Seminar organized by the Supreme Administrative Court of the Czech Republic and ACA-Europe

Limits of judicial guarantee

Brno, 9 September 2019

Answers to questionnaire: Luxembourg

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ACA-Europe seminar on 9 September 2019 in Brno on measures to facilitate and limit access to administrative courts

I. Structure of the administrative judicial system

a) *Please briefly describe the structure of the administrative judicial system: indicate how many instances there are in your administrative judicial system (including all specialised courts, e.g. finance or social security) and describe the hierarchy and subordination relationships between them, unless this updated information is available on the ACA-Europe website (in the Tour of Europe tab).*

In the Grand Duchy of Luxembourg there are two judicial orders: the ordinary courts and the administrative courts. The administrative order is composed of two courts, namely the administrative tribunal (which is the administrative jurisdiction of first instance) and the administrative Court, which functions as a court of appeal but which is (according to the provisions of Article 95*bis* of the Constitution) the supreme court of the Luxembourg administrative order. There is no instance in cassation in the Luxembourg administrative judicial order.

The social security courts, in particular the *Conseil arbitral de la sécurité sociale* (Social Security Arbitration Tribunal) and the *Conseil supérieur de la sécurité sociale* (High Council of Social Security), are part of the judicial order and are not counted among the administrative courts.

With a few scattered exceptions (in matters of referendums, electoral lists and appeals by a municipality against a negative decision of the State supervisory authority brought directly before it), the administrative Court is in principle seised with an appeal against a judgment of the administrative tribunal.

b) *How many administrative tribunals and judges are there in each of these instances? Please provide the figures corresponding to the end of the year 2018. (Note: if your administrative justice is based on two instances, use columns I. and II. If there are more than three instances, please adjust the table. The same applies to all the tables in this questionnaire.)*

In Luxembourg there is a single administrative tribunal with jurisdiction over the whole territory of the Grand Duchy and a single administrative Court, also with jurisdiction over the entire territory of the country. At the end of 2018, the administrative tribunal consisted of 15 judges divided into 4 chambers sitting in panels of 3 judges. Similar to its original situation on 1 January 1997, the administrative Court currently consists of 5 judges sitting in panels of 3 judges.

Instance	I.	II.
Name	administrative tribunal	administrative Court
Number of courts	1	1
Number of judges	15	5

c) *How many judges are there in all the courts (administrative, civil and criminal)? Please provide the figures corresponding to the end of the year 2018.*

At the end of 2018, the total number of Luxembourg judges (both orders combined) stood at approximately 240, including the 20 judges at the administrative courts.

II. Costs and access to the courts

a) *Is access to the administrative tribunal subject to legal (processing) fees? Please indicate the principle which generally applies (for exceptions, see questions e., f. and g.). Respond yes or no.*

Neither access to the administrative tribunal nor to the administrative Court is subject to any legal (processing) fees. Access to administrative justice is essentially free. Since, as a general rule, applications before the administrative court (except in tax matters) and in all cases before the administrative Court must be submitted by a barrister, and since each party is in principle required to pay its own lawyer whatever the outcome of the dispute (except in the case of legal aid) [see infra. sub IV b], this lack of costs is not absolute.

Instance	I.	II.
Legal costs	/	/

b) *If yes, what is the amount of these costs (in euros)?*

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c) *Is the amount of costs in each instance fixed or can it change? If the amount may change, under what conditions and how does it change (e.g. when the applicant has to correct or remove errors in the application, do the fees increase)?*

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d) *At what stage of the proceedings must the applicant pay these costs (e.g. with the application, after the proceedings have begun, once the tribunal has rendered its decision)? What are the consequences of not paying these costs?*

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e) *Are some applicants (e. g. a public authority) or areas of litigation legally exempt from the obligation to pay these costs?*

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f) *Are non-governmental organisations legally exempt from the obligation to pay*

these costs?

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g) Can an applicant be exempted by a court decision from the obligation to pay these costs? What are the exemption conditions?

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h) Under what conditions are the costs reimbursed to the applicant (e.g. in the event of withdrawal of the application)? Are costs reimbursed wholly or partially?

/

i) Can an applicant be required to pay a deposit before the procedure begins? If you responded in the affirmative, please indicate under which conditions.

/

j) Are vexatious applications penalised? Please indicate how and in which conditions.

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k) Finally, is there an analysis (based on empirical studies or your own personal assessment) of the correlation between the amount of costs payable in your administrative justice system and the incentive or deterrent effect that these costs have on the willingness of applicants (in general or particular groups) to take legal action or not?

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III. Costs of proceedings

a) May the court award compensation for costs of proceedings to the participants? If you responded in the affirmative, please indicate under which conditions.

In parallel with Article 240 of the New Code of Civil Procedure, Article 33 of the amended Act of 21 June 1999 on the Rules of Procedure before the administrative courts allows the administrative tribunal to award an indemnity for costs of proceedings to a party who so requests, in order to cover at least part of the unrecoverable costs not included in the costs incurred by it. Article 54 of the same Act of 21 June 1999 also provides for this possibility before the administrative Court. The essential criterion for the award of an indemnity for costs of proceedings is based on fairness. Whenever the court considers that, having regard to the outcome of the dispute and the particular circumstances of the case, it would be unfair to leave the unrecoverable costs (not included in the awarded costs) at the expense of a party, it may award an indemnity for costs of proceedings if such party has so requested. This is assessed *ex aequo et bono.*

b) May the court award an indemnity for costs of proceedings to the public authority? If you responded in the affirmative, please indicate under which conditions. In particular, are there any cases / situations in which costs incurred by public authorities are by default unrecoverable, even if the (private) applicant has not

been successful (and if, in accordance with the usual rule that costs are settled at the end of the proceedings, an order for costs should normally be made in favour of the public authority)?

The same principles as described under (a) are applicable to private parties and public parties alike. Therefore, a public party may be awarded an indemnity for costs of proceedings provided that it has requested it and that the court seised considers that such compensation should be awarded to the party claiming it on the basis of the fairness criteria described in a) above.

c) *May the court decide not to award an indemnity for costs of proceedings, even if the conditions in question are fulfilled? If you responded in the affirmative, please indicate under which conditions.*

To the extent that the an indemnity for costs of proceedings depends on an assessment of fairness, it is hardly conceivable that the court would not award such an indemnity when the criteria for fairness are verified in this respect.

d) *Are there any specific areas of administrative law in which rules different from those discussed in this section apply? What are these areas, and how and why are the rules applying to these areas different?*

Articles 33 and 54 of the Act of 21 June 1999 are applicable to all matters before the administrative courts. There is no exception under the law.

e) *How does the court determine the amount of legal representation costs as part of costs of proceedings? Is it defined by a rate (in this case, please describe the main calculation method), or is it based on a price stipulated between a lawyer and their client (in this case, please also specify if there is a limit)?*

There is no rate for legal fees incurred by a party to the dispute. The equitable liquidation of an indemnity for costs of proceedings takes into account all the information provided to the court, including, where applicable, the amount of legal fees incurred by the party claiming the indemnity for costs of proceedings. However, in practice it is quite rare for a party to specifically indicate the amount of fees paid by it to its lawyer. As a general rule, a lump sum is requested without indicating the actual amount paid as fees.

In assessing the indemnity for costs of proceedings to be awarded, the court seised shall take into account, in terms of fairness, the outcome of the dispute, the degree of difficulty encountered and the particularities of the case.

IV. Representation

a) *Must a party be represented by a legal professional? Respond yes or no.*

In principle, the parties must always be represented by a barrister, i.e. a lawyer who has successfully passed their final examination at the end of the judicial traineeship. Before the administrative tribunal, this rule applies first and foremost to all official administrative cases.

In tax matters, however, it is not mandatory to be represented by a barrister before the administrative tribunal at first instance. Here, the party can sign the motion to instigate proceedings and prepare the pleadings before the court, as well as present their case at the public hearing. Also in tax matters, a party may also entrust their defence to a lawyer who has not yet passed their end-of-traineeship judicial examination, just as they may entrust their defence to a chartered accountant registered with the order of chartered accountants or to a company auditor registered with the order of auditors.

By way of exception, the State may be represented both before the administrative Court either by a government delegate or by a barrister. Government delegates are appointed from among civil servants of the higher echelon of the State. They have traditionally come from either the Department of Justice or the Department of Immigration in the case of administrative affairs and the Department of Finance, if not the senior echelon in the administration of Direct Tax Contributions, for tax matters. However, it is open to the State to be represented by a barrister. As a general rule, the State is represented in the vast majority of cases by a government delegate.

Instance	I.	II.
Representation of the applicant	adm. : barrister fisc. : liberty	adm. + fisc. : barrister or government delegate
Representation of the adverse party	adm. : barrister fisc. : freedom State: government delegate : barrister	adm. + fisc. : barrister State: delegate of the government or barrister

b) Does your legal system provide free legal assistance for participants (e.g., representative appointed at the request of a participant)?

In all matters and before all courts, it is possible for a destitute party who meets the income conditions provided for by law to obtain legal aid and to have appointed an ex officio representative to represent them in court by the President of the Bar Association.

At the end of the proceedings, the representative appointed ex officio who provided legal aid prepares a statement of costs and fees which is first audited by the bar association and then transmitted to the Ministry of Justice, where it is subject to a second audit with a view to its timely settlement at the expense of the State budget.

c) What are the forms and conditions of free legal aid? Please explain for all instances.

The court seised has no role in the appointment of an ex officio representative in the context of legal aid. As described in (a) above, the Bar Association and the Ministry of Justice are respectively

responsible for this matter. As a general rule, the appointed representative shall indicate in their request or statement that they are operating on the basis of legal aid and the court seised shall, in that case, acknowledge them. Unless the court seised is aware that an representative is acting in the context of legal aid, the former shall not otherwise intervene in this respect.

d) Is there a link between the exemption from the obligation to pay legal costs and the right to free legal aid?

The fact that a large part of applicants receive legal aid nevertheless does not mean that they cannot be ordered to pay the costs of the proceedings. In principle, it is the losing party who is ordered to pay the costs of the proceedings, whether or not it is eligible for legal aid. If a party has been ordered to pay the costs of the proceedings and has been granted legal aid, it is in the context of legal aid that the order will to pay the costs of the proceedings will be settled.

V. Exclusions and immunities

a) Are there any mandatory steps after the public authority has made its final decision and before filing an application with an administrative tribunal (e. g. mediation)?

There is no compulsory preliminary conciliation or mediation before the Luxembourg administrative courts. However, the administrative Court sees its role as a public service, in that it is responsible not only for determining the application of the law, but also, as far as possible, for reconciling the parties if this is achievable and definitively resolving the dispute between them, with a view to achieving social peace.

b) Are there final administrative acts of a public authority which may not be objected to?

Luxembourg case law, like its Belgian and French neighbours, knows the theory of acts of government which, as such, are not subject to any judicial review.

c) Is there a specific public authority whose administrative acts are not subject to judicial review (e.g. acts of a Head of State)?

In principle, there is no public authority whose administrative acts are not under judicial control because of the capacity of the authority which has taken the decision. The Grand Duke is the Head of State in Luxembourg. Although the Grand Duke is politically not responsible, all his actions must be accompanied by a ministerial countersignature, with the countersigning minister assuming the related responsibility. In this way, the acts of the Head of State may be subject to review by the administrative judge and, in this context, be sanctioned, in particular for non-compliance with the law.

d) Can certain final acts of a public authority be reviewed by an authority (of the State or other) other than the administrative tribunal?

Article 95*bis* of the Constitution entrusts the administrative courts with administrative litigation. However, the delimitation of administrative disputes is such that not all decisions of a public authority fall entirely within the competence of the administrative courts. Thus, certain decisions

in social matters fall within the competence of the social courts, namely the Social Security Arbitration Tribunal and the High Council of Social Security, with the possibility of appeal in cassation to the Court of Cassation if applicable. To this extent, not all decisions of a public authority fall within the jurisdiction of the administrative tribunal. Similarly, in the field of indirect taxation, the decisions of the Registration, Domains and VAT administration, more particularly in the field of VAT, registration duties and inheritance taxes, fall within the competence of the civil courts and are not subject to the competence of the administrative courts.

e) *Apart from the review of the administrative acts of a public authority, are some cases reviewed by administrative courts (e.g. election monitoring, dissolution of a political party)?*

In principle, the administrative courts have jurisdiction to hear appeals against individual administrative decisions or administrative acts of a regulatory nature having a direct effect on the situation of a citizen. Beyond these cases and by way of exception, the administrative courts are competent to hear disputes from voters concerning municipal election operations. However, no jurisdiction is devolved to administrative courts with regard to national elections, . It is the newly-elected Chamber of Deputies itself which currently still monitors the regularity of election operations at the national level. According to the current draft revision of the Constitution (Bill 6030), this competence would be devolved not to the administrative courts but to the Constitutional Court. However, in matters concerning referendums, the administrative Court alone can rule on certain aspects of the regularity of the referendum procedure. It is directly seised without having to refer to the administrative court at first instance.

VI. Selection by lower and higher courts

a) *Do administrative courts have the power to choose cases? Respond yes or no.*

No

Instance	I.	II.
Power to select cases	NO	NO

b) *If yes, under what conditions can they choose cases?*

Does the court's legislation/case law contain objective criteria in this regard or is the selection of cases entirely at its discretion?

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c) *Is the power to choose cases limited to certain areas of law? Please specify.*

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d) *Does the court have the power to choose cases which fall under administrative criminal law? If yes, are the selection criteria the same in other areas of law? Please specify.*

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e) *Please indicate who chooses which cases to settle and how. Is there a judicial panel or case selection procedure for this purpose? Does this procedure only concern the higher court which will ultimately decide the case, or do the lower courts also participate in this selection in some manner?*

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f) *If the court decides whether or not to choose a case, is it required to inform the applicant? If so, does it make a formal decision (e. g. rejection of the application) or does it inform the applicant through an "informal" letter?*

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g) *Is the court required to provide reasons for a refusal to decide a case?*

/

h) *If a lower court decides not to accept a case before it, can such decision be reviewed by a higher court? Please specify.*

/

i) *Does a lower court have the power to choose cases of a higher court?*

If so, may this choice be reviewed by the higher court? Please specify.

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j) *Does a judge determine the order of cases to be dealt with?*

The amended Act of 21 June 1999 laying down the rules of procedure before the administrative courts provides for strict time limits, under penalty of debarment, for the investigation of cases before both the administrative tribunal and the administrative Court. In practice, once the time limits for examination have almost expired, all the cases, (without distinction of order) are established for scheduling at the hearing in order to find a date for the pleadings, together with the parties' representatives (if they so wish) . The administrative Court thus schedules cases at a very short notice (normally one or a few weeks after the expiry of the examination period) in order to be presented in public hearing for pleadings. In fact, the magistrates, together with the registrars, control the docket order of cases for scheduling at the hearing, and then for pleadings at a subsequent hearing, all of which take place in the short term before the Court. Insofar as judges are directly involved in the scheduling, they determine the order of cases to be settled. However, since in principle all cases are scheduled before they are fully heard, no real order is established by the judge in relation to them. All cases proceed promptly to the hearing for pleadings before the Court.

It should also be noted in this context that, according to Article 46 (5) of the above-mentioned Act of 21 June 1999, the President of the administrative Court, in urgent cases, may shorten the time

limits for examination by issuing an order (which is not subject to appeal) after hearing the parties or duly convening them, thereby giving a certain priority to such urgent cases.

VII. Other measures

a) *Does your legal system provide for other measures which facilitate or limit access to the courts? Please explain.*

Article 14 of the Grand-Ducal Regulation of 8 June 1979 on the procedure to be followed by State and municipal administrations, commonly known as the non-contentious administrative proceedings (PANC), provides that for all negative decisions not fully granting a request from the citizen, an indication of the remedies must be given indicating not only the remedy available but also the time limit for appeal, the institution before which it must be brought and the relevant procedures, including whether representation by a professional is required.

VIII. Statistics

a) *Please provide the exact number of cases to be dealt with and the number of cases settled for the years 2016, 2017 and 2018 in each instance of the administrative judicial system (including all specialised courts, e. g. finance or social security).*

At the level of the administrative courts:

Instance	I.	II
Cases to be processed 2016	1183	241
Cases settled: 2016	1156	245
Cases to be processed 2017:	1231	286
Cases settled 2017	1144	278
Cases to be processed 2018:	1246	246
Cases settled 2018	1071	253

At the level of the social security courts (which are not part of the administrative judicial system), only the figures of the appeal body (namely the High Council of Social Security) are available:

Instance	I.	II

Cases to be processed 2016		272
Cases settled: 2016		282
Cases to be processed 2017:		259
Cases settled 2017		365
Cases to be processed 2018:		214
Cases settled 2018		331

Administrative Court of the Grand Duchy of Luxembourg on 08 May 2019