterclaim. This doesn't prevent the application of ADR. Agreement between both parties justifies the choice for a reciprocal relationship. Any administration or administrative body must have the general interest as its objective and no rule inhibits the citizen to allow

the administration the possibility to introduce counterclaims during the course of ADR.

In administrative procedural law the position of third party interests is more protected than in civil procedural law. The material component of the third party's specific protection exists in the obligation of the administrative judge to apply the regulations for the protection of the public order. Each rule that protects interests of third parties that are not engaged in the procedure, is to be considered to protect the public order. On the procedural side the protection consists of a large access to the administrative judge for citizens.

This doesn't lead to the incompatibility of ADR because third parties are not bound by the outcome of the ADR and their right to appeal the original decision is not affected.

As to securing legal certainty, administrative procedural law makes important concessions to the legal protection of the citizens. Short terms of appeal are applicable and administrative decisions are, until proven otherwise, considered to be legal (Flamme, 1995). The use of ADR doesn't affect these elements. Even when in the context of the initiation of ADR administration and citizen agree that the normal procedural terms for appeal will be suspended, the contractual base prevents third parties to be bound by this agreement.

2.2.4 Conclusion

There are multiple reasons and circumstances that have led to the development and use of ADR in administrative conflicts. The specific nature of administrative procedural law does not lead to the exclusion of ADR in administrative conflicts.

Still it is important to point out that ADR is not appropriate or possible for all administrative conflicts, e.g. when the parties wish to create a precedent, given the confidential nature of ADR, or when the administration exerts a bound competence and there is effectively only one possible decision it can legally take, ADR has no added value.

2.3 Legal problems and limitations

2.3.1 Power of disposal

In principle, administrative bodies have not the power to dispose their competences and have the obligation to apply them with the general interest as finality. The constitution and the laws indicate what is attributed, how it should be exercised and that no agreement can be made concerning the way an administrative body will exercise its powers.[4]

4 Art. 6 and 1128 Civil Code and art. 33, Belgian Constitution.

As stated earlier, the scope of ADR in administrative law would be very narrow if we are to stop here.

An administrative body cannot by means of an agreement engage itself to definitely take a certain administrative action in the future. It is obliged to take the action that best serves the general interest. If the administrative body has already bound itself before in the private agreement to take a particular action in the future, it could no longer make a genuine evaluation at the time the decision is to be made, since it would no longer have a choice.

This problem can be easily overcome by the incorporation of a reservation in the agreement concerning the decision that will be finally taken.

2.3.2 Value of the agreement

If the administration systematically incorporates reservations in the agreements that are the result of ADR, how should their value be determined?

The administrative body has at least engaged itself. The application of the principles of protection of legitimate expectations and duty of care means that the administrative body can no longer, without good reason, deviate from this engagement. There is a contract with legal value. So, if the administration, without good reason, neglects this agreement, the other party will be entitled to compensation based on contractual liability.[5]

The same principle of duty of care has a backside. It imposes on the administration the obligation to take into account all relevant facts (De Geyter, 2004, p. 472), which means also all new relevant elements that have emerged after the closing of the contract. These new aspects can have an impact on the evaluation on how the general interest is best served and ultimately bring the organ to take other action than the one it has conditionally committed itself to in the agreement.

Besides the strict legal value of the agreement, the use of ADR has a larger positive effect. Not only the enforceability of the agreement is relevant. Negotiation, consultation and mediation as methods of ADR stimulate dialogue between the parties and lead not only to more clarity but even so to better mutual understanding (De Geyter, 2005, p. 802).

2.3.3 The relevant interests

In ADR procedures the administration and one or multiple parties are involved. Nevertheless the administration needs to decide in order to safeguard the general interest, which means not only the interests of the parties directly involved in the conflict but also those of the indirectly affected.

5 Council of State, 3 April 1984, nr. 24.210–24.226, Boogaert.

Since ADR is mostly informal there is a greater possibility to include parties that do not meet the strict legal conditions to be considered as having an interest in the context of a judicial procedure. The more relevant actors are involved, the more the outcome will ensure legal certainty (Lancksweerdt, 2003, p. 156).

Under the current legislation, there are no obligations for participation, consultation or transparency when closing agreements. Third parties, not involved in the ADR, can be affected in their interests by the agreement.

This means that such third party can initiate an administrative judicial procedure to annul the administrative action taken in execution of the agreement. An annulment can lead to financial liability for the administrative body.[6]

In the absence of legislative remediation, it is advised to both parties in ADR to be well aware of this pitfall and to make an effort to include as many interested parties as possible, in order to heighten the legal certainty of the agreement.

2.3.4 Compulsory public law framework

Legality

The rule of law, as applicable in Belgian legal order, imposes several restrictions as to what a specific administrative body can do. The relation between the different rules and regulations is dominated by the doctrine "hierarchy of legal norms", which is a fundamental principle of the legal order.[7]

Within the context of ADR, this means that an administrative body, when closing a contract, is held to respect and execute all present written and unwritten rules. Given the fact that many outcomes of ADR are never made public, it is in praxis possible to deviate from these rules if it is never brought before a judge. The limits to this deviation are the rules protecting the public order; these cannot be neglected.

In order to avoid problems in this respect, it is advised to clarify the relationship between the agreement and the existing legal framework, in the agreement itself, e.g. by mentioning the different administrative actions that need to be taken and which legal conditions surround these decisions. Doing so strengthens the realization that the engagements in the agreement are conditional (De Geyter, 2005, pp. 783–784).

Every administrative body is held by the rules it has made itself: "*patere legem quam ipse fecisti*". Not only the regulations made by higher authorities limit the field of action by the administrative body. In an agreement the

6 Council of State, 3 April 1984, nr. 24.210–24.226, Boogaert.

7 Council of State, 10 September 1998, nr. 75.710, de Vereniging zonder winstoogmerk Gemeenschappelijk Verbond van de Verenigingen voor natuurbescherming.

administrative body cannot deviate from the regulations it has promulgated itself.

The attributed nature of the powers of the administration implies that administrative bodies, when closing agreements in the context of ADR, are obliged to follow the separation of powers as it is incorporated in the constitution and the special laws containing the reformation of the institutions.

The constitutional stipulation that all powers must be exercised in the manner determined by the constitution, is interpreted as containing a prohibition for the administration to delegate their powers (Van Mensel, 1997, p. 44). Delegation is defined as "transfer of the power to decide" (Veny et al., 2009, p. 241). This would mean that arbitrage and every method of ADR where the decision is left to a third party, is impossible.

Here a remedy can be found in transferring the power within a preset legal framework which stipulates that the outcome of the ADR will be considered as a preparatory action leading to an actual administrative action, in which the outcome of the ADR is reprised.

When doing so, the administrative body formally stays responsible (De Geyter, 2005, p. 786) and remains master of the power to decide because it can decide whether to present the conflict to a third party. It also decides at the end if it makes the decision of the third party its own by incorporating it in an administrative action. In doing so the formal legal base of the decision is not the verdict by the third party but this administrative action. Thus, formally the decision is taken by the administrative body and not the third party.

Principle of changeability

The administrative organization and functionality can always be changed to meet the variation in needs to serve the general interest. Changes in policy are needed when the demands, imposed by the general interest, change in time (Mast, 2012, p. 107; De Staerke, 2002, p. 77).

If necessary, administrative body can unilaterally change the terms of the agreement made in the context of ADR. In this case, as a contracting party, it can be held accountable to remediate by means of a financial compensation to the civil party.[8]

Nevertheless, the effects of this principle can be softened (De Geyter, 2005, p. 787). The administrative body can explicitly incorporate in the agreement that new elements will only be taken into account if they have a significant impact on the conflict. Furthermore, the longer the delay is between the agreement and the administrative action(s) that execute it, the higher the risk that new and significant facts arise. If the administrative body takes it

8 Council of State, 3 April 1984, nr. 24.210-24.226, Boogaert.

up on itself to take the agreed action within a fixed term, the effects of this principle can be reduced.

General principles of sound administration

Administrative actions need to meet the demands set by the general principles of sound administration. They have a determining influence on the relation between citizen and government and are applicable when the administration acts within a public or private law framework.

Principle of duty of care

In the context of ADR this principle implies that a party contracting with an administrative body needs to have a clear idea about the legal status. The information provided by the administration should be correct. This principle works in two directions. It obliges the administrative body to take all relevant facts into account and on the one hand there is the contract but on the other hand there are new elements that might have arisen in the delay between the time of closing the agreement and the time an administrative action is taken to execute it. The administration can temper the effects of this principle the same way as the impact of the principle of changeability.

The principle of reasonableness

Each administrative action must be able to withstand the test of reasonableness that can be executed by the administrative judge.

The margin of appreciation by the administration can show great variation given the concrete measure in question. In testing the reasonableness the judge must beware not to enter the domain of policy-making. This is why the judge exercises restraint and the principle will only be considered as breached if the judge decides that no reasonably thinking person would make the same decision in the given circumstances (Boes, 2006, p. 175).

Applied in ADR procedures, the principle means that the administrative action cannot render effects to one or more interested parties that are disproportionate to the objective of the action. To avoid such judgment the administration needs to take into account the interests of all concerned parties to the conflict but even so the interests of not directly involved thirds that could be effected by the result of the solution to the conflict.

This is another reason why it is recommended for the administration initiating a procedure of ADR to make an effort to include as many interested thirds in the process as possible.

Principle of equal treatment

It is a fundamental principle that similar cases should be treated similarly.[9] This can lead to restrain the administration from the application of ADR because it might stimulate citizens in other conflicts to demand the same treatment and solution.

Equality possesses an even greater risk for the administration given the potential precedent effect: when concessions are made in the course of ADR relative to one citizen, what is there to stop all others subject to the same administrative action to demand to be treated equal and thus all receive the same concession.

However, parties can for a great deal remediate this risk themselves: as a major condition for applying the principle of equal treatment is that the cases are the same, this will not be so if the parties during the ADR make an effort to make their conflict sufficiently unique by the way they describe it (Lancksweerdt, 2003, p. 159).

The confidentiality that in principle is part of ADR can also reduce the fear for and impact from the precedent effect.

Administrative transparency

Confidentiality is a key in the applicability and effectiveness of ADR. However the principle of administrative transparency is a constitutional right in Belgium and has been elaborated in the legislation as a right of the citizens to actively request specific administrative documents.[10]

There is no exception for documents relative to the proceedings during ADR. To this day, no satisfactory general and formal *modus vivendi* has been established between these two principles. For the specific ADR method of the ombudsman, the internal rules of operation stipulate that only the elements accepted by both parties will be put in writing and immediately signed.[11] In this case they are binding.

All documents that precede a certain administrative action can be requested and obtained by every citizen, within the conditions set in the relevant legislation. Since the action executing the agreement will take the form of an administrative action, the agreement itself will fall under the scope of the documents that can be obtained by the public.

Furthermore, to the extent that the content of the administrative action is determined by the agreement, the duty to formally state reasons in individual

9 As incorporated in art. 10 and 11, Belgian Constitution.

10 Art. 32, Belgian Constitution; Act of 11 April 1994 concerning the openness of administration, Official Gazette (OG) 30 June 1994; Decree of 26 March 2004 concerning openness of administration, OG 1 July 2004.

11 The internal rules of operation of the committee of the Federal Ombudsman of 19 November 1999, OG 27 January 1999.

decisions[12] will oblige the administration to incorporate these elements of the agreement in the decision.

2.3.5 Bound or discretionary power

The measure to which an administration has bound or discretionary power in the execution of its powers, has a determining impact on the possibility to use ADR.

Per definition bound powers mean that the administration has no choice whether or not to take a certain action. It can only take note of the fact that the conditions set in the legislation have or have not been met and act accordingly (Boes, 1993, p. 92).

Since the administration has no choice an ADR is in principle impossible because there is nothing to negotiate about.

Executing discretionary powers means that the administration has to make a choice as to what it considers to be the most appropriate action.[13] If there is a choice, there is room to maneuver so ADR can be applied to help making this choice.

However, redefining the conflict can turn the content from a bound power to a discretionary power. A conflict concerning an expropriation for example leaves no margin of appreciation; when the conditions are met, the expropriation needs to take place. ADR cannot lead to a different result and is therefore useless. Nevertheless, the parties could redefine the conflict as not concerning the decision to expropriation but having as subject the size of financial compensation and other modalities like delays and method of payment (De Geyter, 2005, p. 799). As flexibility is a key characteristic of ADR, this extends equally to a large freedom in determining what the parties consider to be the actual conflict.

2.3.6 Competent administrative body.

ADR will lead to nothing if the right persons do not partake in the procedure. The outcome of negotiations or mediation by a person inadequate to bind the competent administrative body, will be of no value.

The competent administration needs to be present. This points to the different administrative entities on the many governmental levels that Belgium enjoys: federal, regional, provincial and local. Within the appropriate level of government a competent administrative body needs to be established. If the conflict or the potential solution invokes multiple administrative actions, then the competent department for each of these should be present.

12 Act of 29 July 1991 concerning the formal statement of reasons of administrative acts, OG 12 September 1991.

13 Council of State, 8 July 1982, nr. 22.446, *Zoete II.*

The competent administration needs then to be represented by the appropriate body; a person with the capacity to bind the concerned administration.

2.3.7 Interplay between ADR and the delay for appeal.

There is a general applicable delay for requesting an annulment of an administrative action before the Council of State[14] and a multitude of specific delays in the context of the variety of administrative appeals. Some of the administrative appeals need to be introduced and completed as a condition to have access to the annulment procedure before the Council of State (Veny et al., 2009, p. 521; Mast et al. 2012, pp. 1136–1137).

To strengthen legal certainty, the delays for appealing administrative actions are short.

Potentially ADR can be initiated and completed before the delay is finished, but this is not likely. If it does not lead to a satisfying result for the citizen, his right to appeal evaporates. Even when an agreement – leading to a new administrative action – is reached, the surpassing of the delays for appeal can be problematic. The original decision cannot always simply be withdrawn. If the administrative action is not stained with an irregularity and it grants rights to third persons, the administration has not the right to withdraw it (Mast et al., 2012, p. 893; Vandamme, 1996; Vandamme & De Kegel, 1997).

For these reasons it is better to launch an appeal although ADR is being undertaken. It creates more time for ADR, notably until the closure of the debates. The parties keep their rights; if ADR fails, they can still fall back to appeal procedures. In the situation where the original administrative action is not stained with an irregularity, it grants rights to third persons and the outcome of the ADR is among others that it needs to be withdrawn and the appeal procedure will be necessary to materialize this part of the agreement.

3 Conclusion

Application of ADR is increasing in administrative law because of the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. A definition of ADR with the least restrictions offers the best conception for designing the most appropriate tool for all specific disputes.

The reasons and advantages for ADR in private law equally extend to its use in administrative law, where they can sometimes be applied with even greater significance.

14 Art. 4 of the Ordonnance of the Regent of 23th Augustus 1948 concerning the internal procedure of the Administrative Section of the Council of State, *OG* 23–24 Augustus 1948 & Art. 14 of the coordinated Acts concerning the Council of State of 12 January 1973, *OG* 21 March 1973.

When applied in administrative law ADR offers possibilities in examining a dispute beyond the boundaries of a specific administrative action and in its full complexity. Resolving disputes by pacifying them based on mutual agreement and dialogue will result in a more stable relationship between government and citizens in the future, which will have positive spill-over effects in society as a whole.

The actual rules and principles incorporated in Belgian administrative procedural law do not prevent alternative methods of dispute resolution. Nevertheless, the specific nature of a compulsory public law framework has an impact on the concrete application of ADR in administrative law.

At every step of the way, the administration needs to be aware that, notwithstanding the fact that it is engaged in a contractual relation, its principle objective is to safeguard and serve the general interest. This has its effects on reservations in the agreements resulting from ADR, the need to involve relevant third parties in the process, the conditions in which a neutral third can be appointed with a degree of power to decide.

Given the flexible nature of ADR, these aspects should not be seen as merely restrictions; instead, they are the contextual elements that, once taken into account by the administration, still offer a wide scope for the government in which to resolve disputes in a variety of alternatives, by allowed methods whenever this is deemed appropriate and without endangering the legal certainty of the parties involved or others. In an intertwined process the development of an information and research platform similar to "*Belmed*" would generate data capable of substantially strengthening the general theoretical framework and facilitating the daily usage of ADR in public law.

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POVZETEK

1.02 Pregledni znanstveni članek

Pravni okvir glede alternativnega reševanja sporov v belgijskem javnem pravu

Ključne besede: alternativno reševanje sporov, pravni problemi in omejitve, upravno procesno pravo

V belgijskem upravnem pravu se uporaba alternativnega reševanja sporov povečuje in se hkrati uveljavlja tudi bolj dvostranski odnos med upravo in državljani, za katerega sta značilna vzajemnost in dialog. Specifična narava javnega prava pa povzroča specifične pravne probleme in omejitve. Članek raziskuje te omejitve in njihove priložnosti kot prispevek k ustvarjanju teoretičnega okvira za alternativno reševanje sporov v upravnem pravu. Članek omogoča pregled te aktualne teme v mednarodnem kontekstu.

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Mediation in Belgian Administrative Practice, with Special Focus on Municipal Administrative Sanctions and Urban Planning

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ABSTRACT

Given Belgian legal doctrine, the rise of mediation in other legal disciplines, and the influence of the EU, the call for mediation in administrative practice is increasing in Belgium. The proposed framework for ADR in the legal doctrine at the beginning of this century was the start of the increasing use of mediation in Belgian administrative law. This contribution is a study of these new forms of mediation as they occur in Belgium in the year 2014. On the basis of two examples (mediation in municipal administrative sanctions and urban planning), administrative mediation and the associated problems are outlined.

Key words: mediation, Alternative Dispute Resolution, municipal administrative sanctions, urban planning

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1 Introduction

The rise of mediation. Mediation is one of the oldest forms of dispute resolution (consider, e.g., the Old Testament, or the Laws of Solon). Last decades, mediation is a tremendous success in several branches of Belgian law. The first legal framework for mediation was introduced with regard to

criminal matters.[1] Furthermore mediation appears in social affairs,[2] in family matters.[3] In 2005[4], a general law on mediation finally came into effect in private law, again as a result of a European stimulus.[5]

Europe continues down this path. Not only in the context of its access-to-justice policy, but also because of the other mentioned benefits of ADR.[6] Emphasis is put on the confidentiality of mediation[7], the suspension of the limitation period[8], the importance of a legal framework[9] and the A call for mediation in Belgian administrative practice and the obstacle presented by the compulsory public law framework

The call for mediation in administrative matters. On the above-presented background, it became clear that mediation in administrative law should not lag behind the trend. Calls for mediation in administrative matters rose after increasingly common annulment judgments with far-reaching social consequences. The example par excellence was the annulment on 28 April 2011[10] of the planning-permission/building permit granted in 2007 for a tram line, following a complaint from a local resident when the works were already two-thirds complete.

Other examples include the decision of the city of Antwerp regarding the compulsory retirement of a staff member, who was not contacted about the decision for five years and all the while remained at home waiting for new work orders.[11] Another example is the annulment of the dismissal of a police inspector who had been criminally convicted for attempted extortion and fraud, due to the violation of language legislation.[12]

Both among politicians and in the media a storm of criticism blew up around the strictly legalistic approach of the Council of State, which seemed to have no regard for the social consequences of its judgements. But on such case law,

1 Act of February 10, 1994 regulating the procedure for mediation in criminal cases, *Belgian Official Gazette* April 27, 1994.
2 Act of July 5, 1998 on the collective debt settlement and the possibility of sales from the hand of the seized goods, *Belgian Official Gazette* July 31, 1998.
3 Act of February 19, 2001 on the procedure mediation in family matters, *Belgian Official Gazette* April 3, 2001.
4 Act of 21th February 2005, *Belgian Official Gazette* March 22, 2005.
5 Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, to consult on http://eur-lex.europa.eu/LexUriServ/site/nl/com/2002/com2002_0196nl01.pdf
6 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 3–8.
Hereabout also: Vanderhaeghen, 2008, 6-7: Verbist, 2011, 6-39.
7 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 5.
8 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 5.
9 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 3.
10 Council of State 28th April 2011, n°. 212.825.
11 Council of State 9th June 2011, n°. 213.776.
12 Council of State 15th March 2012, n°. 218.494.

the Council could not be judged by its critics. After all, the limited suspension and annulment competences of the Council of State were not designed to be effective for factual dispute resolution. Above all, it became clear that administrative mediation prior to a judicial procedure could play an important role.

Mediation in administrative matters: a useful tool. Mediation, as a form of alternative dispute resolution in administrative disputes, has many advantages. The conciliation procedure is usually quicker and cheaper than court proceedings, and often leads to durable solutions, since in theory everyone agrees with the solution. The outcomes of mediation also meet the real interests of the person concerned, as some interests cannot be addressed in a judicial procedure. Mediation can also improve or restore the relationship between the parties concerned, who are more often satisfied if the case is amicably resolved.

In order to demonstrate the relevance of mediation in administrative matters, the case of the tram line can once again be cited as an example. Since the neighbour was not arguing a matter of principle, mediation could have presented a solution to the dispute. The ruling of the administrative court was based on a legal problem, in particular the illegal exemption from preparing an Environmental Impact Study. However, the local resident merely feared that the infrastructural works would disrupt his street; he had no problems at all with the tram line as such, and even suggested in the media that it was not his intention to shut down the works, either in the short or the long term. The question must therefore be raised whether the local resident and the government could have solved the problem by means of a conciliation procedure, without addressing the legal issue. It is clear that a legal procedure could have been avoided if prior administrative mediation had occurred.

Mediation in Belgian doctrine. Although mediation in administrative law has no general legal basis in Belgian law, De Geyter created a basis for mediation, as a form of Alternitive Dispute Resolution, in Belgian law.[13] The doctoral thesis by De Geyter (2006, p. 366), under the supervision of Professor Veny, titled "Mediation in administrative law: alternative methods to resolve administrative disputes". In the first part of his thesis, the author describes the different definitions of Alternative Dispute Resolution (ADR), the elements identified as constituent and those that are regarded as not constituent, and why ADR is useful in Belgian Public Law. The second part of the dissertation deals with the compatibility of ADR and administrative law (i.e., compatibility of ADR and administrative procedural law and the legal problems and limitations of ADR in administrative law). De Geyter examined these issues in order to create a theoretical framework for ADR in Belgian administrative law. Since the thesis deals with these aspects extensively, they are only briefly introduced in this paper for the foreign reader to prove

13 See for example: Veny et al., 2009; Warnez et al., 2014.

that mediation as a form of alternative dispute resolution is not evident and to show why mediation has not been extensively implemented in Belgian administrative law.

The thesis also makes a first step towards mediation in administrative law. Because of this doctrine, the rise of mediation in other legal disciplines and the European influence, the call for mediation in administrative law is increasing in Belgium.

Mediation in administrative matters: restrictions. Not all disputes are suitable for mediation in administrative matters. First, suitability obviously depends on whether both parties are willing to talk and reach a solution which is desirable for all parties. Secondly, discretionary competences should not be involved in order to ensure the decision is fixed by law and cannot change. Finally, the applicant must not be intending to set a precedent.

In addition, there are still numerous other legal restrictions. In De Geyter's doctoral thesis mentioned above these restrictions are described in detail.[14] The author argues inter alia that Belgian government cannot freely decide its competences; this restriction stems from the Constitution, on the one hand, and the civil code on the other. Government may therefore not relinquish its powers and should exercise these in the public interest. As a solution, it is suggested that in the agreement on the resolution of the dispute a reservation should be included, i.e., a certain commitment on the part of the government that may not be deviated from without good reason, and which is part of the general interest. Furthermore, the government must always act within the framework of mandatory public law, and will therefore have to take into account the hierarchy of legal norms, the general principles of good governance, and the principle of open government, among other things. Another important limitation is the scope of mediation in relation to third parties/stakeholders. Mediation can only apply between two parties, although the effects can still stretch to third parties (De Geyter, 2005, pp. 772–773).

Given the extensive contribution of De Geyter and others, it is not the intention of this paper to discuss the legal problems and limitations of ADR in administrative law and the compatibility of ADR and administrative procedural law; we therefore refer to the relevant legal doctrine.[15]

Instead, the paper concentrates rather on characteristics of mediation and its problems in practice. Therefore, it is important to define the concept of "mediation" first of all.

14 De Geyter, 2006, pp. 119–175; also De Geyter, 2005b.

15 See Allemeersch et al., 2005, pp. 9–57; Andersen et al., 2002, p. 285; Caprasse, 2006, pp. 21–26; De Leval et al., 2005, p. 178; De Geyter, 2006, p. 366; De Geyter, 2005a; De Geyter, 2005b; Goovaerts & Thielmans, 2000, p. 361; Hubeau, 2001; Lancksweerdt, 2003; Lancksweerdt, 2010; Lancksweerdt, 2006; Lindemans, 2003, p. 255; Vanderhaeghen, 2009; Van Ransbeeck, 2008, p. 277.

2 Mediation Defined In Belgian Doctrine

In France and the Francophone part of Belgium, "mediation" is used to describe the job of the ombudsman; the French *"défendeur des droits*" is the French national ombudsman, while in Belgium the federal, and of course the regional ombudsmen are called *"médiateurs*". It seems that mediation is limited to the services delivered by ombudsmen. One rare Anglophone article follows the francophone approach and considers both the French and the Belgian ombudsmen to act as mediators. The article states that mediation in France cannot be considered as being widely and successfully applied in administrative courts; however, the system of institutional mediators, as well as well as the institutional *défendeurs des droits* (and previous *médiateurs de la République*) and their practice, support the finding that the practice of mediation in disputes arising between public authorities and citizens is well established in France. The authors conclude that this system tends to be one of the best examples of the implementation of mediation in the administrative sphere (Kavalne, 2011, pp. 251–265). An *ordonnance* of 16 November 2011 defines mediation and establishes a common regime for all mediations in order to contribute to the development of ADR in France.[16]

In the Netherlands and in Flanders, on the contrary, mediation is considered to be a kind of alternative dispute resolution, and excludes the ombudsman's work. When we look at the situation in other countries, we find that in the United Kingdom, mediation in the "Dutch" sense is still rarely used in public law litigation. Evidence shows that although some public law cases are also suitable for mediation, there is a lack of confidence among practitioners and officials in identifying them. Even if they do identify suitable cases for mediation, practitioners are then faced with the challenge of persuading the other side to agree. The usage of mediation as an alternative dispute resolution method in solving disputes between citizens and public authorities is continually applied in the United Kingdom. Moreover, analysis of documents recently adopted by the public authorities confirms a prospective application of mediation in disputes between public authorities and private parties.

In Germany (Trenczek et al., 2012, pp. 61–70) and Austria mediation is mainly applied in civil (commercial and family) and criminal procedures but is unknown in public law. Although the Spanish mediation regulation defines *"mediación"* very largely as *"aquel medio de solución de controversias, cualquiera que sea su denominación, en que dos o más partes intentan voluntariamente alcanzar por sí mismas un acuerdo con la intervención de un mediador"*, it is only applied in civil and mercantile matters.[17] Only in the spring of 2013, proposals were launched and a pilot project established to apply mediation between citizens and public administration. As for the Portuguese situation, mediation occurs

16 Ordonnance de 17 Novembre 2011 fixant un cadre général à la médiation, JORF n° 0266.

17 Art. 2, Real Decreto-ley 5/2012, de 5 de marzo, de mediación en asuntos civiles y mercantiles. Boletín Official del Estado, 6 March 2012

in civil and mercantile matters, too. Some would consider the ombudsman – the *"Provedor de Justiça"* – as a mediator. The Portuguese ombudsman himself considers the power to foster initiatives of concertation and mediation as a characteristic quality of the ombudsman function.[18]

For the scope of this paper, what should be understood by "mediation"? A quick overview of West-European public law shows that this term has a lot of different meanings. Some would consider ombudsmen's tasks to be a means of Alternative Dispute Resolution; others would argue that ADR is anything but an ombudsman's work.

In our opinion mediation should be described as "an alternative way to resolve conflicts between two or more persons, based on consensus and with assistance, which is organized by a neutral, impartial and independent third party that does not use any method of coercion, but possesses a right to examine and to make recommendations and tries to reconcile the parties in order to facilitate, structure or coordinate the voluntary search for a solution, and that tries to achieve a lasting solution which the parties have agreed upon voluntarily, because it takes into account the mutual interests and viewpoints" (De Geyter, 2005b, pp. 763–764).

3 The Characteristics of Mediation ond Their Appearance in the Imposition of Municipal Administrative Sanctions (MAS)

It is important to note that the described form of mediation in this contribution does not take place in court and therefore is a form of alternative dispute resolution. The characteristics of mediation given below are common elements derived from the various forms of mediation in the various branches of public law (such as the regulations concerning municipal administrative sanctions, the right of education, environmental protection, urban development, social protection, housing, institutional consultation structures between the federal and regional authorities, etc.) (Lancksweerdt, 2003, pp. 103–105; Santens, 2005; Lancksweerdt, 2005). Nevertheless, they do not appear to the same extent for each of these forms of mediation.

The following are the essential features of mediation:

- A voluntary process ("mediation agreement");
- The presence of an independent, impartial and neutral third party ("mediator");
- The search for a satisfactory solution;
- A clear communication process;
- Taking into account the underlying interests;

18 X, Portuguese Ombudsman – Report to the Parliament – 2010, Lisbon, The Ombudsman's Office 2011, 26.

- Equivalence between the parties;
- No strict legal approach to the conflict;
- The confidentiality of mediation.

To explain the features in an understandable way and to show that a difference may exist between the desired theory and used administrative practice, these characteristics are explained on the basis of the mediation form of the law on municipal administrative sanctions. We opted for MAS mediation since it is an excellent example of how citizens come closer to the government through mediation in Belgium. The empirical study of mediation in the procedure concerning MAS shows that the use of mediation is increasing significantly. In the district "Geraardsbergen", for example, the use of MAS mediation increased from 122 cases in 2010 to 210 cases in 2012. In other districts, we see a similar increase.[19] In 2011 129 cases of MAS mediation were closed in the district "Leuven". Only in 11 cases no agreement was reached. [20] The increasingly horizontal nature of the relationship between citizen and administration is therefore one of the main reasons for the rise of administrative mediation. Another important reason is the attention of the legislator for the main features of mediation in the MAS procedure. The characteristics are necessary to successfully complete mediation.

3.1 An introduction to the regulation of municipal administrative sanctions (MAS)

As described in the recent legislation on municipal administrative sanctions,[21] every municipal council has the power to counteract local nuisance using municipal administrative sanctions (MAS). Examples include street litter, vandalism or dog fouling on public roads. The law provides various municipal administrative sanctions but MAS mediation is only possible with the imposition of an administrative fine.

The legislation was introduced with the aim of counteracting the impunity of small nuisances. In the mainstream justice system these often went unpunished. In essence, municipal administrative sanctions have a mainly repressive character, and mediation has to be seen as a balance to this (De Schepper, 2013, pp. 118–119).

As previously stated, mediation is only possible during the procedure to impose fines. In the law, it is also referred to as "local mediation". Mediation should not be confused with the right to oral defence.[22] In the case of a minor

19 In the district "Ghent" there were 188 cases in 2011 and 401 in 2012. The cases in the district "Dendermonde" increased from 94 (in 2011) to 148 (2012).

20 Bemiddelingsdienst Arrondissement Leuven (2011). Jaarverslag, 8–9 (to consult on www.alba.be).

21 Act of 24th June 2013 concerning municipal administrative sanctions, *Belgian Official Gazette* 1 July 2013 (hereafter abbreviated as "MAS Act").

22 Cf. art. 25, §4 MAS Act.

offender of 14 years and older, the local government is required to present a mediation proposal.[23] The legislation does not allow municipal administrative sanctions for offenders younger than 14 years of age, and therefore there can be no question of mediation in these cases. Although mediation is not an obligation for adult offenders, it is widely used in practice. To illustrate: in the district »Leuven« there were 46 minors and 81 adults offenders involved in MAS mediation.[24]

The success of the MAS mediation means that the municipal administrative fine cannot be imposed. The imposition of a penalty after successful completion of mediation would undermine the mediation process, the powers of the mediator and especially the decision of the parties.

Several definitions of mediation can be found, but the MAS Act defines mediation as "a measure, caused by the intervention of a mediator, that allows for the offender to repair the damage or to indemnify or to calm the conflict".[25]

3.2 A voluntary process (*"mediation agreement"*)

A voluntary approach is an essential requirement of mediation and its importance cannot be stressed enough. The voluntary approach applies to all the participants in the mediation. The offender may not be led to participate in the conciliation with the threat of a (higher) penalty in the event of non-participation, as this would be improper. The victim must also choose whether he/she wishes to participate in the conciliation procedure, and decide whether a conciliation procedure can serve his or her interests.

Voluntary does not mean absolute permissiveness for the parties. Once they have agreed to proceed to mediation, the parties must act in good faith. This means actively and constructively contributing to finding a solution (an obligation to perform to the best of one's ability).

MAS mediation for minors aged 14 and over is always provided (*supra*). In the case of adults, this is only provided if the local government has explicitly defined the possibility of mediation in its local regulations.[26] Given its voluntary nature as a constituent element, mediation may never be imposed but may only be offered. The consent of the offender is always required to start the mediation.[27] An informal – not necessarily written – agreement, given for example by attending the mediation talks, is sufficient.

23 Art. 18, §1 MAS Act.
24 Bemiddelingsdienst Arrondissement Leuven (2011). Jaarverslag. (to consult on www.alba.be).
25 Art. 4, §2, 2°, MAS Act.
26 Art. 12, §1, 1°, MAS Act.
27 Art. 12, §1, 2°, and 18, §2, and § 5, MAS Act.

Another aspect of the voluntary nature of the process is that the damage is freely negotiated and decided upon by both parties.[28] A solution can never be imposed by the mediator.

3.3 The presence of an independent, impartial and neutral third party (*"mediator"*)

Although a neutral third party is not a decisive element of ADR, the mediator as an independent, impartial and neutral third party is essential for mediation. The mediator may not benefit someone and he may not take a position on the content of the solution. For this reason the mediator is not allowed to intervene as a lawyer, as a judge or as an arbitrator.

The mediator will try to get the dialogue going again. He focuses on the process and on the interpersonal communication between the parties. By listening to the parties and conducting a constructive dialogue with them, the mediator will try to make the parties come to an agreement.

The mediator treats the parties as equivalent persons and does not distinguish between offender and victim. The mediation aims to search for a solution rather than a culprit. As a result, the mediator ensures his/her neutrality vis-à-vis the parties and independence with regard to facts and results. He/she is also, as far as possible, independent of the institution that employs him.

The designated MAS mediator can be a municipal staff member or an employee of an external mediation service. In the first case, it may seem difficult to ensure neutrality. To maintain neutrality, the mediator cannot be the municipal staff member usually tasked with imposing administrative fines.[29] In this way, the mediator is unrelated to any decision imposing sanctions. The Belgian government aims to establish additional neutrality conditions in the near future.[30]

3.4 The search for a satisfactory solution

As one purpose of ADR is yielding a solution to a dispute, the objective of mediation is either to repair the damage or to calm the conflict. Compensation can therefore be considered as an expression of material damage and/or moral damage. Usually, material damage can be expressed in monetary terms. In such cases, there will usually be a specific identifiable victim. Typical examples of this type of damage are destruction or vandalism. Often, however, the damage is not limited to a purely material affair, but contains also a moral component. The recovery of the damage will not be confined to a formal repayment, but will also cover the emotional significance. In such cases, offering apologies can lead to a form of recovery.

28 Art. 12, §2, MAS Act.
29 Art. 12, §1, 2° and 18, §2 en § 5, MAS Act.
30 Art. 8, MAS Act.

In some cases, it is more difficult to determine the actual damage, for example with noise pollution. With these kinds of events, it is often difficult to pinpoint specific victims because the case often involves a large group of affected people. In such cases, more creativity will be needed in order to repair the damage. This is also the case where no individual victims can be found, for example where the offender has urinated in a public area, or broken other behavioural rules in a public park. In such cases, there is often also no material damage.

Mediation makes it easier for the offender to be reconciled with the consequences associated with the offence. The explanatory memorandum to this law therefore underlines that mediation is an educational and not a repressive measure. By focusing on dialogue, the mediator works with a process of awareness between both parties. As the mediation aims to stimulate the offender to think about his or her behaviour and its harmful effects on fellow citizens, offenders start a dialogue with the victim and gain a better understanding of their erroneous behaviour (Opgerfelt, 2012).

3.5 A clear communication process and the choice with knowledge

It is important to find the best solution and to make informed choices. The parties are invited to share all their information. If the participants are not informed about their rights and obligations, the mediator shall inform them of the existence of a legislative framework and may refer to legal counsel.

The parties concerned must then try to formulate as clearly as possible their views on the conflict and actively listen to the views of the other parties. Mutual understanding can arise due to this openness. Many conflicts arise from miscommunication.

Despite the gap in the MAS Act on direct or indirect communication between the offender and the aggrieved party, in reality the parties sit down in physical proximity to each other to resolve the conflict ("face to face"). Because of this direct contact, emotions, body language, etc., also play an important part in the process. In this way, the awareness of the offender and any processing on the part of the victim are being encouraged. The mediator, however, cannot impose direct contact.

3.6 Taking into account the underlying interests, needs and desires

The conflict is not strictly legal. In addition to material damage, emotions are also discussed. Many conflicts are soluble once people feel respected.

One of the main needs of the aggrieved party is the repair of or compensation for the damage suffered. Given the explicit mention of indemnity in the MAS Act as a target for successful mediation,[31] this should be taken into account.

It is also in the interest of the municipality to avoid cases of inconvenience. Through mediation, the offender is intended to acquire insight and move towards a full sense of guilt. As such, mediation has a preventive character through which the offender will no longer commit new acts.

3.7 Equivalence between the parties

The principle of equal treatment is a fundamental principle in Belgian law (*supra*). When material or moral damage has been caused to another citizen, equivalence between the parties can easily be ensured. In the case of a minor offender, equivalence is strengthened by involving parents in the mediations[32] and making a lawyer available.[33] A lawyer is also a possibility for adults, but is not offered by the municipality.

In many cases, however, the municipality is the direct or indirect victim. Consequently, the aggrieved party is the same as the potential imposer of sanctions. The municipality therefore maintains a superior position. The law, however, does not consider this imbalance; therefore, the inequality remains in reality.

3.8 No strict legal approach to the conflict

One of the constituent elements of ADR is flexibility. Parties are free to choose if they will apply mediation, which procedure they will follow, which person or institution will be appointed as a third party, if any, and, with the exception of arbitration, which person or institution will remain master of the outcome. The mediator should not be regarded as a truth seeker. MAS mediation is therefore not concerned with whether an administrative fine should be imposed or how heavy this fine should be.

On the other hand, MAS mediation is bound by a number of legal rules (cf. MAS Act). According the MAS Act, the mediator still has great control over the progress of the mediation procedure. In addition, the parties are not free to choose a mediator; the mediator is chosen by a municipal staff member.

3.9 The confidentiality of mediation

All methods of ADR are confidential in each aspect, and mediation is no exception. To achieve a successful mediation, the content of the discussions should be confidential. Everything said during mediation or exchanged (documents, emails, etc.) is strictly confidential. From the beginning

31 Art. 4, §2, 2° MAS Act.
32 Art. 17, MAS Act.
33 Art. 16, MAS Act.

of the mediation process, the parties must agree that everything said in the mediation will remain internal and will not be communicated to third parties without mutual agreement. Any potential third party (for example an expert) is bound by the same confidentiality. The confidential nature of the mediation must be respected during the whole mediation procedure. The mediator is bound by the duty of professional confidentiality and must follow the same rule. This increases the possible effectiveness of mediation because parties can be more open about their interests, goals and potential concessions, without having to fear abuse.

Nevertheless, the MAS Act provides no explicit safeguards for preserving the confidentiality of talks between the parties. The duty of confidentiality does not rest with the mediator, either. A constitutional principle of "administrative transparency" prevails in Belgian public law, which gives everyone the right to consult any administrative document and receive a copy thereof.[34] For administrative sanctions in general, and thus also for mediation, an exception has been made so that these documents need not be made public.[35]

4 Mediation and granting a permit concerning urban development in Flanders[36]

4.1 Introduction

A permit from the local authority is necessary for a lot of activities in urban development, such as chopping down large trees or building or renovating a house. When a local authority decides whether or not to grant planning permission, it is bound by a number of legal rules. On the other hand, the local authority has autonomous discretion that leaves room for policy decisions. The local authority has therefore first and foremost to take into account the general interest, but also takes the individual interests of citizens into consideration. For example, building an industrial building may cause a nuisance to local residents. Mediation between the planning permission applicant, residents and any other relevant body of government can be helpful. As stated earlier, there is almost no regulation of mediation concerning the granting of planning permission.

It should be noted that in the procedure of planning permission citizens have the possibility for participation: the so-called "public inquiry".[37] At this stage of the proceedings anyone can submit objections to the application of the permission (Van Hoorick, 2011, pp. 236–237). The licensing authority is required to take into account these concerns (Van Sant et al., 2012, p. 960).

34 Art. 32, Belgian Constitution.

35 Art. 13, 4° Flemish Decree of 26th March 2004 concerning openness of administration, *Belgian Official Gazette* 1 July 2004.

36 Policies and regulations on urban planning is a competence of the regions. Therefore, the regulations discussed here applicable in the Flemish Region.

37 Art. 4.7.15 Flemish Codex of Urban Planning.

Despite the possibility of the public inquiry, mediation can be useful since such an inquiry is not aimed at adjusting and negotiating the planning permission, but rather at whether or not to refuse the permission.

4.2 Mediation preceding the procedure for planning permissions

The procedure for planning permission starts form the moment the applicant submits an official request to the local government. Given the limitations of this procedure (*infra*) preceding mediation will be the most efficient. As written in Belgian legal doctrine, the only form of mediation in urban development is the so-called "project meeting", which can only be used under strict terms (Lancksweerdt, 2010). In addition, informal mediation is still possible. Informal mediation is in practice the most used form, since the constraints of the project meeting do not apply.

In practice it is not easy to take the decision to use any form of (semi-)mediation before the procedure for planning permissions is started. Usually problems and conflicts between the planning permission applicant, the government body and/or other stakeholders arise during the procedure, since this is the time that concretizes the proposed plans. Therefore it is appropriate for the permission applicant to be vigilant and to detect possible tensions in advance.

4.2.1 The project meeting

Persons responsible for the development and implementation of major constructions or building projects may request of the advisory and the licensing authorities a "project meeting".[38] This request cannot be refused.[39] In this meeting possible conflicts and tensions are eliminated in advance.

In our opinion this cannot be called mediation. Firstly, it is not a voluntary process (*supra*), as the concerned authorities may not refuse the request. In the second place, an independent, impartial and neutral third party (mediator) is not present. Thirdly, there is no question of equality between the parties since the concerned authorities also act as the advisory and licensing authorities after the mediation. Finally, we should note that the project meeting does not take into account other interests considering the non-presence of local residents, neighbourhood associations and other interested parties.

4.2.2 The informal mediation

Obviously, the planning permission applicant, the authorities and/or the other stakeholders are allowed to consult the plans in advance. The fact that such a procedure is non-binding is not relevant. In practice, for large projects such informal meetings are organized because thus a large number of complaints can be avoided. Yet it is difficult to speak in this case of mediation, as usually

38 Art. 5.3.2., §1 Flemish Codex of Urban Planning.
39 Art. 5.3.2., §2 Flemish Codex of Urban Planning.

no neutral mediator is involved. In practice the licensing authority takes this role.

The mediation agreement resulting from this must also be nuanced. In the first place, third parties not involved in the mediation can still file a complaint or lodge an appeal during or after the procedure for the planning permission. It is important to involve the relevant actors to ensure legal certainty.

Secondly, the question arises whether the public authority can give up its public power through a private agreement. In principle the powers attributed to the administration should be exercised. The administration does not have the power to dispose of these competences and has the obligation to apply them in the general interest. The constitution and the Law indicate what powers are attributed and how these should be exercised, and make clear that no agreement can be made concerning the way an administrative organ exercises its powers.[40] An administrative organ cannot by means of an agreement engage itself to take a certain administrative action in the future. It is obliged to take the action that best serves the general interest, and if it has bound itself the organ may no longer be able to make an evaluation at the time the decision is made. The private agreement that results from the mediation should contain the reservation that the authority can bypass the agreement for reasons of general interest. For this reason, in practice there is rarely a successful informal mediation preceding the procedure for planning permission.

4.3 The mediation during the procedure for planning permissions

The Flemish legislator has not provided any option of mediation for when the procedure for planning permission is ongoing. Neither is informal mediation evident. It is very difficult to conduct a profound mediation, as the time in which the government must by law come to a decision on the planning permission is too short.[41] Moreover, there is an important legal principle that states that a planning permission application may not be fundamentally modified after the public inquiry.[42]

For that reason, in practice we rarely see a successful mediation during the procedure for planning permission. Given the absolute prohibition of changing the planning permission application after the public inquiry, the essential characteristic of mediation – the search for a satisfactory solution – is completely nullified. However, it is theoretically possible that the planning permission procedure is stopped as a result of the mediation talks for

40 Art. 6 and 1128 Civil Code and art. 33 Belgian Constitution.

41 The terms vary between 75 and 150 days. Cf. art. 4.7.18, §1 Flemish Codex of Urban Planning.

42 Council of State 28 November 2007, n°. 177.326, *Bernaert*; Council of State 10 August 2007, n°. 173.955, *Carron en Callewaert*; Council of State 19 November 2007, n°. 172.417, *nv Prima*; Council of State 14 February 2007, n°. 167.789, *Collaert*; Council of State 4 August 2008, nr. 183.773, *nv D.M.P.*

the applicant to put in an altered planning permission application.

Finally, we should also emphasize that in this form of (semi-)mediation there is no question of equivalence between the parties, and a neutral mediator is rarely called in.

5 Conclusion

Application of mediation is increasing in Belgian administrative law because of the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. The historical overview shows that administrative mediation in Belgium has grown under the influence of the rise of mediation in other legal disciplines and pressure from the European Union. The created legal framework for ADR in the legal doctrine has also played a crucial role.

When applied in administrative law, mediation offers possibilities in examining a dispute beyond the boundaries of a specific administrative action, and in its full complexity. Resolving disputes through mutual agreement and dialogue will result in a more stable relationship between government and citizens in the future, which will have positive spill-over effects in society as a whole.

As of 2014, we can find administrative mediation in the regulations concerning municipal administrative sanctions, the right of education, environmental protection, urban development, social protection, housing and institutional consultation structures between the federal and regional authorities. It should be noted that the mediation forms discussed always occur before a judicial procedure is started. The administrative court that may refer to mediation during the legal process is a very recent concept in Belgian law; finalized cases of application, are, therefore, not yet known.

Administrative mediation occurs in many forms. Nevertheless, common characteristics can be observed. The study of mediation in municipal administrative sanctions (MAS) demonstrates that its features do not always occur to the same extent. When it is determined that a characteristic is present only to a lesser degree, often it must be concluded that this is the Achilles heel of the particular mediation form. For example, the lack of equality between the parties in MAS mediation is a problem that makes the mediation form less valuable.

The specific nature of a compulsory public law framework has an impact on the concrete application of mediation in administrative law. The discussion of mediation in urban planning makes clear that the importance and usefulness of mediation as a form of alternative dispute resolution depends on the ad hoc arrangement contained in the law. Moreover, it appears that informal mediation in practice has little chance of success, given the restrictions imposed by some public law principles.

For these reasons, we argue in favour of a global mediation regulation that is applicable to public law as well as to other branches of law. A central mediation body with accredited mediators is necessary to avoid recurrent ad hoc legislation. An independent, impartial and neutral mediator, approved by the Central Mediation Commission, may lead consultations while the basics of mediation can be guaranteed. Such legal certainty will lead to a significant increase in cases that can be resolved through mediation.

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POVZETEK

1.02 Pregledni znanstveni članek

Mediacija v belgijski upravni praksi s poudarkom na občinskih upravnih sankcijah in urbanističnem načrtovanju

Ključne besede: mediacija, alternativno reševanje sporov, občinske upravne sankcije, urbanistično načrtovanje

Glede na belgijsko pravno doktrino, porast mediacije na drugih pravnih področjih in vpliv EU se zahteve po mediaciji v upravni praksi v Belgiji povečujejo. Predlagani okvir za alternativno reševanje sporov v pravni doktrini z začetka tega stoletja je pomenil začetek vse pogostejše rabe mediacije v belgijskem upravnem pravu. Prispevek je študija novih oblik mediacije, kot se pojavljajo v Belgiji v letu 2014. Na podlagi dveh primerov (mediacija pri občinskih upravnih sankcijah in pri urbanističnem načrtovanju) so analizirane upravna mediacija in z njo povezane težave.

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New Wine in Old Wineskins: General Administrative Procedure and Public Administration Reform in Croatia

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ABSTRACT

In 2009, Croatia adopted the new General Administrative Procedure Act (GAPA), which introduced several novelties in the regulation of general administrative procedure. The main research topic deals with the changes that the new GAPA, as an incentive for public administration reform in Croatia, has produced. The empirical data were collected within the EU funded IPA project "Support for the implementation of the General Administrative Procedure Act" (2012–2013) and interpreted on the basis of institutional theory. Despite changes to the legal text, the empirical data show that the new GAPA has not resulted in actual changes in everyday public administration.

Key words: *general administrative procedure, Croatia, modernization of public administration, administrative law, institutional theory, historical institutionalism*

JEL: : K20, K23, K30, K39

1 Introduction

Reforms in public administration can be defined as changes that result in significant institutional innovations, are undertaken periodically, and represent a mix of structural, functional, personal and other measures (Koprić et al., 2014). There are several incentives for public administration reform, such as the adoption of new legislation, reorganisation of administrative bodies, personnel changes, the introduction of new processes and methods of work in public administration, etc.

The reform of public administration has been on the agenda of many countries in recent years. This is especially the case in the countries of Eastern Europe, as part of their EU accession process. However, administrative reform in these countries, in many cases, is understood simply as changes to the formal rules (legislation), rather than the expectation that such changes will automatically result in actual changes in everyday administrative practice.

Croatia belongs to a group of countries that have codified their administrative procedural laws (Đulabić, 2012). This tradition is quite old and dates back to the early 20th century, when Austria adopted its first General Administrative Procedure Act, which served as a role model for the first GAPA of the Kingdom of Yugoslavia (adopted in 1930). This act, with some amendments, survived in the territory of former Yugoslavia for almost 80 years. Croatia, as a successor country, inherited the old Yugoslav GAPA, formally adopted in 1956, but as has been previously shown, its roots went back two decades earlier (Koprić, 2006).

The new legal regulation of general administrative procedure should be considered an incentive for its modernization and for the modernization of public administration in Croatia. The purpose of this paper is to show that reform of legislation is not a universal remedy (panacea) for public administration reform. An analysis of the reform of the General Administrative Procedure Act (GAPA) is used as a case study to show that deeply rooted legal institutions, such as codified administrative procedures in Croatia, have a tendency to survive, despite the fact that the legal norms regulating such institutions have changed. According the historical institutionalism approach, changes to the legal text itself will not result in real changes in the everyday work of public administration, if those changes are not significant enough to provide a basis for departure from existing practice (Peters, 1999, p. 23). In order for reform to happen, deep and thorough change in institutions should take place, followed by clear human and financial support, as the main prerequisites for the success of reform (Koprić et al., 2014)[1].

The main efforts to draft the new GAPA were undertaken within the EU CARDS project "Support for public administration and the civil service in Croatia", which was implemented in the period 2005–2007. After more than two years of public debate and lengthy technical preparation, the Croatian Parliament passed a new General Administrative Procedure Act (Zakon o općem upravnom postupku, Official Gazette 47/09) on 27 March 2009. The new GAPA superseded the old GAPA (formally dated 1956, but originally dated 1930), after more than fifty years of application and many, mainly cosmetic, amendments. The new GAPA came into force on 1 January 2010 (on the genesis of the new GAPA see: Medvedović, 2009; Đulabić, 2009, 2009a).

The drafting process of the new GAPA took place in a very transparent manner and took into account a fairly broad public debate within the EU-funded CARDS project "Support for public administration and the civil service in Croatia." So the reform was mostly supply driven and was the result of the Europeanization of public administration (Koprić & Đulabić, 2009). The Working Group established under the CARDS project developed a Draft General Administrative Procedure Act and upon completion of the project

1 Other prerequisites are political support, organisational capacity, sufficient time for strategy development, etc. (Koprić et al., 2014).

(September 2007) submitted it to the Ministry of Administration. A year later (September 2008) the draft GAPA although substantially modified, was sent into the legislative procedure. In February 2009, the third, again significantly modified version of the GAPA, was sent to a second parliamentary reading. At the end of March 2009, the Croatian Parliament adopted the new General Administrative Procedure Act.

After two and a half years of implementation, the impact of the GAPA on public administration could be assessed. The empirical data for the assessment come from research undertaken within the EU funded IPA Project "Support for the implementation of the General Administrative Procedure Act" (IPA, 2012). During a five-month period (January–June 2012) the empirical research was undertaken with the main aim of assessing the attitudes of Croatian civil servants towards the new Act. The research consisted of qualitative and quantitative elements and covered the implementation of the GAPA in ten legal areas covered by the new Act. Altogether, 214 civil servants participated in the quantitative (on-line) survey, and 147 in the qualitative research (55 were interviewed face-to-face using semi-structured interviews and 98 participated in group discussions organized in 11 focus groups across the country) (IPA, 2012, p. 9, 51; IPA, 2012a).[2]

Part Two of this paper assesses the main characteristics, improvements and modernization potential of the new GAPA. Part Three deals with the issue of special procedures in the Croatian legal system, which represents an important element in relation to general administrative procedure. The correlation of the new GAPA with some institutes in EU law is covered in Part Four. The impact of the new GAPA on the whole administrative system is the subject of concluding Part Five. Throughout the paper, empirical data and other evidence are used to support the claims and statements put forward. Research data are interpreted on the basis of institutional theory, especially normative and historical institutionalism as two variants which provide a framework for understanding why significant changes have not occurred (Peters, 1999; March & Olsen, 2005).

2 The civil servants surveyed represented three target groups (state administration, local and regional government, and public service providers) and ten legislative areas. The areas covered the following: 1. Education, sport and culture, 2. Health and social welfare, 3. Infrastructure, utilities and transportation, 4. Economy, 5. Finance, 6. Physical planning, construction and environmental protection, 7. Agriculture, rural development and forestry, 8. Tourism, 9. International relations and EU integration, and 10. Legal affairs and property. The civil servants surveyed also represented different Croatian regions (IPA, 2012, p. 21–22, 40–41). The eleven focus groups were organized in nine towns in Croatia (three in Zagreb and one each in Split, Zadar, Rijeka, Pula, Osijek, Vinkovci, Varaždin and Karlovac) combining a mixed approach with the focus on only one legislative area (IPA, 2012a).

2 Characteristics, Improvements and Modernization Potential of the New Act

Several improvements should be emphasized as the main characteristics of the new GAPA, but also it should be stated that the new Act is still very much rooted in the logic of the old administrative procedure.

The new GAPA is divided into eleven parts and contains 171 articles compared with almost 300 articles in the old Act. This means there are 120 articles fewer. Nevertheless, a comparison of the number of actual provisions shows that the new Act still contains around 500 legal regulations, which is quite a large number in comparison with other European administrative procedure acts. The old Act had approximately 750 legal regulations in almost 300 articles. Thus, the new Act is actually about 20 % shorter than the previous one in terms of the number of actual legal provisions (Koprić, 2010).

The new GAPA has several improvements and some new legal institutes. These are: (1) the introduction of new legal terminology, (2) the simplification of language and reduction of legal text, (3) the reduction to a certain extent of the over-casuistic provisions of the old Act, (4) the introduction of new general principles of administrative procedure, (5) the definition of administrative matter and the wider application of the new Act, (6) the use of IT in administrative procedure, (7) the introduction of new legal institutes, (8) the omission of unnecessary legal remedies and the introduction of new ones, (9) the competences given to the second instance authorities in the appeal procedure, intended to speed up procedure, (10) the introduction of the administrative contract, (11) the extension of the application of the Act to public service providers.

The new GAPA introduced terminology which had not been legally defined previously, such as public law authority (*javnopravno tijelo*) (Art. 1), administrative law (Art. 3/2) or direct resolution (*neposredno rješavanje*) (Art. 48). It also developed several new legal concepts, such as single administrative location (*jedinstveno upravno mjesto*) – one-stop shop (Art. 22); electronic communication (Art. 75), notification (*obavješćivanje*) (Part 2, Chapter 6); guarantee for acquiring a right (*jamstvo stjecanja prava*) (Art. 103), complaint (*prigovor*) (Art. 122), administrative contract (*upravni ugovor*) (Art. 150); notification on conditions for the acquiring and protection of rights (*obavješćivanje o uvjetima ostvarivanja i zaštite prava*) (Art. 155); protection from other forms of procedures by public law authorities (*zaštita od drugih oblika postupanja javnopravnih tijela*) (Art. 156), public service providers (Art. 3/3, 157, 158), etc.

Despite the fact that in the new GAPA language is simplified and the legal text reduced, in many ways empirical data show that "six interviewees out of ten recognize that the application of the GAPA requires a deeper understanding of this Act, particular on the part of those employed in the Ministries (74 %)

and in Towns/Municipalities (55 %)." (IPA, 2012, p. 65). It is the reason why "all legal terms defined or introduced by the GAPA should be clarified and explained for training purposes." (IPA, 2012, p. 65).

However, the new GAPA still contains many technical details. This is particularly the case with certain regulations regarding minutes (Art. 76), reconstruction of files (Art. 78.) and technical details of administrative acts (Art. 78–100). Also, some important new legal institutes are regulated in a very general manner, while traditional elements of administrative procedure are regulated in detail. This is particularly true of the first instance procedure, which is regulated in Parts Two and Three of the new Act, in comparison with new institutes introduced in Parts Six (the administrative contract) and Seven (legal protection from procedure by public law authorities and providers of public services).

This is probably the reason why so many civil servants included in the IPA survey considered legal uncertainty to be a critical aspect of the new GAPA (IPA, 2012). But at this point, differences in their ages and previous working experience in public administration played an important factor. Older, more experienced civil servants who had worked under the old Act preferred it to the new GAPA, while less experienced civil servants were readier to accept the new GAPA "estimating the opportunities for greater freedom in the implementation of certain provisions as good and stimulating" (IPA, 2012, p. 56). However, the IPA survey concluded that "the aims and principles of the new Act are not fully understood and respondents had a very limited knowledge of the novelties introduced" (IPA, 2012, p. 53). This clearly shows that administrative procedure is deeply rooted in administrative culture, and that the changes introduced were perceived differently by different categories of civil servants. The difference was most obvious between those who had worked under the old Act and recently employed civil servants.

Some legal institutes which were previously unknown in the Croatian administrative system have been introduced too cautiously. The most important are the new institute of the administrative contract, the principle of a single administrative location (*one-stop shop*) and the potential for using electronic means of communication in administrative procedure.

The new GAPA introduces several new general principles, such as proportionality (Art. 6), or access and data protection (Art. 11), while some principles (e.g. the right to legal remedy – Art. 12) have been expanded in order to cover other administrative actions such as administrative contracts, provision of public services or any other action by public authorities that affects rights, obligations or legal interests (Art. 156). Legal remedies have been rationalized and some new legal remedies (e.g. *prigovor* – complaint) have been introduced.

One of the novelties of the new GAPA is the legal regulation of the administrative contract. The administrative contract has been praised as a major innovation in the Croatian system of administrative law. Parliamentary debate clearly favoured the introduction of the administrative contract as a novelty in the Croatian legal system. Unfortunately, from an analysis of the articles dealing with the administrative contract, it is evident that this institute has been regulated in too restrictive a manner.

The administrative contract is covered by four articles dealing with the conditions for conclusion and the subject of the administrative contract (Art. 150), the nullity of administrative contracts (Art. 151), *clausulae rebus sic stantibus* (Art. 152), the termination of administrative contract (Art. 153) and complaints regarding the administrative contract (Art. 154).

The administrative contract should be one of the greatest novelties of the new administrative procedure, but it appears that no major breakthrough has been made (it can be concluded only a) between a public law authority and the party concerned, b) for the execution of a decision (administrative act), and c) if prescribed by a special law). Such a conception of the administrative contract allows only a very limited area of application, which is inconsistent with recent administrative developments and the submission of public administration under the principle of legality. Significant areas of administrative action, such as cooperation between authorities regarding the realization of joint development projects, the performance of many public services and other similar areas of cooperation, have remained outside the scope of the institute of the administrative contract.

Such an approach will eventually prevent this instrument from being used widely in administrative practice and serving as a major tool in public administration modernization. It can be used in only a few public administration activities, such as concessions, or public procurement. The question remains – what is the added value of such an approach?

3 The Problem of Special Administrative Procedures

A specific feature of the Croatian public administration system is the existence of more than a hundred special administrative procedures (Ljubanović, 2010, 2006).

Special administrative procedures are scattered throughout various acts that, alongside material provisions, often contain many procedural provisions too. There are also many procedural provisions in secondary legislation prepared for the implementation of these acts. Sometimes, astonishingly, this secondary legislation is produced without a proper legal foundation containing provisions that create new procedural provisions, instead of regulating existing institutes only when necessary (Ljubanović, 2006; Šimunec, 2011, p. 15).

Special procedures often contain procedural provisions that are identical to the old GAPA. However, the main problem with these provisions is not that they were copied from the old Act, but that they sometimes contradict the provisions of the new GAPA. This is why these provisions should be amended and – if copied word for word from the old Act – deleted completely. Special laws should contain general clauses indicating the new GAPA as the main procedural law for administrative matters in most administrative fields.

Such practice has resulted in a huge body of procedural legal provisions which are cumbersome for civil servants and the ordinary public. It has also contributed to the development of a mentality among civil servants which fosters excessive bureaucratization. Finally, the situation has created legal uncertainty and confusion, resulting in the erosion of the relevance of general administrative procedure and weakening the rule of law.

The provision of Art. 3/1 of the new GAPA stipulates that special laws may regulate procedural issues differently from the current Act. This refers only to particular issues; if necessary for proceedings in particular administrative areas; and if not contrary to the basic provisions and purpose of the GAPA. Such exceptions may arise only from the Act, never from secondary legislation.

The new GAPA contains around 40 provisions allowing for special procedures to regulate some existing procedural situations differently than the current Act. The IPA survey shows that more than two-thirds (67 %) of the respondents applied the GAPA only as a secondary procedural law when deciding in administrative matters. Only 33 % of respondents applied it as a primary procedural law (IPA, 2012, p. 64). This raises the very important issue of special procedures and their harmonization with the new GAPA.

In October 2010, the Croatian Government adopted a Conclusion (*zaključak*) requiring line ministries and other administrative bodies to prepare amendments of special laws in order to align them with the new GAPA. In the context of Croatia – EU negotiations under Chapter 23 – Judiciary and fundamental rights, one of the ten benchmarks established was the adoption and harmonization of legislation necessary for the full implementation of the new GAPA, particularly in connection with the need to align special administrative procedures with the new GAPA (Šimunec, 2011, 2011a)[3].

During 2011 and 2012, many special laws were adopted that were already aligned with the new GAPA. The Croatian Parliament adopted laws containing and/or amending special procedures and harmonizing them with the new GAPA. Only few special laws remain unaligned with the new GAPA. According to the annual report of the Ministry of Administration for the 2012, 105 special laws have been aligned with the new GAPA (MA, 2013: 52). Despite

3 With bilateral assistance from the Kingdom of Denmark, the project "Preparation for the implementation of the new GAPA" has been realized. The report analyzed existing special procedures and identified discrepancies in the new GAPA in this respect.

this, almost half (49 %) of the IPA survey respondents stated that special laws in their particular administrative areas had not been aligned with the new GAPA, making application more difficult (IPA 2012, p. 54).

Special emphasis should be placed on the issue of special procedures in the process of implementing the new GAPA. This relates to situations in which the new GAPA allows for special procedures to regulate certain issues differently. Public bodies should be given clear instructions on when, how and to what extent, certain procedural steps should be regulated differently than under the present Act. This should help to sustain the alignment of the whole administrative procedural system, in which the new GAPA should have a central place[4].

4 Correlation with EU Law

Some of the solutions in the new GAPA should be correlated with efforts to achieve administrative simplification in EU law. A significant step towards administrative simplification was made in 2006, with the adoption of the Directive on Services in the Internal Market (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market). Member countries were given three years to implement it in national legislation, i.e. until the end of 2009. The main objective of the Directive was to launch a project to build a single EU market at a higher level.

Besides contributing to building a single market in services within the EU, the Directive has had a significant impact on the administrative procedures of administrative authorities in the Member States. Among other things, the Directive obliges member states to review procedures and other formalities relating to accessing and performing specific activities in the services sector. It is particularly concerned with their simplification, if they are not simple enough for the parties (Art. 5/1 of the Directive). It stresses the obligation of accepting documents that confirm compliance with certain standards issued in other Member States and the exceptions to this principle (Art. 5/2, 3). However, there are also several key institutes of administrative simplification, which directly affect administrative procedures in EU member states. These are the point of single contact, administrative procedure by means of electronic communication between government and citizens, the legal consequences of "administrative silence" and administrative cooperation between Member States. The goal of the new GAPA is not to transpose the Directive into the Croatian legal system, but to use some of the institutes mentioned as potential reform tools for general administrative procedure.

4 The question still remains as to whether special procedures should be rigorously abolished, or allowed only when are really necessary, or whether special laws should be only aligned with the new GAPA. The latter case would perpetuate a situation with many special procedures that would probably undermine the position of the GAPA as the main procedural law in Croatian public administration.

Through the creation of a legal basis for the establishment of points of single contact (Art. 6 and 7), the Directive implements the one-stop-shop principle. This should help to accomplish several aims. On the one hand, legal entities and individuals should be able to exercise their rights more easily and quickly, while, on the other, mechanisms of internal administrative connectivity and better coordination of public authorities will be enabled (Art. 7).

Through the provision of the single administrative location (Art. 22) the new GAPA has also created the prerequisites for the one-stop-shop principle. Unlike the Directive, the provisions of the new GAPA are quite general, and their realization requires strong and decisive administrative leadership to ensure the establishment and effective operation of new organizational units in different government agencies. Otherwise, there is a real danger that the provisions of the single administrative location remain a dead letter. There is no evidence that the single administrative location has been established in many administrative fields. The general public seems to be completely unaware that such service even exists in the Croatian legal system.

The Directive promotes heavily the concept of conducting administrative procedure by means of electronic communication (procedures by electronic means) when it comes to registration and authorization processes and similar activities (Art. 8 of the Directive). It contributes to the realization of the concept of e-government based on the wide usage of IT in the daily work of public administration. It should allow the provision of a wide range of "long-distance" administrative services, i.e. without needing to appear in person public, or even send documents by regular mail. In accordance with Article 8 of the Directive, electronic communication should cover the entire process, from the initial application to the issuance of a decision.

The new GAPA contains provisions on electronic communication, but they are confined to specific legislation on electronic documents and electronic signatures. This may limit the use of electronic means of communication for the vast majority of clients (citizens) who do not yet have the technical means for publishing documents electronically and adding an electronic signature. However, for most clients, the legal nature (if any!) of messages sent to public authorities electronically (i.e. ordinary e-mails) is still unclear. Could the new GAPA have regulated the use of ordinary e-mail addresses in administrative procedure? Might it have been possible to regulate the introduction of public authority e-mail addresses for the conduct of certain types of administrative proceedings (e.g. direct resolution – Art. 48)? This is even more important if one takes into consideration the fact that the use of IT in administrative

procedure was designated by the majority of IPA survey participants (54 %, across all sectors) as the most interesting topic (IPA, 2012, p. 60)[5].

5 Impact on Public Administration in Croatia

The analysis of the new GAPA and available empirical data on its implementation raise the question of the main achievements of the new act. Does the new GAPA contain a modernizing potential that should provide a basis not only for the reform of administrative procedures as such, but for the overall reform of public administration functions, based on a newer, or more modern understanding of public administration? According to the historical institutionalism approach, in order to change administrative behaviour, reforms must be strong enough to change extremely long traditions in administrative procedure.

Despite the improvements and novelties introduced, the new GAPA can be to a significant extent considered as an expression of the traditional approach to public administration, and this is one of the main reasons why significant change has not been achieved. Traditional elements have prevailed thus creating a strong foundation for continuity in administrative practice, despite some changes. It confirms that institutions transcend individuals, are very stable over long periods and may be used to predict the behaviour of those involved as well as restrain their behaviour (Peters, 1999, p. 22).

It is not surprising that, although 44 % of the IPA survey respondents found administrative procedure after the new GAPA entered into force simpler, while 23 % considered it faster, an enormous number of civil servants interviewed (62 %) said that the introduction of the new GAPA had not affected their everyday work (IPA, 2012, p. 64).

The main reason for the limited modernization potential of the new GAPA lies outside the legal text itself. It is probably due to a lack of awareness-building and training activities. The old GAPA was in force for over fifty years, so it is vitally important to the successful implementation of the new Act to raise awareness regarding the changes it introduces, and to train civil servants to work according to the new Act. The line ministry has failed in this regard and it should come as no surprise that more than a third of the civil servants surveyed (32 %) did not "understand the meaning of the new Act and why it is not formally defined like the old one" (IPA, 2012, p. 53). Also, 31 % of the civil servants interviewed thought the new Act should retain links to the old

5 Other interesting topics for the survey participants were new principles introduced (40 %), regulation of the appeal procedure (38 %), complaint as a new legal remedy (38 %), administrative contract (32 %), appeal as a remedy (29 %), the prerequisite for adopting a party's request (28 %), citizens' complaints about the procedure of public service providers (26 %), the jurisdiction of the appellate authority in the appeal process according to the new GAPA (25 %), notifying citizens on the conditions for the acquisition and protection of rights) (20 %), and guarantees for the acquisition of rights (14 %) (IPA, 2012, p. 61, 62).

GAPA, and many of them admitted to continuing to rely on the old Act when interpreting certain legal institutes[6].

The respondents to the IPA survey identified several major obstacles to the efficient implementation of the new GAPA. Some lie outside the legal text, such as an administrative culture characterized by non-responsiveness to citizens, the working context, e.g. "relating to superiors, workloads unequally shared between departments and organizational units, the lack of material and non-material incentives" (IPA, 2012, p. 54). Finally, the lack of professional support, in the sense of senior advisors who would instruct and guide junior civil servants, and the low availability of high quality commentaries on the new Act, were identified as important obstacles to the implementation of the GAPA (p. 54).

All in all, reform which is mainly based on the old Act is probably acceptable from the point of compliance with current administrative development and dominant legal tradition. It is also a quite pragmatic approach, bearing in mind the need to ensure the smooth adjustment of public law bodies in implementing the new Act, but it is doubtful whether such an approach leads to real changes in the everyday work of public administration.

It is evident that the new GAPA contains a number of novelties, nomotechical improvements as well as simpler, more clearly structured text. However, in terms of its structure, the new GAPA relies to a large extent on the old Act, which is a significant mitigating circumstance for administrative authorities expected to apply the new Act. New institutes have been regulated, and the number of legal remedies simplified and reduced, while legal protection has been extended to a large number of administrative activities. It is expected that this will stimulate the modernization potential of the new Act. Whether this potential will be realized depends on factors beyond the legal text, particularly the willingness of political and administrative staff to modernize public administration and initiate the necessary changes in the system of everyday administrative work and conduct.

As a result, certain parts of public administration are likely to continue previous practice, which has not always produced the best results. It is realistic to conclude that the reform of the GAPA in 2009 did not have the necessary and desirable modernization potential, which should be one of the incentives of serious, comprehensive public administration reform. The impression remains that the legislator did not take into account sufficiently modern tendencies of administrative development that are particularly important for the daily conduct of public authorities, and therefore generally followed the spirit of the old Act formed in the mid-twentieth century. Also, the competent line

6 "The impact of the new Act on administrative procedure implementation is difficult to quantify, because in almost all legal areas the new GAPA has resulted in only slight changes. Civil servants continue to apply primarily substantive laws and in some places still use the old GAPA." (IPA, 2012a, p. 6).

ministry (Ministry of Administration) failed to prepare a coherent succession strategy from the old to the new GAPA, which, if it had existed, would have been more than valuable, especially in the context of the deep roots of the old Act in Croatia's administrative culture.

Excessive formalism will probably still remain a characteristic of administrative procedures, which will very likely continue to be copies of court procedures. This emerges as a straightforward conclusion from the IPA survey, according to which many civil servants who participated in the focus groups "pointed out that they were unsatisfied with the new GAPA, because it was less formally defined than the old one. The opportunity to interpret the Act in a more flexible way is frightening and gives them a sense of greater responsibility." (IPA, 2012a, p. 6).

To some extent, the new service-oriented and citizen-oriented concept of public administration has been pushed into the background. The general understanding of public administration is still too focused on unilateral, authoritative decision-making, rather than collaborative, service-oriented public administration, which encourages partnership, but which is sometimes subsumed in contractual relations, especially among public bodies.

Finally, along with the special observations and recommendations in this paper, there are others which can be made regarding the future implementation of the new GAPA. Since the new GAPA takes the old Croatian GAPA as its role model while attempting to incorporate some new solutions, it is important to train civil servants to understand the new logic behind these new institutes. There is a real danger that the situation will remain largely unchanged if old attitudes are perpetuated under the new Act. This may undermine the novelties introduced in the new GAPA and result in the same administrative practice as before. Civil servants should be trained in the spirit of serving public interest, while respecting the position of all parties in administrative procedure.

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POVZETEK

1.02 Pregledni znanstveni članek

Novo vino v starih mehovih: splošni upravni postopek in reforma javne uprave na Hrvaškem

Ključne besede: splošni upravni postopek, Hrvaška, modernizacija javne uprave, upravno pravo, institucionalna teorija, historični institucionalizem

Leta 2009 je Hrvaška sprejela nov zakon o splošnem upravnem postopku (ZUP), ki je uvedel nekaj novosti pri urejanju splošnega upravnega postopka. Glavna raziskovalna tema obravnava spremembe, ki jih je prinesel novi ZUP kot spodbuda za reformo javne uprave na Hrvaškem. Empirični podatki so bili zbrani v okviru projekta IPA »Podpora za izvajanje zakona o splošnem upravnem postopku« (2012–2013), ki je bil financiran s sredstvi EU in interpretiran na osnovi institucionalne teorije. Kljub zakonskim spremembam empirični podatki kažejo, da novi ZUP ni prinesel dejanskih sprememb v vsakdanjem delu javne uprave.

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