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and the Supreme Administrative Jurisdictions of the European Union:**

Preventing Backlog in Administrative Justice

**The Administrative Court
and
The Council of State
of the Grand Duchy of Luxembourg
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**Report of
the Federal Administrative Court
of Germany**

by
Michael Groepper
Ulrike Held-Daab
Ulrich Maidowski

Judges of the Federal Administrative Court

Questionnaire for the Conference of 7 June 2010

„Preventing Backlog in Administrative Justice“

I. Techniques for limiting the number of appeals

I. 1. Must those wishing to refer a matter to the Supreme Administrative Court be represented by a lawyer? If so, are there any dispensations to this requirement? Are there any criteria regarding the lawyer's qualifications or seniority?

In proceedings before the Federal Administrative Court as before the Higher Administrative Courts (courts of second instance), legal representation is compulsory under Article 67 para. 4 of the Administrative Court Act (Verwaltungsgerichtsordnung - VwGO). This applies not only to matters of appeal, but also, where the court, in certain matters, exceptionally has to decide as a court of first instance, e.g. the Federal Administrative Court in matters of non-constitutional litigation between federal states or in cases concerning the planning of railroads, motorways or airports (see Article 50 para. 1 VwGO). Only in proceedings to obtain Legal Aid, parties may act on their own (Article 67 para. 4 VwGO).

As a legal representative, they can choose any attorney or university professor eligible to be a judge. Public authorities may be represented by civil servants of the same qualification.

I. 2. Is the Supreme Administrative Court's jurisdiction limited to points of law or can it also rule as an appeals court with cognizance of points of fact?

As a rule, the Federal Administrative Court's jurisdiction in matters of appeal is limited to points of law (Revision, see Article 137 para. 1 VwGO). There are two exceptions however. One is the jurisdiction in cases concerning military service regulations (Wehrbeschwerdesachen) or military disciplinary measures (Wehrdisziplinarsachen). In both cases specialized panels of the court decide on appeal with cognizance of law and fact. The other exception is regulated in Article 50 para. 1 VwGO, under which the court has to decide as court of first instance (examples see above).

I. 3. and 5. Is the right of appeal to the Supreme Administrative Court an absolute right or are there limitations? If there are, under what circumstances? Do appeals have to go through an admission or authorisation procedure before being brought before the Supreme Administrative Court? (Nr. 4. see below)

The right of appeal to the Federal Administrative Court is subject to leave, just as the right of appeal to the Higher Administrative Courts of the federal states.

The Higher Administrative Courts, besides having some jurisdiction as courts of first instance, decide on appeal against the decisions of the Administrative Courts. Their own judgment is subject to appeal to the Federal Administrative Court. In both instances appeals are only admissible if leave to appeal has been granted, either by the court having issued the contested judgment or, on request of a party having lost the case, by the court of appeal.

Leave to appeal to the Federal Administrative Court is only granted if one or more of the three following grounds for appeal is submitted and applies (Article 132 para. 2, Article 133 para. 3 VwGO):

- (1) Fundamental importance of the case
- (2) Divergence
- (3) Procedural errors causal for the decision contested

Leave to appeal to the Higher Administrative Courts may also be granted if there are serious doubts concerning the lawfulness of the judgment contested (Article 124 VwGO).

The first and second ground for appeal aim at guaranteeing the uniform application and the appropriate development of federal law. The third ground ensures that the parties' right to a fair trial is respected; it can be invoked even if the individual case lacks general importance.

The Federal Administrative Court has developed detailed criteria that have to be met in order to establish one of these grounds. The party requesting leave to appeal must submit and substantiate that those criteria are fulfilled. Otherwise the request is dismissed as inadmissible. If grounds are substantiated, but cannot be stated, the request is dismissed as unfounded.

(1) Fundamental importance of the case (Article 132 para. 2 Nr. 1 VwGO)

A case is of fundamental importance if the applicant raises a question pertaining to federal law and relevant to the case which can not be answered by referring to the precedents of the Federal Administrative Court, or by applying the standard methods of interpretation, and if an appeal decision is necessary to guarantee the uniform application and development of federal law. It is not sufficient to demonstrate that the question has not been answered by the Federal Administrative Court explicitly. There is no need to grant leave to appeal if the answer to the relevant legal question can be derived from the law by applying the standard methods of interpretation and by drawing the obvious inferences from the existing case law.

(2) Divergence (Article 132 para. 2 Nr. 2 VwGO)

The ground of diversion is given if the contested judgment establishes a rule of law differing from a rule of law developed by the Federal Administrative Court, the Joint Panel of the Federal Courts or by the Federal Constitutional Court. Therefore, the applicant has to demonstrate that each one of the allegedly divergent decisions sets up an abstract rule of law, and that those rules collide with each other. Furthermore, it has to be shown that each of the rules was relevant to the outcome of the decision which set it up. It is not sufficient to submit that the contested judgment is not conform to the legal standards set up in the Federal Administrative Court's case law, or misapplies one of its decisions.

(3) Procedural mistakes (Article 132 para. 2 Nr. 3 VwGO)

The applicant invoking that the contested decision is based on the violation of a procedural rule, has to demonstrate the breach of the rule, and has to show that the contested judgment may have been influenced by the procedural error (Article 133 para. 3 VwGO). Moreover, the applicant has to show that he made use of all procedural means to assure that his rights were respected, e.g. by a formal request to take a certain piece of relevant evidence. The application of this rule is explained in detail by a vast number of precedents. If the Federal Administrative Court holds that a procedural error has occurred, it may reverse the judgement and refer the case back to the lower court without deciding on the merits.

As the assessment of the relevant facts is considered to be a part of the application of substantive law, alleged mistakes in assessing the evidence generally cannot be qualified as procedural mistakes and therefore cannot justify granting leave to appeal.

In the admission procedure, there are strict deadlines to be respected. If the court issuing the contested judgment has refused to grant leave to appeal, the aggrieved parties may form a complaint against the refusal (article 133 para. 1 VwGO). It has to be filed within a delay of one month, and the reasons have to be substantiated within two months after the party has received the judgment in full written form. Upon considering the submission, the court issuing the contested judgment may grant leave to appeal. If it upholds its denial, the Federal Administrative Court has to decide.

The Federal Administrative Court's decision is taken in written procedure by the president and two more members of the competent panel.

This highly effective filtering system ensures that the appeal to the Federal Administrative Court is reserved for cases of fundamental importance. Statistically, out of the judgments of the Administrative Courts, less than 20 percent (about 30 000 to 35 000 per year), are presented to the Higher Administrative Courts as courts of appeal, and out of their judgments, only about 2000 per year are submitted to the Federal Administrative Court (most of them being requests for leave to appeal). As a result, the number of appeal cases where the Federal Administrative Court has to decide on the merits, is very small and does not exceed 400 per year.

I. 4. Are there any penalties for abuse of appeals? If so, are they applied at the request of the respondent or by the court as a matter of course? Does the procedure respect the principle of the right to be heard? Are reasons provided for the decision? Is the session heard by several judges or just one?

There is no law empowering administrative courts to impose any penalty for abuse of appeals, as the Federal Constitutional Court is allowed to do under Article 34 para. 2 of the Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). However, under Article 38 of the Court Fee Code the administrative courts can impose a penalty if proceedings are unduly delayed by a party's fault causing further time-consuming investigation or a second hearing.

Also, Legal Aid to finance legal representation is denied if the intended complaint or appeal is abusive or has no sufficient prospects of success.

II. Techniques to speed up proceedings

II. 1. Are there accelerated procedures for emergency situations? If so, describe the main conditions.

Where the Federal Administrative Court appeals on points of law, there are no accelerated procedures for emergency situations, because these fall into the competence of the courts of first and second instance.

Where the Federal Administrative Court decides in first instance (see Nr. I.1. above), it may suspend the execution of an administrative decision or issue interim injunctions under Article 123 VwGO in order to ensure that no rights be violated until a final decision may be reached.

Exceptionally, Article 123 para. 1 VwGO entitles the court even to consider the merits of the case and pronounce a ruling which factually is not only provisional, but final, if that is the only means to grant an effective remedy. This presupposes that the applicant, in waiting for the final judgment, would suffer a violation of rights impossible to correct or to compensate adequately afterwards. *For instance, if one of the candidates of an oncoming election was unlawfully denied the right to take part in a pre-election TV-discussion, and the court could not hear the case before the election, an injunction might order the TV-company to let the candidate take part. In cases where more than one candidate apply for appointment to a position in public service, an injunction may stop the authority to appoint one candidate until the court has ruled on the legality of the selection procedure.*

As a rule, proceedings to obtain interim relief or interim injunctions have to be instigated at the Administrative Court. The applicant or respondent not satisfied with its ruling may file a complaint at the Higher Administrative Court which decides, as far as emergency procedures are concerned, in second and last instance.

Decisions in emergency procedures are usually taken by the full panel competent to judge in the main procedure. Yet, in urgent situations where any delay might be perilous, the president of the panel is empowered to decide as a single judge (Article 80 para. 8, Article 80a para. 3 sentence 2 and Article 123 para. 2 sentence 3 VwGO).

II. 2. Are there accelerated procedures for appeals that are clearly founded, unfounded or inadmissible? If so, refer to the questions listed under II, 1.

Article 144 para. 1 VwGO provides that appeals which are inadmissible are rejected without an oral hearing by court order.

In the admission procedure, the Federal Administrative Court may annul contested decisions resting on a breach of procedural law by court order and order proceedings at the lower court to be recommenced (Article 133 para. 6 VwGO). There are no further accelerated procedures as far as the admission of appeals is concerned. Yet the law enables speedy decisions in such cases by the short delays to substantiate the grounds for appeal, by not prescribing an oral hearing and by relaxing the obligation to provide written grounds for rejecting or dismissing an appeal. Under Article 133 para. 5 VwGO only a short summary of the relevant grounds has to be given. The court may even dispense with a written reasoning insofar as the reasons can not contribute to enlighten the conditions under which leave to appeal has to be granted.

In cases where the facts are clear and undisputed and only questions of federal law are at stake, claimants may get a speedy final ruling by “skipping” the second instance and, with the consent of their adversary, file an appeal limited to points of federal law directly at the Federal Administrative Court (Article 134 VwGO, leap frog appeal = “Sprungrevision”). Leave to do so must be granted by the court of first instance.

II. 3. Are there accelerated procedures for appeals that should be straightforward? If so, refer to the questions listed under II, 1.

There is no special procedure to be followed in cases where the solution is evident. Even where the court, instead of granting leave to appeal because of procedural errors, may reverse the erroneous judgment by court order, there is no distinction between proceedings in straightforward cases and those where the procedural error is not evident.

With the consent of the parties, the court may decide without oral hearing (Article 101 para. 2 VwGO). Such consent is usually given if there is no evidence to be

taken, and none of the parties deems pleading on the legal questions to be necessary. This rule is applicable in proceedings of all instances.

Any court of first instance (including the Higher and the Federal Administrative Court, if exceptionally acting as such) may decide cases which are not especially difficult by a special form of court order (Gerichtsbescheid, Article 84 VwGO) that is equivalent to a judgment, but is rendered without oral hearing. Before rendering the order, the parties have to be consulted. Yet their consent is not necessary to authorize this form of decision. After it has been rendered, the parties may contest it by applying for an oral hearing or in the way they might contest a judgment.

In appeal proceedings, the Higher Administrative Courts may decide by court order, if the decision on the admissibility and the merits of the appeal is unanimous and the court deems an oral hearing to be unnecessary (Article 130a VwGO). Here as in the case of Article 84 VwGO the parties have to be consulted, although their consent is not necessary to authorize the form of decision. Following Article 141 VwGO, Article 130a VwGO is not applicable in appeal proceedings before the Federal Administrative Court.

Please also refer to II.6.

II. 4. Other than for proceedings for interim relief that do not issue preliminary rulings on the merits of the case, are there sessions where appeals are heard by a single judge and if so, for what kinds of cases?

Article 6 VwGO allows decisions to be taken by a single judge only in the Administrative Courts and under the condition that the case is not difficult and the parties have been given the opportunity to comment on transferring the power to decide on a single judge. The single judge may refer the decision back to the full panel if he holds that, in the course of the proceedings, difficulties have arisen which necessitate a decision by the whole panel.

Judges of the Higher Administrative Courts may act as single judges only with the consent of the parties (Article 87a para. 2 VwGO). The same applies to judges of the Federal Administrative Court acting as court of first or second instance, but not in matters of third instance, that is in appeals on points of law only (Article 141 VwGO).

However, if authorised by special statutory rules, one member of a Federal Administrative Court's panel may decide, for instance in disputes arising from the implementation of the panel's decision on costs (Article 66 para. 6 of the Court Fee Code <GKG>).

A single judge may refer the decision to the full panel only if a statutory rule allows him to do so. Even if there is no explicit statutory rule this is presumed if the decision to be taken legally requires a decision of the full panel, as for instance referring the case to the European Court of Justice for a preliminary ruling.

II. 5. Can the obligation to provide grounds be relaxed? (e.g. relaxation of the obligation to respond to all arguments or statements; grounds provided simply by referring to the relevant provisions, etc.)

Normally, in administrative procedures the citizen is the claimant, the authority the defendant. The administrative procedure is governed by the principle of investigation ex officio. The obligation to provide grounds normally rests on the defendant who has to show - and eventually to prove - that he acted lawfully when issuing an administrative decision or denying it.

Under Art. 99 para 1 VwGO, the authority is obliged to submit to the court all files and documents (in full and in original) pertaining to the case and to give any explanation which the court might request. Since administrative files and records contain all relevant documents including inter office memoranda and written deliberations, in the average case this provision is sufficient to collect all necessary facts and information which the judge needs for his decision. And since the reasons on which the authority has founded its decisions appear from the administrative decision (or the refusal to issue one), the authority does not need to give further explanation for its decision, unless the courts asks for them.

Under Art. 99 para 1 VwGO, the authority may refuse to disclose their files to the court (and, of course, to the claimant), submitting that their content has to be kept secret by law or because their knowledge might cause detriment to the country. If this argumentation is contested by the opponent, a special interim procedure is opened before the court of appeal (in some cases before the Federal Administra-

tive Court) aiming at a decision whether the position of the authority is justified or not.

II. 6. Is it possible to conduct procedures entirely in writing, with no need for a hearing?

Yes. With the consent of all parties involved, the court may decide without an oral hearing (Art. 101 para 2 VwGO).

Furthermore, the court of first instance may decide without oral hearing by a written decision called “Gerichtsbescheid” if it deems the facts to be clear and the case not to imply factual or legal questions of outstanding complexity. In this case the parties must be heard, but the court may decide without oral hearing even if one of the parties objects to such a procedure. Nevertheless, if the court has ruled that way, the losing party has the choice of either asking for an oral hearing (before the same court) or for leave to appeal (Art. 84 VwGO). By this provision it is guaranteed that no claimant is denied an oral hearing without his consent, as set down in Art. 6 HRC (“everyone is entitled to a fair and public hearing”).

The court of appeal may decide the appeal without oral hearing, provided there was an oral hearing in the first instance. The court of appeal is entitled to this procedure if the judges are unanimous on the merits of the case and do not consider an oral hearing necessary (Art. 130a VwGO). Prior to this decision the parties must be heard.

II. 7. Can any party not cooperating with the procedure be penalised?

The Procedural Code does not provide for any real sanction. It is absolutely uncommon, if not unknown, that public authorities do not fulfil their legal obligations to disclose their files and to answer the Courts additional questions. Eventually, the court could issue an order obliging the party concerned to disclose certain facts or documents, and this order might be enforceable under the statutes governing the enforcement procedure. No actual cases of that kind are known.

If by negligence of one of the parties an oral hearing has to be adjourned or postponed, that party has to bear the additional costs incurred (Art. 155 para 4 VwGO).

Moreover, the court may fix an additional fee to be imposed on the party (Art. 38 GKG).

Under Art. 87b VwGO, the court may ask the parties to disclose further facts or to indicate means of evidence within a deadline fixed by the court. Failing to comply in time with its demand gives the court the right to refuse belated arguments, if the court holds the delay was caused by negligence and the admission of the belated arguments would delay the proceedings.

Generally, failing to cooperate may lead to procedural disadvantages: Parties who refuse to disclose facts which only they can know, have to bear the result of their behaviour. The party concerned may lose his right to enlarge his arguments, and the court may bar him from further introducing new facts or conclusions. The court may consider proved the alleged content of documents which the opponent does not disclose or which he has wilfully destroyed in order to prevent the other to make use of it (Art. 444 of the Civil Procedural Code, stating a principle which is universally applicable).

In cases where the claimant has started legal proceedings to the sole purpose of safeguarding his rights with regard to the legal deadline (see question II. 11), Art. 92 para 2 VwGO provides that the court may ask the party to push ahead his claim. If the claimant fails to do so for more than two months, his claim is considered withdrawn and the case is terminated.

II. 8. Do judges raising legal arguments of the court's own motion always have to order deliberations to be begun again or do they have to authorise the parties to submit new conclusions?

As a general principle the court may not base its decision on a legal argument which has not been open to discussion by the parties. If the court thinks that the case has to be solved on the grounds of a legal provision or a legal argument not yet introduced into the proceedings, the court is required to disclose this reasoning to the parties and to invite them to comment thereon. This can be done in writing before the oral hearing or in the oral hearing itself. Should the court raise new legal arguments after the hearing, it would at least be obliged to authorise the parties to submit new statements.

II. 9. Does the procedure allow the deadlines for submitting statements and documents to be shortened?

The procedure code gives the court power to fix deadlines for submitting statements and documents (Art. 86 para 4 and Art. 87 b VwGO). It does not say anything about the length of such deadlines. It is up to the court's discretion to fix such deadlines. So, normally, there will be no necessity to shorten them. In the contrary, deadlines may be extended if the party concerned submits reasonable grounds.

Summons for oral hearings are subject to legal deadlines ("at least two weeks, before the Supreme Administrative Court at least four weeks", Art. 102 para 1 VwGO). In case of urgency the deadlines may be shortened.

It should be noted that many statutes governing the procedural steps of an administrative procedure led by the administration (for instance in the field of planning airports, highways, waterways, urbane areas etc) provide that objections against the project have to be raised within a certain period. Failure to do so leads to the exclusion of any argument and bars the person concerned from the right to challenge the final decision before the administrative court.

II. 10. Does the procedure allow the appeal, the statements, written submissions and the documents to be submitted electronically?

Generally: Yes. Art. 55 a VwGO provides that all documents may be submitted electronically to the court, provided the government has issued a regulation giving leave to do so. Actually many but not all of the German Federal States (Länder) have issued such regulations. The Federal Government has issued a regulation concerning the Federal Administrative Court and the Federal Fiscal Court. Art. 55 a VwGO also allows the court to communicate its documents electronically to the parties.

However, the procedure is not yet compulsory, and no party is obliged to submit its documents electronically or to make arrangements that documents of the court can be delivered electronically. This may change in future; it may be expected that at least public authorities will have to disclose their files by submitting them electronically.

II. 11. Must statements, written submissions and documents be submitted in strict accordance with the deadlines, with the case being inadmissible if they are not submitted in time? If so, are there any exceptions to this rule?

Deadlines fixed by law only exist for writs initiating litigation to be filed within one month after service of an administrative decision, for requests to grant leave to appeal (one month after service of a judgement) and one more month to give the reasons for the appeal. Except for the last one, these deadlines are strict and may not be extended by the court. All other deadlines are fixed by the court in its own discretion and may be extended as the court thinks fit.

A claim not filed in accordance with the legal deadline is inadmissible. The same applies to appeals and to applications to grant leave to appeal.

II. 12. Is there a limit to the number of statements or written submissions that may be submitted? Can additional statements or written submissions and documents be submitted?

No. However, if the judge feels that all arguments have been exchanged and new statements tend to repeat what has already been said, he may fix a deadline to submit final statements. Statements submitted after that date may be barred from consideration, if the judge states that the delay was caused by negligence and was meant to delay proceedings. However, whatever is submitted to the court must also be submitted to the opponent, and eventually he must have the possibility to comment on it if new arguments or facts have been submitted.

II. 13. Is it compulsory to submit a summary statement closing the written submissions?

No.

II. 14. Once the investigation has been closed, is it possible to submit new documents, written submissions or written observations at the last minute?

The answer is roughly the same as to question no. II.12. If the party submits new documents or observations, the opponent must be granted the right to submit his comments. This might eventually lead to the necessity to adjourn the hearing or to reopen the investigation. It can be sufficient to postpone a decision (which is nor-

mally given after the oral hearing of the case) and to give the opponent leave to submit his answer within a deadline fixed by the court.

As a general remark, it should be noted that the German procedural Code does not make a special distinction between the investigation of facts and the submission of legal arguments. The final point is the closure of the oral hearing.

II. 15. Can new arguments be raised during the procedure?

Yes, but the judge may fix a deadline if he holds that new arguments are only raised for the purpose to delay the decision.

II. 16. Can new arguments be raised on appeal?

Generally yes, but exceptionally the court may refuse to accept new arguments if it deems that they had not yet been submitted by negligence and that they should have been raised at an earlier stage.

II. 17. Are there appeal channels for accelerating the course of the procedure or applying a penalty for exceeding “reasonable time”?

In federal procedural law, there is no special remedy against proceedings exceeding the “reasonable time”. Yet, undue delays constitute a fault of procedure and may be invoked as such in court because they violate the party’s right to efficient judicial protection under Article 19 para. 4 of the Fundamental Law (Grundgesetz - GG). Some federal states’ constitutions, as in Saxony or Brandenburg, explicitly guarantee each litigating party’s right to a speedy procedure, and allow constitutional complaints against proceedings of excessive length. Besides, there are measures of courts’ administration to ensure that proceedings are diligently led and concluded without unnecessary delay (see answers to Nr. III. 1.).

Where, all the same, proceedings have taken more than reasonable time, even if it were for reasons of shortness of staff or due to other facts beyond the court’s control, complaints for violation of constitutional rights are usually successful. *In one case, where during the proceedings at least interim relief had been granted, the*

state's constitutional court denied a violation of the duty to give efficient judicial protection in reasonable time, but imposed on the state the duty to bear a considerable part of the costs of the proceedings (Verfassungsgericht des Freistaates Sachsen, Beschluss vom 25. September 2009 - Vf. 44-IV-09 -).

II. 18. What does the court understand by “reasonable time” for a hearing within the meaning of Article 6 of the European Convention on Human Rights? If applicable, mention some cases where sanctions were applied because a hearing did not take place in reasonable time.

There is general consent that the reasonable time to conclude administrative court proceedings cannot be defined by a deadline applicable to all kinds of cases. The time in which one may reasonably expect a final decision depends on the nature and the urgency of the case, the difficulty in taking and assessing necessary evidence, and in cooperating with third parties whose behaviour the court has only limited power to influence. In any case, the court has to lead proceedings diligently and is obliged to do all in its power to assure a speedy decision.

On a statistical average, main proceedings in the first and second instance are usually terminated within one to two years. Decisions on the admission of appeals generally take about three to six months to decide, and appeals one to two years, depending on the workload of the court and the conditions described above (for further details see the answer to No. III.2).

III. Performance criteria

III. 1. Are there quantitative and qualitative criteria for measuring the “performance” of court activity? What is the judicial value of these criteria and what body issued them?

Measuring the performance of the judiciary and defining criteria for it have their constitutional basis in Article 19 para. 4 of the Basic Law providing for effective legal protection. It is the duty of the judiciary to ensure an effective examination concerning facts and law of any individual case presented, leading to a procedurally and substantially correct decision within a lapse of time as short as possible. To reach at a more operational level of managing the court system it is necessary and can be lawful to formulate quantitative and qualitative criteria for court activity.

However, the independence of judges and their being subject only to the law (Article 97 Basic Law) are not to be infringed.

There are no other than the above mentioned quantitative or qualitative criteria to be found in legally binding instruments. Nevertheless, the constitutional framework has been substantiated in many formal and informal ways:

Quantitative criteria: All courts have developed a certain expectation as to what length of proceedings is acceptable (e.g. for the Federal Administrative Court: Main proceedings settled by judgment should not exceed 12 months; applications for leave to appeal should be settled by court order within 4-6 months). These expectations express just a form of self-evaluation but are not without any factual consequences because they may have an impact on the self-esteem of the judiciary as a whole as well as on a possible magistrate's assessment procedure. Far more important and leading to serious political consequences is the so called "PEBB§Y"-system, a statistic-based Manpower Requirement Planning (MRP) system. From 1998 on, a working group consisting of members of all federal state ministries of justice and several professional associations designed and executed an extremely widespread and intense statistical survey on the question of how much time the judge needs to fulfil his duties. The survey has first been carried out within the system of the ordinary courts (civil and penal courts) and then has been extended since 2005 to the specialised courts. On the basis of a detailed self-evaluation covering a period of 4 to 6 months and carried out by 2.969 members of court staff (hereof 1.173 judges) a compilation of "basic figures" concerning administrative, labour, social and finance courts has been published. A basic figure expresses the amount of time required to settle a single case; e.g. for a higher administrative court dealing with an appeal: 2.100 minutes for a case concerning environmental law, 1.200 minutes (civil service law), 990 minutes (building and planning law), 790 minutes (police and regulatory law), 540 minutes (aliens law), and so on. Taking into account the annual working time of a judge - 103.000 minutes (average) - and the number of cases to be dealt with per anno, the manpower required can easily be calculated. It might be noted in this context that the German tradition of giving detailed reasoning as a substantial contribution to an effective legal protection influences in a decisive manner the average length of proceedings. Although serious objections as to the validity and accuracy of the "basic figures" can be raised, the MRP-system currently practised in the German judiciary is founded predominantly - if not solely - on the "PEBB§Y" evaluation. Even without legally binding effects

PEBBS§Y therefore has reached an overwhelming importance in the field of measuring court activities in terms of quantity.

Qualitative criteria: Formulating means of measuring court performance in terms of judicial or legal “quality” is even more difficult. Despite the existence of detailed legal instruments to assess the performance of magistrate, taking into account quality issues (e.g. professional and social competence, productivity, organisational competence, capacity for teamwork etc), the constitutionally guaranteed judicial independence strictly limits the competence of administrative bodies to measure the performance of court activity in terms of legal quality. The lawfulness of court decisions can only be reviewed on appeal by another court but not by legislative or executive bodies. However, the necessity to discuss quality issues concerning court activities is widely accepted. Thus a debate on judicial ethics is going on within the judiciary and apart from being influenced by the court administration. Main issues of the debate are topics currently discussed in the European Network of Councils for the Judiciary (ENCJ) or the Consultative Council of European Judges (CCJE), but also specific aspects of the self-conception of German judges (e.g. the above mentioned requirement of a detailed and well founded reasoning leading to the court’s decision). Working groups dealing with quality issues have published consultation papers on various aspects of the everyday-work of judges as well as on abstract ethical issues. It might be remarked, though, that many judges tend to feel rather reluctant to participate in this discussion.

III. 2. Are there statistical data on the average length of proceedings in the Supreme Administrative Court and the average length of a procedure from the court of first instance to the final decision by the Supreme Administrative Court?

Yes. The significance of any statistical data on this topic is, however, influenced by the fact that the average length of proceedings is generally evaluated on the basis of settled cases excluding therefore pending cases. The current (2009, evaluated in January 2010) figures concerning the Federal Administrative Court are:

- “Revision Cases” (appeals on points of law only) settled by judgement: approx. 13 months
- “Complaints” (leave to appeal matters) settled by court order: approx. 4 months
- First instance cases settled by judgement: approx. 19 months

- First instance cases settled by court order: approx. 11 months

Considering the federal structure of the German judiciary it is clear that reliable data on the average length of proceedings in the courts of first and second instance are not to be established without difficulties and a certain vagueness. Referring to the publications of the Federal Statistical Office (www.destatis.de) the following picture can be drawn:

- Main proceedings (overall duration for first and second instance courts): 30.8 months (to be added to the proceedings at the Federal Administrative Court, if appealed)
- Urgent actions (overall duration for first and second instance courts): 6.3 months
- First instance courts: 15.6 months (main proceedings settled by judgement) resp. 1.9 months (urgent actions settled by court order)
- Second instance courts: 17.2 months (main proceedings settled by judgement) resp. 3.0 months (urgent actions settled by court order)

III. 3. Are there significant differences in the length of procedures depending on the nature of the case?

Yes. According to available statistic data (cf. III 1 - "PEBB§Y", and annual statistics of the Federal Administrative Court) there are mainly two factors influencing the length of proceedings: the mode of procedure and the field of law as posed by the case in question. Concerning the mode of procedure, the first instance cases - 6.5% of the pending cases at the Federal Administrative Court - take considerably more time to be settled (approx. 19 months <rulings> resp. 11 months <court orders>) than reviews on point of law (approx. 12-13 months), whereas proceedings on leave to appeal matters don't exceed a period of approx. 4 months. As to the fields of law relevant for a case, the differences are even more distinct albeit that a reliable data basis is difficult to establish. As a result of the above mentioned PEBB§Y study 16 fields of law can be identified for which statistically sound figures are to be made out. Extremely time-consuming fields of law are, following the evaluation of the study, environmental law, civil service law and the law governing the administration of economic affairs, whereas asylum law and social welfare law are marked as less time-consuming. It has to be noted, though, that the PEBB§Y study did not include the Federal Courts so that the validity of its results for the

level of the Federal Administrative Court might be questionable. In addition, it is obvious that any reference for preliminary ruling by the Federal Constitutional Court or the Court of Justice of the European Union will cause a significant prolongation of proceedings.

III. 4. During proceedings, are lower courts authorised to request the Supreme Administrative Court's opinion on a new point of law in the aim of guaranteeing judicial security and preventing an influx of disputes?

Not any more. Until 1997 the Higher Administrative Courts (courts of second instance) had to submit points of law concerning the interpretation of federal law as relevant for the validity of delegated legislation or bye-laws (e.g. land-use plans) to the Federal Administrative Court (Article 47 para. 5, 7 of the Administrative Court Act). However, this procedural remedy which was applicable only in connection with an action to review delegated legislation and bye-laws below federal state law turned out to be of no practical importance and has since been abandoned.

III. 5. What is the ratio between the number of judges in the Supreme Administrative Court and the number of cases settled each year?

Approximately 35 cases are settled by each judge per year. Considering the fact that nearly all decisions of the Supreme Administrative Court are being taken by panels of 3 or 5 judges it may be added that the number of cases settled by a panel amounts to 180 - 200 each year.

III. 6. What is the ratio between the number of judges and the number of assistants?

Generally, no more than one assistant is available for a chamber of five or six judges. It should also be mentioned that the assistants - mainly judges from the first instance courts or assessors working within the public administration - use to be assigned to the Federal Administrative Court for two years, this period of time forming part of their professional development. As a consequence, the assistant personnel are undergoing continuous change.

III. 7. Are there specialised judges within the Supreme Administrative Court who only deal with a certain kind of cases? Does this specialisation have a basis in law or is it a result of internal work distribution?

Yes. At least annually the Court's steering committee has to decide on the assignment of business within the court (Article 21e Judicature Act). This leads to a rather high degree of specialisation in the panel's competence *ratione materiae*. The assignment of business within the panel by decision of the panel (Article 21g Judicature Act) may establish further specialisation of single judges. However, specialisation is only exceptionally required or recommended by law, i.a. concerning decisions on access to official files of a public authority (Article 189 of the Administrative Court Act), matters of social welfare (Article 188 of the Administrative Court Act) and asylum law cases (Article 83 of the Asylum Procedure Act).

1.2.2010