

## Colophon

**Editor:** Mr. Stéphane Tellier,  
Assistant Secretary-general  
Email: [stephane.tellier@raadvst-consetat.be](mailto:stephane.tellier@raadvst-consetat.be)  
Council of State  
Wetenschapsstraat 33  
B-1040 Brussels

**Publisher:** Mr. Yves Kreins  
Secretary-general  
Email: [yves.kreins@raadvst-consetat.be](mailto:yves.kreins@raadvst-consetat.be)  
Council of State  
Wetenschapsstraat 33  
B-1040 Brussels

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## Contact persons

Country	Name	Email address
Austria	Mrs. Annemarie Ginthör	<a href="mailto:Annemarie.ginthoer@vwgh.gv.at">Annemarie.ginthoer@vwgh.gv.at</a>
Belgium	Mr. Tom De Waele	<a href="mailto:tom.dewaele@raadvst-consetat.be">tom.dewaele@raadvst-consetat.be</a>
Cyprus	Ms. Anastasia Papanicolaou	<a href="mailto:npapanicolaou@sc.judicial.gov.cy">npapanicolaou@sc.judicial.gov.cy</a>
Czech Republic	Mr. Filip Krepelka	<a href="mailto:Filip.krepelka@nssoud.cz">Filip.krepelka@nssoud.cz</a>
Denmark	Mr. Jon Stokholm	<a href="mailto:Jonulrikstokholm@hoejesteret.dk">Jonulrikstokholm@hoejesteret.dk</a>
Estonia	Ms. Sirje Kaljuma	<a href="mailto:Sirje.kaljuma@nc.ee">Sirje.kaljuma@nc.ee</a>
Finland	Ms. Hannele Klemettinen	<a href="mailto:hannele.klemettinen@om.fi">hannele.klemettinen@om.fi</a>
France	Ms. Claire Landais	<a href="mailto:Claire.landais@conseil-etat.fr">Claire.landais@conseil-etat.fr</a>
Germany	Mr. Michael Groepper	<a href="mailto:groepper@bverwg.bund.de">groepper@bverwg.bund.de</a>
Great Britain	Mr. Justice Stanley Burnton	<a href="mailto:Mrjustice.stanleyburnton@courtservice.gsi.gov.uk">Mrjustice.stanleyburnton@courtservice.gsi.gov.uk</a>
Greece	Ms. Christina Sitara	<a href="mailto:s-epikr@otenet.gr">s-epikr@otenet.gr</a>
Hungary	Mr. Nagy Gabor	<a href="mailto:nagy@legfelsobb.birosag.hu">nagy@legfelsobb.birosag.hu</a>
Ireland	Mr. Nial Fennelly	<a href="mailto:nialfennelly@Courts.ie">nialfennelly@Courts.ie</a>
Italy	Mr. Giuseppe Barbagallo	<a href="mailto:annamaria.tiberi@libero.it">annamaria.tiberi@libero.it</a>
Latvia	Mr. Indra Luse	<a href="mailto:Indra.luse@at.gov.lv">Indra.luse@at.gov.lv</a>
Lithuania	Ms. Goda Ambrasaitė	<a href="mailto:gambra@ite.lt">gambra@ite.lt</a>
Luxembourg – Administrative Court	M. Marion Lanners	<a href="mailto:marion.lanners@ja.etat.lu">marion.lanners@ja.etat.lu</a>
Luxembourg – Council of State	Mr. Marc Besch	<a href="mailto:marc.besch@ce.etat.lu">marc.besch@ce.etat.lu</a>
Malta	Mr. Justice David Scicluna	<a href="mailto:david.scicluna@gov.mt">david.scicluna@gov.mt</a>
Poland	Ms. Marta Kulikowska	<a href="mailto:mkulikowska@nsa.gov.pl">mkulikowska@nsa.gov.pl</a>
Portugal	Mr. Rosendo Dias José	<a href="mailto:correio@lisboa.sta.mj.pt">correio@lisboa.sta.mj.pt</a>
Slovak Republic	Ms. Helena Zavadská	<a href="mailto:rupcova@supcourt.gov.sk">rupcova@supcourt.gov.sk</a>
Slovenia	Ms. Nevenka Rihar	<a href="mailto:Nevenka.rihar@sodisce.si">Nevenka.rihar@sodisce.si</a>
Spain	Mr. Manuel Campos Sanchez Bordona	<a href="mailto:m.campos@ts.mju.es">m.campos@ts.mju.es</a>
Sweden	Mr. Schader Goran	<a href="mailto:goran.schader@reg.dom.se">goran.schader@reg.dom.se</a>
The Netherlands	Mr. Johan van Haersolte	<a href="mailto:j.haersolte@raadvanstate.nl">j.haersolte@raadvanstate.nl</a>



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## 1. From the Secretary-general's desk

No comprehensive study on administrative justice in the 25 Member States of the European Union currently exists. For this reason, the Board of our association decided to take part in a research project on this subject in partnership with the French public interest grouping *Mission de recherche Droit et Justice*, headed by Yann Aguila, *maître des requêtes* at the French Council of State.

The research is being conducted by three professors at the University of Limoges - Hélène Pauliat (Dean of the Faculty of Law), Joël Andriantsimbazovina (Professor of Public Law) and Gilles Dumont (Professor of Public Law) – helped by a dozen assistants and colleagues. A steering committee, chaired by Jean Louis Dewost (Division President at the French Council of State and former head of the European Commission's Legal Service), provides follow-up and general coordination for the project. It is made up of equal numbers of representatives from the Association and the *Mission de recherche*<sup>1</sup>.

The team of French academics, supervised by the steering committee, began by drafting a questionnaire in French and English (see Newsletter 14 and the Association's website) which was sent to representatives of the Association's 25 member courts<sup>2</sup>. The questionnaires and answers can be viewed on the Association's website.

A seminar was held at the ERA in Trier on 12 December 2005 to enable the 25 contact persons to discuss the answers to the questionnaire, exchange their ideas and give the academic team the

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<sup>1</sup> The Association is represented by Messrs Kreins (General-Secretary of the Association), Campos (Judge at the Supreme Court of Spain), Fennelly (Judge at the Supreme Court of Ireland), Herbert (Judge at the Federal Administrative Court of Germany), Konijnenbelt (Councillor at the Dutch Council of State) and Pek (Judge at the Supreme Administrative Court of Poland). The *Mission de recherche* is represented by Messrs Aguila (Head of the *Mission*), Stirn (Vice-President of the Judicial Division at the French Council of State), Kintz (President of the Administrative Court of Toulouse), Fairgrieve (contact person at the British Institute of International and Comparative Law, lecturer at the University of Paris), Ms Pauliat (Dean of the Limoges Faculty of Law) and Messrs Andriantsimbazovina and Dumont (professors at the Limoges Faculty of law).

<sup>2</sup>The national correspondants are: Alberto Augusto Andrade de Oliveira (Portugal), Vassilis Androulakis (Greece), Susanne Billum (Sweden), Jautrite Briede (Latvia), Stanley Burnton (UK), Manuel Campos Sanchez-Bordona (Spain), Roberto Chieppa (Italy), Takis Eliades (Cyprus), Marseanne Farrugia (Malta), Nial Fennelly (Ireland), Marc Feyereisen (Luxembourg), Annemarie Ginhör (Austria), Georg Herbert (Germany), Andrzej Kisielewicz (Poland), Gorazd Köbler (Slovenia), Julia Laffranque (Estonia), Claire Landais (France), Paul Lewalle (Belgium), Gabor Nagy (Hungary), Rimvydas Norkus (Lithuania), Pavla Prochazkova (Czech Republic), Jon Stockholm (Denmark), Johan C. van Haersolte (Netherlands) and Pekka Vihervuori (Finland). Slovakia did not respond to the questionnaire.

chance to present an initial summary of the answers and clear up directly with the participants any questions arising from an initial reading of the answers to the questionnaire.

The seminar work will be used as the basis for a major review colloquium to be held in Paris in 2007 and will be published by PUF (*Presses universitaires de France*) in French and if possible also in English.

This research project on administrative justice in Europe, conducted jointly by the *Mission de recherche Droit et Justice* and our Association, is a particularly fine example of a partnership since the two partners complement one another perfectly: the *Mission de recherche* with its team of French academics and the Association with its contact persons in each supreme administrative court. I am sure that this alchemy between theorists and practitioners will bear its fruit.

This newsletter is therefore mainly devoted to the seminar, which was held with the support of TAIEX (the European Commission's Directorate General for Enlargement) and the help of the ERA.

Naturally, alongside this ambitious project, our association is continuing with its other activities. One of these strikes me as being still too little known: the working visits of one or more judges to another member court. These working visits can receive substantial funding from TAIEX (the European Commission's Directorate General for Enlargement) when judges from courts in new Member States visit a court in an 'old' Member State. For example, this newsletter contains an account of the visit of Julia Laffranque, judge at the Supreme Court of Estonia, to the Federal Administrative Court of Germany. Hopefully, reading about this fruitful encounter will encourage other members to follow suit.

Lastly, it should be pointed out that the Association is one of the first to be allocated one of the new .eu domain names. As from today we have our own website which is not longer hosted by the website of the Council of State of Belgium. The new address is "www.juradmin.eu".

Yves Kreins,

Secretary-General.

## **2. Working visit by Mrs Laffranque to the federal administrative court of Germany**

### *Impressions from a study trip to the German Federal Administrative Court*

From 17 until 22 October 2005 I had an excellent possibility to discover the insight of German Federal Administrative Court. The visit was made possible thanks to the close co-operation between member courts of the Association of the Councils of State and Supreme Administrative Jurisdictions and to the financing of the Technical Assistance and Information Exchange Unit of the European Commission (TAIEX).

The programme of my study visit, which was extremely well prepared above all by judge Groepper, enabled me to participate not only in the hearings and sessions of the court but also in the deliberations of two different chambers as well as to take a look at the work in the court in general and visit the supporting structures such as the library, registry etc.

Perhaps to somewhat to my surprise we: the Administrative Chamber of the Supreme Court of Estonia and the German Federal Administrative court, share quite many similarities.

Although I cannot reveal any secrets of the deliberations and even though the senates of the German Federal Administrative Court differ from each other in their methods of deliberations similarly as the different chambers of the Estonian Supreme Court, I must admit that the general approach in interpreting law and valuing the general principles of law are very close to the ways of analysing law during the discussions in our chamber in Estonia.

Likewise the German Federal Administrative Court emphasizes quality instead of quantity in deciding cases, each judge writes approximately 10 judgments per year, this is very close to the approach and figures common to the Administrative Chamber of the Supreme Court of Estonia.

There are some similarities, but however also some differences concerning the admissibility of cases. We have in our court a system of leave to appeal, which means that three judges from the whole court decide whether there are grounds to take the case, whereas in Germany in the Federal Administrative Court each senate decides it on its own with three members out of five respectively six or seven members of the respective senate. But similarly, the same judge who decides upon the admissibility will continue with the case and writes the judgment. We do not give any reasons why we are considering not to give a leave to appeal, we only refer to the relevant stipulation in the procedural law which lists the possible grounds, while in German Federal Administrative Court they reason both: in the cases where it is not given admission and in the cases where the leave to appeal is granted. This is done, among others, in order to ensure the possibilities for further remedies in front of the German Federal Constitutional Court.

One of the similarities is that we both decide also cases dealing with privatisation, in Estonia the reasons are due to the reforms which took place after our country regained its independence, in Germany the cases concern the former German Democratic Republic, the new *Länder*. These cases are both, in Estonia and in Germany very complicated and time consuming. In Germany they have even abandoned the three instance levels and the privatisation cases are decided by the Federal Administrative Court being the second and the last instance.

This brings me to the further differences between our systems. For example the Administrative Chamber of the Estonian Supreme Court is only a cassation court, but the German Federal Administrative Court has also a competence of first instance court in certain cases regarding for example planning of motorways, airports, etc in the new *Länder*. It was quite interesting to see the supreme court judges getting used to the work of first instance dealing with the facts and even visiting for example of a location of a possible airport extension.

Another big difference in the competences is, that in Germany the administrative courts do not decide appeals against competition board, matters relating to state aid, nor with the state responsibility. Also there exist special jurisdictions for social aid matters and tax cases, the latter being resolved in finance courts. In Estonia the five members of the Administrative Chamber of the Supreme Court decide all the "regular" administrative cases, including for instance cases dealing with environment law and civil service law, citizenship and aliens law etc plus the abovementioned. In previous years there have been discussions about giving a separate jurisdiction to public finance cases, but it was considered not appropriate for a small country such as Estonia, interestingly in Germany there are currently debates in "melting" the different jurisdictions concerning public law and joining for example the finance courts with the administrative courts.

In Estonia we have in Supreme administrative jurisdiction only oral hearing if one of the parties so wishes, in Germany it is the other way around, if parties agree, there can be also "only" a written procedure. However, the oral hearings are structured quite the same way in both countries, the major common line here is that a hearing is actually a "legal discussion." To my astonishment it was even much more informal in German Federal Administrative Court than I had imagined. For example the representatives of the parties addressed the court while being seated, the judges give very precise questions and guidelines about the case etc.

Unfortunately it is impossible to describe on few pages all the impressions of one week. In conclusion I would like to stress the openness of the German Federal Administrative Court - the press work is done by a judge responsible for the relations with media, the judges often conduct themselves also excursions in the courtroom (which is of course magnificent, but hopefully many of you will be able to visit it also during the colloquium of the Association in May 2006 in Leipzig!), there exists a society called "Art and justice/judiciary" which arranges concerts in the court building, there is even organized an open doors day. I was very lucky to experience this day during my stay in Leipzig and was amazed how the judges talked to the people and the president of the court opened his office for all visitors and answered their questions. The atmosphere - the court building, the people who work there, an excellent library, the judges, everything is important to assure that the justice is done and seems to be done rightly and adhering to the principle of rule of law. This is true for the German Federal Administrative Court and I wish my colleagues good luck in continuing their work. I hope the experiences gained also in the field of European law and regarding the asking of preliminary references from the European Court of Justice, are very useful for me back home and that the colleagues from Germany are able to visit the Administrative Chamber of Estonian Supreme Court during one of their next "missions" to the new EU Member States.

Dr iur Julia Laffranque,

Judge of the Supreme Court of Estonia



### 3. Administrative justice in Europe: Report of the meeting held in Trier on 12 december 2005

#### 1. The Questionnaire

The questionnaire on the inventory and typology of review by the courts of administrative authorities in the 25 Member States of the EU contains some 76 questions<sup>1</sup>. The questionnaire aims at finding out as precisely as possible the modes, bodies and means of controlling administrative acts in the 25 Member States. The questionnaire is broken down into four main parts (See annex 1), dealing respectively with the question of who reviews administrative acts (Part I), how administrative acts and actions are reviewed by the courts (Part II), whether administrative disputes can be settled by non-judicial bodies (Part III) and the availability of statistical data concerning the administration of justice in the Member States (Part IV). These general parts are preceded by a handful of 'preliminary questions' asking for basic information on the main dates in the evolution of the review of decisions and acts of the administration, whether review by the courts aims to submit administrative authorities to the rule of law or whether it is only a review of the good functioning of the administration, how the notion of administrative authority is defined and whether there is a classification of administrative acts in the legal order in question.

Part I, dealing with the question of who reviews administrative acts, is broken down into six sub-sections. The first of these asks about the bodies that are competent to review administrative acts. This sub-section gives the national correspondants an opportunity to describe the organisation of the court system in their country and in particular to explain which courts are competent to hear disputes concerning acts of the administration. The second sub-section deals with the rules governing the competent bodies, asking if these are laid down in legal texts or in case-law. The third sub-section deals with the internal organisation and composition of the competent courts and is followed by a fourth sub-section asking about the recruitment, training and career structure of the judges who sit on these courts. A fifth sub-section deals in detail with the role of the courts competent in administrative matters, asking what orders the judge may make in relation to a contested administrative act or action, whether some form of preliminary reference mechanism exists within the national legal order and whether the competent body has only judicial functions or whether it can also have an advisory role vis-à-vis the executive or legislature. Finally, the sixth sub-section deals with the allocation of competences between the various levels of courts competent to hear administrative disputes within the national judicial system.

Part II concerns the issue of how administrative acts and actions are reviewed by the courts. Again this part is divided into six sub-sections. The first of these deals with the broad topic of access to justice, asking *inter alia* about national rules on standing, time-limits for bringing an action, presentation of pleadings, legal representation, legal aid and the sanction of abusive applications. The

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<sup>1</sup> The complete questionnaire has been published in the newsletter nr 14 and can be consulted on the Association website.

second sub-section deals with the main trial, asking *inter alia* about the fundamental principles that govern the trial hearing, the rights of interveners, evidentiary issues and the rules governing the deliberations of the judges. The third sub-section deals with the judgment, asking how the grounds for the decision are given, what criteria and methods of review are used by the courts, how legal costs are apportioned, whether dissenting opinions are allowed if the case is heard by several judges and whether the decision is delivered orally or in writing. The fourth sub-section asks about the effects of decisions and the execution of judgments, looking in particular at issues such as *res judicata*, *stare decisis*, the effects of the judgment in time and the powers of the judge to ensure compliance. The fifth sub-section looks at issues of remedies, asking in particular about the interaction between the various levels of the courts and whether there is a system of appeal. Finally, the sixth sub-section addresses the topics of emergency or summary jurisdiction proceedings and applications for interim relief.

Part III of the questionnaire asks whether administrative disputes can be settled by non-judicial bodies, such as independent offices, agencies, mediators, or other regulatory authorities, or whether recourse to the courts is always necessary for administrative disputes. Part IV of the questionnaire, finally, asks for statistical information regarding the administration of justice in the Member States. A first sub-section asks for information on the financial resources made available for the review of administrative acts, a second sub-section looks for statistics on the volume and length of proceedings and the main fields in which administrative litigation arises, and a third sub-section asks about the economics of administrative justice.

## **2. The Trier Meeting**

The Trier meeting of 12 December 2005, organised with the generous financial support of TAIEX, brought together the principal actors in the project to discuss its progress and represented a valuable opportunity for the university research team to raise questions concerning the responses to the questionnaires with representatives of the national judicial bodies in whose name they were completed. The meeting was chaired by Yves Kreins and Yann Aguila and was attended by more than twenty national correspondants or their substitutes<sup>2</sup>, together with two observers from Turkey<sup>3</sup>, representatives of the General Secretariat of the Association<sup>4</sup> and a representative of the Academy of

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2 The representative of national Councils of State or Supreme Administrative Courts who attended were: Goda Ambrasaitė (Lithuania), Vassilis Androulakis (Greece), Alberto Augusto Andrade de Oliveira (Portugal), Giuseppe Barbagallo (Italy), Jautrite Briede (Latvia), Susanne Billum (Sweden), Stanley Burnton (UK), Manuel Campos Sanchez-Bordona (Spain), Marseanne Faruggia (Malta), Nial Fennelly (Ireland), Marc Feyereisen (Luxembourg), Georg Herbert (Germany), J. Kleijne (Netherlands), Willem Konijnenbelt (Netherlands), Julia Laffranque (Estonia), Claire Landais (France), Paul Lewalle (Belgium), Pavel Molek (Czech Republic), Gabor Nagy (Hungary), Rimvydas Norkus (Lithuania), Vaclav Novotny (Czech Republic), Ryszard Pek (Poland), Wolfgang Pesendorfer (Austria), Pekka Vihervuori (Finland), Marek Zirk-Sadowski (Poland).

3 Mehmet Cakmak and Orhun Yet of the Council of State in Ankara.

4 Christophe Stassart and Stéphane Tellier.

European Law<sup>5</sup>. Judge C.W.A. Timmermans from the European Court of Justice in Luxembourg also attended. The sessions were directed by the academic experts from the OMIJ who travelled to Trier for the meeting<sup>6</sup>. During the course of the day the research team provided participants with interesting information and insights drawn from the preliminary results of their examinations of the national reports. The team also availed of the opportunity to engage in a lively and useful exchange of views with the representatives of the national institutions responsible for drawing up the reports. The meeting lasted one full day and was preceded by an evening dinner allowing the various parties to the project to get to know one another better in a pleasant informal setting.

Following the introductory words and presentation of the project by Yves Kreins and Yann Aguila, Professor Joël Andriantsimbazovina proceeded to give some preliminary quantitative and qualitative results of the project, to explain the methodology used in examining the questionnaires and to indicate some of the initial convergences and divergences between the various national administrative justice systems revealed by a first reading of the reports. Of the 24 completed questionnaires received, 9 were in French and 15 were in English. In Professor Andriantsimbazovina's opinion the reports are of a high quality and offer a solid basis for the preparation of a global synthesis of administrative review in the Member States. The responses were first of all translated from English into French by members of the research team so that all the researchers could work with them. In the medium term it is envisaged that the French reports will be translated into English by professional translators. The research team are also preparing a standardised glossary of terms, expressions and legal concepts in order to facilitate mutual comprehension in both working languages of the project<sup>7</sup>. It is hoped that this glossary will complement the glossary currently being prepared by the Association and in time the two may even be merged. The completed questionnaires were then subjected to a first perusal and a standard table allowing for the comparison of national responses on individual topics was drawn up. On average each member of the research team is responsible for completing the table for two Member States. A global synthesis will be prepared on the basis of these tables.

Professor Andriantsimbazovina then proceeded to indicate some of the preliminary results in terms of convergences and divergences between the various national systems of judicial control of the administration (See annex 2). Regarding structures, a distinction can be made between those systems having a supreme administrative court, those having an administrative chamber within a single supreme court and those with a single supreme court competent for both administrative and non-administrative actions. In terms of convergences, it seems at the outset that there is universal consensus on the necessity of judicial control of the administration across the Member States and this control is founded on the principle of the Rule of Law, though this may be formulated in terms such as the principle of legality or the principle of submission of the administration to the law. There also appears to be a trend across many Member States towards the expansion of an autonomous system

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5 Richard Crowe.

6 They were: Joël Andriantsimbazovina, Gilles Dumont, Clotilde Deffigier, Caroline Capelle and Cédric Groulier.

7 A brief presentation on how this glossary project is progressing was delivered after Professor Andriantsimbazovina's talk by Caroline Capelle and Cédric Groulier.

of administrative justice. This can be seen in several Member States in the extension of review beyond the mere control of legality and also in the transfer of jurisdiction from civil courts to a system of autonomous administrative courts. It also seems that the notion of public administration is generally understood in a broad sense, so that administrative justice may also control the actions of private entities exercising public prerogatives. Overall, it seems that the judicial control exerted over the administration is increasingly broad-ranging. Convergences can also be seen in the relatively generous conditions governing the admissibility of administrative actions.

As far as divergences are concerned, Professor Andriantsimbazovina noted in particular the diversity of courts competent for controlling the acts and action of the administration, with some countries having specialised systems of administrative courts and others conferring competence for control of the administration exclusively on courts of ordinary jurisdiction. There also exist wide disparities on the question of whether administrative courts can exercise consultative functions and how this can be done. Professor Andriantsimbazovina concluded his presentation with some open discussion on the influence of the law of the European Convention on Human Rights and Community law on national systems of administrative justice (See annex 5). Various contributions from the floor highlighted the importance of the Strasbourg case-law concerning, for example, the right to due process and the impact that this has on the organisation of national courts. It also seems that Community law is having a strong impact in specific sectors of administrative justice within many Member States, such as environmental law and public procurement.

The discussions were then taken on by Professor Gilles Dumont, who addressed the responses relating to judicial bodies and judges (See annex 3). Professor Dumont used a number of charts to illustrate the varying structures of administrative justice within the Member States and there was a good deal of interaction with national correspondants who were asked to explain more clearly the exact roles of particular administrative courts or administrative chambers within their national systems. The role of the national constitutional court vis-à-vis the administrative courts was the subject of particularly lively discussion, with various national correspondants explaining what happens when the same administrative acts are challenged before the constitutional court and the administrative courts. The question of how exactly to divide the competences between the administrative courts and the ordinary courts in those countries having a specialised system of administrative courts was also raised, with several national correspondants providing further information on how conflicts of competence are resolved within their national legal orders. The discussions then turned to the question of how administrative justice is organised and how many levels of administrative jurisdiction exist. Here there are wide disparities across Europe. The approach to the territorial division of jurisdiction between administrative courts within the Member States also varies. Turning then to the topic of judges and the question of whether administrative judges have a special status compared to ordinary judges, the approach again varies across Europe. On the question of whether an administrative judge may go to work in the administration and then return to his judicial post, it seems that this is possible in some Member States but not in others. Similarly, in some countries it is possible for the administrative judge to participate in an advisory role in the drafting of legislation.

The afternoon session then turned to questions of the efficacy of administrative justice, particularly the right to bring a case to court and the quality of justice (See annex 4). This session was directed by Clotilde Deffigier of the OMIJ. The question of the effects of a judicial ruling in time gave rise to heated discussions, with the possibility of curtailing the effects of a retroactive annulment of an administrative act in some Member States being noted. As for enforcement against the administration, it seems that in principle civil liability of the administration can arise in several countries if judicial decisions are not complied with, but in general this problem does not arise in practice. Emergency procedures were another topic of much discussion. They exist in all systems of administrative justice but the exact conditions for granting them vary across the Member States. As far as the issue of reasonable delay is concerned, it was demonstrated that administrative cases take an average of one to two years in the Member States and there is no real magic formula for stating exactly what is to be considered an unreasonable delay. Any more statistical data from the Member States that may become available on this point would be welcomed by the research team. Finally, the discussions turned again to the impact of European law and the question of the extent to which European decisions are cited before national courts. The challenge in Strasbourg to the presence of the French *Commissaire du gouvernement* in the deliberations of the *Conseil d'Etat* gave rise to particularly lively discussions on the precise role of the *Commissaire du gouvernement* and similar institutions that exist in the courts of other Member States.

The proceedings were brought to a close with some final discussions on the overall direction of the project. There was a comment from the floor that it might be appropriate to place a greater emphasis on the issue of the grounds for judicial review of administrative acts, a topic that was not discussed to any great extent during the day in Trier. It was also suggested that it might be interesting to set a hypothetical model case concerning, for example, planning law and to then ask the national correspondants to provide an answer. This would allow for an analysis of how judges from different legal orders will approach the same concrete administrative law problem. Yves Kreins noted that this is exactly the approach that is being adopted for the Association's bi-annual colloquium due to take place in Leipzig in May 2006. Mr. Kreins then proceeded to thank the research team and the participants for all their efforts and looked forward to a good continuation of the project over the year ahead.

### **3. Follow-up**

The Trier meeting can be considered to have provided a very useful opportunity for the university research team to clarify certain points with the authors of the national reports. However, time being short and many questions needing to be asked on the day, it was not possible to clarify every point of uncertainty in Trier. For this reason, the dialogue between the research team and the national correspondants continues through the medium of the electronic forum that is hosted on the website of the Association. This forum allows the researchers to post additional questions on the site and gives national correspondants the facility to respond in writing with further information on their national systems of administrative justice.

The next step in the project will see the research team finalising a first global synthesis on the basis of the completed questionnaires that they received back from the national correspondants and on the basis of the fruitful dialogue that was initiated in Trier and that continues through the electronic forum. This innovative and ambitious project is now well up and running and all involved can look forward expectantly to the colloquium in Paris in 2007, marking the culmination of the first phase of a project the results of which will surely constitute an important and lasting contribution to the advancement of administrative justice in Europe.

Richard CROWE

E.R.A.

## **4. Annexes**

### ***Annex 1: Synthesis of the questionnaire***

This research is based on a questionnaire containing 76 questions, divided up as follows<sup>1</sup>.

#### **Preliminary questions.**

#### **I – WHO SUPERVISES THE MEASURES AND ACTIONS TAKEN BY THE PUBLIC SECTOR?**

- A. THE COMPETENT BODIES
- B. STATUS OF THE COMPETENT BODIES
- C. COMPOSITION AND INTERNAL ORGANISATION OF THE COMPETENT BODIES
- D. THE COURTS
- E. TASKS OF THE COMPETENT BODIES
- F. DIVISION OF TASKS AND RELATIONSHIP BETWEEN THE COMPETENT BODIES

#### **II – HOW ARE THE MEASURES AND ACTIONS TAKEN BY THE PUBLIC SECTOR SUPERVISED BY THE COURTS?**

- A. ACCESS TO THE COURT
- B. TRIALS
- C. RULINGS
- D. EFFECTS AND ENFORCEMENT OF RULINGS
- E. RIGHTS TO APPEAL
- F. EMERGENCY PROCEEDINGS AND MEASURES FOR INTERIM RELIEF

#### **III – CAN ADMINISTRATIVE DISPUTES BE SETTLED BY NON-JUDICIAL BODIES?**

#### **IV – ADMINISTRATION OF JUSTICE AND STATISTICAL DATA.**

- A. MEANS AVAILABLE TO THE COURTS FOR PUBLIC SECTOR SUPERVISION
- B. OTHER STATISTICS AND FIGURES
- C. THE ECONOMICS OF ADMINISTRATIVE JUSTICE

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<sup>1</sup> The complete questionnaire can be consulted on the Association website or in the newsletter nr 14.

## Annex 2: Similarities and differences

By Joël Andriantsimbazovina

Professor of public law at the University of Limoges

Head of the Observatoire des Mutations Institutionnelles et Juridiques

As the table shows, there are three main types of judicial supervision system for the public sector. This table requires elaboration.

System with administrative supreme court.	System with administrative chamber within a single court	Single court with same courts used for public sector and private individuals
Austria; Belgium; Czech Republic; Finland; France; Germany; Greece; Italy; Lithuania; Luxembourg; Netherlands; Poland; Portugal; Sweden	Estonia; Hungary; Latvia; Slovenia; Spain	Cyprus; Denmark; Ireland; Malta; United Kingdom

Even at this stage, much can be learnt concerning the similarities and differences between Member States.

### §1. SIMILARITIES

Clear similarities emerge in five areas: the existence and need for judicial supervision of the public sector, the expansion of an independent administrative judicial system, this system supervises the public sector in the broad sense of the term, judicial supervision covers all the measures and actions taken by the public sector except in some marginal cases, administrative justice is accessible.

#### A. The existence and need for supervision

Although there are differences in the judicial systems for public sector supervision, in particular between common law countries and countries with administrative courts specifically responsible for public sector supervision, the public sector is subject to judicial supervision in all EU Member States.

This supervision is based on the principle of a state of law, translated into a number of variants: the principle of the rule of law, the principle of legality, the principle that the public sector is subject to the law and the principle of protecting the rights of individuals against the power of the State.

#### B. The expansion of an independent administrative judicial system

The expansion is twofold.

Judicial supervision of the public sector, which used to be limited to monitoring legality, i.e. annulling administrative measures, has been expanded into full judicial supervision, in particular ensuring that the authorities redress any damage caused by the public sector (Greece Italy, Portugal).

Judicial supervision of the public sector, which was initially restricted to civil courts, has been gradually transferred to independent administrative courts (Czech Republic, Estonia, Latvia, Lithuania).

In all cases, administrative justice is firmly bound by legislation and is almost always enshrined in the constitution. Its powers and the administrative judicial procedure are amply codified.

### **C. Administrative justice supervises the public sector in the broad sense of the term**

The public sector is not limited to public legal bodies. The term also covers private individuals authorised to exercise public authority (in some States, such as Spain, they must be authorised by a specific law), except in Poland where private individuals are not authorised to exercise public authority.

### **D. Administrative justice has widespread and in-depth supervisory powers over the public sector**

Judicial supervision of the measures and actions taken by the public sector is thorough and widespread. Only in exceptional cases does it not apply (acts of government, political measures). Disputes involving contracts are the responsibility of ordinary law courts in some States (in particular Lithuania, Sweden and the UK).

### **E. Administrative justice is accessible**

The conditions that petitions must meet to be judged admissible are neither drastic nor strict.

Fines for improper recourse to administrative justice are not applied in all systems, although various systems provide for mechanisms to penalise such recourse (Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, UK, Slovenia, Sweden).

## **§2. DIFFERENCES**

There are three main areas of difference: judicial supervision of the public sector may be restricted exclusively to ordinary law courts, it may be undertaken by more than one type of court and not all administrative courts act in a advisory capacity.

### **A. Judicial supervision of the public sector may be restricted exclusively to ordinary law courts**

This is the case in Cyprus, Denmark, Hungary (a single judiciary including courts specialising in administrative matters), Ireland, Malta and the UK.

## **B. A variety of courts responsible for supervising the measures and actions taken by the public sector**

As mentioned above, disputes involving contracts are the responsibility of ordinary law courts in Lithuania, Sweden and the UK.

In Belgium, disputes concerning the liability of the public sector and the authorities are the responsibility of the judicial courts.

In some States, under some circumstances, the constitutional court may hear cases regarding measures taken by the public sector (in particular Austria, Germany, Poland and Spain).

## **C. Differences regarding advisory role**

In some States, administrative courts are not allowed to act in an advisory capacity; in others they are obliged to, and in others they are authorised but not obliged to.

Although in some States, administrative courts may act in an advisory capacity, in others they have no advisory role whatever (in particular Cyprus, Estonia, Finland, Germany, Luxembourg, Poland, Portugal and Spain), although this is not always cut-and-dried (for example, in the Czech Republic, members of the administrative courts are allowed to act as government experts on legal issues).

# **Annex 3: Bodies and judges responsible for ruling on administrative measures**

*by Gilles Dumont*

*Professor of Public Law at the University of Limoges*

## **I. Bodies responsible for ruling on administrative measures**

A quick review of the answers to the questionnaire reveals a difficulty linked to the diverse nature of both the answers themselves and the underlying nature of the systems in question, in particular with regard to the very concepts of 'court' and 'administration'. The few avenues explored in this document must therefore be viewed with the utmost caution.

### **A. Dual or single nature of the court system**

In reading the replies to the questionnaire, it becomes clear that a clear majority of the States (15 out of 25) have a system of special administrative courts. Five other States have a chamber or body specifically charged, within the judicial court, with ruling on administrative measures.

However, this situation must immediately be put into perspective: virtually none of the special administrative courts have exclusive jurisdiction for assessing administrative measures. Therefore, there is competition for jurisdiction with the judicial court and with other courts, mainly the constitutional courts (in five States).

In cases where the jurisdiction of special courts is shared with the ordinary courts, the latter take charge of a very wide range of disputes, thus making it impossible, at this juncture in the research, to draw up a typology of matters reserved for either court system. In any case, and subject to further information and examination, it would not appear that disputes involving compensation (whether contractual or extra-contractual) are reserved for the ordinary courts (except in Belgium and Luxembourg).

The diversity of the bodies responsible for monitoring administrative measures raises the question of how to divide up jurisdiction. While this question was not included in the questionnaire, some ten respondents answered it nevertheless. In those States, jurisdiction is generally decided on by one of the courts, not by a special body responsible for establishing jurisdiction (such bodies only exist in France, Greece and Portugal).

### **B. Organisation of administrative courts**

In nearly all of the States studied, the administrative court is diversified: alongside a general administrative court, which can be found everywhere, there are many specialised courts in a wide range of areas; however, tax courts (seven States) and social courts (five) predominate.

Diversity can also be seen in terms of levels of court. Five States have just one level of administrative court, nine have two levels, eight have three levels. However, this information is only have limited

interest, in so far as levels of court do not have the same significance in all of the Member States ('pre-judicial' level; court not having full jurisdiction, etc.). It can be seen, however, that a system with multiple levels has no direct link to the demographic importance of a given State.

In the vast majority of States, the first level of court is an initial general level: only four States have nothing more than a first, specialist level.

The territorial structure of the courts must be combined with the previous point: 15 States have a centrally structured court; 11 have regional courts, and ten have sub-regional courts.

## **II. Judge with powers to rule on administrative measures**

### **A. The status of judges**

If we leave aside highly specific cases, such as Belgium and Hungary, all of the countries studied have a body of professional judges whose task is to rule on administrative measures. However, this apparently standardised structure covers different situations in actual fact: for instance, professional judges do not necessarily act alone, nor do they necessarily act at all levels of court. When judges other than professional judges intervene, they might be political representatives or non-judicial legal experts. In actual fact, these two possibilities interfere with the organisation of the court; either political and/or professional bodies are empowered to rule on administrative measures, especially in the first instance, or the presence of non-professional judges can be explained by the methods used to recruit professional judges.

Accordingly, it should be pointed out that in almost all of the countries studied, the judges, even when there is an autonomous administrative court, enjoy the unique status bestowed upon the judiciary. The only exceptions are France, Greece and Luxembourg, where administrative judges have a special status, albeit one which is very similar to the status of other judges.

Access to the judiciary differs to some extent from one country to the next: recruitment solely via competitions or professional examinations are found in just ten countries; in the other cases, judges responsible for ruling on administrative measures are appointed by political bodies, either freely or, most often, under strong guidance. The concept of the free appointment of judges, involving just a fraction of administrative judges, can only be found in France, Luxembourg and Sweden.

No matter how they are appointed, in all countries, without exception, judges are appointed for their entire career (either for life or until the statutory retirement age).

In nearly all of the countries, judges are given general legal training before taking up their post. Such training may be supplemented by judicial training (mainly in States where there is no judicial body specifically responsible for monitoring the administration: the exercise of such monitoring in such cases is the result of judicial specialisation).

### **B. Judges carrying out non-judicial functions**

The status of administrative judges not only helps ensure their independence, but is not such as to answer the question as to whether there is a possibility of such judges carrying out functions outside

the courts to which they belong. In this regard, the questions raised do not make it possible to fully answer the issue of links which might exist between judicial and administrative functions. However, when replying to the question on courts or judges carrying out advisory functions, some countries did answer that question. For instance, in Germany, it is possible for judges to carry out administrative functions, but only if they did so prior to taking on judicial functions. The same situation is possible in France, but the administrative judges also have the option of alternating administrative functions with their judicial functions (mobility). The same option is available in Hungary and Malta. The issue of simultaneously carrying out administrative functions (apart from advisory functions) remains unanswered.

With regard to the exercise of advisory functions, the answers vary widely. Ten countries have an obligation to consult one (or more) administrative courts in connection with the drafting of legal acts, for the most part government measures. Only Austria reserves consultation for decisions pertaining to the organisation and operation of the courts. Seven countries explicitly prohibit administrative courts from exercising advisory functions. The others, without prohibiting it explicitly, do not charge administrative courts with any specific advisory task.

Here too, the value in this kind of questionnaire lies in how it breaks down classifications between systems with special administrative courts and systems operating under ordinary law. Apart from certain scenarios, it is difficult, especially bearing in mind recent and varying developments in a number of countries, to continue to use such models. In many cases, the disparities -- even between legal systems which at first glance seem rather similar (France and Italy; the Baltic States) -- actually prove to be more significant, making any efforts to devise a typology of administrative courts in Europe rather unconvincing and fruitless.

On the other hand, major synergies seem to be emerging independently of the type of monitoring, specifically regarding the constitutional guarantees granted to appellants, either directly or by appealing to constitutional courts.

## **Annex 4: The right to the effectiveness of the decision and the right to swift justice**

By Clotilde Deffigier

lecturer at the University of Limoges

Going through the reports on the issues of urgency, the enforcement of judgments and binding decisions, a 'transversal' concept emerged, the concept of 'right of access to the courts'. The idea of the quality of justice and taking into account the usefulness of decisions for beneficiaries and users, cannot be ignored or undermined. Right of access to the courts is a highly dynamic concept which implies the efficient right of access to the administrative courts.

- Efficient right of access to the administrative courts assumes that the judgments handed down have a specific effect and imposes in particular recognition of a right to enforcement of judgments, regardless of how that is achieved (see ECHR, 19 March 1997 *Hornsby v. Greece*: the right to a fair trial supposes the right to enforcement of judgments, once they are final and compulsory, otherwise Article 6 of the European Convention on Human Rights would be devoid of any useful effect).

- In addition, efficient right of access to the courts is based on sufficiently rapid justice within a reasonable time-frame and which can also be implemented on an urgent basis. A certain level of speed is essential in justice, although care must be taken to avoid haste.

- The aspect relating to the 'economics of justice', i.e. the right to economical access to the courts, can be set aside because it is not fully taken on board in the States. In fact, the States do not ask questions about knowing whether the sentences handed down by the administrative court have a major impact on public finances. This is simply an avenue of discussion for the future; one might well think that here we are in the presence of a component that is essential in order to make a well-reasoned assessment of the quality of justice in the broad sense of the term. However, it should be noted that in Spain, general studies into the economic impact of law and justice have been carried out but that they do not focus specifically on administrative justice. France is also examining the idea of taking this imperative on board.

### **I. The right to the effectiveness of the decision**

Here, we will examine the authority of judgments and the recognition of a right to the enforcement of judgments.

#### **A. The traditional affirmation of *res judicata* only as regards the parties**

The binding nature of judgments is generally deemed to have a relative effect. On the other hand, judgments annulling administrative measures are effective *erga omnes*, as in Belgium, for instance. Furthermore, there is a possibility of extending the binding nature of judgments to third parties in the event of cases that are strictly identical. Other States, such as Latvia, emphasise that the

interpretation of a legal standard in an appeal judgment is obligatory for the court which is once again handing down a ruling.

It can be seen that for certain States, the impact of rulings by administrative courts can sometimes be shifted in time, whereas other States rule out such an approach a priori, such as Austria, Poland, Latvia and Cyprus. By way of illustration, it can be seen that in France the Council of State uses its powers to modulate the impact of annulment decisions over time (CS 11 May 2004 Association AC). In Portugal, the administrative court can decide that a declaration of unlawfulness having general obligatory force can only be effective as of the expiry of the period within which an appeal must be lodged. Lastly, in Belgium, the Council of State has the option of modulating in time the effect of a judgment and the option of stipulating, within a judgment, which effects are temporary or permanent. In the Netherlands, the court can make its decision effective retroactively; this is also the case in the Czech Republic, Great Britain and Finland.

Other States, such as Great Britain and Ireland, have what are called *common law* systems, not the Western Roman-Germanic system. They rely on the authority of precedent. The relative effect of judgments between parties to the case is enshrined, but a ruling by the court can be cited as a precedent in the main proceedings involving issues which are similar *de facto* or *de jure*. In addition, the principle of *stare decisis*, respect for the judgments of higher courts, applies to all decisions of the court of appeal, the House of Lords and the decision of the divisional court of the administrative court.

## **B. General attempt to give judicial decisions a useful effect**

The right to the enforcement of judgments is generally recognised in connection with the *Hornsby v. Greece* judgment.

In the States, the administration found to be at fault is required to enforce the judgment within a certain period of time, with the courts generally empowered in this connection to impose fines and injunctions. This is the case with Portugal, where, in addition, in the event of non-enforcement, the civil liability of the administration and the individual responsibility and disciplinary responsibility of officials can be sought. The States do not generally have a substitute enforcement procedure entrusted to the court.

For countries which do not have these procedures, such as Austria, the liability of the administrative authorities and the individual liability of officials can be incurred. This gives rise to special administrative appeals and appeals against the public sector before the supreme administrative court.

In some States, such as Great Britain and Ireland, there is no difference between public and private persons with regard to the enforcement of judgments. In Ireland, the system of enforcing judgments is even left up to the parties and to private individuals. The court can, however, issue an injunction in order to limit the repetition or duration of the unlawful conduct. If the party does not comply with the order, it can be penalised for contempt of court (fines, imprisonment). In the Netherlands, the court can also, in connection with civil proceedings, impose fines or penalties against public persons.

## **II. The right to swift justice**

The focus is here is on a ruling being issued in a reasonable period of time and on the urgency of the ruling, essential factors in the recognition of the right to swift justice. Accordingly, the party concerned has the right to obtain measures geared to the situation (urgency), as well as a general right to obtain a legal ruling within a reasonable period of time.

### **A. The right to obtain an appropriate response in due course**

Many States have established emergency mechanisms on electoral matters, markets and measures for interim relief in order to respond to situations resulting from the principle whereby appeals are not suspensive. On the whole, proceedings for interim relief are governed by urgency, serious grounds casting doubt on their unlawful nature and, in particular, a risk of serious detriment which is difficult to remedy (Belgium, Portugal, Spain). Quite apart from the sometimes differing approaches involved, it is mainly the terminology used that changes, while the objectives are shared (Cyprus: provisional measures; Estonia: provisional legal protection proceedings; Latvia: proceedings to suspend a measure; Lithuania: measures to secure an application by appellants; Great Britain: proceedings for an injunction; Czech Republic: preliminary measures).

For those countries which have not provided for such proceedings, there are nevertheless useful mechanisms. In Austria, there are no emergency proceedings, but the judge can grant suspensive effect to an appeal if it is likely to harm the appellant in a way that is difficult to remedy. Furthermore, the Constitutional Court and the Supreme Administrative Court deal with urgent questions as a matter of priority. In Ireland, in exceptionally urgent cases, the High Court can shorten the time period even if that requires the agreement of the administrative body in question.

It should be noted that the judge hearing the application for interim measures is most often a single judge, but that it can be a panel of judges; he can generally rule on the substance of the case, but there are exceptions: for instance, in the Netherlands, the judge hearing the application for interim measures does not, in principle, have jurisdiction to rule on the main proceedings.

In addition to emergency measures, there is a right to a court ruling within a reasonable period of time.

### **B. The right to a court ruling within a reasonable period**

For some States, this is an essential imperative.

In Portugal, there is a well-known problem of time-limits. The 'administrative dispute reform' of 2004 tries to take account of this by increasing the number of administrative courts, broadening powers and expanding procedural means. The average duration of proceedings is anywhere from 2 to 32 months.

In Austria, the creation of independent administrative chambers and the refusal to entertain certain appeals have helped speed up the pace at which judgments are handed down (average time to reach a judgment in appeals against administrative decisions: 22 months). Spain also faces this problem. Provisions have been made for preferential treatment of 'test appeals' and to extend the effects of a judgment so that they apply to similar cases. In Ireland, those cases in which a judgment is handed

down late, after two months, are listed and courts are less strict in respecting the time limits imposed, either expressly or implicitly.

Rulings are issued within one to two years in the Netherlands, for example, and one to two-and-a-half years in Cyprus.

However, in these States, there are no means or special procedures for ending procedures that have lasted an unreasonably long time or for guaranteeing appellants compensation for any damage resulting from the excessive time taken to issue a ruling. Italy, on the basis of the Pinto Law of 24 March 2001, promulgated in response to ECHR case law, provides for a compensation mechanism implemented by the court of appeal in the event of excessive duration of proceedings. Despite this special procedure, the ECHR ruled in 2004 that the compensation was neither suitable nor sufficient (see ECHR 10 November 2004 *Apicella v. Italy*). In Spain, instances of compensation are very rare; in France, a decree of 28 July 2005 empowers the Council of State to rule on State liability in the event that an excessive amount of time is taken to issue a ruling in administrative cases.

In conclusion, it may be noted that the States often share the same concerns as regards the right to efficient access to the administrative courts, but their solutions and the procedures that they have implemented vary. High-quality administrative justice seems to remain elusive, but progress is being made under the steady influence of the European Convention on Human Rights and the ECHR as well as Community law and case law.

## ***Annex 5: Influence of community law and European human rights law***

*By Joël Andriantsimbazovina*

*Professor of public law at the University of Limoges*

*Head of the Observatoire des Mutations Institutionnelles et Juridiques*

Community law and the European Convention on Human Rights are indisputable sources for administrative law in the Member States of the European Union.

The influence of the European Convention on Human Rights can be clearly seen in the right to a trial in countries such as France, Luxembourg, the Netherlands and Portugal; rulings against these States by the European Court of Human Rights have been responsible for reforms, some of which are completed (France, Luxembourg, Portugal) and others still ongoing (in the Netherlands, following the ECHR's ruling in the Kleyn case, and in France, following the ECHR's ruling in the Kress case).

The influence of Community law is apparent in many States. The incorporation of Community law has resulted in a broad definition of the public sector in Italy and is a particularly strong factor in certain areas such as economic law (Greece), the environment (Greece and the Netherlands), disciplinary law (Portugal) and procurement contracts (Italy). The incorporation of the *acquis communautaire* by the new Member States is sure to have repercussions. There is no doubt that the primacy and direct influence of Community law will make it a force for change in the administrative law of these States.