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From the Secretary-General's desk

With a view to the entry into force of new legislation on administrative disputes on 1 January 2012, the Administrative Court of the Republic of Croatia suggested that ACA-Europe organise a Conference that, thanks to information about 'best practices' in the high administrative courts that are members of the association, will allow judicious integration of the new arrangements into the Croatian administrative legal system.

This reform is an important step for the Republic of Croatia's accession to the European Union, which we now know will take place on 1 January 2013. The reform provides for the establishment, on 1 January 2012, of four administrative courts of first instance that will be competent to hear appeals for the reform of individual administrative acts and, on the same date, gives the Administrative Court full jurisdiction over administrative acts of a statutory nature, power to hear appeals against the first-instance administrative courts' judgments in cases relating to individual administrative acts and exclusive jurisdiction over various matters (which have not yet been defined in detail).

It goes without saying that ACA-Europe wanted to act on the court's suggestion. The association takes a proactive approach to supporting the high administrative courts of countries that are candidates for EU accession by promoting a genuine exchange of knowledge and experiences between its members, whether they are full members or observers, like the Administrative Court of the Republic of Croatia has been since 2002.

Four issues were studied, at the suggestion of the Administrative Court of the Republic of Croatia:

- review of lawfulness of general acts by the High Administrative Court of Croatia (admissibility conditions and consequences of an annulment);
- appealing a decision by a court of first instance (Administrative Courts) before the High Administrative Court of Croatia (filter mechanisms);
- exclusive material jurisdiction of the High Administrative Court of Croatia;
- organisation of Croatia's administrative courts of first instance in terms of target setting and judge evaluation.

The Conference's proceedings were chaired by Mr Eckart Hien, former President of the Federal Administrative Court of Germany and former President of ACA-Europe, and Mr Jean-Marie Moreau, section head in the European Union delegation in Croatia, introduced the issues for discussion, the importance of which was highlighted from the outset by the presence of the Croatian Minister for Justice, Mr Dražen Bošnjaković, at the opening of the day's activities. Each of the issues was first explained by a Croatian participant before being explained by two judges from high administrative courts that are members of ACA-Europe. Proceedings were closed by Mr Marc Gjidara, Professor Emeritus at the Université Panthéon Assas Paris 2, who is responsible for relations between that university and the universities of Zagreb and Split and who, based on his personal experience, gave some recommendations for the implementation of the reform.

All of the participants' contributions were very interesting and useful and are all featured in this newsletter. They stand testament to the commitment of the high administrative courts that are members of ACA-Europe to the European integration process and show (as though it were necessary) the energy and enthusiasm they put into their involvement in ACA-Europe. The contributions are also available at www.aca-europe.eu.

Yves Kreins,
Secretary-General of ACA-Europe

Presentation of the Conference

By Mr Eckart Hien, Former President of the Federal Administrative Court of Germany

This is a remarkable conference and somewhat different to many conferences about legal issues: Let's take it sporting: Croatia is in the start holes for the final spurt to become a member of the European Union. A long way had to be gone with many competitions in a large field of political, economical and legal issues. On this way the judiciary in general was a problem child for a long time – at least in the eyes of the European Commission.

Even at the beginning of March in 2011 I read in the newspaper, that the European Commission was not satisfied with the Croatian justice, though the Commission also admitted remarkable progress in this field. Only three months later the situation has changed to the better: Last week I read in the same newspaper that now the whole justice system of Croatia seems to be in line with the European principles. The famous chapter 23 of the negotiations between the EU and Croatia can be closed successfully.

My congratulations to our Croatian colleagues, who achieved an immense work on the long way.

For me it is a special pleasure to take part in this conference and even to present it, because I had the opportunity to accompany the Croatian reform process over two years as project leader of the Twinning-Project:

“Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic of Croatia” (CARDS 2004).

In this project experts from Austria, from Croatia and from Germany worked together. After two years of work we not only filled many hundreds of pages with general considerations, but we also presented a concrete final draft of a new Law on Administrative Disputes, accompanied by comments for the better understanding of the law. And we also presented recommendations for an effective and smooth implementation of the new law.

I am glad to see here in this conference some participants of our working groups. We all remember the tough discussions and the difficulties based not only on the topics but also on the language problem: Working language was – or better should be – English, which was not the mother language of any participant. And if you think, in both Germany and Austria people speak the German language – you are right. But the legal terms in both countries are nevertheless quite different. And of course for our Croatian colleagues it was sometimes necessary to speak together in their mother language. So we got a very good impression of the fact, that the language confusion after the tower building of Babylon was really thought as a punishment for human mankind!

The mentioned Twinning Project ended in May 2009. Afterwards the Croatian institutions formed new working groups, which revised our draft law in some points. But the main points of our recommendations were accepted.

Let me stress only the most important ones:

Till now there was only one administrative court in Zagreb for whole Croatia.

The new administrative court system will have two levels: Four administrative courts of first instance, seated in Osijek, Rijeka, Split and Zagreb, and one High Administrative Court in Zagreb.

In order to align the former Croatian law with the *acquis communautaire*, especially Art. 6 of the European Convention on Human Rights, other important changes are formulated in the new law:

- Legal protection against all administrative measures before administrative courts, including factual acts or the non-observance of administrative contracts
- Full jurisdiction on law and facts
- Mandatory oral hearings
- Reformatory instead of mere cassatory system
- Provisional court protection.

Some other innovations will also be discussed today.

But all these novelties must not lead to the conclusion, that the administrative court procedure in Croatia is something new at all.

On the contrary: The legal protection by an administrative court has a very long tradition in Croatia, which was influenced especially by Austrian law. It was changed, but kept alive during the

Yugoslavian time, where also some French influence can be observed; and it was renewed again after the independence of Croatia in 1991.

So we look at many interconnections with other genuine European roots in the judicial system of Croatia. Therefore it is not only an adequate but a splendid and even compelling idea, to organize this conference with members of the European family under the roof of the Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union. Like in every family – you will hardly get all members together. But all the present members are happy to have the opportunity to give our incoming new family member Croatia a good start.

Introduction – Conference issues

By Mr Jean-Marie Moreau, Head of the Institution Building and Social Cohesion, Section of the European Commission's delegation in Croatia

Dear Secretary General, dear participants, I am very pleased to address you with some introductory words on this very interesting conference. The European Commission supports your association, ACA (Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union) which in our opinion contributes to transfer knowledge and to build trust among its members. This is the inevitable result of the concrete exchange of views and experience of its members on matters concerning their own "core business", the management of the administrative justice.

This is true also for any observer members and especially for Croatia who is preparing to be the next country acceding the European Union. Your association has a key role in the European integration process by supporting a natural process of increasing EU standards on the organization and functioning of administrative jurisdiction bodies and in strengthening of their performance in judicial and/or advisory functions, particularly with regard to EU Law. Relevant energy is also rightly focused from your association on the jurisprudence generated by its members.

Today's initiative arrives at a good timing. In fact the new administrative justice system in Croatia will enter into force in 6 months (as of 1 January 2012). The selected issues of discussions at the conference are extremely appropriate as they are touching some of the most significant aspects of the reform, and mainly the introduction of a two-tier system with the creation of a High Administrative Court with review, appeal and exclusive competences.

As of 2012 Croatia will indeed have on a new system of full jurisdiction in the meaning of Art. 6 of the European Convention of Human Rights - ECHR ("... everyone is entitled to a fair and public hearing...") within the framework of the Council of Europe, and the Art. 47 of the European Union's Charter of Fundamental rights (Right to an effective remedy and to a fair trial). Moreover, the last focus issue of the day will be dedicated to the organization of the first instance tribunals (Administrative Courts) of Croatia. Indeed management and organisational aspects will be of major relevance.

However, even if as said, this initiative is of major relevance and arrives at a crucial timing, I would like to encourage the Croatian competent bodies, mainly the Ministry of Justice, the Supreme Court, the current administrative jurisdiction and State judicial Council, to keep the momentum high and to concentrate all efforts in this remaining 6 months in order to guarantee a proper preparation to the reform. In concrete terms, Croatia could already take into consideration all suggestions and recommendations to be reached at the end of this conference while preparing the reform. I am confident that today's conference will bring new ideas which will enrich tomorrow's work. This can be considered as another form of support that comes from European initiatives.

On this field I would like to underline how the European Union contributed concretely on the Croatian reform process. Back in 2008/2009 a CARDS (2004) project analyzed the administrative justice system and provided concrete suggestions and recommendations to the Croatian competent authority.

We are now happy to see that in a constructive way this work had been taken into consideration while defining the final reform of administrative jurisdiction

I believe that the adopted reform is a step forward for Croatia especially because it includes:

- A full jurisdiction of the administrative court on facts and law
- Oral hearings that will be conducted by the Administrative court
- Faster and more efficient court procedure
- Better legal protection against administrative measures
- More efficient cases handling and cost effectiveness
- Proper enforcement measures for court decisions
- Better access to justice with the creation of first instance administrative courts

In more general terms this reform is key for the improvement of the Croatian judiciary for the following reasons:

- It contributes to a further democratization of the system introducing a system in line with fundamental rights international standards
- Better serving the citizens and the public interest
- Contribute to strengthen the judiciary system increasing its capacity to serve the society
- Brings Croatia a step closer to the EU

This reflection allowed the European Commission to state on the February Interim report on reforms in the field of Ch.23 (Judiciary and Fundamental Rights) that "Croatia has improved access to justice, including by taking steps to ensure that, by the time of accession, the Administrative Court is made a court of full jurisdiction". By stating this one the European Commission gave a positive opinion on the fulfillment of one part of the closing benchmark related to the protection of human rights.

Regarding these more general aspects I would like to remind that the role of the Administrative justice is to make sure that public administration respects the Law and compensate possible damages that wrong decisions might have caused.

The importance of a functioning administrative judiciary also for the economic development of a country should not be underestimated. For instance, almost every investment-decision as well as most infrastructure projects have to pass through a licensing process which is conducted by state authorities and therefore subject to judicial review by the administrative courts.

The legal review of administrative decisions by independent courts is part of the EU standard and an important contribution to ensure the Rule of Law. Administrative court is not only responsible for the practical implementation the law and has to ensure the efficient enforcement of judicial decision in sectors like pensions, health insurance, construction and residential law, residence permit.

Next step for Croatia will be finalizing the preparation of the reform and its effective implementation. The attention has now to be focused on finalizing the appointment of judges, finalizing the preparation of the infrastructure, continue with the support of the Judicial Academy the training of judges especially with regard to the new competences included by the reform (i.e. asylum appeals, appeals on judicial appointments), appropriate awareness of judges, members of the legal profession, public officials and citizens... Together with the novelties I mentioned before (oral hearings, new procedures), you will understand that these things need to be adequately prepared. Administrative courts will be confronted for the first time with them.

I trust that Croatia will succeed on this task and that the new administrative jurisdiction system of Croatia will be a successful development within the more comprehensive judicial reform. The impact assessment which had been made on the draft legislation within the earlier stated EU financed project had been considered accurate also by an independent expert which recently came to evaluate the status of the preparation of the reform. We believe that the recommendations from the assessment had been followed accurately.

As a conclusion, I would like to wish you an excellent work and to suggest you to focus on specific and concrete recommendations which may give to Croatia an additional support in this crucial phase of finalization of preparation of the reform and on the soon to start implementation of the reform.

I am confident that the Croatian counterpart will make treasure of these recommendations and will be ready at the day of accession (I hope the sooner!) with a well structured and functioning administrative jurisdiction system, efficient and accessible to any citizen and other interested parties.

By Mr. Martin KÖLHER, judge at the Administrative Court of Austria

1. Introduction

After several years of intensive debate and hard work on the reform of the administrative jurisdiction in Croatia there has been issued a new Act on Administrative Disputes that will enter into force in January 2012.

As the implementation of this Act requires the establishing of a new structure of the administrative judiciary this is an important step in the development of the legal system in Croatia.

It is therefore quite understandable that there is a great need for information and for further deliberations on the way the Act could be best implemented.

The present Conference that has been organised by the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union together with the Administrative Court of the Republic of Croatia offers an excellent opportunity for a first exchange of views on the different aspects of the new provisions on the court procedure and the organisation of the administrative courts.

I want to thank the organisers that they also took account of the close links the Austrian Administrative Court had with the project of the reform of the Croatian administrative jurisdiction and that they invited me as a member of the Austrian Administrative Court to take part in this Conference. I understood the task that was attributed to me to deliver a sort of "opener" to the Conference that should cover the whole range of topics dealt with in the Act on Administrative Disputes in general and that are to be discussed on our Conference in particular.

As we have a very dense programme I will concentrate on the second part of this task and limit the remarks on the Act on Administrative Disputes as a whole to the necessary minimum.

2. The new Act on Administrative Disputes

Survey on the contents of the Act:

a) In the light of the requirements of Union Law and the European Convention on Human Rights the new (Croatian) Act on Administrative Disputes establishes a system of judicial appeal in administrative matters that tries to cope with the necessities of European law on the one hand and establish an effective system that is able to grant justice within reasonable time on the other hand.

b) The main task to decide on appeals against administrative decisions is attributed to the administrative courts. The judgments of these courts can be appealed against before the High Administrative Court. So the Act provides for a two instances administrative court system.

As an interesting Croatian peculiarity the Act on Administrative Disputes, however, provides for a remedy of last resort even against the decisions of the High Administrative Court. According to Art. 78 AAD the parties to the dispute may "propose" to the State Attorney's Office of the Republic of Croatia file "a request for extraordinary examination of legality of final decisions" "due to violation of law". The Supreme Court of the Republic of Croatia has to decide on such an appeal. It is entitled to annul the judgment and remand the case for a new decision "or reverse the judgment".

c) The Act on Administrative Disputes provides for the organisational structure as well as the procedure of the administrative jurisdiction.

d) Administrative disputes are defined (in Art. 3 AAD) as disputes on

- the lawfulness of a decision of a public body
- the lawfulness of an act of a public body or

- the failure of a public body to decide on a request or legal remedy.

Thus, legal protection can be granted in a very broad way. The citizen can lodge an appeal against decisions adversely affecting his or her rights and also against any action of an administrative authority that infringes his or her rights. Moreover, it is possible to launch an appeal against the failure to act so that the authorities cannot deprive the citizens of his or her rights in just refraining from issuing an act that should be issued and that is of importance for the citizen (to exercise his or her rights).

One of the most important conditions for the right to lodge a complaint is that the decision, action or administrative contract affects the rights and legal interests of the complainant (Art. 30 n° 2 AAD).

e) In the procedure before the administrative courts the following principles and rights have to be observed:

- right to be heard
- principle of oral hearing
- principle of efficiency
- principle of assistance to an ignorant party

f) Binding effect of the decisions of the courts

Art. 10 (1) AAD explicitly states that the final judgments shall be binding upon the parties and their legal successors.

Decisions of the High Administrative Court regarding the validity of a general administrative act shall be binding upon all.

g) Organisation, competences

The AAD contains the necessary provisions on the competences of the "administrative courts" and the High Administrative Court, their composition (the chambers as well as the competences of a single judge).

h) Procedural details

The AAD – not surprisingly - to a large extent is a procedural law, laying down detailed rules on the procedure before the courts of first instance and on the formal requirements of the judgments as well as their substance.

Of specific interest is the definition of the "parties" in Art. 16 AAD, which is considerably wide ("any interested party").

i) Contents of decisions

Art. 56 and following AAD deal with the competences of the administrative courts (their possibilities to decide on the complaint). According to these provisions the courts under certain circumstances have to "reject a claim" (Art. 57). It is not laid down precisely what is to be understood by the notion "claim". There could be either actions to annul an administrative decision so that the "claim" would be to annul the administrative decision (in which case there would be the necessity for a new administrative decision) or actions to grant a certain (substantive, administrative) claim (to decide on the merits of the case, which would not leave any room for a further decision of the administrative authority).

Read in conjunction with Art. 58 and Art. 66 AAD the Act seems to aim at decisions of the courts of first instance on the merits of the case: the administrative court is not restricted to the cassation of the administrative decision under appeal but it is entitled to issue a decision on the "administrative" claim itself. "Claim" in the sense of Art. 57 is the substance of the administrative matter, not just a "procedural claim before the administrative court". This becomes clear from Art. 58 (1) AAD

according to which the administrative court can “accept the claim”, “nullify the dispute decision and resolve the matter itself”.

So the AAD provides for a decision on the merits of the administrative matter.

Administrative jurisdiction according to the AAD is not limited to the cassation of the contested administrative decisions.

For the rest the contents of Art. 58 AAD is not very precise. It is hard to understand what the “statement of the claim” in the case of the quashing of the administrative act really should be (Art. 58 (2) AAD). The court at the same time is expected to “adopt the statement of the claim and declare the decision null and void”. It is open for discussion what this could mean: first it was to be clarified under which conditions a decision of the administrative authority is null and void. Only then one can determine what the “statement of the claim” could be: if the authority just interfered with the rights of the citizen without any legal basis there seems to be no “claim” of the citizen that is to be “stated” unless one assumes that it is to be stated that the authority must not issue the decision under the given circumstances. But this is already expressed by the quashing of the decision.

The AAD moreover seems to draw a distinction between the “statement of the claim” and the “resolution of the matter” by the court itself. But then it is not necessary to combine the “statement of the claim” and the “resolution of the matter” in the case of Art. 58 (3).

It surely will be necessary to clarify what is meant by the different possibilities of the administrative courts according to Art. 58.

j) Legal remedies

As has already been pointed out the AAD provides for a two-instance administrative court system. So the right of appeal before the High Administrative Court is an important part of the Act.

Art. 66 (1) AAD lists the reasons on which the appeal can be based.

Art. 66 (2) AAD states the principle that the appeal can only be filed if the “rights, obligations or legal interests of the party” are at stake and if the court “decided itself”.

This is a necessary limitation (and is in line with Art. 30 AAD that contains the same condition for the lodging of a complaint) as otherwise the possibility to lodge an appeal might be too wide: according to Art. 16 AAD “any interested party” is party to the (first instance) proceedings. But only those parties whose rights are (possibly) infringed can lodge an appeal.

Moreover, Art. 66 (2) AAD aims at reducing the number of appeals in another way: the appeal to the High Administrative Court is only possible if the administrative court has decided on the merits of the case.

k) Review of the legality of general administrative acts:

The solution found in the new administrative authority on the one hand is similar to that in other countries, e.g. Germany, with regard to the fact that it is not the Constitutional Court that has to decide on the legality of acts of the administrative authorities of a general character (regulations). On the other hand the review now is concentrated with the High Administrative Court; the administrative courts are not entitled to review the legality of the administrative acts, but it is up to the parties to lodge a request for the review. Such a request can only be lodged after an administrative act based on the contested provision has been issued. So the competence to decide on the legality of a regulation does not lie with any court, but it is necessary to refer the question to the High Administrative Court. Interestingly, it is not the decision of the public body that is based on the contested regulation that has to be appealed against, but the regulation (alone). According to Art. 87 Act on Administrative Disputes, however, the parties to the case after the quashing of the provision on which an administrative act was based are entitled to ask for the reopening of the administrative procedure.

After such a first glance on the new AAD one can describe the solution chosen as a very ambitious one that surely will enable the administrative courts and the High Administrative Court to secure the rights and interests of the citizens and to fulfil the task also European law requires with a view to the granting of effective court protection. The Act at the same time contains some interesting specific

Croatian elements such as the request for extraordinary examination of legality of final decisions" the consequences of which will only be assessable after some years of practical work with the Act. One consequence of this extraordinary remedy, however, will be the splitting of the competences concerning administrative law between the High Administrative Court and the Supreme Court and it will be interesting to see how this will work in practice.

3. Short outlook on the Conference's issues

The organisers have chosen four different topics for a more detailed discussion on the Conference.

- And I suppose it is not by chance that the review of lawfulness of general acts by the High Administrative Court is the first issue to be presented. Croatian lawyers will be interested very much in this new competence of the High Administrative Court and there will surely be the need for a thorough discussion of this competence and especially its practical implications.

I am very much looking forward hearing the first comments on that decisive competence of the High Administrative Court that could prove to be an effective means of the protection of the rights of the citizens. As I already pointed out, the review procedure before the High Administrative Court can be led immediately after an administrative decision which is based on the contested general act has been issued. Thus lengthy proceedings before the administrative courts can be avoided, where the only legal question is whether the general act on which the decision of the authority is based is lawful or not.

We shall have the opportunity to have a first glance on the practical side of this solution.

- After the review of legality of general acts we will turn to the problems of the appeals against the decisions of the courts of first instance. The organisers stress the need to achieve speedy procedures and the focus therefore will lie on the filter mechanism provided for in the new Act on Administrative Disputes.

Here the provisions on the right to appeal against decisions of the administrative courts will have to be discussed.

As already mentioned Art. 66 (2) AAD contains an important restriction on this right: if the administrative court dismissed the complaint there is no further remedy within the administrative jurisdiction. The administrative decision is final in this case (there only remains the so called "request for extraordinary examination of legality of final judgments" according to Art. 78 AAD; this raises the question whether it is really suitable to change the "line of jurisdiction" and entrust the Supreme Court with the ultimate decision in those cases; thus there might be a large number of administrative cases which cannot be decided by the High Administrative Court but in which the Supreme Court has to adjudicate; this could cause severe problems as to the harmonisation of the case-law).

- The third set of presentations is devoted to the "exclusive competences" of the High Administrative Court.

Those competences will have to be determined by law. The discussion in this respect is to be seen as a first orientation which competences could be envisaged for the sole competence of the High Administrative Court.

- Finally, the organisation of the courts of first instance is to be discussed.

4. Conclusion

The organisers have succeeded to assemble an illustrious circle of high ranking experts and judges of a large number of different countries so that we will get a colourful picture of the possibilities the new Act provides.

First Issue: Review of Lawfulness of general acts by the High Administrative Court of Croatia – Admissibility conditions and consequences of an annulment

By Mr Mato ARLOVIC, Judge at the Constitutional Court of Croatia

The principles of constitutionality and legality, their adoption, implementation and safeguarding, make one of the most important prerequisites, particularly from the legal and constitutional aspect, for establishing the rule of law, protecting human rights and fundamental freedoms, as well as other democratic and universally accepted individual and collective rights and social values. Their implementation is as equally important as their constitutional and legal regulation. It is carried out in a number of ways; here we emphasize the most important ones:

1. Consistent normative elaboration of these principles when adopting general regulations for the purpose of development and enforcement of legal and constitutional provisions (if permitted under the Constitution) on the part of executive and administrative authorities, and other bodies vested with public authority, particularly the local and regional self-government units, and legal persons performing their activity or a part thereof as a public service, i.e. with public authority.
2. Consistent adherence to the principles when applying laws and other regulations to concrete cases related to exercising rights, meeting obligations or establishing responsibilities of natural and legal persons.
3. Consistent safeguarding of the principles of constitutionality and legality by initiating and conducting the assessment of constitutionality and legality of laws and other regulations or pertaining by-laws.

Increasing the number of institutions, creating new forms and aspects of safeguarding the principle of constitutionality, directly or indirectly, will bring the principles to a higher level in terms of their content, efficiency, logical structure and functional organization. Such expectations are supported by the enactment of the new Administrative Disputes Act that includes in the sphere of activity of the High Administrative Court the assessment of legality of general acts of the local and regional self-government units and legal persons who are vested with public authority and provide public services. It is evident that the Constitution provides grounds for *diferentia specifica* between the regulations regulating social relations in a general way, referred to as ‘other regulations’, and those referred to as general acts of the local and regional self-government units with public authority. The very fact that the Constitutional Court has so far treated both of them (as well as the implementing regulations of the Government of the Republic of Croatia) as general normative acts corresponding to ‘other regulations’, results more from the past constitutional/legal structure according to which the assessment of the constitutionality of law and the assessment of the constitutionality and legality of other regulations, i.e. their individual provisions, lies within the jurisdiction of the Constitutional Court of the Republic of Croatia. Hence the Constitutional Court considers these general acts as ‘other regulations’. It is clear that the first motion of the Constitutional Court, High Administrative Court or some other court (e.g. the Supreme Court of the Republic of Croatia) will be sufficient to prompt a discussion on the legal nature and differences between general acts and ‘other regulations’ the basis for which is already provided in the Constitution and laws. This brings to the conclusion that there are two kinds of general normative acts regulating the social relations in a general way. In my view, it is likely that the Constitutional Court will take such a (new) standpoint on this matter, which would definitely leave no room for doubt as to whether the High Administrative Court may assess the legality of general acts of the local and regional self-government units and legal persons who are vested with public authority and provide public services; if it may do so, it should be indicated to which general acts this applies. We are rightfully expecting such a course of events, as it would bring numerous significant changes that will contribute to a more efficient application of the principles of constitutionality and legality.

By Mr Georges RAVARANI, President of the Administrative Court of Luxembourg

As the interest for the institutions of a country depends – which is quite understandable – on its size, I will refrain from attempting to explain the problems of the assessment of legality of general administrative acts by administrative courts from a purely Luxembourg perspective and I will try to address the relevant questions on a more general basis.

On the other hand, it is by pure coincidence that Luxembourg has recently faced similar problems to Croatia in establishing a judicial control of such acts. As a matter of fact, Luxembourg has a long standing control – since 1856 – of individual administrative decisions, first by the Council of State, and, more recently, since 1997, by the newly created administrative courts of first and second instance. However, for almost 150 years, there has been no direct judicial control of general administrative acts. It is true that since the enactment of the Constitution of 1856, there has always been an incidental control of regulatory acts (*exception d'illégalité*): every court is empowered to set aside (not to annul) a regulatory act that it considers contrary to a constitutional or a legal provision or even a rule enacted in an international convention duly approved by the national Parliament (art. 95 of the Luxembourg Constitution: "*Courts apply general and local regulation only if it is consistent with the law*"). But there was no direct control (*par voie d'action*) of such kind.

The question of establishing such a control came up when, due to the now well-known *PROCOLA*-judgment of the European Court of Human Rights of 28 September 1995 the Council of State could no longer cumulate the functions of advisor to the Parliament and the Government – including advice as to the enactment of laws and general regulations – with those of an administrative judge who would, after having advised, construe the same regulations, this having been considered contrary to a fair trial as provided for in Article 6 of the European Convention of Human Rights. So there had been no other choice than to establish separate and independent administrative courts. The Luxembourg legislator opted for a two-level control of administrative acts and decisions. It was felt necessary to establish a two-level full control – not only a cassation control at the second level – encompassing the substance of administrative acts as several administrative acts falling under the jurisdiction of administrative courts – e.g. administrative fines and dismissal of public servants – are considered by the European Court of Human Rights as decisions taken in criminal matters where article 2 of Protocol Nr. 7 to the European Convention of Human Rights, that guarantees that everybody convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.

Incidentally, the question of establishing a judicial direct review of general regulations arose, especially as legal writers had, for years, severely criticized the absence of such a control and pointed out that this showed that Luxembourg was not a full democracy with an all encompassing rule of law. Several questions then arose that had to be solved. As these questions may occur in the context of any establishment of a control of regulatory acts, I will try to address four of the main questions that were discussed in the context of the establishment of such a control.

1. Direct control versus incidental control

First, and over all, **what is the use of a direct control of general acts** if there is already an incidental control that, in the context of an individual administrative decision's review, enables a court to discard the general act and, consequently, to annul the individual decision deriving there from.

Of course, if there is no possibility of an incidental control, the use of the control and the ability to challenge the general act is obvious: without such a possibility, the general act will be applied despite its potential illegality and it will automatically consolidate the individual act.

But if a court called to pass a judgment on the legality of an individual act has the power to set aside the general regulation that is being invoked as a legal basis, it is far from easy and obvious to find out the usefulness and the added value of a direct control of the general act. In a vast majority of cases indeed, there is an interposition of an individual act that applies the general act and if the judge of the individual act has the possibility to control incidentally the legality of the general act, one may legitimately wonder whether such a direct control of general acts is really needed.

It is true that the annulment of a general administrative act produces its impact *erga omnes* and removes the said definitely from the legal environment, whereas an incidental refusal to apply a

general act impacts only on the individual case and does not bind the courts in subsequent cases. But for the individual claimant, this makes no real difference.

Anyway, the numbers speak for themselves: I was told that in Germany, claims of this kind represent less than 3 % of the total cases, in Belgium 6 to 7 % Since the introduction of the assessment of general acts in Luxembourg 15 years ago, only a handful of such claims have been filed, except in matters of land-use plans. On the other hand courts incidentally almost daily set aside general acts they consider contrary to the Constitution, an international convention or a law. Well, although there are not so many of them, there may be situations where a party suffers damage by a general act before or without the interposition of an individual administrative act. One can imagine that there is a plot of land situated in a zone that had been declared a construction zone. Later on, the relevant public entity changes the rule and declares the entire zone a non building area. This is obviously a general act. It is true that the owner of the affected parcel can ask for a building permit and if it is refused, he can, when challenging the individual decision of refusal, incidentally challenge the legality of the general act of reclassification of the zone in a non-building area. – What happens however if the owner of the parcel wants to sell it as a constructible plot of land? He will not ask for a building permit; this will be a matter for the buyer. But will the potential buyer still be interested if – officially and perhaps, only provisionally – the parcel is declared as non building zone? There will be no individual decision that can be challenged before the sale, and nevertheless the owner of the parcel is negatively affected by a general act. Consequently he should be able to challenge directly – and without waiting for an individual decision – the general act as to its legality.

There is another aspect of the problem: if a general act establishes a tax, will the tax-payer really wait for the individual payroll and then challenge the legality of the general act? A company will, long before the reception of the payroll, have to make provisions that may affect its assets. – A general regulation orders a census including the collection of elements belonging to the citizens' private life. The obligation to respond is enforced by a heavy administrative fine. Will the individual citizen who doubts the legality of the questions asked really have to refuse to answer these and, in the context of the fine he is ordered to and that he challenges in court, risk to pay the fine in case he loses his case? – A last example: if a perfectly illegal regulation forbids the sale of certain goods, will the shopkeeper have to sell the goods, to be fined and to challenge the fine in court – probably a criminal court? Moreover, if the same regulation prohibits the import of certain goods, it is not even sure that the importer will be able to take possession of the goods that will be blocked at the customs and it is not sure he can obtain an individual decision that he can challenge in court. If so, he will have suffered a severe loss before being able to restore legality. In other words, if one obliges the citizen to challenge the legality of a general act in the sole context of an individual decision, one forces him to face the true risk to behave illegally and to bear the consequences. Indeed, the outcome of a lawsuit is rarely without any hazard. Without the possibility of challenging a general act before it is applied in an individual decision, one deprives the citizen of the possibility to do things properly and to have a clear answer to an actual problem before damage is caused, potentially without a remedy, by an individual decision.

In this context, it is noteworthy that the Croatian text (art. 83, par. 1 of the Act on Administrative Acts) provides that a general act can only be challenged within 30 days of the individual decision that, by implementing the general act, violates a person's right or legal interest. As far as I understand the said provision, this means that there must be, forcibly, the interposition of an individual decision in order to be able to challenge the general act. This implies then, on the one hand, that one can wonder why the general act has to be challenged at all, as the satisfaction for the claimant is the same if he only challenges the individual act and, on the other hand, that there is no possibility to challenge a general act without the interference of an individual decision.

To sum up, I do not want to say that the possibility to assess the legality of general acts is not useful, but I believe it is only useful if it has another scope than the incidental assessment of such acts in the context of individual decisions.

2. Violation of a right or legal interest

Who is entitled to challenge the legality of a general act? This raises the question of the standing or interest of a party (*intérêt à agir*). Of course a party has to be affected by the rule. Luxembourg law provides that the affected interest must be "direct, personal, present and certain." It does not require the violation of a right. This is consistent with the very nature of the interest in administrative matters: whereas in civil matters, interest is the personal, subjective right that a party claims to be violated by the adverse party, in administrative matters, in the Luxembourg system, an action is not directed against a party but against an act or a decision and the claim is in principle not for the protection of an individual right, but for the withdrawal of an illegal act in itself and the restoration of the objective legality. To have the standing to formulate such a claim, a party has to be individually and negatively affected by the act. This is easy to control in a claim for annulment of an individual decision: is the neighbour of the beneficiary of a building permit really affected by the construction or not? The answer to the said question provides the solution as to the interest to act.

The problem is much more difficult to resolve in matters concerning general acts. Of course, if a regulation prohibits the import of goods that someone is actually trading, he is presently and negatively affected by the regulation. But what to decide if someone is making precise studies in order to apply – in three, five or more years – for a job in environmental matters and if during his studies, the government changes the requirements for the envisaged career and if it seems as if these new requirements were illegal? The interest can hardly be qualified as current. Nevertheless, everybody will agree that he has a real interest to have an immediate control of the legality of the regulation, in order to enable him to change possibly his studies.

The problem is further complicated by the time limit that normally prevents a late challenge of the regulation – in our case once the student has finished his studies and is ready to apply for the job. This aspect of the problem will be addressed hereafter.

Another problem in the context of legal interest is the standing of **non-profit organizations**, pressure groups, etc., that are active in various matters of public interest, e.g. in environmental matters and that are willing to exercise an *actio popularis*. Will such an organization have the standing to challenge a regulation it deems illegal? In principle, legally speaking, its interest is not personal. But the issue is of high political content, and it is difficult to discuss it from a legal point of view. There are anyway, nowadays, many international, especially European rules (e.g. the Aarhus Convention) that make it difficult to deny any interest to such organizations. Luxembourg law grants the standing to associations that act in the public interest and that are benefiting from a special statutory norm to challenge general regulations in the field of their activity.

3. Time limitation

Is it necessary to provide for a **time limit to file a claim against a general act**? At first glance, the answer is clearly positive. Under Luxembourg law, the time limit is three months from the publication of the regulation in the Official Gazette or, if it is not published, from the knowledge of the existence of the regulation by the complainant. I think in Germany it is one year and in France 2 months. The justification for such a rule is not less obvious: legal certainty and, consequently, the impossibility to challenge indefinitely a rule.

The truth is that nothing is obvious in this context. First, the rule is genuinely unjust: take the example of the student who is studying and finds, before the end of his studies, an illegal regulation that will prevent him from applying for a certain job. As his interest is not present at the moment of the publication of the regulation and as the time limit will have expired at the moment he applies for the job, he will have no legal means to directly challenge the said regulation.

Moreover, despite this severe rule, the regulation will not be free from a later challenge. There remains indeed the possibility of an incidental control in the context of a lawsuit directed against an individual decision – e.g. the refusal of the candidate to a public office as he cannot avail himself of the relevant studies and diplomas.

Finally, the time limit and the affirmed need of legal certainty are not consistent with what happens with unconstitutional laws, at least in the Luxembourg system. The constitutionality of a law can be challenged before the Constitutional Court irrespective the time it was enacted – it can be 100 years

old – and if the said court declares the law unconstitutional, it ceases its effects from the date of the said declaration or, more precisely, from the date of the publication of the judgment declaring the law unconstitutional.

Why should it be different with general administrative acts that have a lesser value than genuine laws? What could truly happen if a general act could perpetually be challenged? As with laws, vested rights (*droits acquis*) would be, at any rate, untouchable. If a law or a regulation is declared void, situations definitely consolidated under such act remain in force (at least in France, in Belgium and in Luxembourg). Individual administrative decisions that confer rights under a general act that is declared void at a later stage remain in principle in force. Consequently, if a house is built in a construction area and if, at a later stage, the general act that has declared the zone a building area is annulled, the house obviously will stay in place. Moreover, if a concession is granted by an individual decision for a 10 years' period and if, during the said period, the regulatory act that enables to grant the said concession is declared void, the right to operate the concession is not affected until the end of the term of the concession. Things are of course worse if there is no time limit for the validity of the individual permit. It seems as if it had to lose its validity then. But, at least in the Luxembourg system, the situation is in no way different from what happens if a law is declared unconstitutional.

To conclude on this point, I think if the time limit is too tough, one prevents the direct assessment of general acts to have a real impact.

4. The competent court

Should the assessment of the legality of general acts be reserved to the sole supreme administrative court? When it was first enacted in 1997, the legality control of such acts was directly and exclusively entrusted, by the Luxembourg legislator, to the Supreme administrative court. But very soon, i.e. already in 1999, the law was amended and there is now a control in two stages, first by the first instance administrative court, and then by the Supreme administrative court.

It seems a good solution. Indeed, whereas one can say, at first glance, that such important matters should be reserved to the highest jurisdiction, one can argue against this that it is somewhat odd that matters of lower importance, such as individual decisions, should undergo a double judicial control whereas more important matters are "expedited" with less care. It is a clear advantage if a judicial matter comes before a higher judge after having undergone a thorough control by a first panel of judges. At any rate, ultimately and if the government – being a party to the proceedings – appeals a first instance judgment, the matter will end up with the Supreme administrative court.

Another problem was raised in this context. Sometimes it is quite difficult to establish whether an administrative act is a general act or an individual decision. If a decree declares that the expropriation of a single parcel is of public utility, is this a general or an individual act? It is then much easier for a claimant to have the possibility to go before the same court irrespective the nature of the challenged act, rather than to oblige him to make potentially a fatal choice of the wrong court.

It is true that a control in two instances risks delaying the solution of the case. This does however not seem to be a decisive argument. At any rate the law could provide for a time frame within which courts would have to decide such important matters. – It is also possible to establish a *prima facie* review of legality to diminish the pressure for obtaining a quick definite judgment. In Luxembourg, upon certain conditions, the president of the first instance court can stay the effect of a general act until the definite court order is rendered.

These are some of the problems that a judicial assessment of the legality of a general act raises.

Other questions could also be addressed:

- if, in the context of a direct challenge of the legality of a general act, the claim is rejected – which means logically that the act is not illegal – can another judge – even a civil or a criminal judge – in a subsequent claim – between different parties and concerning another issue, so that

there can hardly be *res judicata*, nevertheless declare the same general act – incidentally – illegal?

- can a person file a claim before a court if the reverse of an illegal general act happens, i.e. if the government illegally refrains from taking an act, e.g. if a law specifically provides for implementation regulation of the law and the government remains passive? Under Luxembourg law, the only means is to claim for damages before a civil court. Such actions are relatively frequent;
- what is the scope of the legality control? How to draw a sharp line between pure legality (formal and substantial) and political opportuneness? Could a court deem the laying-out of a highway highly unreasonable?
- if an illegal general act has caused a loss to a citizen – or if the illegal abstention to take a general act has caused such harm – under what circumstances can the individual citizen qualify this a tort and seek the liability of the State (or another public body) and claim damages? Under Luxembourg law, such possibility is largely granted, even for pure economic loss. There is even a specific law on State liability of 1st September 1988.

Questions over questions... There is certainly not one scheme for establishing a judicial control of general acts, each having its difficulties, but the worst solution is certainly the mere absence of such a control.

By Mr Michel Pâques, member of the Council of State of Belgium

Introduction

1. Statutory instruments and individual acts

The distinction between administrative statutory instruments and specific and individual administrative acts is important in Belgian law, since an act's placement in one category or the other determines whether various rules and principles are applied. It is not always easy to categorise an act¹. For instance, we know that there are hybrid acts², or acts that are only individual or statutory within the meaning of one legislative provision or another³. Despite this, the system is almost exclusively binary⁴. The third category, 'non-statutory acts'⁵ is not autonomous and does not seem to be used often in Belgian law⁶.

2. Administrative disputes in Belgium

In Belgium, there are many ways for disputes between the administrative authorities and citizens to be brought and resolved. Participation and stating of grounds are highly developed methods of avoiding disputes. The first is applied to a great many statutory instruments, while the second has only been

¹ For example, the criteria applied and the reasoning in CofS, 16 December 2010, Dutron and others, 209.810.

² A typical example is a permit to divide land into lots, since it is both an individual permit to divide property and a land development regulation.

³ For example, the case of draft statutory orders "within the meaning of Article 3 of the laws on the Council of State, as coordinated on 12 January 1973", which must be submitted to the legislation division of the Council of State for a prior opinion if they originate from the federal, community or regional government.

⁴ M. Leroy, *Les règlements et leurs juges*, Brussels, Bruylant, 1987, no. 11.

⁵ The expression "non-statutory" is sometimes used to define the scope of application of Article 159 of the constitution (Cass., 10 June 1926, Pas., 1927, I, p. 12; Cass., 21 April 1988, Pas. 1988, I, p. 983; RCJB, 1990, p. 402, contribution by P. Quertainmont). Upon further examination, it covers both administrative acts and statutory instruments (F.-X. Barcena, *Le champ d'application normatif du contrôle de légalité*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010, pp. 103 et seq., sp. no. 4).

⁶ M. Pâques, *De l'acte unilatéral au contrat dans l'action administrative*, Brussels, Story-Scientia, 1991, nos. 4 et seq.

applied systematically to individual acts since the adoption of a law on 29 July 1991⁷. The grounds for statutory acts are only formally stated if a particular provision requires it. It should also be noted that mediation has been somewhat successful, alongside the traditional methods of appealing before the responsible administrative authority and the courts⁸.

This contribution only looks at the main features of the administrative court system. Judicial review only examines the lawfulness of administrative acts and does not bear in mind their appropriateness. Responsibility for judicial review is shared by the ordinary and the administrative courts.

3. Belgian court system

The ordinary courts were created by the constitution when it was originally adopted in 1831. They are the “courts and tribunals” or “judicial courts”. The Court of Cassation is the highest of these judicial courts.

The constitution does not create administrative courts itself⁹, but it provides for their creation by law¹⁰. There are a great many administrative courts¹¹, and the Council of State was created as the highest administrative court in 1946¹². Its distinguished position among administrative courts stems from the fact that it has cassation powers for decisions by administrative courts. The Council of State also hears direct appeals for the annulment of non-court acts by the administrative authorities. The Council of State was included in the constitution with the revision of 1993 (Article 160).

4. Administrative disputes on subjective rights and objective administrative disputes

Ordinary courts hear disputes relating to subjective rights. There are just two categories of rights under Belgian law, namely, civil rights and political rights. When citizens assert their ‘civil rights’ against the administrative authorities, the disputes are heard exclusively by the ordinary courts. An example would be the case of the right to compensation for damage caused by government negligence. The ordinary courts also have power to rule when citizens assert ‘political rights’ against the administrative authorities, but only in principle. In fact, the lawmaker can confer the power to hear disputes relating to political rights upon any administrative courts it may create. For example, this is the case for some electoral rights. As regards disputes relating to civil or political rights, Article 159 of the constitution requires courts to review the lawfulness of applicable individual administrative acts or administrative statutory instruments. I will come back to this point later.

⁷ Law of 29 July 1991 on formal statement of the grounds for administrative acts, which requires the administrative authorities mentioned in Article 14 of the coordinated laws on the Council of State to formally state the grounds for their individual administrative acts (for a general presentation of the law, see Xavier Delgrange and Bruno Lombaert, *La loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs : question d’actualité* in *La motivation formelle des actes administratifs*, edited by P. Jadoul and S. van Drooghenbroeck, Brussels, La Charte, 2005, p. 1 et seq.).

⁸ Recently, E. Lanckswert, *Naar een faciliterende wetgeving voor bemiddeling met openbare besturen*, TBP, 2010, pp. 511 et seq.

⁹ Except for the Court of Audit, which has associated judicial functions.

¹⁰ In principle, this refers to federal law. The communities and the regions do not have the power to create courts. However, they may create courts by encroaching on the State’s power and using the implicit powers conferred upon them. The Constitutional Court has recognised the constitutionality of such procedures (CC, 27 January 2011, 8/2011; TBP, 2011, pp. 195 et seq., contribution by J. Vanpraet, *Deelstatelijke administratieve rechtscolleges: enkele beschouwingen bij het arrest nr 8/2011 van het Grondwettelijkhof*).

¹¹ According to estimates, there were 250 before the 1967 judicial reform, and there were some 65 administrative courts in Belgium in 1995, I. Sirjacobs and H. Vanden Bosch, *Introduction sur le contentieux administratif* in *Les juridictions administratives en Belgique depuis 1795*, Brussels, State Archives in Belgium, 2006, 84-127, in translation, note 4. In 2008, Mr M. Leroy counted several hundred administrative courts in the country (M. Leroy, *Contentieux administratif*, Brussels, Bruylant, fourth edition, 2008, p. 124).

¹² The Council of State was created by the law of 23 December 1946. This law and the laws that amended it were coordinated on 12 January 1973. Since then, reference has been made to “the laws on the Council of State, as coordinated on 12 January 1973”, which have been amended more than 40 times since (hereinafter referred to as “the CLCS”).

In Belgian law, there is another type of dispute that does not relate to subjective rights, where the sole aim is to challenge the objective legality of administrative acts. In this case, the party concerned brings proceedings against an act and requests its annulment. This is the main type of dispute given to the Council of State, under Article 14 of the coordinated laws on the Council of State. These actions for the annulment of acts of the administrative authorities, also referred to as “appeals on the misuse of powers” are a way of reviewing administrative acts that has just been added to the existing mechanisms for disputing laws, without taking away from any of these mechanisms¹³. Such actions can be taken against individual acts and statutory instruments.

As a complement to actions for annulment, the Council of State has the power to suspend, as an interim measure, the enforcement of individual acts and statutory instruments of the administrative authorities^{14 15}.

I. Methods of challenging statutory instruments

A. Full challenge of acts

5. Actions for the annulment of statutory acts

The lawmaker sets out provisions for actions for annulment in Article 14 of the coordinated laws on the Council of State. It is explicitly stipulated that actions for annulment can be brought against both acts and regulations. This mainly applies to acts and regulations adopted by the administrative authorities, but also to acts and regulations issued by certain other authorities that the lawmaker names without recognising them as administrative authorities¹⁶.

6. Broad understanding of lawfulness but not of appropriateness

Article 14 also lists a number of elements for the validity of administrative acts, which the Council of State can check. However, the list is not exhaustive. It covers the external (powers, forms and proceedings) and internal (grounds, purpose and aim) lawfulness of individual administrative acts or administrative statutory acts, including reviews for manifest error and proportionality. Conversely, the court may not review the appropriateness of an act that relates to policy.

7. Broad interpretation of personal interest in an action

While actions before the judicial courts focus on protecting subjective rights, appeals on the misuse of powers (which are brought before the Council of State) aim to restore lawfulness. Appeals of this type

¹³ This is also partially true of the actions heard by the Aliens Litigation Council, which are sometimes actions relating to political rights and sometimes objective actions relating to lawfulness (Article 39(2) of the law of 15 December 1980 on aliens’ entry to the territory, residence, establishment and expulsion).

¹⁴ In principle, both requests are made in a single application. However, in the case of extremely urgent actions for interim relief, the request for suspension may be submitted before the application for annulment.

¹⁵ The Council of State hears other types of dispute too: actions aiming to overturn decisions by administrative courts, some specific types of action relating to political rights and actions on fairness relating to compensation for exceptional damages. These are mentioned as a matter of interest.

¹⁶ Article 14(1) The section rules through judgments on actions for annulment for the infringement of procedural requirements that were either essential or were needed for validity and actions for annulment for misuse or abuse of powers brought against acts and regulations:

(1) of the various administrative authorities;

(2) of legislative assemblies or their bodies, including mediators established within these assemblies; of the Court of Audit and the Court of Arbitration; of the Council of State and the administrative courts and of the bodies of judicial power and the High Council of Justice where these relate to public tenders or members of their staff.

Article 159 of the constitution also applies to the acts and regulations mentioned in Article 14(1)(2).

could have been mass actions, as logically allowed by their *objective nature*. In reality, however, they may only be filed by people who can claim an interest in seeing the act annulled. This condition was created for practical reasons. Thus for an action for annulment to be receivable, the appellant must prove that there is injury or an interest (Article 19, CLCS). The annulment must benefit the appellant, whether the appellant is a natural person or a legal entity governed by public or private law. The interest must continue to exist until the annulment is performed. The interest must be personal, direct, certain, present and legitimate. These characteristics of the interest, as shown by case law, have been interpreted very subtly in practice over the years. We refer here to specialist works on the subject¹⁷. Interest is interpreted broadly, particularly when it comes to appeals against regulations. In such cases, it is enough for appellants to show that their situation has been affected by the contested regulation. For instance, the judgment of 19 October 2001 in the Lannoye case (no. 99961) is noteworthy due to the interpretation of *locus standi* developed. The appellants contested a statutory royal decree setting standards for exposure to electromagnetic waves from mobile telephone antennae, claiming that the standards were not protective enough. The respondent, the Belgian State, argued that the appeal was inadmissible because the appellants had not clearly shown that their own personal situation was directly affected by the contested act, that their accommodation was situated near a mobile telephone antenna or that they were more affected than most by the standards set out in the contested act. The State added that the appellants did not mention any potential damage to their health associated with the enforcement of the contested act and that they themselves acknowledged that their situation was no different to that of any other Belgian citizen. The Council of State observed that the condition of interest set down in the law exists solely to avoid mass actions. It found the appeal to be admissible, expressing itself as follows: “considering that according to the Report to the Crown on the contested act ‘people everywhere in the world are worried that exposure to electromagnetic fields (EMF) from sources such as high-voltage lines, radar equipment, mobile telephones and mobile telephone antennae may damage their health’ and since this regulation was adopted with a view to protecting public health and the environment from the harmful effects and damage, known and unknown, caused by non-ionising radiation, infrasound and ultrasound (as emitted by mobile telephone antennae), it must be acknowledged that the appellants have sufficient interest in challenging the act’s lawfulness”¹⁸.

8. Collective interest

The collective interest claimed by incorporated associations is recognised in case law, under certain conditions¹⁹, so that they can contest statutory instruments of which the content relates to the purpose they have set themselves. For example, it was recognised that the non-profit association *L'ESPOIR à Wavre-Nord* had an interest in contesting a Walloon regional development plan for the town of Wavre and the surrounding area²⁰. Similarly, the non-profit associations *Ligue des droits de l'Homme* and *Mouvement contre le racisme, l'antisémitisme et la xénophobie* were acknowledged to have an interest in challenging the Royal Decree of 2 August 2002 establishing the regime and regulations applicable to premises in Belgian territory run by the Aliens Office, where foreign nationals are held, placed at

¹⁷ M. Dumont, *Variations sur le thème de l'intérêt*, APT, 1999, pp. 85 to 118; P. Lewalle and L. Donnay, *Contentieux administratif*, Brussels, Larcier, 2008, pp. 778 et seq.; M. Leroy, op. cit., 2008, pp. 510 et seq.; David Renders, *Droit administratif, T. III, Le contrôle de l'administration*, Brussels, Larcier, 2010, no. 342; J. Baert and G. Debersaques, *Raad van State, Ontvankelijkheid*, Bruges, La Chartre, 1996; A. Mast, J. Dujardin, M. Van Damme and J. Vande Lanotte, *Overzicht van het Belgisch administratief recht*, Mechelen, Kluwer, 2009, pp. 1017 et seq.

¹⁸ The appeal was refused due to the assessment that no serious harm that would be difficult to make good would be caused by the immediate enforcement of the contested act. The Royal Decree was annulled by the judgment CofS, 15 December 2004, Non-profit association Teslabel Coordination, 138471, Am.-Env., 2005/3, p. 202, which recognised that the non-profit association had an interest.

¹⁹ There is an interesting study on this subject in the Council of State's opinion of 9 March 2010 on the bill to amend the coordinated laws on the Council of State to give associations the right to file an action in the collective interest, in Doc. Parl. Ch., 52-1939.

²⁰ CofS, 11 September 2000, Delstanche and others, 89585; CofS, 17 December 2009, Non-profit association Grez Doiceau Urbanisme et Environnement, 199.055.

the disposal of the government and kept pursuant to the provisions cited in Article 74/8(1) of the law of 15 December 1980 on aliens' entry to the territory, residence, establishment and expulsion²¹.

9. Action for statutory inaction

Inaction in the exercise of the government's regulatory role can also be punished by the annulment of the detailed implicit decision resulting from the government's consistent failure to respond four months after receiving notice from an interested party²².

10. Deadline for lodging appeals

Appeals against acts before the Council of State are only admissible if they are filed within the legal timeframe²³. Regulations are published, and the timeframe for appeal begins on their publication date. Once this deadline has passed, appeals against the regulation are no longer admissible and the principle of legal certainty takes precedence over lawfulness, although not completely, since a regulation's unlawfulness can still be raised through an objection of illegality and there is no time limit for such measures.

11. Publication of appeals

Article 3quater of the Rules of Procedure²⁴ stipulates as follows: "when the Council of State is asked to rule on an action for the annulment of a regulation, the chief registrar has a notice mentioning the appellant's identity and the contested regulation published in the Belgian Official Gazette in French, Dutch and German".

12. Urgent interlocutory proceedings against statutory instruments

Filing an action for annulment does not suspend the enforcement of the contested act, but the appellant can ask the Council of State to make an interlocutory judgment suspending the enforcement of the contested regulation²⁵. Enforcement is not suspended unless the court orders it. There was a system that automatically suspended the enforcement of acts as soon as an appeal was lodged against them, but this was abandoned very quickly because it presented obstacles to the continuity of government action²⁶. Appellants request suspension of an act in a single application for the act's suspension and annulment. Nevertheless, if the request for interim measures is very urgent, the request for suspension may be filed before the action for annulment.

²¹ CofS, 10 December 2008, Non-profit associations Ligue des droits de l'Homme and Mouvement contre l'antisémitisme et la xénophobie, 188.705.

²² Article 14(3) of the coordinated laws on the Council of State: "when an administrative authority is asked to make a decision and does not make a decision in the four-month period from its receipt of a formal decision request from an interested party, the authority's failure to respond is seen as a refusal, against which an appeal may be lodged. This provision does not affect special provisions that establish a different timeframe or attach other consequences to a lack of response on the part of the administrative authority"; CofS, 6 November 1985, Boitquin, 25.814, APT, 1986, p. 80 et seq., mentioned in M. Leroy, *Une arme nouvelle contre l'inertie du pouvoir, le recours contre la carence réglementaire*.

²³ "Appeals, as referred to in Articles 14(1) and 14(3) of the coordinated laws, may be made in the 60-day period following the publication or proclamation of the contested acts, regulations or decisions. If the acts, regulations or decisions do not need to be published or proclaimed, the timeframe for appeal begins on the day that the appellant first becomes aware of them." (Article 4(3) of the Regent's Decree of 23 August 1948 establishing procedure before the administrative division of the Council of State).

²⁴ This refers to the Regent's decree of 23 August 1948 establishing procedure before the administrative division of the Council of State.

²⁵ Article 17, CLCS.

²⁶ Appeals for interim relief had full suspensive effects for a short period, which ended shortly after the inappropriateness of the system came to light (Royal Decree of 27 October 1989, as amended by the Royal Decree of 6 December 1990 and the Royal Decree of 10 July 1991).

To be able to rule on the suspension of the enforcement of an individual act or statutory instrument, the Council of State must find that the appellant has serious grounds for the request and would risk being caused serious harm that would be difficult to make good if the contested act were enforced immediately. This condition results from the lawmaker's desire to ensure that annulment remains useful while guaranteeing that urgent interlocutory proceedings are only used in exceptional circumstances. It should not be confused with *locus standi*, which remains necessary and is always a prior condition for appeal. For instance, in the Lannoye judgment (mentioned above), the court found that the appellants had *locus standi* but could not show that the immediate enforcement of the regulation would potentially cause them serious harm that would be difficult to make good.

B. Challenging statutory instruments through an objection of illegality

13. Objections of illegality relating to rights

When an objection is made for reasons relating to rights, the court that is asked to rule (be it an ordinary court or an administrative court with power to rule in matters relating to political rights) reviews the regularity of the administrative acts mentioned. The same applies to objective challenges, but I will come back to that.

The constitution gave the courts this power, and they have held it since Belgium became independent. Article 159 stipulates that “courts only apply general, provincial or local decisions and orders if they are in accordance with the law”. This article is a way of channelling resistance to government oppression²⁷ and the wording has remained unchanged since 1831. It was not amended to match the federal structure of the State²⁸, which has nonetheless not prevented its application to administrative acts by the federate entities (as it was previously applied to acts by administrative authorities that it does not mention). In one notable summary, Mr Jan Theunis demonstrates that all of the words in Article 159 have been interpreted very broadly²⁹.

If an act is illegal, the courts must refuse to apply it³⁰.

²⁷ S. Rials, *Oppressions et résistances*, Paris, PUF, 2008, note 1, p. 14; A. Alen, *Rechter en bestuur in het Belgisch publiekrecht. De grondslagen van de rechterlijke wettigheidscontrole*, two volumes, Antwerp, 1984; A. Alen, *De raadsels van art. 107 van de Belgische grondwet*, RW, 1984, col. 1729 et seq.; A. Mast, J. Dujardin, M. Van Damme and J. Vande Lanotte, *Overzicht van het Belgisch administratief recht*, Mechelen, Kluwer, 2009, pp. 863 et seq.; J. Theunis, *De 'exceptie van onwettigheid' (art. 159 G.W.) : meer vragen dan antwoorden*, RW, 2007-2008, pp. 5 et seq.; J. Theunis, *De exceptie van onwettigheid : op zoek naar een verloren evenwicht*, TBP, 2011, pp. 260 et seq.; see also contributions in the work entitled *De wettigheidstoets van artikel 159 van de Grondwet*, Bruges, La Chartre, 2010 (A. Alen, *Woord vooraf*; K. Leus and B. Martel, *De wettigheidstoets van artikel 159 van de Grondwet. Procedurele benadering - de toepassing van artikel 159 G.W. als exceptie*; J. Ghysels and J. De Staercke, *Artikel 159 Grondwet als directe vordering*; J. Theunis, *De rechter geklemd tussen het beginsel van scheiding der machten en het vereiste van volle rechtsmacht?*; G. Van Haegenborgh, *Artikel 159 van de Grondwet in de rechtspraak van het Hof van Cassatie en het Grondwettelijk Hof. Bedenkingen vanuit Europees perspectief*; T. Erniquin, *Le principe de protection de la confiance légitime, facteur de pondération de l'application du principe de légalité*; W. Weymeersch, *Artikel 159 van de Grondwet in de rechtspraak van de Raad van State*) and the contributions in the work entitled *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010 (F.-X. Barcena, *Le champ d'application normatif du contrôle de légalité*; D. Déom, *Le refus d'application*; B. Lombaert, *Un contrôle d'ordre public à géométrie variable*; R. Van Melsen, *Le champ d'application personnel du contrôle de légalité incident*; M. Nihoul, *L'autorité de la chose jugée de la déclaration d'illégalité incidente*; J. Theunis, *Le contrôle de légalité en droit français et néerlandais*; S. Adam, *Le contrôle incident de légalité à l'épreuve du droit de l'Union européenne entre mutations et transfiguration*; J.-F. Leclercq and D. De Roy, *L'exception d'illégalité et le contrôle incident de légalité des actes administratifs en droit belge par la loupe du droit comparé*; Marc Nihoul's conclusions and the bibliography).

²⁸ F.-X. Barcena, op. cit., no. 10.

²⁹ “Elk tekstonderdeel omvat meer dan wat uitdrukkelijk is vermeld” (“Each part of the text covers more than is explicitly mentioned”), J. Theunis, *De exceptie van onwettigheid : op zoek naar een verloren evenwicht*, TBP, 2011, pp. 260 et seq., sp. no. 11.

³⁰ D. Déom, *Le refus d'application*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010, pp. 147 et seq.

The standards reviewed by the courts include all administrative acts, be they individual acts or statutory instruments^{31 32}, emanating not only from the central powers (the king and the federal ministers, the governments of the communities and regions³³), the municipalities and the provinces, but also from all other administrative authorities³⁴. Conversely, Article 159 does not allow a court decision by an administrative court – which is, by definition, binding – to be challenged, nor does it allow a law to be set aside³⁵.

The reference standards referred to are laws. This means all sources of administrative law that have a higher value than the act under review, including general legal principles.

The government cannot be one of the parties in the dispute that results the act being set aside. An example of such a dispute would be one in which a tenant contends to his or her landlord that the decision on the basis of which the landlord is requesting a rent increase is illegal. The act in question must bear some relation to the dispute for it to be set aside³⁶.

14. Scope of lawfulness reviewed

The courts review the internal and external lawfulness of the act, so the review is as broad as the review that the lawmaker entrusted to the Council of State³⁷.

15. Deadlines for lodging appeals and legal certainty

When a challenge is made relating to a right, an objection of illegality based on Article 159 may be raised at any time³⁸. As long as the challenge relating to the right is not statute-barred, the courts may set aside a very old individual administrative act or administrative statutory instrument if they discover that it is illegal through the dispute on which they were asked to rule. This way of trying to ensure that lawfulness is always the most important principle poses a considerable problem in terms of legal certainty, but also constitutes as an important guarantee for citizens harmed by illegal acts.

16. Objection of illegality against a regulation in objective appeals brought before the Council of State

Like all other courts, the Council of State must apply Article 159 of the constitution.

While direct appeals must be made by the relevant deadline, a regulation's illegality may be raised through an objection of illegality at any point in time, as long as the main challenge is filed within the

³¹ Prof. Marc Nihoul suggests that more modern wording would refer to individual administrative acts and administrative statutory acts (*Les affres de la législation en matière d' « autorité administrative » et le respect de la Constitution*, JT, 2008, pp. 71 et seq.). The third type of act, namely 'non-statutory acts', rarely occurs in Belgian law.

³² M. Leroy points out that until 1926, ordinary courts only applied Article 159 of the constitution to regulations (*Contentieux administratif*, Brussels, Bruylant, fourth edition, 2008, p. 75). Nowadays, Article 159 is sure to be applied to individual acts (Cass., 4 December 2006, JT, 2007, p. 169).

³³ As well as the executive bodies of the French and Joint Community Commissions in Brussels-Capital Region. The Flemish Community Commission is a decentralised institution.

³⁴ This interpretation is reinforced by the new version of Article 14 CLCS. On this subject, see: M. Nihoul, *Les affres de la législation en matière d' « autorité administrative » et le respect de la Constitution*, JT, 2008, pp. 71 et seq.

³⁵ Reviewing the constitutionality of legislative acts is a responsibility of the Constitutional Court and does not fall within the scope of Article 159 (except in matters relating to compliance with Brussels ordinances, which partly fall under Article 159). Checks on the consistency of legislative acts with international and European law are not based on Article 159 either (for more on this subject, see F.-X. Barcena, op. cit.).

³⁶ D. Déom, op. cit., p. 172.

³⁷ Cass., 3 March 1972, Pas., 1972, I, p. 601; CA, 14 July 1992, 57/92, ground B.7.

³⁸ Brussels Civil Court, 18 September 1987, JT, 1988, p. 480, note by D. Lagasse; Brussels Industrial Tribunal, 16 February 1988, JT, 1988, p. 482; Cass., 21 April 1988, RCJB, 1990, p. 402, note by P. Quertainmont. See also the criticisms voiced by P. Martens, JLMB, 1988, p. 1535, who believes that there is "legalistic conservatism".

prescribed timeframe. For instance, when the main appeal is made against a single urban planning and environmental permit and is filed in 2007, the appellant may argue that a very old regional development plan (adopted in 1993, or 1981) is illegal and ask the Council of State to find that the permit awarded in application of the illegal regulation is itself illegal and should be suspended or annulled³⁹. As long as the illegal regulation is a decisive reason for the adoption of the individual act, the regulation may be annulled if the court upholds the related argument⁴⁰.

17. Deadline for raising an objection of illegality for objective reasons

In proceedings before the Council of State, only statutory instruments can be challenged through an objection of illegality with no deadline. The Council of State only hears challenges to the lawfulness of an individual act within the timeframe for lodging direct appeals against that act, even if the challenge is brought by means of an objection of illegality.

18. Compulsory nature of Article 159

The Court of Cassation requires all courts in the domain for which it is responsible to apply Article 159 of the constitution. In proceedings before ordinary courts, arguments based on the illegality of the administrative act of which the application is requested must be raised of the court's own motion.

Conversely, in proceedings before the Council of State, an argument based on the illegality of a regulation being applied by the government must be mentioned by the appellant in the appeal, as with all other arguments. The only exception to this principle is when the reason for the challenge through an objection of illegality is also a matter of public policy, wrote Mr Bruno Lombaert⁴¹. In this case, the appellant, the auditor or the Council of State may raise the argument at any point until proceedings are closed. There are few arguments based on matters of public policy in the case law of the Council of State⁴². Notable matters of public policy include the jurisdiction or consultation of the Council of State's legislation division over draft statutory orders from the government. This limitation of the possibility to raise the issue of illegality of the court's own motion is criticised by Mr Lombaert, who does not accept the claim that it would be paradoxical to allow all arguments in objections of illegality when only arguments relating to matters of public policy may be raised of the court's own motion in direct appeals⁴³.

However, stricter judgments can be found that create a distinction between arguments related to matters of public policy and directed at the contested act itself and arguments relating to illegality and directed at the regulation. For example, in a case where the appellant was challenging a permit that was awarded based on a regulation that had been annulled in the meantime (Royal Decree of 10 August 2005) but had not been questioned in the appeal, the Council of State found that "the Royal Decree of 10 August 2005 setting a standard for antennae emitting electromagnetic waves with a frequency of 10 MHz to 10 GHz was annulled for infringement of rules on powers, which is a matter of public policy. However, it does not follow that the contested act is vitiated by the lack of power of the author of the decree simply because the act refers to the decree. The delegated government official's position as the competent authority to adopt the contested act has not been challenged. The annulled Royal Decree was nothing more than a reason for adopting the contested act and the appellant could usefully have mentioned the illegality of the Royal Decree when filing the appeal, requesting the application of Article 159 of the constitution. The challenge based on the illegality of the contested act (that refers to the annulled Royal Decree) mentioned above was made too late, so this

³⁹ CofS, 30 September 2008, Vantomme and others, 186.682.

⁴⁰ For instance, CofS, 16 March 2010, Huys and Kupka, 201.930.

⁴¹ B. Lombaert, *Un contrôle d'ordre public à géométrie variable, in L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010, pp. 187 et seq.

⁴² A. Wirtgen, *Het ambtshalve aanvoeren van middelen door de Raad van State in het raam van het beroep tot nietigverklaring*, TBP, 2006, pp. 515 et seq.

⁴³ B. Lombaert, op. cit., nos. 13 et seq.

new line of argument is inadmissible”⁴⁴.

19. Review of the lawfulness of statutory instruments is not performed by the government

It has traditionally been accepted that Article 159 only gives powers to the courts. The government, for its part, must apply national law and not set aside rules adopted by higher-ranking authorities or by itself (*patere legem quam ipse fecisti*). Thus, were the government to become aware of the illegality of an act that it must apply, it must consciously behave illegally by applying the act, and its unlawful behaviour will later be penalised by the courts if they are asked to rule on an appeal by an interested party⁴⁵.

This historical solution has sometimes been ruled out by the Council of State itself⁴⁶. It has been criticised by people who recommend avoiding illegality at all costs and believe that it would be better to allow the government to set aside, of its own accord, any irregular acts that it must apply,⁴⁷ with the rule of law being mentioned in support of this view⁴⁸. On the other hand, Article 33 of the constitution is mentioned in support of the historical solution: it stipulates that powers are exercised in the manner laid down by the constitution, which gives the power to set aside illegal acts to the courts, not to the government⁴⁹. In recent times, the Constitutional Court has been using the traditional interpretation of Article 159 (Const. Court, 30 March 2011, 44/2011).

However, in its judgment, the Constitutional Court left unresolved the question as to whether a general legal principle should lead governments to do what Article 159 reserves for courts alone and therefore does not allow them to do (Const. Court., 30 March 2011, 44/2011, ground B.16)⁵⁰.

Both the Court of Cassation⁵¹ and the Council of State⁵² have already recognised that such a principle exists. Various prominent authors also argue that Belgium’s constitutional structure means that the courts would have the power to set aside illegal administrative acts even if Article 159 did not exist⁵³. Since Article 159 does exist, the usefulness of the principle has been questioned⁵⁴.

The existence of a principle that would allow the government to set aside the illegal acts it must apply is another matter altogether. The practical problems posed by a broad interpretation of Article 159 are the same as those associated with the government’s application of such a principle. Indeed, we could take the view that the principle of legal certainty precludes the government setting aside administrative acts that are in force. The historical solution has the advantage of clarity and order, and takes account of the realities of governing and the difficulties governments would have in carrying out this obligation. After all, it is not easy to determine that acts are illegal without the type of adversary proceedings used in court appeals. The purely theoretical advantage for abstract lawfulness that would be derived from giving the government the power to annul illegal acts may not be as significant as the

⁴⁴ CofS, 6 April 2011, Schoonbroodt, 212.496.

⁴⁵ For instance: CofS, 27 April 2010, De Kempeneer, 203.323: “Considering that the author of the contested act is an active government body, that it must apply statutory provisions and does not have the power to set aside any provisions it believes to be illegal and that, by contrast, the Council of State is required to refuse to apply any statutory provision that it finds to be illegal, that it follows that when it reviews the lawfulness of a planning permit or a refusal to grant a permit and if the grounds justify it, it must refuse to apply the illegal development plan”.

⁴⁶ K. Leus and B. Martel, op. cit., 2010, no. 90.

⁴⁷ See the observations by R. Van Melsen, *Le champ d’application personnel du contrôle de légalité incident*, in *L’article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010, pp. 23 et seq.

⁴⁸ See CofS, 22 April 1997, Artois, 65.974.

⁴⁹ D. Renders, observations on Cass., 21 December 2007, JT, 2008, pp. 554 et seq., sp. no. 5.

⁵⁰ “In the case in point, the court therefore does not have to analyse the extent to which the administrative authorities should apply, if necessary, an objection of illegality by virtue of a general legal principle”.

⁵¹ Cass., 8 April 2003, Juridat; Cass., 9 January 2002, JLMB, 2002, pp. 1076 et seq., concl. general opinion by Spreutels; also concl. general opinion by Leclercq on Cass., 4 September 1995, Pas. 1995, I, p. 753.

⁵² CofS, 10 September 1998, non-profit association Front commun de groupements de défenses de la nature, 75710 (Am.-Env., 1999, p. 55, observations by M. Quintin; APT, 1998, p. 201 et seq., with extracts from the report and opinion of M. Kovalovszky); on this subject, see F.-X. Barcena, op. cit., no. 32.

⁵³ J. Theunis, op. cit., TBP, 2011/5, pp. 260 et seq., sp. no. 2.

⁵⁴ P. Lewalle and L. Donnay, *Contentieux administratif*, Brussels, Larcier, 2008, p. 355.

cost in indirect uncertainties and court appeals, which would still be necessary for clarifying the lawfulness of the acts.

However, we should note that the European Court of Justice recommends a different solution with regard to the primacy of European law, which the government itself must guarantee in relation to the country's national laws, even before a court appeal is lodged⁵⁵. In national law, the view is that an illegal act must be recognised as such by all those who deal with it. It is also accepted that the government has a duty not to act on an obviously illegal hierarchical order because of a general principle of legislative value to the effect that the administrative authorities must refuse to apply an obviously illegal administrative act⁵⁶. If the possibility of setting aside an illegal act exists, it must be exploited. I believe that the government could only carry out this obligation when faced with an act that is undeniably illegal, the illegality of which could be easily spotted by any administrator⁵⁷. In my view, it seems excessive to require that all administrators read and are familiar with all case law (even published case law) in principle, to infer that it is illegal. Can it be accepted that if a citizen demonstrates that an act is illegal, the government must examine the relevant point in the reasons provided for the contested act and decide if it should conclude that the act is illegal? In such cases, should it not ask for the opinion of the author of the contested act beforehand? This question could also be asked with regard to individual acts. The question as to whether the government can set aside an act on supervision, for instance, on the grounds of illegality by giving assent is very sensitive. Would this not be contrary to the balance sought in the effective organisation of administrative supervision? Faced with the significant delay in proceedings and appeals that can result from the application of these principles and the associated disadvantages for the citizen requesting authorisation, the General Assembly of the French Council of State ruled that the policymaker could decide whether the opinion provided was lawful or not and set it aside if necessary. And "if it makes use of this possibility wisely, the courts shall approve this infringement on the rule on circumscribed powers"⁵⁸. The existence of such an option in case law calls into question the entire concept of circumscribed powers, which is all the more reason for it to be limited to cases of simple opinions that could, in principle, be set aside by a decision with relevant grounds.

Finally, the creation of a requirement for the government to set aside illegal acts should be viewed in relation to liability, as discussed later in this paper (see below, at the end of section 26).

II. Penalties for illegal statutory acts

A. The scope of the consequences of an act being declared illegal

20. Consequences of a regulation being found illegal following an objection of illegality

If a regulation is found to be illegal following an objection of illegality raised in a related case, the regulation cannot be applied. The decision not to apply the regulation can have several types of consequence. In some cases, it can mean that the court does not apply a penalty requested by the government (e.g. when the court upholds an objection of illegality and acquits a person being charged on the basis of an illegal regulation). A regulation being found illegal can also cause the court to annul the act being challenged (when the argument based on the regulation's illegality is upheld).

⁵⁵ On this subject, T. Bombois, *L'administration « juge » de la légalité communautaire. Réflexions autour des arrêts Fratelli Costanzo et Abna de la Cour de Justice de Luxembourg*, JT, 2009, pp. 169 et seq.

⁵⁶ D. Renders, *ibid.*; B. Lombaert, *Le pouvoir hiérarchique comme mode de contrôle administratif*, in *Les contrôles administratifs et financiers de l'action administrative*, Revue de Droit de l'ULB, 2008, pp. 137 et seq.

⁵⁷ Theunis recommends keeping to an obligation to set aside an act that is clearly illegal and defends a more demanding position with regard to supervisory or appeal authorities (TBP, 2011/5, pp. 260 et seq., sp. no. 13). However, he believes that this requirement should be combined with a deadline for raising objections of illegality.

⁵⁸ M. Guyomar et P. Collin, *Chronique administrative générale de jurisprudence administrative française*, AJDA, 2002, pp. 118 et seq., sp. p. 120, comment by the French CofS, 26 October 2001, Mr and Mrs Eisenchteter, *ibid.*, p. 122.

The effects of illegality being discovered in this way are relative⁵⁹, which means that even if the regulation in question has to be applied in other cases, the declaration of illegality in the ruling or judgment upholding the argument of illegality is only applied to the case being ruled upon: “making an authority’s decision non-applicable by virtue of Article 159 of the constitution has the sole consequence of not creating any rights or obligations for the interested parties. The illegal decision continues to exist as long as it is not subsequently annulled through an action for annulment”⁶⁰. In practice, however, the decision not to apply the individual act can be very much comparable to an annulment⁶¹. Other judgments can require the administrative authority to disregard the statutory standard that was declared illegal by the court⁶², and the standard will certainly be disregarded when it comes to redrafting the act that was annulled after the court upheld the argument relating to the regulation’s illegality.

The body that issued the regulation is not necessarily present in court for the discussions about the lawfulness of the regulation applied by the contested act⁶³. The issue of the author’s right to defend the regulation could also contribute to a limited effect being given to the indirect decision that the regulation is illegal.

Furthermore, when an act is declared illegal, the authority that issued it is required to restore lawfulness without delay, such as by repealing the illegal act⁶⁴ if it cannot withdraw it.

21. Legislative approval

A regulation may be declared illegal through such proceedings long after its adoption, at a time when it has already been applied a great many times. In such cases, a declaration of illegality undermines legal certainty and could be viewed as excessive application of the principle of lawfulness. Besides, it is often acknowledged that the court with material jurisdiction⁶⁵ may have sufficient reasons for approving the regulation in question to prevent a varying number of disputes raising the argument of the regulation’s illegality in appeals against decisions that apply that regulation. Approval has retroactive effects and, in the past, has been applied legitimately to disputes that were going on at the time⁶⁶.

22. Effects of a regulation’s annulment on the acts deriving from it

A rescinding judgment by the Council of State has an *erga omnes* effect⁶⁷, so the act’s annulment applies to all situations from the time of the judgment.

Annulment is retroactive, and retroactivity is imaginary, requiring people and bodies to behave as though the act had never been adopted. The Council of State deems that “a rescinding judgment, in

⁵⁹ For a recent, in-depth analysis of this traditional position, see M. Nihoul, *L'autorité de la chose jugée de la déclaration d'illégalité incidente*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Chartre, 2010, pp. 211 et seq.

⁶⁰ Cass., 29 June 1999, Juridat.

⁶¹ K. Leus and B. Martel, op. cit., pp. 19 and 35.

⁶² CofS, 21 December 2004, Municipality of Kasteelbrakel and others, 138.732; D. Déom, op. cit., no. 27.

⁶³ M. Nihoul, op. cit., 2010, p. 263.

⁶⁴ Report by Auditor Bovin, in CofS, 19 December 1989, Ernens-Dodemont, 33637; CofS, 2 December 1998, Albrecht, 75.355; K. Leus and B. Martel, op. cit., 2010, no. 93.

⁶⁵ There are a number of lawmakers in Belgium: the federal government, the community governments and the regional governments.

⁶⁶ For instance, as regards regional development plans: Constitutional Court, 28 March 2007, 51/2007; 18 November 2010, 131/2010.

⁶⁷ For more on the far more limited scope of the effect of a Council of State judgment throwing out an action for the annulment of a statutory instrument, see Cass., 24 March 1977, Pas., 1977, I, p. 789. D. Lagasse, *L'absence de toute autorité de chose jugée d'un arrêt de rejet du Conseil d'Etat devant les cours et tribunaux ou de la suprématie du principe de la légalité du principe de la légalité administrative sur le principe de la sécurité juridique*, note on Cass., 9 January 1997, RCJB, 2000, p. 257. Proposals have been made to boost the authority of these judgments, see J. Theunis, op. cit., TBP 2011, pp. 260 et seq., sp. no. 24 et seq.

itself and without any need for a further declaration of illegality, restores the situation to the way it was before the annulled act was adopted⁶⁸.

The effect of annulment on acts deriving from the annulled regulation has been examined in depth⁶⁹. In principle, all that has disappeared is that which has been annulled in the rescinding judgment. Derived acts continue to apply, like all other acts. Penalties can only be applied against them for their illegal basis if appeals are lodged against them.

For example: a judgment annuls a regulation. Another appeal is lodged against a permit that applies that regulation. Upon examining the appeal, the Council of State upholds the argument that the permit applies a regulation that was annulled by an earlier judgment and annuls the permit. The same solution would be used if the Council of State annulled the regulation after the permit was adopted, so if the permit was adopted when the regulation was still in force⁷⁰. As we can see in this case, the retroactive effect of the rescinding judgment confounds the plans of the authority that issued the individual act, since it had fulfilled its task by complying with the rules and regulations that were in force on the day it adopted the permit.

23. Adjusting the effects of an annulment. Preservation of the effects of an act annulled by the Council of State

The lawmaker has acknowledged the sometimes excessively damaging effects of retroactive annulment. Article 14ter of the coordinated laws on the Council of State states as follows: “if the administration division deems it necessary, it shall indicate, through a general provision, which of the effects of the provisions of annulled statutory instruments should be considered permanent or retained provisionally for a period that it shall determine”⁷¹. It should be noted that when it adopted this text, the lawmaker set aside a legislative proposal with a much broader scope that encompassed all acts, including individual acts. During preparatory work on the law, the minister did not rule out the idea of expanding the system to cover individual acts once its application to statutory instruments had been evaluated⁷².

The Council of State may therefore preserve the effects of a statutory instrument that it annuls. When exercising this new power, it takes account of the difficulties presented by the repercussions of the regulation’s annulment. It may exercise this power of its own motion, in which case it is recommended that the parties be allowed to debate the matter⁷³. When deciding to preserve the effects of a

⁶⁸ CofS, 12 October 2007, Clobus, 175.725.

⁶⁹ P. Lewalle (various contributions), most recently the third edition of *Contentieux administratif*, with the collaboration of L. Donnay, op. cit., 2008, pp. 1105 et seq.; M. Leroy, op. cit., pp. 762 et seq.

⁷⁰ CofS, 16 March 2010, Huys and Kupka, 201.930. In this case, the appellant has appealed against the permit before the annulment of the regulation, which was due to be annulled following a different appeal. In his last submission, he endeavoured to show that one of his arguments against the permit already criticised the illegality of the regulation, which became more apparent after its annulment. The Council of State accepted this. In another judgment, where the case concerned the same regulation but the arguments were different, the Council of State could not accept the appeal (CofS, 6 April 2011, Schoonbroodt, 212.496, in which there was also a question as to whether the argument based on the regulation’s illegality should be raised of the court’s own motion, see no. 20 above).

⁷¹ M.-F. Rigaux, *L’effet rétroactif des arrêts d’annulation rendus par la Cour d’arbitrage et les effets de la norme annulée*, JT, 1986, pp. 589 et seq.; B. Lombaert, *Le maintien des effets des normes censurées par la Cour d’arbitrage. Recours en annulation et questions préjudicielles*, APT, 1998, pp. 174 et seq.; K. Muylle, *Les conséquences du maintien des effets de la norme annulée par la Cour d’arbitrage*, in *La protection juridictionnelle du citoyen face à l’administration*, Brussels, La Charte, 2007, pp. 526 et seq.; G. Rosoux, *Le maintien des ‘effets’ des dispositions annulées par la Cour d’arbitrage : théorie et pratique*, in *Liber Amicorum Paul Martens*, Brussels, Larcier, 2007, pp. 439 et seq.; R. Andersen, *La modulation dans le temps des effets des arrêts d’annulation du Conseil d’Etat*, in *Liège, Strasbourg, Bruxelles : parcours des droits de l’homme, Liber Amicorum Michel Melchior*, Limal, Anthémis, 2010, pp. 381 et seq.

⁷² Report on a bill and two legislative proposals to amend the coordinated laws on the Council of State, Doc. Parl. Ch., 644/4-95/96, of 15 July 1996, p. 4.

⁷³ Otherwise, Article 6 of the ECHR may be violated (in this connection, see M. Quintin, unpublished report on CofS, 18 January 2011, non-profit associations Inter-Environnement Wallonie and Terre Wallonne, 210.483).

regulation, the Council of State is not bound by the fact of illegality already having been mentioned in the opinion issued by the legislation division on the draft regulation⁷⁴.

24. The scope of the preservation of effects is controversial

Does preservation of effects prevent a court from upholding an argument based on the illegality of the regulation of which the effects have been preserved? The Council of State answered this question in the affirmative and found that a decision to preserve effects applied *erga omnes*. It based this idea on the text of Article 14ter, which stipulates that decisions to preserve the effects are made ‘through a general provision’⁷⁵. Conversely, others believe that the decision to preserve a regulation’s effects are not binding on an ordinary court asked to rule on an appeal and that the latter should, on the basis of Article 159 of the constitution, penalise the irregularity of an act adopted in application of the annulled regulation of which the effects have been preserved. In such a situation, questions could be raised as to the usefulness of Article 14ter⁷⁶.

We believe that the *erga omnes* effect is the logical and useful consequence of the application of Article 14ter. If the effects are preserved, it will not be possible for the government or another court (even an ordinary court ruling on matters related to subjective rights) to uphold an argument based on an objection of illegality against the annulled act, regardless of the reason for this illegality. The question is whether this effect does not contravene Article 159 of the constitution or infringe upon

⁷⁴ See the limitation of the annulment’s effects in CofS, 11 March 2009, non-profit association INTER-ENVIRONNEMENT WALLONIE, 191.272; cf. CofS, 4 June 2010, Town of Andenne, 204.782: “considering that the respondent had been notified of the illegality of the contested act by the opinion of the Council of State’s legislation division but nonetheless took the risk of adopting it without taking account of the legislation division’s comments, the respondent must accept the consequences. Considering that the order’s annulment would affect neither the organisation of firefighting services nor citizen safety but would require corrections to be made to accounts in the case of the municipalities where the decisions have not been made final and that this could result in financial transfers, the paperwork involved, however complex it may be, does not represent such a great danger that it would justify a derogation from the normal effects of a rescinding judgment”; CofS, 21 April 2004, SPRL Funéailles Clerdent and others, 130.492: “considering that the enforcement of this judgment would only result in financial transactions being performed, even assuming that these would inconvenience the respondent, it falls to the respondent to accept the consequences of its illegal behaviour. In any case, there is no risk to a greater public interest that would justify depriving the annulment made by the judgment of the retroactive effect that annulments generally have”.

⁷⁵ CofS, 18 December 2009, Debie, 199.045: “Considering that with its judgment no. 162.616 of 22 September 2006, the Council of State annulled Article LI.TXVIII.CIII.3(2), which the appellant asked not to be applied by virtue of Article 159 of the constitution and that, in the interests of legal certainty, the Council of State postponed the effects of the annulment on 1 March 2007; that when the Council of State decides to postpone the effects of an annulment on the basis of Article 14ter of the coordinated law on the Council of State, it rules ‘through a general provision’ that the effects of all or part of the annulled act should be preserved; that by declaring that the Council of State is ruling ‘through a general provision’ when it decides to implement Article 14ter, the lawmaker gave an *erga omnes* effect to the Council of State decision ordering that an irregular statutory instrument could have effects in law; that a court decision of this nature, taken in the interests of legal certainty, temporarily reinforces the statutory instrument in question and suspends non-application for implementing measures taken while the effects of the instrument are being preserved; that temporary suspension of non-application does not contravene Article 159 of the constitution since that provision only applies to regulations or orders and cannot be applied to those that are given a temporary legal value through a ‘general provision’ judgment of the Council of State; that the fact that the appellant was not a party to the proceedings that led to the judgment of 22 September 2006 cannot call into question the *erga omnes* and binding nature of the decision; that there is therefore no need to refer a preliminary question to the Constitutional Court; that the acts adopted in implementation of Article LI.TXVIII.CIII.3(2) of the Walloon Civil Service Code between 1 January 2004 and 28 February 2007 cannot be annulled on the basis of the arguments examined in judgment no. 162.616 of 22 September 2006; that the contested act was adopted on 21 June 2004; that the argument is therefore unfounded”.

⁷⁶ D. Renders, note on CofS, 18 December 2009, Debie, 199.045, JT, 2010, p. 177.

certain fundamental rights⁷⁷, while straightforward annulment of an act is seen as fully compliant. In my opinion, a felicitous interpretation the constitution could mean that this limitation would apply to all courts asked to rule on the effects of the order, which would be equivalent to asking the lawmaker to define the Council of State's use of Article 14ter once more. After all, retroactive annulment is the rule, and application of Article 14ter is the exception. For this exception to be used, the Council of State must find that the interest protected by the provision violating the annulled regulation and legal order as a whole (including specific interests) are better served by preservation of the effects than by retroactive annulment. If the Council of State finds this to be the case, an *erga omnes* limitation may be more advantageous to legal order as a whole than subsequent upholding of individual challenges. From a constitutional viewpoint, it would be justifiable to devise some limitations to the scope of Article 159 with a view to guaranteeing legal certainty and the coherence of the system. Several arguments could be put forward, such as the developing constitutional status of the principle of legal certainty, the existence of the Council of State as guaranteed by Article 160 of the constitution and delegation to the lawmaker of organisation of its powers, notably time limits for appeals⁷⁸, the comparable jurisdiction given by law to the Constitutional Court on the basis of a non-explicit constitutional text (Article 142), the Court of Cassation's recognition of the principle of legal certainty and the need (sometimes acknowledged by that court) to weigh it up against the principle of lawfulness⁷⁹. On this same subject, we should recall that the matter of application of a *contra legem* principle was discussed when the question was raised as to whether the principle of legitimate expectations or fair play could lead to an act that is otherwise consistent with the law being declared irregular (illegal) in the event that the government had created legitimate expectations against the text of the law, especially in tax matters. Following several judgments that would lead to the conclusion that the principle could lead to the annulment of an otherwise consistent act⁸⁰, the Court of Cassation seemed to come back to the pre-eminence of the law⁸¹, which nevertheless does not prevent damages from being awarded for harm caused by violation of the principle of legitimate expectations⁸². In a recent judgment, the Court ruled that "the general principles of good governance include the right to legal certainty", that "this right implies, in particular, that citizens can trust public services and rely on them to comply with rules and pursue well-founded policies, and that there would be no room for citizens to think otherwise" and that "however, citizens can only invoke the right to legal certainty if this would give rise to a policy that goes against legal rules". Nevertheless, the decision is full of nuances and seems to ask the courts (rather less directly than Advocate General Mortier in his conclusions) to actually weigh up the requirements of legality against those of expectations⁸³.

⁷⁷ D. Renders, *Le maintien des effets d'un règlement annulé par le Conseil d'Etat et le respect des droits fondamentaux*, JT, 2002, pp. 761 et seq.

⁷⁸ See *mutatis mutandis*, CofS, 19 May 2009, Goslar, 193.418.

⁷⁹ In this connection, see the examples provided by J. Theunis, *op. cit.*, TBP, 2011, pp. 260 et seq., sp. no. 26.

⁸⁰ See my comment in M. Pâques, *L'application de la loi fiscale, Principes de bonne administration en droit administratif et en droit fiscal*, Actualités du droit, 1993, pp. 399 et seq.

⁸¹ On the same subject, see V. Scoriels, *Le principe de confiance légitime en matière fiscale et la jurisprudence de la Cour de cassation*, JT., 2003, pp. 301 to 310; note by C.B., *Situations contra legem : le principe de confiance resurgit parfois*, in *Le Fiscologue*, 1216, 3 September 2010, pp. 9-10.

⁸² Public Prosecutor Leclercq, concl. on Cass., 26 May 2003 and the judgment, Juridat; Cass., 22 May 2006, CDPK, 2008, pp. 456 et seq., note by S. Koval.

⁸³ The Court of Appeal judgment refusing to examine an objection of illegality raised by the government against an act in which a citizen had placed trust was set aside. The decision was justified and qualified as follows: "the court that was asked to evaluate a decision mentioned by the litigant for the purposes of legal certainty but viewed as illegal by the government must determine the extent to which that decision gave rise to reasonable expectations. In this instance, the court must take into consideration the lawfulness of the decision in question. In the interests of legal certainty, the examining judge analysing the topicality of the provision on which the government is basing its sentencing can take account of a subsequent regularisation decision that has not yet been annulled. However, this does not mean it can simply rule out the government's objection of illegality as regards the regularisation decision. The issue of the lawfulness of the regularisation decision may be decisive for the litigant's reasonable expectations and legal certainty. The appeals judges decide, without examining the legality of the regularisation, to dismiss the objection of illegality against the regularisation permit in favour of legal certainty, which, in the hierarchy of norms, has the same status as the lawfulness of norms. In so doing,

The Constitutional Court is currently handling a preliminary question that will doubtless allow the debate to progress⁸⁴.

One could also ask whether Article 14ter can be applied in the case of an annulment for a violation of European law. The Council of State recently referred a preliminary question on that matter to the Court of Justice of the European Union⁸⁵.

Finally, it is not yet clear what specific consequences preservation of effects will have on evaluation of the wrongful nature of the annulled act and compensation for damage caused.

25. Consolidation

Lawmakers regularly intervene to give new force to an administrative act that is about to be adopted or that is already irregular, liable to annulment, suspended or even annulled, depending on the case⁸⁶. The term *consolidation*, as suggested by Prof. Renders, has found something of an echo⁸⁷. It encompasses several types of action: authorisation, legalisation, ratification and declaration of validity. Either the lawmaker intervenes to remove the defects in the act while retaining its administrative nature or the lawmaker rewrites the act by turning its content into a law, decree or ordinance, retroactive or otherwise (but often retroactive). This confirmation or ratification is either planned in the authorisation given to the government or decided *ex post*. There is a considerable body of case law from the Constitutional Court on these legislative interventions⁸⁸.

B. Government liability in the exercise of its regulatory role

26. Application of ordinary law on liability

The government's liability in the exercise of its regulatory role can be incurred. In such cases, ordinary law is applied to government liability – in Belgium, this means Article 1382 of the Civil Code. The government's action or inaction must be classed as wrongful and the harm (violation of a right or legitimate interest) and causal link must be shown. If these conditions are met, there is a civil right to compensation for all damage caused. Such cases are heard by the ordinary courts.

they are violating the legal provisions mentioned in the argument in this section" (Cass., 1 March 2010, C.09.0390.N, conclusions by Advocate General Mortier, Juridat).

⁸⁴ In a judgment handed down on 21 January 2011 in the case of the non-profit association Clinique Saint-Jean – Kliniek Sint-Jan and others versus the Belgian State (JT, 2011, pp. 366 et seq.), the Brussels court of first instance referred the following preliminary question: "does Article 14ter of the coordinated laws on the Council of State, as inserted by Article 10 of the law of 4 August 1996, contravene Articles 10, 11 and 13 of the constitution, read in conjunction with Article 159 of the constitution and interpreted such that it would prevent ordinary courts from suspending, as per Article 159 of the constitution, the application of a statutory order that was annulled by a judgment of the Council of State but the effects of which are preserved until the date of the court's ruling and such that it would prevent a litigant from challenging the lawfulness of that statutory act, even though the litigant would be able to do so had Article 14ter not been applied, such as if there had never been an appeal to the Council of State regarding the illegality of the irregular statutory instrument?" (opinion published in the Belgian Official Gazette of 1 April 2011) The Charleroi court, for its part, decided to uphold an objection of illegality despite the effects of an annulled regulation having been preserved (Charleroi Civil Court, 11 February 2011, JT, 2011, p. 368, approving remarks by D. Renders, *L'article 159 de la Constitution prime l'article 14ter des lois coordonnées sur le Conseil d'Etat*).

⁸⁵ CofS, 18 January 2011, non-profit associations Inter-Environnement Wallonie and Terre wallonne v. Walloon Region, 210.483.

⁸⁶ David Renders, *La consolidation législative de l'acte administratif unilatéral*, foreword by Francis Delpérée, Bibliothèque de la Faculté de Droit de l'Université catholique de Louvain (vol. XXXIX), Brussels, Bruylant, and Paris, LGDJ, 2003, XVIII pp. and 492 pp.

⁸⁷ Court of Arbitration, 14 December 2005, 188/2005, ground B.5.8.

⁸⁸ K. Muylle and J. Theunis, *La Cour constitutionnelle comme juge de la séparation des pouvoirs : le cas des délégations et des validations*, in Liège, Strasbourg, Bruxelles : parcours des droits de l'homme, Liber Amicorum Michel Melchior, Limal, Anthémis, 2010, pp. 113 et seq.

Anyone wishing to request compensation for harm caused by government negligence consisting in the adoption of an illegal act does not need to have the act annulled by the Council of State before filing their claim⁸⁹.

27. Wrongful failure to regulate

In regulatory matters, both action and inaction can be considered wrongful. For instance, failure to regulate in a case where the law provides for the adoption of a regulation can be considered wrongful, even if the law does not set a time limit. For example, the king did not adopt a regulation setting out which jobs would entitle their holders to free accommodation. The appellant, Goffin, argued that this wrongful negligence had caused him damage amounting to 78,000 francs. The Court of Cassation viewed this failure to regulate as violation of a political right, which can constitute harm within the meaning of Article 1382. It criticised the reasoning of the Brussels Court of Appeal, which had ruled out that failure to exercise the regulatory role could constitute negligence⁹⁰.

28. Illegality of regulations and error

The question arises as to whether illegality of a regulation is always wrongful. The point at issue is the interpretation of the case law of the Court of Cassation, which states that “unless there is an insurmountable error or another factor allowing exoneration from liability, an administrative authority commits an error when it adopts or approves a regulation that does not take account of constitutional or legal provisions requiring it to abstain from taking action or to act in a certain way, so its civil liability is incurred if this error causes damage”⁹¹. This begs the question as to whether there are two types of law: laws which require a certain type of action, of which violation would, *ipso facto*, be wrongful (unless there is an insurmountable error or another factor allowing exoneration), and other less specific laws. Violation of these latter laws, it is claimed, is not the same thing as an error: the court should also find that there was a lack of diligence. Legal literature is divided on the issue⁹². The trend is currently towards the idea that most laws have a specific scope, or even that all laws have a specific scope and that illegality is always wrongful unless there is an insurmountable error. This issue goes beyond the scope of my brief contribution.

In a recent study, Mr R. Van Melsen suggested combining the idea that illegality is always wrongful with recognition of a requirement for the government to set aside illegal administrative acts itself. This would mean an extension (which Mr Van Melsen recommends) of the scope of application of Article 159 of the constitution, which, as we have seen, is traditionally interpreted as only authorising

⁸⁹ Brussels, 5 October 2006, JT, 2006, pp. 767 et seq.

⁹⁰ Cass., 23 April 1971, Pas., I, p. 752; RCJB, 1975, pp. 9 et seq. note by F. Delpérée.

⁹¹ Cass., 13 May 1982, JT, 1982, p. 772, conclusion by J. Velu.

⁹² Recently, Mr David De Roy argued that a distinction should be made between two categories of law (D. De Roy, *La responsabilité quasi-délictuelle de l'administration : unité ou dualité des notions d'illégalité et de faute*, in *La protection juridictionnelle du citoyen face à l'administration*, Brussels, La Charte, 2007, pp. 67 et seq.). This position was challenged by Prof. Renders, who would prefer just one category of specific legal provisions (D. Renders, *Droit administratif, T. III, Le contrôle de l'administration*, Brussels, Larcier, 2010, pp. 184 et seq.); see also G. Pijkcke, *Illégalités et caetera. Défaut de base légale, légalité de l'acte administratif et responsabilité des pouvoirs publics*, in *Liber Amicorum Michel Mahieu*, Brussels, Larcier, 2008, pp. 449 et seq.; B. Dubuisson, *Faute, illégalité et erreur d'interprétation en droit de la responsabilité civile*, on Cass., 26 June 1998, RCJB, 2001, pp. 28 et seq.; D. Renders and J.-F. Van Drooghenbroeck, *Erreur de droit et droit à l'erreur, Liber amicorum M. Mahieu*, Brussels, Larcier 2008, p. 467; P. Lewalle and L. Donnay, *Contentieux administratif*, third edition, Collection de la Faculté de Droit de l'Université de Liège, Brussels, Larcier, 2008, no. 566; Cass., 25 October 2004, JTT, 2005, p. 106 et seq., conclusion by J. Leclercq; JLMB, 2005, p. 638 et seq., observations by D. De Roy and N.J.W., 2004, p. 1316, note by I. Boone; R.O. Dalcq and G. Schamps, *Examen de jurisprudence, La responsabilité délictuelle et quasi délictuelle*, RCJB, 1995, p. 693 et seq., sp. no. 107; M. Pâques, *L'application de la loi fiscale, Principes de bonne administration en droit administratif et en droit fiscal*, Actualité du droit, 1993, pp. 399 et seq., sp. nos. 51 et seq.; M. Pâques, *De la responsabilité de l'Etat pour violation du droit communautaire*, in *Droit des citoyens et des associations dans le droit européen de l'environnement*, Brussels, Story-Scientia, 1998, pp. 95 to 142.

the courts to set aside an irregular act (see above, section 20). In the system recommended by the author, a court determining, through a related case, that a regulation was illegal⁹³ would prevent any government from continuing to apply that regulation. Furthermore, from the moment the regulation was declared illegal, application thereof would be wrongful unless those applying it could prove that there was an insurmountable error. However, the author wonders whether this analysis does not come down to giving an *erga omnes* effect to declarations of illegality based on related cases, bearing in mind that such declarations have traditionally had relative effects⁹⁴. In this connection, I refer to my discussion of the matter above (section 19).

Conclusion

The aim of these brief observations was to provide an introduction to the wealth of issues surrounding disputes on administrative acts in Belgium.

The organisation of this area of law has given rise to a wide range of protective instruments allowing acts to be annulled or set aside and, if an error has been committed, for appropriate compensation to be provided for any harm caused by the illegal regulation. Failure to regulate can also be penalised.

At present, the main issues under debate are the connections between illegality and error, but these go beyond the scope of this contribution. The balance between lawfulness and legal security is also under discussion. In this connection, much is expected of a potential Constitutional Court decision on the constitutionality of time limits for hearing objections of illegality.

Second Issue: Appeal of a first instance tribunal (Administrative Courts) decision before the High Administrative Court of Croatia – Filter mechanism

By Mr Zoran PICULJAN, State Secretary – Minister of Justice of the Republic of Croatia

1. Introduction

Legal mechanism established with Croatian regulations in order to accelerate decision-making in administrative-judiciary procedures is easier to understand throughout short presentment of a new administrative-procedural and administrative-judiciary legislation of the Republic of Croatia.

In that sense it is necessary to point out that from the 1950s to the end of the first decade of this century the procedural laws which defined the procedure in front of the public law bodies and procedures at courts in deciding over administrative matters did not change essentially in the Republic of Croatia. The laws in use were (with minimal changes) the General Public Administration Procedure Act from 1956 and the Administrative Disputes Act from 1952.⁹⁵

These regulations were based on their Austrian models and for a long time they very well rated by both domestic and international expert public.

Due to that fact, administrative conduct, based on formalized and detailed elaborated procedures, has stabilized a recognizable conduct of administrative servants in its long-term application. At the same time, judicial review on administrative acts legality was enforced only by the Administrative Court of the Republic of Croatia from 1977.

⁹³ Mr VAN MELSEN also examines the publication procedure of judgments and postulates, to a large extent, the administration has to have the knowledge of these decisions.

⁹⁴ R. VAN MELSEN, *op. cit.*, no. 32.

⁹⁵ After gaining state independence, these laws are assumed to the Croatian legal system from the former federal (Yugoslavian) legislation, but they have only been slightly (legally and technically) moderated.

However, the quality and a long-term acceptance of both regulations, with time could not satisfy all higher standards of a good administration anymore, as well as the need for efficient and wide court protection from all forms of administrative acts and actions.

Administrative scope and issues that administrative bodies and courts met with became more complex with time. It resulted with longer administrative conduct of public law bodies and also with long-lasting court procedures of the overburdened Administrative Court.

Due to that fact a standardized, but not modernized legislative frame became a great obstacle to realization of citizens' justified expectations.

Modernization of procedural laws, but also of administrative law in its wider meaning, was imposed as a duty.

2. Legal modernization of administrative procedure and administrative dispute

a) Administrative procedure modernization process was started as a part of the international CARDS 2003 Project "Support to Public Administration and Civil Service". In 2007, after a few years' work, expert groups (consisting of international and Croatian experts), created strategic documents and the Bill. The Croatian Parliament passed the new Act on 27 March 2009. General Public Administration Procedure Act was enforced on 1 January 2010.

New Act is based on principles which change subordinate role of citizens in relation to public law bodies. Its main premises are:

- simplification and acceleration of complicated procedures of settling administrative matters on all administrative levels;
- enabling modern (electronic) communication between citizens and public law bodies;
- extension of rights' protection and citizens' interests in administrative procedure from individual administrative decisions to all actions of public law bodies;
- introduction of new legal institutes to Croatian administrative law system (for example – administrative contracts);
- extension of the Act application to the actions of legal entities that perform civil services

Work on creation of this regulation put forward many questions important for the overall Croatian legal system:

- relation between tradition and modernization in Croatian administrative system (The act reflects a kind of a "balance" between tradition and modernization – procedures affirmed in practice are modernized, and many legal institutes affirmed in comparative practice are incorporated to the regulation);
- nomotechnical standards (a dilemma should the act be very short as recommended by international experts or greatly comprehensive as Croatians experts suggested is settled by accepting "intermediate" variant – The Act is much shorter now than the previously valid one, but it is however more elaborated than suggested by foreign experts);
- relation between general and specialist administrative–procedural legislation (due to full application of new general regulation it will be necessary, to a varying extent, to eliminate regulations that are uncoordinated with it in more than 70 different acts).⁹⁶

b) Modernization process of administrative judiciary also started as a part of the international CARDS 2004 Project "Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic of Croatia". Work technology on creation of the Administrative Disputes Act was similar to creation of General Public Administration Procedure Act.

⁹⁶ Since there is no legal regulation hierarchy in the Croatian Constitution (except Constitutional Acts whose legal force is stronger than that of "ordinary" acts), General Public Administration Procedure Act is subsidiary applied in all administrative areas for which special procedures are prescribed. In the 20-years' period there were exemptions from general regulation in more than 70 areas. The Government of the Republic of Croatia decided to renounce this illogical and unnecessary issue, which affects significantly to the quality of settling and citizens' legal security, by legislative initiative of aligning all specific regulations with the General Public Administration Procedure Act. The aligning process is in its final phase.

Strategic documents and the Bill were created in 2008, and the Croatian Parliament passed the Administrative Disputes Act on 29 January 2009 and it will be enforced on 1 January 2012. In its base the Act is a logical follow-up of a normative intervention to administrative procedure, but also a result of incorporation of contemporary judiciary legal postulate of European countries to Croatian administrative judicial right.

Basically, it is a legislative intervention in three directions.

First intervention is related to the reform of the procedural right:

- ensuring judicial protection from all forms of administrative actions, and not only from individual decisions of public law bodies (extension of judicial protection in respect to former solutions);
- with right of the court to define facts autonomously;
- court obligation to conduct an oral discussion;
- passing primarily reformation court decisions (great change in respect to former practice of the Administrative Court);
- judging in the committee, but also by judge individual (acceleration of settling in simpler cases);
- introducing new institutes (for example, model dispute – uniform dispute settling with equal or similar factual and legal condition).

Second intervention is related to new organizational model of judiciary:

- First-instance (regional) courts are established;
- High Administrative Court is established⁹⁷.

Third intervention is related to fulfilling gaps in Croatian legal system that relates to review of general acts legality of local and regional self-government, legal entities that have public powers and legal entities that perform public service. This control is not performed by any court in Croatian legal system, so a considerable task is given to jurisdiction of the High Administrative Court.⁹⁸

Work on creation of this regulation opened further questions, important for the complete Croatian legal system:

- relation between national and conventional right (strong influence of the European convention for the protection of human rights and fundamental freedoms on creation of decisions of national legislation in administrative dispute);
- relation between conventional and constitutional law in the Republic of Croatia (judgments of the European Court of Human Rights in proceedings against the Republic of Croatia regarding forthwith for the length of procedure by which it does not count from the moment of starting an administrative dispute at the Administrative court, but from the period of filing an appeal on first-instance decision of the public law body, it resulted with a change of legal understanding of the Constitutional Court of the Republic of Croatia).⁹⁹

c) Checking administrative procedure and administrative dispute as a “unique entity” by the European Court of Human Rights showed a specific character of this area (in relation to, for instance, settling matters in the civil law area). In Croatian legislation this was an immediate motive also for introducing

⁹⁷ First-instance courts are established in Zagreb, Osijek, Rijeka and Split. Appointing judges for the very courts by the State Judicial Council is in process.

⁹⁸ The constitutionality and legality supervision is in jurisdiction of the Constitutional Court of the Republic of Croatia. However, since these are general acts (and they are not regarded as regulations), the Constitutional Court intervention is missing, so the High Administrative Court jurisdiction is defined. Since demarcation between regulation and general act is not always simple, if dilemma arises, the High Administrative Court has the possibility to dismiss a request on review of general act legality if it regards it as a regulation (and forwards it to the Constitutional Court for the review of legality).

⁹⁹ Judgments of the European Court are from 2006 and 2007. The Constitutional Court, based on these very judgments altered its legal view with the decision from 20 June 2007.

a mechanism of a so-called filter to the pre-phase of appeals procedure at the High Administrative Court of the Republic of Croatia

3. Filter mechanism as a method of realization of legislators' principled commitment

The optimal method of observing principled commitment of a Croatian legislator in creation of mechanisms that accelerate more efficient and faster realization of parties in an administrative dispute is throughout possibility of parties' rights realization from the moment of raising their claim to administrative bodies up to court decision.

In administrative matters, different from civil cases, the "problem" of realization of right is laid down to a party much earlier than it addresses the court domain. Its interest is to settle its disputable issues in front of public law bodies. Noticing a problem of long-lasting administrative procedures and weak administrative practice of second-instance bodies in returning almost all cases to renewed first-instance settlement (this includes slower realization of parties' legitimate interests), in a new General Public Administration Procedure Act a Croatian legislator changed a way of settling second-instance administrative bodies in appeals procedure from cassation to reformation principle. A former legal possibility of appeals body direct deciding (almost never used in practice) has so been transformed to obligation of competent deciding of second-instance bodies due to appeals in administrative procedure.

From the party's point of view, this was a major, but still insufficient progress. Namely, a party legitimately expects that administrative and court procedures in which there is a public law body on the other side will be solved "forthwith".

How to achieve this, if there is a possibility that administrative matter is being settled at two administrative instances, and then also at two instances in administrative judicature? What had to be established was a legal mechanism that would guarantee a right to court protection from one part, and a settling of an administrative matter in administrative dispute in reasonable timeframe from the other part.

That is how the so-called filter mechanism was introduced to the new Croatian Administrative Disputes Act.

In order to stop second-instance settling of court procedures (after possible second-instance settling in court procedure)¹⁰⁰ from being a rule that would unnecessarily prolong court procedure, a legal mechanism of a so-called "filter" limits a possibility of noticing appeal against every judgment of a first-instance of an administrative court.

In the appeals procedure the High Administrative Court will reconsider appellant's claims that in the first-instance procedure there was an important violation of court procedure, that facts are wrongly or incompletely defined or that a substantive law is wrongly applied. However, High Administrative Court will supervise the legality of a first-instance judgment from reasons mentioned only when (a first-instance) court by judgment dissolved an administrative matter by itself!

Therefore, the possibility of filing an appeal is introduced only when the administrative court by judgment decided on a right, obligation or a party's legal interest, that is, when it has not confirmed the legality of a public law body's decision.

When the administrative court, by refusing the appeal, confirms that public law body's decision is lawful, it seems unnecessary, expensive and inefficient to conduct appeal proceedings on the same administrative matter. However, if the court has adopted the appeal with its decision and by reformation judgment settled the administrative matter by itself (and changed public law body's

¹⁰⁰ Deciding on two instances is a rule in administrative procedure. However, the appeal can be excluded by special acts, and against such a decision an administrative dispute will be directly conducted. Exceptions to the rule of two-instance deciding are numerous.

decision), all potential mistakes in that dispute can be corrected in the appeals procedure at the High Administrative Court.

This sort of solution certainly accelerates settling of administrative matters, but it also raises a question of a full harmonization of administrative-court practice by the High Administrative Court, since some decisions of the first-instance administrative courts will remain out of its reach.¹⁰¹ However, this sort of solution is also an expression of administrative courts' position in the Republic of Croatia. Supreme Court of the Republic of Croatia, "as the highest court, shall ensure the uniform application of laws and equal justice for all"¹⁰² by administrative decisions. In the Administrative Disputes Act this is disabled throughout the mechanism of a specific extraordinary remedy – claim for legality reconsideration of administrative or High Administrative Court's final judgment due to law violation.¹⁰³ In addition, harmonization of case law of its kind, in the case of administrative rights violation (human rights and freedoms) at administrative and administrative-court procedure is in jurisdiction of the Constitutional Court of the Republic of Croatia.

4. Instead of summary – from neglect to administrative process affirmation

With the process of legal modernization of administrative procedure and administrative dispute, in the Republic of Croatia a renewed affirmation of this neglected and partly marginalized area in Croatian legal system has started.

Activities related to creation of new procedural laws put forward many questions (especially those on interrelation between conventional and national right) which are important for other legal areas.

Importance and influence of the conventional right is seen in finding national legal mechanism that would accelerate court procedures (due to implementation of a legal notion on sui generis "unity of administrative procedure and administrative dispute" *in favorem* of parties' legitimate expectations). When deciding on admissibility of submitting an appeal to the High Administrative Court of the Republic of Croatia, filter mechanism is one of the illustrative examples of such a choice.

Finally, legal modernization of the administrative procedure and the administrative dispute that includes creation of new procedural laws, but also monitoring their implementation, has become one of the benchmarks for closing Chapter 23 (Judiciary and fundamental rights) for the accession of the Republic of Croatia to the European Union's full accession.

By Lord Justice Stanley BURNTON, Judge of the Royal Courts of Appeal of England and Wales

1. First instance proceedings

Under the law of England and Wales, a claimant seeking to make a claim in judicial review proceedings must obtain the permission (previously referred to as leave) of the Court both:

- in order to bring judicial review proceedings at first instance in the Administrative Court;
- in order to appeal to the Court of Appeal against a decision by the Administrative Court refusing permission to apply for judicial review; and
- against a substantive decision of the Administrative Court on the hearing of a claim for judicial review.

The Administrative Court is the division of the High Court that decides applications for the judicial review of decisions of public authorities.

¹⁰¹ There are also legal views that call into question the inability of the High Administrative Court to settle in an appeals procedure due to decisions of first instance courts, confirming the decision of the public law body.

¹⁰² Article 119, paragraph 1 of the Constitution of the Republic of Croatia

¹⁰³ Request can be submitted by a party via State Attorney's Office of the Republic of Croatia, but also by the State Attorney's Office itself in the six months' period after delivering valid court decision to parties.

At first instance, the purpose of imposing a requirement of permission is:

“to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is required is designed to ‘prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived’¹⁰⁴. Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence.”¹⁰⁵

The application for permission is normally considered by a judge first on the papers alone, i.e. without a hearing. The Defendant to the proceedings will have been served and given the opportunity, normally taken, to make written submissions why permission should not be granted. If permission is granted, the claim proceeds to a substantive hearing. If permission is refused, the claimant has an unqualified right to an oral hearing by a judge of his application for permission. If, at that hearing, permission is again refused, the claimant may seek to appeal to the Court of Appeal. If permission is granted, the case proceeds to a substantive hearing, in the same way as a case in which permission was granted on paper.

Usually, the hearing of an oral application for permission to apply for judicial review is given 30 minutes. Often, the defendant to the proceedings does not appear. As many as 10 (or more) such applications may be heard by a judge on a single day.

Where it is appropriate (generally, where the application for judicial review must be decided as a matter of urgency), an order is made for the hearing of the substantive application for judicial review to be heard immediately after the oral application for permission to apply for judicial review, if permission is granted.

Many claims against public authorities are decided at first instance not by the courts but by tribunals. The tribunal system in the UK has recently undergone radical change. There are now two tiers of tribunal: the First Tier Tribunal and the Upper Tribunal. For example, virtually all immigration and asylum claims, challenging a decision by the Home Office (i.e., central government), e.g., to reject a claim for asylum, go to the Immigration and Asylum Chamber of the First Tier Tribunal. There is no requirement of permission for an application to the First Tier Tribunal.

2. Appeals

1) To the Upper Tribunal

As will become clear, it is convenient first to summarise appeal procedures in the Tribunal system.

An appeal lies on a point of law from a decision of the First Tier Tribunal to the Upper Tribunal. Permission is required to bring an appeal. The application for permission must be made initially to the First Tier Tribunal. If the First Tier Tribunal refuses permission to appeal, the applicant may apply to the Upper Tribunal for permission. The applicable legislation does not specify the test to be applied when deciding whether or not to grant permission to appeal. As at the date of my writing this paper, no general guidance has been given judicially as to the criteria to be applied when deciding whether to

¹⁰⁴ (*R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd* [1982] A.C.617 at p.642 per Lord Diplock).

¹⁰⁵ See the note to *Civil Procedure*, (the standard textbook on procedure), 2011 edition, at paragraph 54.4.2.

grant permission to appeal, but I have seen draft guidance to be issued by the President of the Immigration and Asylum Chamber of the Upper Tribunal. I would expect the tribunals to apply a similar test to that applied by the Court of Appeal to applications for permission to appeal from decisions of the Administrative Court in cases in which it has exercised original (i.e. not appellate) jurisdiction. I refer to this test below.

2) To the Court of Appeal

Appeals to the Court of Appeal lie on questions of law only. A finding of fact by a lower court or tribunal cannot be appealed to the Court of Appeal. However, the Court regards issues such as whether there was any evidence to support a finding of fact, or any evidence on which a reasonable judge could have made a particular factual finding, and a failure to give adequate reasons for a finding of fact, as issues of law.

With minor (but in principle important) exceptions¹⁰⁶, a litigant seeking to appeal a decision to the Court of Appeal must obtain permission to appeal. Where the appeal is from a decision made at first instance, permission may be granted by the court or tribunal whose decision it is sought to appeal or, if that court or tribunal refuses permission, by the Court of Appeal itself.

When deciding whether to grant permission to appeal to the Court of Appeal, our law distinguishes between cases in which there has already been an appeal (i.e., the decision it is sought to appeal is itself a decision on an appeal from a lower court or tribunal) and cases which have been decided at first instance. The first class of cases is referred to as second appeals.

Where the decision it is sought to appeal is a first instance decision, a test similar to that applied by the Administrative Court at first instance is applied: does the proposed appeal have a real prospect of success, and if not is there some other compelling reason for the appeal to be heard? An example of there being such a compelling reason would be one in which it would be in the public interest for the Court of Appeal to give an authoritative statement of the law.

Only the Court of Appeal can give permission to appeal in a second appeal case. The circumstances in which it may give permission are constrained by statute and the Civil Procedure Rules. Section 55 of the Access to Justice Act 1999 provides:

“Second appeals.

(1) Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—

- (a) the appeal would raise an important point of principle or practice, or
- (b) there is some other compelling reason for the Court of Appeal to hear it.

(2) This section does not apply in relation to an appeal in a criminal cause or matter.”

This provision is echoed in paragraph 52.13 of the Civil Procedure Rules, which uses similar wording¹⁰⁷.

¹⁰⁶ The exceptions are: appeals against a committal order (i.e., an order sentencing a person to imprisonment for breach of a court order or other contempt of court); a refusal to grant habeas corpus (which is an order requiring a person to be released from custody) and an order authorising a child to be kept by a local authority in secure accommodation. All of these exceptions relate to the liberty of the individual.

¹⁰⁷ 52.13 *Second appeals to the Court*

“(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of a county court or the High Court which was itself made on appeal.

(2) The Court of Appeal will not give permission unless it considers that-

- (a) the appeal would raise an important point of principle or practice; or
- (b) there is some other compelling reason for the Court of Appeal to hear it.”

Where the proposed appeal is from a decision of the Upper Tribunal (which is itself an appellate body), both the Upper Tribunal and the Court of Appeal may grant permission to appeal, but the same conditions must be satisfied¹⁰⁸.

It follows that in second appeal cases, permission to appeal will not be granted simply because the applicant can show that he has a reasonable chance of showing that the decision below was wrong. He must show that his appeal would raise an important point of principle or practice, or that there is another compelling reason for the Court to hear it. What is a “compelling reason” will depend on the circumstances, but an example may be a case in which, if the decision below was wrong, the applicant would be returned to a country in which he would face torture or the risk of death.

Generally, the Court of Appeal should be cautious about giving permission to appeal where the decision sought to be appealed was made by an expert tribunal.

In general, applications for permission to appeal are considered in the first place on paper. In most cases, if the Court of Appeal judge refuses permission to appeal on paper, the applicant has a right to renew his application orally, in court. However, if the judge considers on paper that the proposed appeal is hopeless, he may mark it as “Totally without Merit”, and order that the applicant shall not have the right to renew orally. In such a case, the judge’s order on the papers is final.

In judicial review cases, a litigant may seek to appeal to the Court of Appeal against an order of the Administrative Court refusing him permission to apply for judicial review. In such cases, the Court of Appeal may itself grant permission to apply for judicial review, and if it does so it may decide that the substantive application for judicial review should be heard by the Court of Appeal rather than the Administrative Court. Oral applications for permission to appeal are normally heard by a single judge of the Court of Appeal, but sometimes by two or even three judges. They generally are given 30 minutes. As is the case with applications to the Administrative Court for permission to apply for judicial review, in cases of urgency or other appropriate circumstances the Court may order the application for permission to appeal to be heard on notice to the respondent, with the substantive appeal to follow immediately if permission is granted. In practice, in such cases, all the argument, on both sides, is heard before the Court decides whether to grant permission to appeal and on the order to be made on the substantive appeal if permission is granted.

3. Statistics

In the Administrative Court in 2010, 6854 applications for judicial review were filed. Only 721 (11 per cent) were granted permission to apply for judicial review on paper. 4552 (66 per cent) were refused on paper¹⁰⁹. 2079 (46 per cent) applied to renew their application at an oral hearing, but nearly half of these abandoned their applications. Of the 1027 applications considered at oral hearings, 176 (17 per cent) were granted and 665 (65 per cent) refused¹¹⁰.

Between 20 April 2010 and 19 April 2011, 2,208 applications for permission to appeal were decided on paper by the Court of Appeal. These covered all civil appeals, and were not restricted to public law cases. Of these, 1,136 were refused. Of that 1,136, 780 were renewed to an oral hearing, and of that 780, 236 were then granted permission to appeal. Thus only about 10 per cent of the applications for permission to appeal were successful.

¹⁰⁸ Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 SI 2008 No. 2834 requires that the proposed appeal must raise some important point of principle or practice or that there is some other compelling reason for the Court to hear the appeal.

¹⁰⁹ The remainder were adjourned for oral hearing or the applicant was asked to resubmit his application with additional information or documents.

¹¹⁰ The balance would have been adjourned or otherwise dealt with.

By Mr Jon STOKHOLM, Judge at the Supreme Court of Denmark

We didn't receive this contribution but it is possible to consult the following site (free of charge): http://www.hiil.org/assets/1046/Report_Hoge_Raad_Selection_of_Cases_Seminar_complete.pdf

Third Issue: Exclusive Competence of the High Administrative Court of Croatia – Cases definition

By Mr Marc Gjidara, Professor Emeritus at the Université Panthéon Assas Paris 2

Introduction: terminological observations

Both administrative and judicial courts differ according to whether they have jurisdiction in principle or whether certain texts give them jurisdiction in a limited number of cases.

The Council of State recognised itself as the court of first instance for matters of ordinary law with the famous Cadot judgment of 13 December 1889. Since 1953, it has no longer had this role, which is now filled by the administrative courts, except for derogations¹¹¹.

At present, several bodies share the power to rule in the first instance: in principle, the administrative courts have jurisdiction and certain specialised courts rule in certain types of dispute. Nevertheless, the Council of State has direct jurisdiction in some matters¹¹².

Texts commonly refer to the Council of State's "jurisdiction in the first and last instance"¹¹³, but some authors feel that "this expression should not be used"¹¹⁴ and that it would be more accurate to refer to "direct jurisdiction"¹¹⁵.

Thus the expressions "direct jurisdiction", "jurisdiction in the first instance" and "jurisdiction in the first and last instance" are used indiscriminately, which means that the Council of State's judgments may not be appealed against in a court of appeal or cassation. Although there were originally few courts which had direct jurisdiction, their number grew over time, until the Code of Administrative Justice, which came into force on 1 January 2001, attempted to clarify the situation. In the end, it was the decree of 22 February 2010 that reduced the number of courts with direct jurisdiction by redistributing powers between the Council of State and the administrative courts.

I. THE DEVELOPMENT OF THE DIRECT JURISDICTION OF THE COUNCIL OF STATE

The Council of State has direct jurisdiction for historical and practical reasons.

When French administrative justice was being developed, the Council of State was initially awarded significant conferred powers until such times as the legitimacy of the administrative courts became established. While in some cases, it was the legislator that wished to remove jurisdiction from the

¹¹¹ The Council of State was primarily a court of appeal following the 1953 reform, then the law of 31 December 1987 significantly reduced its powers as a court of appeal. Its role as a court of cassation remained has remained unaltered, and that is its main function today.

¹¹² In her work on the Council of State, (ed. Dalloz, 2005, p. 51), Ms M. A. Latournerie writes "strangely, one single institution holds powers which, in other areas, logic separates: it is at once the court of first and last instance, the court of appeal and the court of cassation". See also J. Massot and J. Marembert, *Le Conseil d'Etat*, La Documentation Française, 1988, p. 110.

¹¹³ This is the terminology used by the decree of 30 September 1953, which continues to be used by the Council of State (aside from some exceptions, e.g. CofS, Division, 7 April 1993, Société d'exploitation immobilière et agricole du Midi).

¹¹⁴ See R. Chapus, *Droit du Contentieux Administratif*, 12th edition, ed. Montchrestien, 2005, p. 301. The author adds that "this expression could lead to a misunderstanding given that jurisdiction in the first and last instance is defined as being expressed in the pronouncement of judgments that may be contested in cassation, which is not the case for judgments made by the Council of State".

¹¹⁵ The Council of State also uses this expression: e.g. CofS, Division, 25 April 2001, Association Choisir la Vie.

administrative courts, direct jurisdiction was more often than not given to the supreme court by decree¹¹⁶. Sometimes jurisdiction was awarded permanently, but it was also given temporarily. Residual power was also given in cases where no administrative courts had jurisdiction to rule. Be that as it may, this jurisdiction is of great qualitative importance.

A. Justification of derogations from the normal rules governing jurisdiction

The first question that a court must ask itself is whether it has jurisdiction, and administrative courts decide on this based on the laws in force at the time of their ruling (unless there is a text stipulating otherwise). All rules governing jurisdiction (whether territorial or material jurisdiction or conferred powers) within the administrative court system are matters of public policy¹¹⁷. In addition, administrative courts first examine jurisdiction within the administrative court system, and then the jurisdiction of the administrative court system itself¹¹⁸. Finally, questions relating to material jurisdiction must be resolved before questions relating to territorial jurisdiction¹¹⁹, it being understood that derogations from the normal rules governing material jurisdiction are only made to give the Council of State jurisdiction.

It is mainly because of their significance that certain disputes have to be judged by the supreme court: to settle them more quickly, because of the type of decision to be made or to avoid the numerous appeals that would be made if certain disputes were ruled on in a lower court. Where direct jurisdiction in matters relating to misuse of powers is concerned, it may be helpful to accelerate the final decision given that appeals of this type are in the public interest.

It may also happen that a derogation is made from the general rules governing jurisdiction to give the Council of State power to rule in a case. This is usually done for reasons linked to the proper administration of justice¹²⁰. Proper administration of justice may be promoted using several techniques, including derogations from principles. This concept embraces all of the exceptional measures enabling the judicial system to run more smoothly¹²¹.

Of course, as soon as more than one court has power to rule in a case, divergent solutions may be found. This would be incompatible with the unity of case law and the coherence of the court system as a whole, which is why it may be necessary to overcome the anomalies that may result from normal application of the division of powers by appointing a specific court to handle certain disputes.

B. Initial direct jurisdiction and the restrictive interpretation thereof

Since the Council of State was weighed down by a huge number of cases (which shows the trust that the litigants had in it) and could no longer rule on cases within a reasonable timeframe, the decree of 30 September 1953 made administrative courts competent to rule in matters of ordinary law, meaning

¹¹⁶ The power to award jurisdiction within the administrative court system is not reserved to the legislator. This is not covered by the “fundamental guarantees granted to citizens for the exercise of their civil liberties” that Article 34 of the constitution places within the legislative domain. As far as these guarantees are concerned, it is important to determine whether or not the administrative court system has jurisdiction, not how this jurisdiction is shared within the system.

¹¹⁷ Questions about which court has jurisdiction may therefore be resolved by the court itself as a matter of course, and the parties may discuss such questions at any time, in any stage of proceedings (Division, 16 October 1981, Ministry of Defence v. Lassus and 26 November 1954, Ministry of the Interior v. Van Peborgh, also CofS, 4 October 1964, Trani).

¹¹⁸ CofS, 8 December 1965, Placenti.

¹¹⁹ CofS, 12 December 1990, Gille.

¹²⁰ Some principles may also have a bearing on the division of powers, such as the rule stating that “the court ruling on the main case should also rule on associated cases”, or the rule that prevents references for preliminary rulings from being made between courts of general jurisdiction (CofS, General Assembly, 16 November 1956, Société BAB et BLB). Derogations may also be made from the normal rules governing jurisdiction within the administrative court system to take account of a ‘connecting link’ between cases, with a view to settling the disputes more quickly and avoiding the risk of contradictory judgments. Such derogations are always made to ensure proper administration of justice.

¹²¹ See J. Robert, *La bonne administration de la justice*, in *Actualité juridique de droit administratif* (AJDA), 1995, special issue, pp. 117 et seq.

they could rule in the first instance from that point onwards. This was the first reform of the whole administrative court system since the texts that created it in the 19th century¹²². This decree, and the decree of 28 November 1953 that complemented it, mainly applied to administrative courts but also specified that the Council of State had the power to rule in the first instance for certain types of case.

The choice of matters reserved to the Council of State was based on a number of simple ideas: on the one hand, the supposed importance of certain cases, or cases that had to be settled urgently, and on the other hand, the need to have a single court for cases where territorial jurisdiction mechanisms would lead to more than one court – or no court at all – being competent to rule on the matter. The Council of State chiefly had direct jurisdiction over appeals on the misuse of powers against individual or statutory decrees and against administrative decisions made by collective organisations with national jurisdiction, as well as appeals against administrative acts with a scope of application extending beyond the jurisdiction of a single administrative court and administrative disputes arising outside of the territories under the jurisdiction of the administrative courts. However, the Council of State also had jurisdiction to rule in cases of opposition to decrees authorising name changes, for instance, which are classed as appeals brought before courts enjoying full jurisdiction¹²³. It also has jurisdiction over applications for interpretation and applications for an assessment of the lawfulness of acts on which it may rule in the first instance¹²⁴. The same applies to applications that would generally fall within the jurisdiction of administrative courts but that have a connecting link with disputes over which the Council of State has direct jurisdiction.

To begin with, case law applied a restrictive interpretation when it came to giving direct jurisdiction to the Council of State.

Hence, when appeals on the misuse of powers are made against the decrees (and the ordinances of Article 38 of the 1958 constitution) of the President of the French Republic, the Council of State uses a decree to justify its decision that it has power to rule, yet finds that it cannot rule in the first instance on the full-jurisdiction appeals that may result from the decrees¹²⁵.

As regards individual disputes concerning government officials appointed by decree, the Council of State's direct jurisdiction initially covered all such government officials, including the President of the Republic and the Prime Minister. Later, however, this only applied to appointments by decree of the Head of State, made by virtue of Article 13(3) of the constitution and Articles 1 and 2 of the organic ordinance of 28 November 1958. The number of government officials concerned has fallen significantly (decree of 28 January 1969), and besides, the Council of State has only retained direct jurisdiction over individual disputes that are statutory in nature¹²⁶.

When the decree of 30 July 1963 gave the Council of State direct jurisdiction over appeals against administrative decisions by collective organisations with national jurisdiction, the measure was initially only applied to professional associations¹²⁷. Insofar as the Council of State then had direct

¹²² Except for the partial reforms of 1926 and 1934, which related to the old prefectural councils. See M. Combarrous, *La réforme du contentieux administratif : du décret du 30 septembre 1953 à la loi du 31 décembre 1987*, in AJDA, 1995, special issue, p. 175.

¹²³ Decree of 28 November 1953, which confirms a practice dating back two centuries, with case law being consolidated by the law of 8 January 1993.

¹²⁴ Decree of 28 November 1953 and CofS, General Assembly, 8 April 1988, Société Gras & Savoye.

¹²⁵ F. Scanvic, *Compétence administrative (Répartition des compétences à l'intérieur des juridictions administratives)*, in Répertoire Dalloz de contentieux administratif, Vol. 1, p. 15. Nonetheless, full-jurisdiction appeals against certain decisions by the minister responsible for housing or the minister in charge of industry or appeals relating to economic integration could be lodged directly with the Council of State.

¹²⁶ That is, related to the rights, benefits or obligations arising from the civil servant's status. The Council of State therefore has direct jurisdiction over disputes provoked by individual decisions about appointment, remuneration, promotion, discipline and dismissal or resignation. This excludes disputes arising from decisions based on legislation other than statutory regulations (e.g. refusal to award a decoration). However, in some cases, case law is based on the actual position held rather than the nature of the method used for appointment. Besides, the disputes in question are defined broadly, being all individual full-jurisdiction disputes and disputes relating to misuse of powers. As for statutory disputes, these fall under the direct jurisdiction of the Council of State, whether they concern decrees or ministerial orders.

¹²⁷ "Professional associations" are not present in any and all organised professions: a law must have granted the profession the power to govern or discipline itself by exercising public powers, and sometimes a certain degree

jurisdiction over all collective organisations with national jurisdiction, the measure was applied restrictively at first. Three cumulative conditions had to be fulfilled: the matter at hand had to be an appeal on the misuse of powers¹²⁸, the decision had to have been made by a collective body¹²⁹ and not an individual organisation that was a member of that body and the body had to have national jurisdiction. In practice, the ‘national’ nature of the powers exercised by these bodies was the most important factor, rather than the fact that they were collective¹³⁰.

Disputes concerning the composition of bodies that are representative at national level should be added to this list. Examples include proceedings regarding elections to the Assembly (later renamed to High Council) of French Citizens Abroad (laws of 7 June 1982 and 18 May 1983), proceedings regarding elections to the European Parliament (law of 7 July 1977), the (very few) challenges¹³¹ regarding the appointment of members to the Economic and Social Council (organic ordinance of 28 November 1958), proceedings regarding the election of judges’ representatives to the High Council of Administrative Courts and Administrative Courts of Appeal (laws of 6 January 1986 and 9 September 2002) and proceedings regarding the appointment of members to the High Council of the Judiciary (judicial). The Council of State was also given power to rule in the first instance on proceedings relating to elections to the Regional Councils (Article L. 361 of the Electoral Code and tge law of 10 July 1985) and the Corsican Assembly (law of 13 May 1991).

The Council of State’s direct jurisdiction was also established with a view to ensuring that a single court would hear certain applications, namely appeals lodged against administrative acts with a scope of application extending beyond the jurisdiction of a single administrative court and disputes arising outside of the territories under the jurisdiction of administrative courts. In both of these cases, case law was restrictive so as not to nullify some of the effects of the 1953 reform¹³². Depending on the matter at hand, the aim in this case is to have a single court with power to rule and/or to avoid differences in case law.

Finally, in some cases an application falling under the jurisdiction of the administrative courts is connected to a case falling under the direct jurisdiction of the Council of State. When this happens, it is logical that the higher court has the power to hear all of the applications¹³³. The Council of State’s

of regulatory power. See R. Odent, *Contentieux Administratif*, Les Cours du Droit, Q 3, p. 797. Under this definition, banks, auditors and journalists are not grouped into professional associations.

¹²⁸ Which excluded, in principle, (except where there were texts stipulating otherwise) actions brought before courts enjoying full jurisdiction (CofS, 12 June 1992, Galy-Dejean and CofS, 22 November 2000, Mutuelle Inter-Jeunes).

¹²⁹ Which excluded government institutions: CofS, 1991, Lepeltier.

¹³⁰ This is why several new matters ended up being ruled on by Council of State in the first instance, even though, quantitatively speaking, there were not many cases. Thus the Council of State had direct power to rule on full-jurisdiction appeals against certain decisions by six collective organisations with national jurisdiction: the High Audiovisual Council; the French Securities Regulator; the Insurance, Mutual Insurance Fund and Provident Institution Supervisory Commission; the Energy Regulatory Commission, the Post Office and Electronic Communications Regulatory Authority; the Council for the Prevention of Doping and the National Commission for Information Technology and Freedoms. Also falling under the Council of State’s direct jurisdiction were appeals against decisions made by the Central Standing Committee for determining the elements used to calculate state-set agricultural profit (Article 1652-4 of the General Tax Code, and CofS, 26 January 1972, Fédération des Syndicats d’Exploitants Agricoles de l’Orne).

¹³¹ CofS, 23 October 1970, Thalmensy and CofS, General Assembly, 11 May 1973, Sanglier.

¹³² A case only falls under the direct jurisdiction of the Council of State if the rules for determining which administrative court has territorial jurisdiction prove to be ineffective (CofS, General Assembly, 2 February 1987, Joxe and Bollon and CofS, Division, 21 October 1988, Eglise de scientologie de Paris and others). The Council of State also has jurisdiction over matters relating to misuse of power if the contested decision was made by a French administrative authority based abroad (CofS, Division, 29 January 1993, Ms Bouilliez and 10 April 1992, Aykan). It has jurisdiction in contractual matters over tenders or contracts signed and executed abroad (CofS, 3 July 1968, Lavigne), in matters relating to damage caused to public works (CofS, 17 November 1965, Société Neptun Transport und Schiffahrt) and for disputes arising outside of territorial waters (CofS, 1 December 1971, widow Benoist).

¹³³ For the connecting link between cases to come into play and the Council of State to exercise direct jurisdiction, the Council of State must be asked to rule on a case in the first instance (and not in appeal or cassation).

idea of ‘connection’ was very restrictive at first: it only recognised cases as being connected where the judgment issued on one of the applications “necessarily depended” on the judgment pronounced on another application¹³⁴. This approach makes it possible to rule on several highly interconnected disputes at once¹³⁵.

It should also be noted that the Council of State has lost its direct jurisdiction over some matters as time has gone by, even though this did not result from a clear desire to reduce the court’s jurisdiction. Some matters were removed as a result of events (e.g. Algeria becoming independent)¹³⁶, others as a result of reforms¹³⁷ and still others as a result of powers being transferred to civil courts¹³⁸, while in other cases the Council of State had been given direct jurisdiction on a temporary or one-off basis¹³⁹. Nevertheless, the addition of a far greater number of new areas of direct jurisdiction more than made up for the restrictive interpretation of the Council of State’s direct jurisdiction and the various matters removed from it. While there were half a dozen areas falling under the Council of State’s direct jurisdiction in 1954, this number eventually rose to over twenty.

C. The gradual expansion of direct jurisdiction

The original list of areas over which the Council of State had direct jurisdiction was expanded through legislative or statutory texts and through the increasingly less restrictive interpretation of the Council of State’s direct jurisdiction.

This expansion happened in stages. In the ten years between 1982 and 1992, two important developments took place: powers were transferred to local authorities within the framework of decentralisation, and also to decentralised state departments as part of the decentralisation measures that saw prefects given the power to take certain individual decisions that had been taken by the central authorities up to that point¹⁴⁰. Generally speaking, this should have led to the Council of State having direct jurisdiction over fewer areas and a considerable share of the caseload being transferred to the administrative courts.

¹³⁴ CofS, 13 May 1964, Carrou and CofS, Division, 23 June 1967, Laquière. Furthermore, the existence of a connecting link is determined based on the applicable legal texts on the date of the court’s ruling (CofS, 14 March 1990, Office Culturel de Cluny).

¹³⁵ CofS, 31 March 1993, Estoup. According to F. Scanvic, *op. cit.*, p. 7, “This method, which is sometimes guided by subjective considerations, has meant that the Council of State does not apply the principle of connecting links too extensively”, quoting CofS, 10 February 1995, Bizet.

¹³⁶ In 1962, the Council of State lost direct jurisdiction over proceedings related to elections to the Algerian Assembly and that body’s deliberations and over mining matters the Organisation of Saharan Regions. It also lost its direct jurisdiction over proceedings relating to the rights of former civil servants in French overseas territories. See R. Chapus, *op. cit.*, p. 302 and J. Baudouin, *Conseil d’Etat*, in *Répertoire Dalloz de contentieux administratif*, vol 1, p. 23.

¹³⁷ For instance, election of the President of the Republic by universal direct suffrage, a method introduced in 1962, removed the need for jurisdiction over matters relating to the list of presidential electors.

¹³⁸ This was the case as regards the unification of jurisdiction over proceedings relating to liability for damages of nuclear origin caused by ships carrying out a state mission (law of 29 November 1968). Similarly, proceedings relating to decisions by the Competition Council were brought under the same jurisdiction as proceedings relating to legislation on free prices and freedom of competition (law of 6 July 1987).

¹³⁹ This refers to proceedings regarding compensation for former solicitors and the removal of the Council of State’s direct jurisdiction over proceedings relating to the suspension of decisions concerning public policy. This latter operation was effected by the decree of 27 January 1983, which put an end to this anomaly that had drastically reduced the jurisdiction of administrative courts in the domain.

¹⁴⁰ Nevertheless, the Council of State still had direct jurisdiction over prefects’ appeals to overturn certain decisions by the decentralised authorities, namely those that could seriously compromise the functioning or integrity of a body or work project connected to national defence (laws of 7 January 1983 and 9 January 1986). Similarly, since the decree of 26 February 1992, the Council of State has had direct jurisdiction appeals against (non-judicial) decisions by administrative courts where these relate to authorisation to go to court on behalf of the local authorities. These appeals are classed as proceedings under the court’s unlimited jurisdiction. (CofS, General Assembly, 26 June 1992, Ms Lepage-Huglo, Pezet and San Marco).

However, several legislative or statutory provisions increased the number of areas falling under the Council of State's direct jurisdiction. When laws were introduced (giving the Council of State power to rule in full-jurisdiction appeals, for instance), they applied to a broader range of matters. Furthermore, a great many decrees made under Article 37 of the constitution modified or added to the Council of State's powers to rule in the first instance¹⁴¹.

But it is the importance attached to certain administrative acts that led to the broad interpretation of the matters falling under the Council of State's direct jurisdiction.

The administrative acts in question include appeals against decrees and ordinances by the President of the Republic¹⁴², appeals against disputes regarding government officials appointed by decrees of the President of the Republic, appeals against ministries' statutory instruments (since 1963) and appeals against decisions taken by ministries as the result of a compulsory opinion by the Council of State (since 1966)¹⁴³. Also included are ministerial circulars and acts signed by an authority that has been authorised to sign on a minister's behalf¹⁴⁴. Furthermore, the Council of State may rule in the first instance on appeals against refusals to adopt the aforementioned unilateral acts or statutory instruments¹⁴⁵. The same applies to appeals against a decree's 'silence', referring to the fact that the provisions that should be contained in the decree are missing¹⁴⁶, and also to appeals against refusals to take measures that should have been taken by decree¹⁴⁷. This broad interpretation of the concept of 'statutory decrees that justify a direct ruling by the Council of State' has certainly made it possible to mitigate problems linked to the interpretation of the scope of application of administrative acts reaching beyond the jurisdiction of a single administrative court, but it has not reduced the number of areas falling under the Council of State's direct jurisdiction – quite the contrary. Besides, it is still the case that the main difficulty lies in determining when an administrative act is statutory in nature.

The expansion of the Council of State's direct jurisdiction is also due in large part to the spread and diversification of collective organisations with national jurisdiction taking administrative decisions (whether statutory or individual) against which appeals may be lodged on the misuse of powers. The bodies affected were not only professional associations (ruling in non-disciplinary matters): all of the numerous similar organisations fell into this category too¹⁴⁸. Even though case law rejected any court-made expansion of the Council of State's jurisdiction in this area¹⁴⁹, the decree of 26 July 1975 enforced the wider application of the solution developed for professional associations in 1963. The effects of this mechanism went far beyond what had been expected. The number of Independent

¹⁴¹ Looking only at the two decades following the 1953 decrees, these were modified by a series of decrees adopted on 22 December 1960, 30 July 1963, 12 November 1965, 13 June 1966, 28 January 1969, 30 January 1974 and 13 May 1975, as well as the laws of 7 and 19 July 1977.

¹⁴² The decrees of 28 January 1969 excluded disputes about the individual situation of civil servants appointed by decree by the Prime Minister from the Council of State's direct jurisdiction.

¹⁴³ This applies to ministers (including the Prime Minister) and all secretaries of state. It applies to the Prime Minister (acting through orders or circulars) and the President of the Republic (acting through orders). The type of statutory instrument is immaterial – it could be an order, a circular or even just an 'agreement' – when the instrument in question is actually a statutory unilateral act (CofS, Division, 23 June 1995, Ministry of Culture).

¹⁴⁴ CofS, 16 December 1987, Fédération Nationale CFDT Intercro.

¹⁴⁵ CofS, 24 January 1962, Société Radio-Filtrex. The Council of State also has direct jurisdiction over cases where a minister explicitly or implicitly refuses to enact a regulation (CofS, 27 March 2007, Syndicat des travailleurs du transport) or bring about the enactment of a statutory decree (CofS, 9 November 1977, Larguier).

¹⁴⁶ CofS, 29 April 1987, Association de gestion de la résidence médicale des Sources.

¹⁴⁷ CofS, Division, 23 June 1998, Ms Richard and 18 May 2001, Meyet and Bouget.

¹⁴⁸ For example, the High Commission on the Press Pass for Professional Journalists and the Commission on the Right to a Response (decree of 13 May 1975). Other organisations include the (non-judicial) Commissions on the distribution of compensation abroad, the Joint Committee for Publications and Press Agencies, the National Amenities Committee, the National Commission on Campaign Accounts and Political Funding, the National Commission for Information Technology and Freedoms, the National Commission for Monitoring Security Breaches, the Board of Directors of the Paris Chamber for the Compensation of Financial Instruments, the Banking Commission (for its administrative decisions) and the Committee for the Regulation of Banking, Finance, Credit Establishments and Investment Companies. Appeals against administrative decisions made by the Court of Audit could be added to this list (CofS, Division, 12 June 1993, Ms Gaillard).

¹⁴⁹ CofS, Division, 14 February 1972, Marion de Procé, concerning the Commission on the Press Pass for Professional Journalists.

Administrative Authorities (later known as Independent Public Authorities with a legal personality) grew, as did the number of cases in which decision-making powers were given to a national-level commission. These circumstances expanded the Council of State's direct jurisdiction, but the expansion was not driven by the nature of the cases or a need for proper administration of justice. For example, the wording of texts gave the Council of State power to rule in the first instance on appeals against decisions by national judging panels for competitions or exams¹⁵⁰. Moreover, while direct jurisdiction had previously been limited, in principle, to appeals on the misuse of powers, it had been extended to cover appeals against such decisions, including full-jurisdiction appeals¹⁵¹. The situation of the law became complicated "in that the Council of State was given direct jurisdiction on an ad hoc basis and for single cases, where it had previously only had direct jurisdiction over appeals on misuse of powers. This expanded the Council of State's direct jurisdiction in the matter of full-jurisdiction appeals against decisions by various collective organisations with national jurisdiction"¹⁵².

The Council of State's direct jurisdiction, as established by the decrees of 1953 and subsequent texts, was also expanded due to rules on 'connecting links'. This concept was initially interpreted restrictively, but was later interpreted broadly for reasons that have more to do with practicality than judicial logic¹⁵³. Evaluation now mainly depends on the facts of each individual case and a 'connecting link' is found to exist whenever there is a convergence in the various applications concerning the same case, which must then be judged together, as though they constituted a whole¹⁵⁴. It does not matter if one application is a full-jurisdiction appeal and the other is an appeal on misuse of powers. Likewise, a connecting link may be found when the same person is challenging several decisions, or when a single decision is contested by several appellants, or even when several people have lodged appeals against separate decisions¹⁵⁵.

Statistically speaking, matters falling under the direct jurisdiction of the Council of State accounted for an average of 10% of the court's activity in the five years before the Administrative Courts of Appeal began their work. However, in the subsequent period, the percentage of cases on matters under the Council of State's direct jurisdiction rose from 20% in 1989 to 28.2% in 1999 (or 3,484 of the 18,330 cases brought). This increase is not so much due to the fact that there were "more contested decrees or other texts with a scope of application going beyond the jurisdiction of a single administrative court as to the fact that appeals by foreigners against the refusal of a visa by consular

¹⁵⁰ Case law also led to a broad interpretation of texts, to include appeals against decisions by the Disciplinary Committees of recognised sports federations (CofS, Division, 19 December 1980, Hechter) and decisions by the admissions panels of some prestigious higher education institutions (CofS, Division, 30 March 1981, Aubert and others). Non-individual decisions by sports federations' collective organisations with national jurisdiction fall within the Council of State's direct jurisdiction (CofS, 25 April 2001, Association sportive Nancy-Lorraine), while the law of 13 July 1992 gave administrative courts the power to rule on actions for the annulment of individual decisions made by such bodies (CofS, 29 July 1994, Etoile sportive « Aiglons » briviste, and, on the same day, Association sportive roannaise).

¹⁵¹ Full-jurisdiction appeals can be made against certain decisions by independent government bodies, such as the High Audiovisual Council (laws of 30 September 1986 and 17 January 1989) and the Telecommunications Regulatory Authority. Where they concern penalties imposed by collective organisations with national jurisdiction, the bodies are as follows: the Insurance Supervisory Commission (law of 31 December 1989), the Futures Board (decree of 21 March 1990), the Investment Company Disciplinary Board (laws of 23 November and 2 August 1989), the Pension and Provident Institutions Supervisory Commission, the High Council for the Prevention of Doping, and so on. The justification for this is that penalties are often applied in sensitive areas and may be severe.

¹⁵² R. Chapus, *op. cit.*, p. 315. In the end, the Council of State was given jurisdiction regardless of the type of appeal being made (CofS, 1 April 2005, Ms Le Pen).

¹⁵³ This new interpretation can be seen in the following judgments: CofS, General Assembly, 7 December 1962, Ms Coursières-Berthezène and CofS, Division, 8 October 1976, Le Blant.

¹⁵⁴ This interpretation is consistent with the wording of Article 22(3) of the Brussels Convention (EEC) of 27 September 1968 on jurisdiction and the enforcement of judgments, which provides that "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

¹⁵⁵ R. Chapus, *op. cit.*, p. 341. See also: CofS, Division, 16 October 1981, Guillaume and Germanaud, CofS, General Assembly, 16 April 1986, Compagnie Luxembourgeoise de Télédiffusion, 2 February 1987, Société T.V.6., CofS, 9 November 1990, Ville de Perpignan.

services fell within the jurisdiction (of the Council of State), since no administrative court had territorial jurisdiction over such matters”¹⁵⁶. It should be noted that the visa system has since become stricter and that there are now far more appeals on misuse of powers against decisions to refuse visas.

II. LIMITATION OF THE COUNCIL OF STATE’S DIRECT JURISDICTION

The Council of State’s activities in matters relating to its direct jurisdiction became more cumbersome over the years, with all the reforms that were passed. Moreover, it appears that efforts to reduce its role as a court of appeal have led, statistically speaking, to a twofold increase (in percentage terms) in the number of disputes falling under the court’s direct jurisdiction in the first instance¹⁵⁷.

Successive expansions also meant that sight was lost of the original justification for giving the Council of State direct jurisdiction, namely, that it would speed up settlement of disputes. Besides, case law in the matter sometimes contained subtleties that might make appellants hesitate to take action, or even refrain from doing so altogether.

A. Restoration to order by the Administrative Justice Code

The Administrative Justice Code came into force on 1 January 2001 and replaced the 1973 Administrative Courts Code, which had become the Code of Administrative Courts and Administrative Courts of Appeal in 1989.

It is a general code and even covers texts applying to the Council of State, so the code’s scope includes both the ‘keystone’ of judicial system and administrative courts with general jurisdiction.

With a view to restoring order, and given the number and diversity of the texts introduced since 1953 (particularly with regard to the distribution of powers in the first instance), the Code splits matters falling under the Council of State’s direct jurisdiction into two categories (depending on whether they are legislative or statutory in origin), with a separate series of articles for each category (Articles L 311-2 to 311-5 and R 311-1 and R 311-2 respectively).

1. Clarifications made by the Code

The Code contained ten sections on the Council of State’s direct jurisdiction. They recapitulate the appeals that are important enough to justify bringing them before the supreme court, the cases that must be resolved as quickly as possible and the disputes that must be heard by a single court. It is not necessarily a case of giving the Council of State all of the cases that meet one of these three criteria. As circumstances changed, decisions were made to either give the Council of State direct jurisdiction overall or to give it direct jurisdiction over particular cases.

It should be noted that the appeals currently falling under the Council of State’s direct jurisdiction “are those aiming to have the contested decisions overturned or reformed on grounds of illegality”¹⁵⁸. The Administrative Justice Code has therefore asserted the idea that appeals on misuse of powers and objective full-jurisdiction appeals are of the same nature, given that the main concern in both cases is the swiftest possible resolution of a question on legality¹⁵⁹. This does not cover full-jurisdiction appeals where they concern rights.

This assimilation has put an end to the distinction made since 1953 between cases where the only appeals that the Council of State could hear in first instance were appeals on misuse of powers and cases where the Council of State automatically had jurisdiction, regardless of the nature of the action

¹⁵⁶ M. A. Latournerie, *Réflexions sur l’évolution de la juridiction administrative française*, in *Revue Française de droit administratif* (RFDA), 2000, p. 924.

¹⁵⁷ Proceedings of this type accounted for an average of 20% of the court’s activity from 1995, from a low of 21% in 1997 to a peak of over 28% in 1999.

¹⁵⁸ R. Chapus, *Droit du contentieux administratif*, as mentioned above, p. 305.

¹⁵⁹ Until that point, the Council of State had general jurisdiction (mentioned in the decree of 30 September 1953) for decisions that were subject to appeals on misuse of powers.

for annulment¹⁶⁰. The change guarantees the uniformity of Council of State's direct jurisdiction and makes it easier for appellants to identify the court of first instance.

For appeals against measures taken by collective organisations with national jurisdiction, the Administrative Justice Code (Article L 311-4) refers to full-jurisdiction appeals so that the penalties applied can be contested directly before the Council of State¹⁶¹.

2. Rationalisation by the Code

While it gave the role of court of first instance for matters of ordinary law to the administrative courts, the Code also established a system facilitating more rational derogation from the rules of material jurisdiction in favour of the Council of State. It reasserts the role of the administrative courts "unless the subject of the dispute or the interests of proper administration of justice mean that the Council of State should be given jurisdiction"¹⁶². This statement both explains the organisation of the Council of State's powers in the first instance and serves as its legal basis.

Article L 331-1 sets out the principle that the administrative courts' power to rule in the first instance on matters of ordinary law does not extend to matters where "the subject of the dispute or the interests of proper administration of justice mean that the Council of State should be given jurisdiction".

It is easy to explain direct jurisdiction due to the subject of the dispute: this refers to pre-existing laws and the distribution of powers carried out in 1953 and the subsequent period. As mentioned before, many changes were made regarding the Council of State's direct jurisdiction in this domain and direct jurisdiction was gradually expanded through special texts, as well as case law that became less and less restrictive as time passed.

The Code also mentions "the interests of proper and sound administrative justice" in Article L 821-2, giving the concept a legal basis. It mainly concerns the organisation of jurisdiction within the administrative court system, especially conferred powers to rule in the first instance in the administrative court system.

This is not a "conceptual idea, but a functional idea"¹⁶³, which can be defined by its usefulness. In a state governed by the rule of law, it is not enough to simply make sure justice is served. Justice must be served correctly and must be 'administered'. This is based on the assumption that requirements relating to rationality in rules governing jurisdiction are as much of a concern as requirements relating to appropriateness. Rationalisation also takes the form of implementing methods to organise a given system with a view to improving its performance. Good organisation of the rules governing competence implies "decentralising administrative justice as much as possible, but preventing it from

¹⁶⁰ Consequently, the Council of State's jurisdiction in this area is no longer limited to appeals on misuse of powers against orders and decrees by the President of the Republic, statutory instruments by ministers, other acts adopted by ministers as a result of a compulsory opinion of the Council of State and administrative decisions by collective organisations with national jurisdiction. Regardless of the type of proceedings, the Council of State also has direct jurisdiction over disputes about the individual situation of civil servants appointed by decree by the President of the Republic, appeals against acts with a scope extending beyond the jurisdiction of a single administrative court and disputes arising outside of the territories under the jurisdiction of the administrative courts.

¹⁶¹ Some temporary proceedings before courts enjoying full jurisdiction have disappeared in the meantime, e.g. compensation of auctioneers for damages resulting from the removal of their monopoly in certain types of sale (law of 10 July 2000) and compensation of shipbrokers following the withdrawal of some of their rights (law of 16 January 2001). Also worthy of note are the occasional proceedings relating to the referendum scheduled to take place in Corsica by the law of 10 January 2003 and held on 6 July 2003.

Although the Council of State lost direct jurisdiction over some matters, it gained direct jurisdiction over others, such as appeals against penalties imposed by the director of the National Film Centre (decree of 29 October 2002). Other areas have also been added, like actions for damages brought by litigants who have suffered due to excessively long proceedings in the administrative court system (decree of 28 July 2005). Case law has also contributed to this expansion, such as by giving the Council of State direct jurisdiction (for reasons of appropriateness) over orders by ministers with a view to nominating members of their staff or advisers.

¹⁶² Articles L 311-1 and R 311-1 of the Administrative Justice Code. See also: R. Chapus, *La lecture du Code de Justice administrative*, in RFD, 2000, pp. 929 et seq.

¹⁶³ R. Chapus, *Georges Vedel et l'actualité d'une « notion fonctionnelle » : l'intérêt d'une bonne administration de la justice*, in *Revue du droit public*, 2003, p. 944.

fragmenting by unifying the rules governing competence as far as humanly possible¹⁶⁴. In the specific case of distributing jurisdiction in the first instance, proper administration of justice requires provision to be made for derogations to Article R 312-1, which sets out principles on the jurisdiction of administrative courts¹⁶⁵. As regards the Council of State and its power to rule in the first instance, the Council of State itself made explicit reference to the need for “proper administration of justice”¹⁶⁶. In fact, the concepts of ‘proper administration of administrative justice’, ‘proper justice’ and ‘proper running of public justice bodies’ are all equivalent¹⁶⁷.

B. The Council of State’s direct jurisdiction redefined by the decree of 22 February 2010

The Administrative Justice Code – and especially its statutory section – has been amended many times since its adoption, which is why the decree of 22 February 2010 on the jurisdiction and functioning of the administrative court system changed the way power to rule in the first instance was distributed, reducing the Council of State’s jurisdiction and increasing that of the administrative courts¹⁶⁸.

1. Reasons for the reform

No major modifications had been made to derogations from the jurisdiction of the administrative courts, which became the courts competent for matters of ordinary law in administrative proceedings upon their creation in 1953, since they were established. Given that cases of this type featured so prominently in the work of the Council of State, there was an urgent need to examine whether certain derogations should be retained.

Disputes falling under the Council of State’s direct jurisdiction accounted for an annual total of 20 to 25% of cases brought, as shown in the table below, which is based on annual public reports and refers to the last ten years¹⁶⁹.

¹⁶⁴ J. M. Favret, *La bonne administration de la justice administrative*, in *Revue Française de Droit Administratif*, 2004, p. 943.

¹⁶⁵ Rationalisation in the interests of proper administration of justice is visible as far as ‘connecting links’ is concerned. Under Article R 341-1, when the administrative courts have power to rule in the first instance on an application relating to a particular case and the Council of State has power to rule in the first instance on another application relating to the same case, the need for proper administration of justice precludes the two ‘connected’ applications being ruled on separately, so the Council of State hears both applications.

¹⁶⁶ CofS, 25 April 2001, *Association Choisir la Vie*: finding that placing medicinal products on the market constituted an administrative act with a scope of application extending beyond the jurisdiction of a single administrative court, the Council of State decided that it should retain direct jurisdiction in the matter “in the interests of proper administration of justice”, both for appeals against authorisation to place a medicinal product on the market and appeals against the refusal of such authorisation.

¹⁶⁷ In a judgment handed down on 12 July 2002, *Mr and Mrs Leniau*, the Council of State mentions “the interests of proper justice”.

¹⁶⁸ The first of this decree’s eight sections deals with this redistribution, but the decree also touches on compositions in the Council of State, composition of the bench in administrative courts and administrative courts of appeal, the Administrative Court Inspection Team, administrative and budgetary management of administrative courts, administrative proceedings, records and expertise. The decree aims to limit the Council of State’s direct jurisdiction and boost the efficiency of investigations and investigation methods in the administrative court system.

¹⁶⁹ Public reports of the Council of State (judicial and advisory activities of the administrative court system), 2001 to 2010, La Documentation Française.

The Council of State's power to rule in the first instance

Year	Number of cases	Percentage of the total number of cases brought
2000	3,292	26.8%
2001	2,738	21.7%
2002	2,434	21.6%
2003	2,052	20.7%
2004	2,242	19%
2005	2,758	25%
2006	2,251	22%
2007	2,219	23%
2008	2,605	25%
2009	3,044	31%

Of all the cases falling under the Council of State's direct jurisdiction on the eve of the reform, the largest categories of dispute were¹⁷⁰:

- disputes about the individual situation of government officials appointed by decree (a little more than 15% of the total);
- appeals against visa refusals (almost 20% of the total);
- appeals against decisions by collective organisations with national jurisdiction (30% of the total, of which almost 10% were appeals against decisions by national judging panels exams and competitions).

The ever-increasing number of appeals meant that it was necessary to re-evaluate working methods and make some procedural adjustments. Besides, the administrative court system had already been undergoing a cycle of reforms for a few years, which Jean-Marc Sauvé, Vice-President of the Council of State, viewed as “an abiding feature and a necessity”¹⁷¹. Thus it was the right time to try to further enhance the speed and quality of administrative justice by reorganising first-instance jurisdiction and to bring the supreme court's focus back to its role as a court of cassation and the examination – ruling on the merits of the case – of appeals whose nature truly justifies bringing them directly before the Council of State.

The reform, which was passed by decree, was prepared by several working groups made up of members of the Council of State, the Administrative Courts of Appeal and the Administrative Courts¹⁷². The main reform introduced by the decree redistributes powers between the Council of State and the Administrative Courts: it reduces the former's jurisdiction in the first instance and transfers jurisdiction over several types of dispute the latter, which will rule on cases on the relevant matters in future¹⁷³. Article R 311-1 of the Code (which deals with the Council of State's direct jurisdiction) was amended and additions were made to the provisions on the territorial jurisdiction of the administrative courts to take account of the courts' new powers (Articles R 312-1 and R 312-5).

¹⁷⁰ From D. Chauvaux and J. Courtial, *Le décret du 22 février 2010, relatif aux compétences et au fonctionnement des juridictions administratives*, in AJDA, 2010, p 605.

¹⁷¹ Conference on current reforms within the administrative court system, organised by Université Paris-2's Administrative Law Research Centre on 18 May 2009 (Council of State website and B. Defoort, in Gazette du Palais, issue 82, 23 March 2010).

¹⁷² See J. Arrighi de Casanova and J. H. Stahl, *Le décret N° 2010 – 164 du 22 février 2010 relatif aux compétences et au fonctionnement des juridictions administratives*, in RFDA, 2010, p 388.

¹⁷³ The new provisions apply to appeals lodged after 1 April 2010.

Nevertheless, the Council of State's direct jurisdiction over certain matters remains justified by three factors: the subject of the disputes in question, the need to settle the disputes quickly and the need for the greatest possible consistency in the interpretation of the law and the settlement of disputes¹⁷⁴.

2. Reduction of direct jurisdiction based on the subject of the dispute

In the past, the Council of State had direct jurisdiction over "appeals against ministers' statutory instruments and ministerial acts that could only be adopted following an opinion from the Council of State" (Article R 311-1(2)). Now, the Council of State no longer has direct jurisdiction over ministerial acts adopted following an opinion from the Council of State. Power to rule in such disputes has been transferred to the administrative court with territorial jurisdiction, i.e. the Paris Administrative Court, given that the ministers are based in Paris¹⁷⁵.

The new wording of Article R 311-1(2) gives the supreme court power to rule on "appeals against statutory instruments of ministers and other authorities with national jurisdiction, and appeals against circulars and directions with general application issued by these bodies"¹⁷⁶. The situation has not changed as far as circulars and ministerial directions are concerned: they still fall under the direct jurisdiction of the Council of State, despite not being statutory in nature¹⁷⁷.

The Council of State's direct jurisdiction has been greatly reduced as regards disputes concerning the individual situation of civil servants and military officers appointed by decree by the President of the Republic by virtue of Article 13(3) of the constitution and Articles 1 and 2 of organic ordinance no. 58-1136 of 28 November 1958. Although it still has direct jurisdiction over the same government officials¹⁷⁸, it may now only rule on disputes concerning recruitment and discipline¹⁷⁹. Other individual disputes are now ruled on by the administrative court that has territorial jurisdiction over the place where the civil servant or officer performs his or her duties¹⁸⁰.

It is particularly important to note that the Council of State no longer has direct jurisdiction over all collective organisations with national jurisdiction. The decree of 30 July 1963 had expanded the Council of State's jurisdiction to cover acts by the collective organisations with national jurisdiction of all professional associations, by generalising the solution that the decree of 4 March 1953 had created

¹⁷⁴ See the ministry response regarding the decree of 22 February 2010 to bring the Council of State's focus back to cases whose significance and character justify derogation from the jurisdiction of the court of ordinary law, the usual court of first instance, and the two tiers of judicial authority, in *Dalloz-Actualité*, 2 March 2010, observations by de Montecler.

¹⁷⁵ Within the meaning of Article R 312-1, unless the decision in question falls under the exceptions mentioned in Articles R 312-6 to R 312-17.

¹⁷⁶ The addition concerning appeals against the statutory instruments "of other national authorities" counterbalances, from a jurisdictional viewpoint, the practice of delegating a statutory power applied at national level to another, usually collective, authority.

¹⁷⁷ This takes account of recent case law (CofS, 18 December 2002, Ms Duvignerès), which finds that a circular can cause damage, and can therefore be contested, if it is compulsory. This decision put an end to previous practice, according to which an appeal against a circular was only admissible if the circular was statutory (and therefore illegal) in nature, which meant that admissibility depended on the substantive assessment. The decree aimed to clarify the distinction between jurisdiction and the admissibility of appeals.

¹⁷⁸ The government officials in question are as follows: members of the Council of State and the Court of Audit; magistrates within the judiciary; lecturers in the higher education system; army, navy and air force officers; members of bodies for which recruitment is usually conducted by the *Ecole Nationale d'Administration*; prefects; engineers in technical organisations whose recruitment partly depends on their class rank upon graduation from the *Ecole Polytechnique*.

¹⁷⁹ The Council of State still has direct jurisdiction over appeals against measures adopted by decree by virtue of Article R 311-1(1), which gives the Council of State power to rule over "appeals against ordinances of the President of the Republic and decrees". Furthermore, the concept of disciplinary disputes has been clarified by case law. An appeal is only considered to be about discipline when it is made against a decision that is obviously disciplinary. This is not the case for 'hidden' penalties, since jurisdiction must not be made to depend on a substantive assessment of the application and legality of the decision (CofS, 29 November 2004, *Centre hospitalier de Lavaur*).

¹⁸⁰ As far as pensions are concerned, the administrative court that rules is the court that has jurisdiction in the place where the pension is to be paid.

for the national medical association. The Council of State was given direct jurisdiction over the collective organisations with national jurisdiction of all professional bodies in a bid to facilitate quick settlement of disputes. However, it turned out that there is not always a correlation between the fact that the decisions were made at national level and their actual importance¹⁸¹. Since the previous situation was unsatisfactory, questioning this expansion led to the redefinition of the exact areas covered by the Council of State's direct jurisdiction. Article R 311-1(4) was therefore rewritten to reduce the number of bodies whose decisions still come under the direct jurisdiction of the Council of State in the first (and last) instance. The solution involved setting out a restrictive list of the independent administrative (or public) authorities that have power in certain areas of the economy and take decisions which should fall under the Council of State's direct jurisdiction as part of their "monitoring or regulatory activities". The Council of State's direct jurisdiction has therefore been reduced, but its retention is still justified by the challenge presented by some cases.

In its former wording, Article R 311-1(4) referred to "appeals against administrative decisions by collective organisations with national jurisdiction", whereas it now refers to "appeals against the decisions taken by the bodies of the following authorities as part of their monitoring or regulatory activities"¹⁸². With this wording, the decree limits the number of authorities in question to thirteen¹⁸³. Furthermore, the Council of State only has direct jurisdiction over acts adopted by the authorities as part of their monitoring or regulatory activities. Finally, by making reference to "bodies", the decree has put an end to the distinction between decisions made collectively and decisions made by the president of the collective organisation. The old version of Article R 311-1(4) was understood as limiting direct jurisdiction to decisions made by the collective organisation itself, but with the new version of the article, decisions taken by the president of such an authority fall under the direct

¹⁸¹ For instance, with regard to subsidies for community radio stations, the decree of 24 December 2002 transferred decision-making powers from a Commission to an Authority that makes decisions based on the opinion of the Commission. This transferred jurisdiction over disputes in this area from the Council of State to the administrative courts, without any change in the nature or importance of the substance of the dispute. Conversely, the ordinance of 8 December 2003 amending the Electoral Code transferred the power to set the amount of expenditure to be reimbursed to candidates whose accounts are approved from the prefect to the National Commission on Campaign Accounts. This placed disputes on the matter under the direct jurisdiction of the Council of State, even though administrative courts had been settling such (admittedly rare) disputes without incident until that point, sometimes with appeals and the involvement of the Council of State in cassation. See J. Arrighi de Casanova and J. H. Stahl, *op. cit.*, p. 389.

¹⁸² The article was worded in this way to prevent broad interpretation and to show that the Council of State's direct jurisdiction should be interpreted restrictively. Nevertheless, **statutory** instruments of collective organisations with national jurisdiction not mentioned on the list still come under the Council of State's direct jurisdiction by virtue of Article R 311-1(2) of the Administrative Justice Code. Consequently, decisions by national judging panels for exams competitions must be contested before the administrative court with territorial jurisdiction, since these decisions are not statutory in nature.

¹⁸³ The authorities in question are as follows:

- the French Anti-Doping Agency;
- the Competition Authority;
- the French Securities Regulator;
- the Post Office and Electronic Communications Regulatory Authority;
- the Rail Transport Regulatory Authority;
- the Nuclear Safety Authority;
- the Energy Regulatory Commission;
- the Insurance and Mutual Insurance Fund Supervisory Authority;
- the High Audiovisual Council;
- the National Commission for Information Technology and Freedoms;
- the National Commission for Monitoring Security Breaches;
- the Banking Commission;
- the Committee on Credit Establishments and Investment Companies.

The latter two bodies have been brought together within the Prudential Supervision Authority, which replaced them following the ordinance of 21 January 2010.

D. Chauvaux and J. Courtial note that "this list may change if new authorities are created and if case law shows that an authority was omitted wrongly", *op. cit.*, p. 607.

jurisdiction of the Council of State if they are related to the authority's monitoring or regulatory activities¹⁸⁴.

3. Removals and transfers in the domain of direct jurisdiction in the interests of proper administration of administrative justice

Excluding the removal of the highly specific case of appeals against penalties applied by the general director of the National Film Centre, which the decree of 29 November 2002 placed under the direct jurisdiction of the Council of State¹⁸⁵, the following areas were removed from the Council of State's direct jurisdiction: administrative acts with a scope of application extending beyond the jurisdiction of a single administrative court and disputes arising outside of the territories under the jurisdiction of the administrative courts.

While it does justify some derogations from the jurisdiction of the court ruling on matters of ordinary law in the first instance, proper administration of justice cannot simply mean systematically sending cases to the Council of State when technical difficulties make it impossible to identify the administrative court that has jurisdiction in the matter. Other factors should be taken into account, such as the number of cases of the same type and the nature of these cases.

For this reason, the decree of 22 February 2010 revoked the old provisions that gave the Council of State direct jurisdiction over "appeals against administrative acts with a scope of application extending beyond the jurisdiction of a single administrative court" (Article R 311-1(5)) and administrative disputes arising outside of French territory (Article R 311-1(6)). These provisions have been replaced by three new articles which, taken together, transfer the relevant powers to the administrative courts using the methods outlined below.

For acts with a scope extending beyond the jurisdiction of a single administrative tribunal, which no longer fall under the direct jurisdiction of the Council of State, it is important to ensure that several administrative courts do not all have jurisdiction in the matter. With this in mind, Article R 312-1 provides that for acts with several authors¹⁸⁶, "the administrative court with power to rule shall be the court with territorial jurisdiction over the place where the first of the authorities mentioned is based"¹⁸⁷.

The decree also introduces a new procedure for disputes arising outside of French territory. Two new articles (R. 312-18 and R 312-19) have been added to deal with these disputes. One gives Nantes Administrative Court jurisdiction over disputes with consular authorities about rejected applications for visas to enter French territory. The wording used also gives the same court jurisdiction over actions for compensation aiming to remedy damage that may have been caused by the consular authorities' rejection. Nantes Administrative Court was chosen because the secretariat of the Visa Refusal Appeals Board is based in Nantes¹⁸⁸. The other new article gives Paris Administrative Court jurisdiction over disputes arising outside France that do not relate to visa refusals (since there are now far more disputes relating to that matter). Residual power to rule on cases that are not within the jurisdiction of any administrative court has therefore been transferred to the Paris Administrative Court (Article R 312-19).

¹⁸⁴ So the administrative courts only have jurisdiction when it comes to decisions about internal management, whether they were made by the organisation as a whole or just the president.

¹⁸⁵ Article R. 311-1(10) (former) and Article 13 of the Film Industry Code. .

¹⁸⁶ For example, interprefectural orders covering departments located within the jurisdictions of different administrative courts.

¹⁸⁷ Nevertheless, D. Chauvaux and J. Courtial underline that "this criterion may cause problems if there is a series of orders about the same situation and the prefects concerned are not listed in the same order. For instance, if one order is revoked, the new order issued by the prefects will fall under the jurisdiction of a different administrative court if the first prefect named is not the same as in the original order, as would happen if a new, more senior prefect was appointed. For the same administrative court to be asked to rule, the principle of 'connecting links' must be applied, or reference made to Article R 351-8 (request for a change of court in the interests of proper administration of justice)", *op. cit.*, p. 607.

¹⁸⁸ In the case of appeals against refusals by prefects to grant visas to foreign nationals who are already on French territory and are applying for long-term visas, the administrative court with power to rule remains the court that has jurisdiction in the place where the prefect is based.

Conclusion: Solving problems relating to jurisdiction within the administrative court system and the Council of State's regulatory role

It may seem complicated to determine which court has jurisdiction when there is a question as to whether a matter should be brought before the administrative court or the Council of State in the first instance. However, the system has been organised so as to avoid negative consequences for litigants and its complexity is controlled by the internal procedure for settling questions about jurisdiction. Articles R 351-1 and R 351-9 of the Administrative Justice Code “make it possible to correct the often understandable errors made by litigants”¹⁸⁹. The decrees of 22 February 1972 and 19 April 2002 provided a simple way of correcting mistakes related to directing appeals within the administrative court system¹⁹⁰. The chosen mechanism, which was based on the principle of directly transferring applications from one court to another, “has the effect of preventing courts from not having jurisdiction over cases brought before them in the administrative court system”¹⁹¹. The mechanism greatly simplifies matters for litigants and saves them a lot of time. This illustrates the administrative court system's unwavering interest in responding to society's demand for swift, genuinely efficient court decisions. This reform is the fulfilment of a continual desire to adapt so that administrative courts can play their part in administering justice under the best possible conditions.

Besides, when the Council of State has been given direct jurisdiction, this has always been done for the same reason: namely, to guarantee unity and consistency in administrative law. The reform can also be viewed as the realisation of the Council of State's general power as the court regulating administrative proceedings within the administrative justice system¹⁹². This role enables it to undertake tasks that could fall to other administrative courts and to meet “justice-related needs that cannot be satisfied by texts”¹⁹³.

Within the French system, which is based on judicial dualism, the Council of State is a supreme court exercising a degree of authority over all of the country's administrative courts. It has a dual role which consists in ensuring that the written standards and general principles of administrative law are applied uniformly throughout the country and managing and monitoring the lower courts (including providing basic and ongoing training for their members). This situation can be explained by the fact that in France, the administrative court system is structured more closely around the Council of State than the judicial system around the Court of Cassation. The judicial system has a pyramid structure, while the administrative court system “has a circular or concentric structure... because it is built around the Council of State”¹⁹⁴. This facilitates regulation of the administrative court system, which is good for the consistency of administrative case law and, at the end of the day, for all citizens, since they can be sure that they are equal before the law in their dealings with public authorities and that they will be treated equally by the administrative courts that hear any administrative disputes they may bring.

¹⁸⁹ D. Chabanol, *La pratique du contentieux administratif*, ed. Litec, 2009, p. 69. Thus “through a simple system of ordinances that cannot be appealed, cases brought before the wrong court are transferred to the court that has jurisdiction, with procedural acts completed properly before the court originally asked to rule remaining valid before the court deemed competent, subject to any regularisations required by the latter court's rules of procedure”.

¹⁹⁰ R. d'Haëm, *La réforme de la procédure de règlement des questions de compétence à l'intérieur de la juridiction administrative*, in RFDA, 2003, p. 497. See also R. Chapus, *Droit du Contentieux administratif*, as mentioned above, pp. 277 and 278: “If the Council of State is asked to rule in the first instance when the case actually falls within the jurisdiction of the administrative courts or a specialised administrative court, the president of the Litigation Division shall be asked by the Investigation Sub-Division to identify the court that has power to rule. This latter court cannot refuse to rule on the case.” For other courts, this is done by “the presidents of the administrative courts and administrative courts of appeal, who rule through orders without a statement of reasons. These orders do not have the authority of *res judicata* but may not be appealed”.

¹⁹¹ D. Chabanol, *op. cit.*.

¹⁹² P. Delvolvé, *Le Conseil d'Etat régulateur de l'ordre juridictionnel administratif*, in *Mélanges en l'honneur de Daniel Labetoulle*, ed. Dalloz, 2007, p. 259. See also: R. Odent, *op. cit.*, p. 757, and C. Debbasch, *Droit administratif*, Economica, issue 6., 2002, p. 709.

¹⁹³ P. Delvolvé, *ibid.*, p. 271.

¹⁹⁴ R. Chapus, *Droit du contentieux administratif*, as mentioned above, p. 65.

By José ROSENDO DIAS, Vice President of the Supreme administrative Court of Portugal

1. General outlines of the current organisation of Portuguese administrative justice

The procedural rules and organisational framework for the existing administrative dispute system are those introduced by the reform that produced the Code of Procedure in the Administrative Courts (CPTA) approved by Law no. 15/2002 of 22 February 2002, as amended by Law no. 4-A/2003, and the Statute governing the Administrative and Fiscal Courts (ETAF) approved by Law no. 13/2002 of 19 February 2002, both of which entered into force on 1 January 2004.

The reform also covered the tax courts designed to hear disputes concerning fiscal matters.

There are currently sixteen administrative courts of first instance, in a network that covers the whole country.

The courts of first instance were given generic competence with regard to administrative disputes that are not specifically allocated to other courts.

At the intermediate level there are two Central Administrative Courts (TCA North and TCA South), which are competent to hear appeals against sentences at first instance, as well as appeals against decisions of arbitration tribunals, and actions brought against judges of first instance.

At the apex of the pyramid we find the Supreme Administrative Court (STA), which retained competence at first instance with regard to actions concerning acts and omissions in administrative matters on the part of the following entities:

- The President of the Republic.
- The Assembly of the Republic and its President.
- The Council of Ministers.
- The Prime Minister.
- The Constitutional Court and its President, the President of the Supreme Administrative Court itself, the Court of Auditors and its President, and the President of the Supreme Military Court.
- The Supreme National Defence Council.
- The Supreme Council of the Administrative and Fiscal Courts and its President.
- The Attorney General.
- The Supreme Council of the Public Prosecutors' Office.

The Supreme Court also has competence at first instance in proceedings concerning elections of the members of the Supreme Council of the Administrative and Fiscal Courts who are elected by their peers, and of the Presidents and Vice-Presidents of both the Supreme Court itself and the Central Courts.

The other election-related cases concerning administrative organs are brought before the Administrative and Fiscal Courts, at first instance.

The competence to hear electoral disputes concerning political and politico-administrative entities and organs, including the organs of the Regional and Local Administration, pertains to the Constitutional Court.

As is also the case with regard to actions concerning the competence of the different instances, the parties that bring actions before the Supreme Administrative Court sitting at first instance can ask the Court: to assess the legality or otherwise of acts, which can lead to their annulment or a declaration of their nullity or inexistence; or to order the Administration to undertake or make a due act – i.e. an act that is required by law. In either case the claimant can additionally ask for reparation for damages and losses caused by the illegal action or omission.

The STA is also competent to hear appeals against:

- Decisions at first instance concerning matters of law, in cases worth more than three million Euros.
- Decisions at second instance on matters of law regarding questions of fundamental importance, when admitted by a Chamber comprising three of the most senior Justices.

Besides this, when sitting in a broad Chamber that includes all the Justices in the Administrative Section, the STA is competent to hear appeals:

- In which this is considered necessary or appropriate (by order of the President) in order to ensure the uniformity of jurisprudence.
- Against rulings handed down by a Chamber of three Justices sitting at the first level of jurisdiction.
- That are intended to standardise the jurisprudence produced by contradictory decisions of the Central Courts, or by a decision taken by an ordinary Chamber composed of three Justices of the Supreme Administrative Court when it contradicts another decision by an identical Chamber of the same Court.
- Involving a reference for a preliminary ruling on a new question of law that raises serious difficulties, may pose itself in other disputes, and is submitted to the STA by a court of first instance as part of a case in which the latter is competent and which it has the responsibility to decide.

2. Assessing the Legality of General Acts

In Portuguese law the jurisdictional assessment of general acts is provided for in the 1984 law governing disputes, and is now regulated in Articles 72 to 77 of the CPTA under the heading “Challenging norms and declaration of illegality by omission”.

The concept of a ‘norm’ or ‘normative act’ has been the object of innumerable decisions by both the administrative courts and the Constitutional Court, which have sought to find a functional (operative) concept for the purposes of the control of constitutionality.

This effort has resulted in the understanding that a norm is an act of authority which contains a rule of conduct or a criterion for decision.

Norms do not have a specific target, but this does not mean that in some cases they cannot have immediate effects on existing concrete situations, which may concern persons that are clearly determined or determinable.

The decision taken by a public entity with a view to the implementation of a law on the updating of retirement pensions, which established a framework of equivalences between the categories of workers who had retired various years before and the categories that were in effect at the moment when the update was operated, gave rise to a 1991 STA Ruling in which

there is a confrontation between two opposing theses – one which saw the decision as an administrative act, and another which considered it to be a regulatory norm that was selfexecuting¹⁹⁵.

The same question poses itself cyclically, and I think that there is presently more openness to the thesis that this type of situation ought to be subject to the regime governing challenges against norms, albeit opinions may vary back and forth depending on the Court’s composition at any given moment in time¹⁹⁶.

The administrative norms that can be challenged under the terms of Articles 72 to 75 of the Code of Procedure in the Administrative Courts (approved by Law no. 15/2002 of 22/02/2002, and subsequent amendments) include not only regulations¹⁹⁷, but also all general acts, seen as acts of authority which contain a rule of conduct or a criterion for decision, even if they decide about situations, but without individualising or concretely specifying their target.

The assessment of whether non-legislative general acts are in conformity with the norms that occupy a higher rank in the hierarchy (not counting the control with general effects of constitutionality and conformity with superior laws, that pertains the Constitutional Court) is undertaken by the

¹⁹⁵ STA Ruling of 7/11/1991, P. 025896.

¹⁹⁶ The current position is influenced more by the definition of ‘administrative act’ which the Code of Administrative Procedure (CPA) introduced in 1991 than by any acceptance of the special weight of any of the arguments that are traditionally advanced by the defenders of the two positions. To quote Article 120 of the CPA: “For the purposes of the present Law, administrative acts are deemed to be the decisions of the organs of the Administration which, acting under the terms of public-law norms, seek to produce legal effects in an individual, concrete situation”.

¹⁹⁷ Which are norms of a general nature and are permanently applicable, and are subordinate to the law, either because they develop the principles and solutions adopted therein, or because their issue depends on the attribution by law of the specific competence to do so (Article 112[5], [6] and [7] of the Constitution).

administrative courts, with regard to defects in the norms themselves, and in relation to those derived from the procedure that produced them.

There is no specialisation between different administrative courts in the competence to assess a general act, so, as a rule, actions with this object are first brought before the District Administrative Courts (unless the author of the general act is one of the senior state entities mentioned in Article 24, ETAF, which I listed earlier¹⁹⁸).

To summarise the Portuguese control of general acts: the law lays down four different ways in which to challenge general administrative acts in administrative courts and tribunals. The effects of two of these, which I will call group one, are restricted to the concrete case of whoever brings the action:

- One is intended to prevent a general act from automatically having effects on the concrete case in question.
- The objective of the other is to challenge an act that itself applied a general act.

Two more paths, to which I shall refer as group two, are aimed at the general act in its own right and are designed to produce general effects:

- One is available to private persons who are injured by the application of a general act, but only when application has already been refused in three previous cases.
- The other can be used by the Public Prosecutors' Office, without any need for a prior refusal to apply.

Portuguese law expressly admits (Articles 52[3] and 73[2], CPTA) the possibility that a general act issued in the exercise of administrative authority can have effects within the legal sphere of individualised persons, immediately and without any requirement for an applicatory act.

In this case injured parties can, without any time limit, ask the court to order that the norm not be applied – an order whose effects will be limited to their specific case.

A system which admits the possibility that general acts can be challenged in the administrative courts by whoever is prejudiced by them, without any requirement for a concrete applicatory act, is one which accepts that certain general acts or administrative norms are self-executing – i.e. that they automatically, without anyone doing anything else, produce effects, define the concrete legal situation, and immediately affect the legal sphere of clearly defined persons.

A person in this situation who asks for a general act not to be applied to their concrete case obtains a declaration of illegality with restricted effects, as if there had been an automatic application that is then set aside by the court's decision.

Looking in more detail at the second of the two options in group one – a path that is available when a general act is concretely applied to individualised persons, regardless of whether or not it was self-executing – the claimant has three months in which to make the challenge, which is the ordinary time limit for appeals.

When a person challenges an act that is targeted at them individually, they are asking for the indirect consideration of the legality or illegality of the general act of which the application is a consequence. This means that this is still a challenge which is an individual, concrete administrative act, and not a challenge which is itself a general act. In such cases the effect of the court's decision is restricted to the concrete case before it. This in turn means that, inasmuch as what is being challenged is a concrete application, the defect of which the general act is accused serves as grounds for the invalidity of the ensuing application.

Let us now turn our gaze onto the two paths in the second group.

These are separate from the defence against acts that have already been applied or whose application is automatic. Instead, let us now focus on challenging legality as a general act '*qua tale*' – i.e. one that is intended to produce general effects.

Here, the Portuguese legal system introduces a distinction between the legitimacy that pertains to persons and that enjoyed by the Public Prosecutors' Office.

¹⁹⁸ In this respect the solution is identical to that adopted in Spain – Law 29/1998, of 13 July 1988 (with changes), art. 6 to 13.

Persons who have been injured – either by a general act on its own, or by the application of a general act – or who are likely to be prejudiced by the general act in question in the near future, can ask for a declaration of illegality with generally binding force.

However, this possibility is only available to them when there have already been three cases in which application of the general act in question has been refused.

These refusals to apply the general act must have resulted from cases that arose and were decided in the past, with regard to interested parties other than the one bringing the new action, in cases that took either of the paths in group one.

The second path in group two is different. Acting either on its own initiative, or at the request of associations or foundations which are defending the rights or interests that have been injured, or at the request of local authorities, the Public Prosecutors' Office (Public Advisor) can ask for and obtain the declaration with generally binding force of the illegality of any norm, with no time limit and without any need for prior refusals to apply.

In addition, if there have been three earlier refusals to apply an administrative norm on the grounds of its illegality, the Public Prosecutors' Office is under a formal duty to ask for the declaration of its invalidity with general effects.

The action to obtain a declaration of illegality was used by certain professional groups of civil servants due to the lack of regulation of laws on the updating of their salaries. It was when a legislative act updated the salaries of groups of staff in general, but said that others in equivalent situations had to wait for new regulatory norms to be issued by the Administration, by means of a general act. After waiting in vain for several years for the Administration to make that act, they asked the court to declare the omission illegal, with a view to securing the issue of the due norms¹⁹⁹.

3. Solutions adopted in the Croatian Law on Administrative Disputes (published in Official Gazette no. 20/10).

Article 12§3 of the new Croatian Law on Administrative Disputes very clearly defines the competence of the High Administrative Court, in which it includes:

- Appeals against decisions of administrative courts
- The consideration of the lawfulness of general acts;
- Conflicts of jurisdiction between administrative courts; and
- Other cases laid down by law.

The competence of the High Administrative Court of Croatia at first instance offers an option that is independent of the matters which are addressed in the general act, of the national, regional or local nature of the public entity which emitted it, and of that entity's position in the organisational hierarchy or its degree of autonomy.

Under Article 31§§1 and 2 of the Croatian Act on Administrative Disputes, the court must decide within the boundaries of the claim, but is not limited to the grounds put forward by the claimant, and what is more must enquire '*ex officio*' whether there are grounds for the nullity of a decision or the invalidity of a contract, and decide accordingly. These are normative provisions that display an exemplary clarity in the way in which they embody the principle of the provision or the request, in harmony with the principle '*curia novit ius*', in a precise delimitation of boundaries.

Articles 83 to 88 of the Croatian Law regulate the process of assessing the legality of general acts ("*upon the motion of a natural or legal person if a particular decision of the body of public law which is based on a general act resulted in a violation of their right or legal interest*").

Article 83§2 also allows the High Administrative Court to begin the procedure for assessing the legality of a general act on its own initiative, "*in the line of duty*" or "*upon the request of the court*". The English text and my lack of familiarity with Croatian law in general prevent me from knowing how this request arises in the first place – i.e. whether it originates with the High Administrative

¹⁹⁹ See www.dgsi.pt - *Acórdãos do Supremo Tribunal Administrativo* (Rulings of the Supreme Administrative Court, in Portuguese) – *inter alia*, Rulings of 30.01.2007 and of 18.10.2007, P. 0310/06; of 20.02.2008, P. 0476/07; of 18.02.2010 and 19.10.2010, P. 0810/07; of 11.03.2010, P. 0819/08; of 5.05/2010, P. 0564/09; of 6.05.2010, P. 0977/07; and of 19.10.2010, P. 0460/08.

Court, or whether the law is referring to an administrative court that submits the request to the latter, or to an entity that resembles the Public Prosecutors' Office in Portugal.

The action always requires there to have been an application to a concrete situation that is exclusive to a specific person or persons which, as a result of that application, are in a position to ask for the assessment of legality.

So Article 83 does not provide for the possibility that the general act may have effects within the sphere of private persons without an applicatory act. In what seems to me to be a good solution, this does away with the doubts that might result from the theory of selfexecuting norms.

When Article 84§2 says that the claimant must plead in such a way as to demonstrate the probability that it is the application of the general act which will violate his rights or interests, it is referring to the sufficient causal link between the general act, the application that is made of it, and the root of the damage.

This is an understanding which appears to me to be confirmed by the definition of the object of the assessment of legality provided for in Articles 83 to 88, and which I believe can be deduced from a comparison of §2 and §1 of Article 3. My thinking is as follows: although the wording of §2 is intended to tell us the entities whose acts are to be scrutinised – the acts of the local and regional administration, of public legal persons when they act in the exercise of public authority, and of legal persons that perform public services – a comparison with §1(1) and (2) shows that the acts in question are individual acts made as the result of a decision. We can thus conclude that the acts with a decision-making content made by the authorities mentioned in §2 are general whenever their target is not a party – i.e. the legal sphere of an individualised person.

A truly interesting aspect is that the new law takes advantage of the dynamic derived from the need to defend individual rights in order to open up, without further ado, a judicial process of assessing objective legality, with general effects.

As to the preconditions for an action, in addition to what we have already said about legitimacy I would particularly note (on the basis of Article 85) two positive ones – the specific duty upon the court to verify whether the act's nature is effectively general, and the requirement for timeliness (the action must be brought within thirty days of delivery of the applicatory act) – and two negative ones – the matter cannot pertain to the Constitutional Court, and the situation cannot be protected by the law in another way.

The Act says that a general act must be assessed with regard to its conformity with the law and with "*the statute of the body of public law*". The general act (or some of its provisions) is repealed or suspended – i.e. ceases to be valid – as of the publication of the High Administrative Court's judgement in the Official Gazette.

The person or persons who have secured a decision that a general act is not in conformity with the law or with the statute governing the public-law entity become the holders of the right to ask (they have three months in which to do so) the administrative entities to amend the decision that violated their rights, by renewing the procedure, this time in accordance with the decision in which the High Court repealed and invalidated the general act.

It seems to me possible to deduce that the grounds for the renewal of the procedure and the new administrative decision aimed at individualised persons, this time without heeding those of the general act's provisions that have been held to be illegal, can be found either in the application (by revalidation) of the general act which was in force before the one which has been set aside, or in a general act that is issued by the time the request to amend is submitted. In cases in which the content of the general act does not have to be innovatory, but is only required to set out the criterion for making a choice that already existed in the law and was indicated in the High Court's Ruling, it appears to me that two hypotheses are possible: application of either a new general act that has been issued by the moment at which the decision is taken under the new procedure, or the criterion indicated by the High Court, without any need for a new general act that is in conformity with the law. From the context regulated by the Articles we have been looking at, it seems to me that in Croatian law the general act corresponds to that which in Portuguese law we call an 'administrative norm', which, whatever the hypothesis, possesses the dependent validity of being subject to a higher-ranking normative framework – namely the law.

From the outlines that I have sought to analyse on the subject of the assessment of the legality of general acts in Portugal and in Croatia, in terms of the preconditions for the right to bring an action,

the delimitation of its object, the assessment criteria, and the effects of the court's consideration of it, I deduce that there are a number of points where the general principles in the two countries come close to one another.

The most notable differences concern the court that is competent at first instance, the moment as of which effects are produced, and certain preconditions for bringing an action.

Under Portuguese law the preconditions for a private person to be able to ask the court to consider a general act are extremely restrictive. The requirement that there be three effective decisions which have already declared the illegality of a norm and transited *in rem judicatam* before a private person is in a position to ask for a declaration of illegality with generally binding force means on the one hand that time must pass before an action can be brought, and

on the other that there are obstacles which practically reduce the efficiency of this format to zero in the case of private persons.

The requests which the Public Prosecutors' Office has submitted in Portugal have been a restricted number and have addressed norms issued by the local administration.

One would expect that the Croatian Act, which does not impose such rigid preconditions – the requirement for the norm to have been struck down in three earlier cases, for example – allows quite a lot of room for the admission of this type of action.

I foresee that the interpretation of the preconditions set out in Article 85§1(1) to (4) will be important for the application and effectiveness of the action to assess the legality of general acts.

So, on the question of whether an act is a general one or not, it is out of the question to require it to be abstract, but even so doubts may arise, especially when the act does not specify who or what it is aimed at, but they are easily identifiable and one may perhaps be sure from the start that they are few in number and can be objectively identified.

Where the claimant's legitimacy (Article 84§2 and Article 85§1[4]) is concerned, opinions may be divided as to the scope of the expression: "*The person filing the motion ... shall make probable in the request that the application of the general act violated his rights or legal interests*".

It seems to me that, with a view to a broad access to the independent protection provided by the court, it is desirable to avoid a formal consideration – for example, when faced with applicatory acts that omit any express reference to the general act – under which the claimant is required to demonstrate a causal relationship between the general act and the violation of his rights or interests.

It is time to conclude.

My contribution has been a very modest one, but the comparison of solutions adopted in different legal systems opens the way for us to improve our knowledge and contributes to better justice. On this subject, Amartya Sen tells us that: "If the discussion of the demands of justice is confined to a particular locality (a country or even a larger region than that) there is a possible danger of ignoring or neglecting many challenging counterarguments that might not have come up in local political debates..."²⁰⁰.

My objective was to offer some starting points for the reflection that is going to take place upon the entry into force of an Act as important as this one on administrative disputes in Croatia.

By Zdenek Kühn, Judge of the Supreme Administrative Court of the Czech Republic

The decision to establish the Supreme Administrative Court was made already at the moment of the creation of a separate state in 1992. The Czech Constitution of 1992, following the tradition of inter-war democratic Czechoslovakia, ordered the establishment of two separate high courts. However, politicians delayed the process of creation of the SAC for one decade. The real Supreme Administrative Court (SAC) was created ten years later, in 2002, and started to work in 2003.

The current SAC does have 28 judges, each of them does have two law clerks. The long-term maximum number of judges shall be 30. Much of rules and competences relating to the SAC reflect the inspiration in the old Austrian administrative judiciary, dating back to the 1870s.

²⁰⁰ Amartya Sen, *The Idea of Justice*, Harvard University Press, 2009, p. 403.

Although the most frequent activity of the SAC is to decide on cassation complaints against the judgments of lower administrative courts, there is a number of important competences which are exclusively granted to the SAC (with the possible constitutional complaint to the Constitutional Court).

The first important area of exclusive competences is a plethora of **electoral lawsuits** (Law on the SAC, Art. 88 – 93). Here, however, we must distinguish between various types of electoral lawsuits. The SAC does decide only with respect to the issues of state-wide elections (the lower and upper house of the Parliament), whereas regional administrative courts do decide with respect to the issues of local (municipal and regional) elections and local referendum; no cassation complaint against their judgments is allowed. There is a strict deadline to decide the case within 20 days, which reflects the importance of the agenda.

The SAC decides on average up to 30 lawsuits challenging elections to the House of Representatives; the elections to the Senate usually do attract less attention of potential litigants. It must be noted that since 2003 no elections have been proclaimed unlawful. There is the only one, though notable exception. It is the decision of December 3, 2004 (file no. Vol 10/2004-24) in which the SAC annulled the election of elected senator Jan Nádvořník to the Senate of the Czech Parliament. The reason was that the elected senator grossly violated the rules of political campaign and shortly before the actual election took place had distributed leaflets which unfairly challenged his rival in campaign. The judgment was however annulled one month later by the Constitutional Court.

Another important exclusive power is the one **over political parties** (Law on the SAC, Art. 94-96). The SAC decides on the motion of the government or president that a political party shall be suspended or banned. Usually this is the case of inactive political parties which do not provide proper accounting to the Parliament. Therefore the purpose is in fact “burry those who are already dead”. Occasionally, however, an interesting case arises which relates to formalities of that accounting.

The second reason to suspend the activity of political parties or to ban them is the fact that the party in question grossly violates the legal order. So far, it has happened just once in the history of the SAC that the court banned any political party for its activity. It was the 2010 case of the Neonazi Workers Party which was banned due to its violent activities and spreading racial hatred. In its very long and detailed judgment of 17 February 2010 (file no. Pst 1/2009-348) the SAC referred to the ECHR case law. It explained that the mixture of Neonazi ideology and violent actions (including the attempt at anti-Roma pogrom in one of the largest Roma settlements in the Czech Republic) justified its dissolution. What was most important was the fact that the violent activities could have been attributed to the party

It shall be noted that the law allows the recourse to the Constitutional Court in case the political party is banned or suspended. The very fact that the competence over political parties is granted to the SAC rather than to the Constitutional Court can be hardly explained from comparative point of view. Rather, it is another proof of the fact that the legislator in drafting competences of the newly established SAC heavily relied on the tradition of the Czechoslovak SAC of the era between 1918 and 1938.

Thirdly, another exclusive competence is the power to decide the so-called **competence lawsuits** (Law on the SAC, Art. 97-101). The SAC decides disputes over competences 1) between administrative bodies and regional or professional self-administration, 2) self-administrative bodies, 3) between central bodies of states administration (typically ministries). The competence lawsuit might be initiated by the involved body or by the one who seeks the decision from the body of disputed competence. This is a very important power of the SAC; however, an average number of cases adjudicated annually is less than ten.

Last but not least, a very important power is the power to decide on **lawfulness of the acts of general nature** (hereinafter “general acts”, cf. Law on the SAC, Art. 101a-101d). This is a new power which

was given to the SAC in 2005 by the law which was hastily drafted. The case law of the SAC defines the general acts as those acts which are neither individual decisions nor general norms. In addition to this negative definition, the general acts address the general problem to concrete participants or individual problem to generally defined participants.

The fact that the amendment to the Law on the SAC was written without any further consultation and discussion (which is rather usual for the Czech legislature) caused a lot of problems in the application of this new competence. For instance, the very definition of the general act begged the question whether “general acts” are only those which are called in this way by the law (formal understanding of the general act) or whether what is general act is decided by the nature of the act, disregarding how it is called (substantive understanding of the general act). There was a conflict between those who argued in favor of the former and the latter conception at the SAC, the conflict finally being decided by the grand chamber in favor of the formal understanding. However, the final say was reserved for the Constitutional Court which quashed the judgment of the SAC grand chamber and decided that the only constitutional interpretation is the substantive one.

Another very conflicting issue is the lack of time limit within which one can challenge the general act. As there is no time limit, there were cases in which a plaintiff challenged general acts ten or twenty years after they had been enacted. The SAC doubted constitutionality of the absence of any time limit. That is why it referred the respective provisions of the Law to the Constitutional Court with the proposal to annul the parts of the Law for its unconstitutionality. The case is still pending before the Constitutional Court (summer 2011).

The most typical example of general act is a zoning plan. According to the case law there is much wider variety of general acts, like for instance traffic signs. As majority of the population has not received the news, there are almost no traffic signs challenged before the SAC.

The SAC does have the duty to decide the issue within 30 days since the lawsuit has been delivered to the Court. The lawsuit might be initiated by anyone affected by a general act.

The last agenda of general acts has become far most frequent example of the exclusive competences in the adjudication of the SAC. The number of general acts challenged before the SAC is higher every year, and in 2011 it might reach 50 cases per year. The complexity of those issues as well as rigid time period made deciding those cases a tough nut. That is why there is now a bill in the Czech Parliament which will delegate the competence to decide those issues to the regional administrative courts, whereas the SAC will act based on the cassation complaint.

Fourth issue: Organization of the first instance tribunals (Administrative Courts) of Croatia – goal to reach and judge assessment

By Mr Ante GALIC, President of the Administrative Court of Croatia

The new Administrative Disputes Act adopted by the Croatian Parliament on 29 January 2010 (came into force on 1 January 2011) stipulates a new organization of administrative courts in the Republic of Croatia in two instances, so that administrative disputes will be adjudicated by administrative courts and the High Administrative Court of the Republic of Croatia.

The amendments to the Courts Act and the Court Jurisdiction and Seats Act stipulate the founding of four administrative courts of first instance, which will be seated in Zagreb, Split, Osijek and Rijeka.

According to the subject-matter jurisdiction prescribed by the provisions of Article 12, Paragraph 2 of the new Act, first-instance administrative courts should adjudicate on the following: 1. complaints against individual decisions rendered by bodies vested with public authority, 2. complaints against the acting of bodies vested with public authority, 3. complaints due to the above-referenced bodies' failure

to render an individual decision or act within the legally prescribed deadline, 4. complaints against administrative contracts and execution of administrative contracts, 5. other cases as prescribed by law. According to the territorial jurisdiction stipulated by the provisions of Article 13 of the new Act, the jurisdiction to adjudicate in administrative disputes lies with an administrative court with territorial jurisdiction on the territory where the plaintiff has a permanent place of residence, i.e. registered office, unless otherwise prescribed by law. If the plaintiff has no permanent place of residence in the Republic of Croatia, territorial jurisdiction lies with a court on whose territory the plaintiff is temporarily residing (Paragraph 1). If the plaintiff has neither permanent nor temporary place of residence, nor registered office in the Republic in Croatia, territorial jurisdiction lies with an administrative court on whose territory the body vested with public authority that rendered the first-instance decision or took the necessary legal actions is seated (Paragraph 2). In disputes involving real estate or a legal matter related to a certain location, territorial jurisdiction lies with an administrative court on whose territory the real estate or the location related to the legal matter is situated (Paragraph 3). In disputes related to administrative contracts, territorial jurisdiction lies with an administrative court on whose territory the body vested with public authority that is a party to the contract is seated (Paragraph 4), while in disputes related to ships and aircraft registered in the Croatian vessel and aircraft registers or in cases where the reason for initiating a dispute arose on such a ship or aircraft, territorial jurisdiction of an administrative court is established in accordance with the location of the parent port/airport of the ship/aircraft (Paragraph 5). Conflicts of territorial jurisdiction between administrative courts are immediately settled before the High Administrative Court, at the motion of a party or the court (Paragraph 6), and if the competent administrative court is unable to adjudicate in an administrative dispute due to justified reasons, the High Administrative Court will, at the motion of a party or the court, designate a court to take over the case (Paragraph 7).

Based on the above, it is evident that the issue of territorial jurisdiction has been regulated by law primarily by taking into account the plaintiff's permanent residence, registered office, and temporary residence; if the plaintiff has neither permanent residence (i.e. registered office) nor temporary residence, territorial jurisdiction is established by taking into account the territory where the body vested with public authority that rendered the first-instance decision or took the necessary legal actions is seated.

The provisions of this Act stipulate that decisions within a first-instance administrative court are, as a rule, rendered by a panel composed of three judges (Article 14, Paragraph 1), and prescribe exceptions to this rule (Paragraph 2 of the same Article). Pursuant to the above-referenced provision of the Act, a single judge of an administrative court adjudicates on the following: 1. complaints against an individual decision of a body vested with public authority rendered through immediate resolution within the administrative procedure, except when the administrative matter is immediately resolved due to public interest, i.e. because this is necessary for undertaking urgent measures aimed at protecting people's lives and health or property of significant value, 2. complaints in cases settled on the basis of a judgement with final force and effect passed in the model dispute, 3. complaints against the actions undertaken by the body vested with public authority, or against its failure to act.

The above-described situations, in which the legislator allows for the single judge to decide in administrative disputes, have been assessed as less demanding, i.e. less complex.

With regard to the most significant novelties in administrative disputes introduced by the new Administrative Disputes Act and affecting the organization and functioning of first-instance courts, i.e. planning the number of judges and their allocation to the newly founded courts, it should be pointed out here that the new Act, as a rule, stipulates that administrative courts adjudicate in administrative disputes on the basis of an oral, direct public hearing, which will not be required only in exceptional circumstances:

- if the defendant has recognized the claim in its entirety;
- if a dispute is decided upon on the basis of a final court judgment rendered in the model dispute;
- if it has been established that an individual decision, acting or an administrative contract contains deficiencies which impede the assessment of their legality;
- if the claimant challenges only the application of substantive law; facts are indisputable and the parties to the claim or counterclaim do not expressly demand that a hearing be held.

The assessment of potential overburdening of the future first-instance courts shows that the Administrative Court in Zagreb will be the largest first-instance court handling 43% of the overall number of expected cases; the Administrative Court in Split should be the second (27%), while the remaining cases are expected to be distributed proportionally among the Administrative Courts in Rijeka and Osijek.

Seven panels of judges (made up of 21 judges) are planned for the Administrative Court in Zagreb, five panels of judges (made up of 15 judges) for the Administrative Court in Split and three panels of judges (made up of 9 judges) for both the Administrative Courts in Rijeka and Osijek.

Furthermore, presidents of the above-mentioned courts should be appointed in order to take all the necessary actions within the court administration by the end of this year, thus allowing for the beginning of court operation as planned. The National Judicial Council is responsible for appointing the judges and presidents of the above courts. We sincerely hope that the appointment procedure will be completed in due time, so that the newly appointed judges can undergo training related to novelties in administrative dispute proceedings and also to the fact that the new Administrative Disputes Act is yet to be tested in practice. Furthermore, it is also necessary to ensure required number of court clerks and employees and provide appropriate premises for the courts. Needless to say, the Ministry of Justice of the Republic of Croatia and its working group for implementation of the new Administrative Disputes Act plays the most prominent role with regard to the above-mentioned activities. It is encouraging that in this phase of implementation many judicial professionals have showed interest in applying for vacant positions at future first-instance administrative courts. Beside the Counsellor at the Administrative Court of the Republic of Croatia, experienced colleagues from state administration and state attorney deputies, the candidates also comprise experienced municipal court judges

Therefore, I am convinced that the National Judicial Council will appoint highly qualified candidates for the position of judges at the future first-instance administrative courts, which will surely be the best guarantee of efficient operation of the future first-instance administrative courts.

By Mr Daniel Giltard, Councillor of State at the Council of State of France, President of the Administrative Court of Appeal of Nancy

For several decades, France's administrative courts only had one type of target, namely a quantitative individual target assigned to each judge. These targets varied depending on the level of the court (court of first instance, appeal or cassation), but they all had in common that they were not set by any text. This system was born of practice and tradition. Each judge had to handle a certain number of cases each year: for instance, a judge in administrative court had to deal with 160 cases a year. That was the standard set for such judges. Some time ago, this figure rose dramatically, mainly due to the rise in class action litigation.

This perfunctory, unofficial system has now been consigned to memory. Several years ago, a complete, official and transparent system was established for defining targets for administrative courts and evaluating the collective and individual results connected to these targets.

I would like to give you a rough overview of this system, starting, of course, with the definition of targets.

This system covers the entire general administrative court system, encompassing 42 administrative courts, eight administrative courts of appeal and the Council of State, in its capacity as a court of cassation. It should also be noted that the Council of State is responsible for managing the administrative court system.

I. Setting targets

In my view, the main characteristics of the policy for setting the administrative courts' targets are as follows:

- the main targets are set at national level, on a long-term basis, for each type of court;
- they are applied each year by each court, using an approach based on dialogue and cooperation.

A. A national, long-term framework

The administrative court system does not define its main targets for itself, behind closed doors. They are published commitments to parliament, as is the case for all State actions. These targets are set for a **three-year period** when the Finance Act is being prepared and are **annexed to the relevant bill** to ensure that members of parliament are informed.

We are currently nearing the end of the three-year period 2009-2011.

The main qualitative and quantitative targets for the period were decided on when the draft Finance Act for 2009 was being prepared. **Three targets** were set, and **performance indicators** were defined for each target. The targets are as follows: reduce the time taken to pass rulings; maintain the quality of court decisions and boost the efficiency of the courts.

So there are three targets, each of which has three performance indicators that develop throughout the three-year period.

The first target, reducing the time taken to pass rulings, is associated with **three performance indicators** enabling achievement of the target to be evaluated in each level of court – the administrative courts, the administrative courts of appeal and the Council of State.

- **First performance indicator: average time taken for a ruling to be passed in pending cases**
For the administrative courts, this indicator was one year and one month in 2009 and is expected to be one year in 2011.
- **Second performance indicator: average time taken for a ruling to be passed in ordinary cases** (not including expedited procedures or orders that do not involve ruling on the substance of the case)
Also for administrative courts, this indicator was two years and two months in 2009 and is expected to reach two years in 2011.
- **Third performance indicator: the share of cases that have been pending for more than two years**
For the administrative courts, this share should drop from 20% to 18%.
- **Fourth performance indicator:** this only applies to the Council of State (average length of proceedings for cassation cases).

The second target, maintaining the quality of administrative decisions, only has **one performance indicator attached to it**, namely the revocation rate of court decisions, both by courts of appeal and the court of cassation.

The third target, boosting the efficiency of the courts, is linked to two performance indicators aiming to assess the work of judges and court clerks.

- **The first indicator is the number of cases resolved per judge per year.** Of course, this indicator is different for each level of court.
- **The second indicator, the number of cases resolved per court clerk**, serves the same purpose for court clerks.

B. A concerted court plan

Bearing in mind the targets and indicators set at national level, each court draws up a plan that also covers a three-year period and is updated each year.

Each administrative court and administrative court of appeal drew up a **court plan** for the three-year period between 2009 and 2011. These projects set out quantitative and qualitative targets based on the court's situation and resources.

The court plans are created using a three-stage procedure.

1. A management conference

A dialogue is held with the general secretariat of the Council of State at an annual **management conference** bringing together the presidents and chief clerks of all the courts and the general secretariat of the Council of State.

The discussion covers the various targets and the resources (each court's operational budget; staff of judges and court clerks).

2. An orientation letter

Following this management dialogue, which concludes either with a consensus or with settlement of the matter by the Secretary-General, the Secretary-General sends an **orientation letter** to the head of each court. This letter sets out the court's financial and human resources for the year in question and outlines the **framework of the targets**, particularly the quantitative targets. In particular, the orientation letter mentions projections and targets for cases registered, cases resolved, time taken to pass a ruling and the number of pending cases.

3. A court plan

a) Working together to set the court's targets

After discussion with the judges and court clerks, the head of the court must implement the targets set in the letter of orientation by defining the targets for each chamber and individual judge in the **court plan**.

b) Individual commitments

Each judge's targets (especially the quantitative targets) are discussed with the judge in question during the **professional review**, which is a meeting held between the head of court and each judge before the start of the judicial year (September).

There is no single model for determining quantitative targets – it falls to each court to decide on the methods that best suit its situation. Targets may be set for each chamber or for each individual judge. They may be expressed as an exact figure, or a margin may be left.

In the court of which I am president, targets are set for each chamber and each judge is allotted a 'margin', with a view to taking account of the varied nature of cases and the difficulties they present. The target is for each chamber of three judges to rule on 425 cases a year, with a target of 130 to 140 cases for each judge.

Those were the steps in the procedure for setting the targets. The procedure starts with the targets set for each level of court during the preparation of the Finance Act, and ends with the individual commitments made by each judge and each court clerk during the professional reviews.

The second stage, of course, involves measuring the results against the targets that were set and accepted.

II. Evaluation of results

As we will see, the procedure for the result evaluation stage is far shorter than for the target-setting stage. After all, it is much easier to record results than to define targets, which requires discussions and dialogue.

The task of evaluating results is made easier by the **computer tool** enabling heads of court to see, in real time and covering all aspects, the situation in their respective courts and consult periodic performance charts.

As can be expected, the evaluation stage runs in the opposite direction to the target-setting stage. We start by evaluating individual results, before moving on to assess the results for the whole court.

A. Assessment of individual results

The head of court goes over each judge's results on the assigned targets during the **professional review**, which was mentioned above.

A report is issued on the professional review. This comprises two major sections: one on the targets and results, and the other on the evaluation of aptitudes and skills.

1. Targets and results

This section reiterates the targets set for the previous year, lists the results and outlines the targets for the coming year, detailing (if required) the process to be followed and resources to be anticipated to facilitate achievement of the targets.

2. Evaluation of aptitudes and skills

I will now give you a brief overview of the current system for evaluating judges' aptitudes and skills, which is the result of recent discussions. Methods for evaluating administrative judges have changed a lot over the years, moving from a mark out of 20 – rather like at school – based on four criteria (professional knowledge, general culture, efficiency and sense of public service) to a far more comprehensive system that details the professional and judicial qualities expected of an administrative judge.

Now, evaluations are based on four categories of aptitudes and skills:

- **aptitude for exercising judicial functions**, which encompasses evaluation of the scope and accuracy of knowledge, understanding of how the law is applied, quality of written and oral expression, participation in deliberations and decision-making ability;
- **general professional aptitude**, i.e. understanding of the context of the professional activity, ability to deal with change, respect for the collective organisation of work, autonomy and organisational skills;
- **service**: efficiency and effectiveness of work, sense of public service, involvement in the general operation of the court, interpersonal skills (both within and outside of the court);
- **aptitude for performing support functions**: listening and leadership skills, organisational and management skills, ability to anticipate and make suggestions, ability to exercise authority, public relations.

Aptitudes and skills are categorised as being in one of **five levels**, where level 1 indicates that the most progress needs to be made and level 5 indicates that the optimum has been achieved. The head of court then provides an evaluation of the judge's activity, and this is no longer accompanied by a numerical mark, as was long the case.

I should add that failure to meet the targets may be punished by a reduction in the amount of the bonuses paid.

B. The activity report

After evaluating each judge's results, the head of court must report on the court's activity as a whole. This is done in two ways:

First, at the **management conference** at the end of the year, where the head of court presents the results for the year – these are useful for setting the following year's targets, so the whole process begins again.

The head of court also reports on the court's activity in the **annual activity report**, which must be submitted to the Vice-President of the Council of State at the start of the next year.

I should add that an administrative court inspection team inspects the administrative courts and administrative courts of appeal every three to four years.

That was a brief outline of the current system for setting the targets of France's administrative courts and evaluating the results. As we have seen, the method has evolved over time and is not fixed. It has been developed based on practical considerations and will be enriched through experience. It was mainly focused on quantitative targets, since these are a priority for courts, but it still needs to develop and improve (aided, in particular, by technological advances) to better incorporate qualitative targets and their evaluation. Current discussions are focusing on that issue.

By Mrs Martine MONDT-SCHOUTEN, Councillor of State at the Council of State of The Netherlands

After a short introduction about the organisation of the administrative jurisdiction in The Netherlands I will speak about workload, expedient judging, quality, selection of cases and final judgment, with the emphasis on the organisation and practice in the district courts.

1. Introduction

Besides an Advisory Division the Dutch Council of State has an Administrative Jurisdiction Division which is the highest general administrative court in The Netherlands. There are two other administrative appeal courts (The Central Appeal Court for Social Security Matters and the Court of Appeal for Trade and Industry) . Cases concerning tax law are treated by the "ordinary" Courts of Appeal and only in these administrative law cases cassation (by the Court of Cassation) is possible.

Since about twenty years we have not had any special administrative courts of first instance in The Netherlands. Administrative disputes are treated by the general courts of first instance, the district courts. Each district court has an administrative division. At the moment there are 19 district courts, but in the near future there will be just 10 because some of the district courts are too small in the opinion of the Dutch Government. Each district court will then have 18 to 53 judges (fte) in administrative law.

The administrative division of a district court treats mainly cases concerning social security, civil servant law, rates and taxes, planning permissions, grants, tree felling permits, the water authorities and cases under the Aliens Act 2000 (regular and asylum permits and detention).

2. Workload

Each judge has a workload of about 300 cases (with oral hearings) per year. The handling of this amount of cases is only possible because the judges are assisted by supporting lawyers. They prepare the cases for the judge, make a summary of the facts, enclose jurisprudence and write a draft judgment in 80 to 90% of the cases, except in cases under the Aliens Act 2000 where the supporting lawyers write a draft judgment in all the cases.

In 2010 the district court in The Hague dealt with 14.546 cases (4.828 cases under the Aliens Act 2000, 3.853 tax law cases and 5.865 other cases, concerning social security, civil servant law, planning permissions, grants, tree felling permits and others) with 29,5 fte judges, 58,5 supporting lawyers, 35 administrative support staff and 6,5 overhead (ict and secretarial).

3. Due progress and expedient judging

In general the target for district courts is that the procedures in administrative disputes are finished within one year. In some cases the legally required period is shorter (for instance: in cases of detention 3 weeks). When an applicant files an application for provisional relief judgment must sometimes be given on the same day or within a few days.

To make sure that the procedure in administrative disputes is finished in time the district courts have a sophisticated registration system. In this system the stage of each procedure is registered, it indicates the set time for each stage, it gives a warning when there is a risk of overstaying a time-limit and also the location of the dossier is registered. The managing vice-presidents think it more and more important that procedures do not take too long and that measures are taken when in any stage of the procedure time limits are not met.

4. Quality

It is important that judges and supporting lawyers maintain the desired quality. For that reason it is thought important within the district courts, that there is sufficient attention for permanent education. Each judge has to spend 30 hours per year on education (participate in courses or attend conferences). More and more the courts organise in house courses themselves.

Jurisprudence meetings are held on a regular basis. Judges or supporting lawyers specialised in a certain field prepare and chair these meetings.

It is also thought important that in a certain amount of the cases which are treated by a judge sitting alone (single judge chamber), another judge reads the judgment and gives his or her opinion about it.

Also intervision is thought important. Judges attend each others hearings and give an opinion about the way of treating applicants, the communication with the parties involved and the way of keeping order. All this in a positive way. As judges are inclined to be very polite to each other, in some district courts an experienced judge from another district court or from a high court is asked to attend hearings of judges and give clear advice. This approach has worked well, judges were positive about the way advice has been given.

5. Case selection

Already for a long time it has been common practice in the administrative divisions of the district courts to select identical cases and treat these cases in a cluster. That is efficient and lessens the chance of divergent decisions within the same court.

At the moment in a number of district courts experiments are being conducted concerning a different case selection. The objective is to offer applicants an approach "made to measure". In some cases the right approach can be to discuss with the parties the possibility of reaching a settlement, in other cases it can be important to make clear during a procedural hearing what kind of evidence is missing and discuss in which way proof could be provided. In some cases it can be efficient that the judge starts the hearing on the contents of the case with asking questions, while in other cases it is better to let the parties start with their pleadings before questions are put to them.

At the moment this is in an experimental phase. Which are goal selection criteria? Which stage of the procedure (at the very beginning or just before or during a hearing?) is the most appropriate to do the selection?

6. Final judgment

More and more it is thought important that a judge in administrative disputes gives a final judgment to avoid that one procedure follows another.

Article 8:72 of the General Administrative Act gives some possibilities such as:

- The district court may direct that the legal effects of the annulled decision shall be allowed to stand in full or in part.
- The district court may rule that its judgment shall replace the annulled decision or the annulled part of the decision.

Since January 2010 there is also a new possibility, article 8:51 of the General Administrative Act. The district court may offer an administrative authority the possibility to repair an ascertained shortage in the disputed decision, for example to repair a lack in the reasoning that is underpinning the decision or to complete an investigation in case of an omission.

In administrative disputes expedient judgments based on clear and appropriate reasoning are to be pursued. To reach this goal in an efficient way a staff of supporting lawyers of high quality is necessary. Management on quality and on time, a sufficient registration and case monitoring system and case selection are also important, both in The Netherlands and in Croatia.

Conference conclusions

By Mr Marc Gjidara, Professor Emeritus at the Université Panthéon Assas Paris 2

The Colloquium's theme raises questions and broaches subjects affecting not only Croatia, but all of the Member States of the European Union (Yves Kreins). One of the challenges currently facing Croatia, where considerable progress has been made as far as justice is concerned, is the upcoming establishment of four new administrative courts and the introduction of two tiers of judicial authority. Although the country has something of a tradition of administrative justice, it must become more familiar with the most established European practices and experiences (Ante Galić). The choice of Dubrovnik as the location for the conference on Croatia's new administrative justice system could be viewed as a good omen, given the tradition of openness and balance that shapes the town's past, and the sense of equality and love of freedom entrenched its character (Andro Vlahušić). The new Croatian Act on Administrative Disputes follows on from a raft of other reforms, given that this is the first time chapter 23 has been applied to a candidate Member State, the decision to do so being justified by experience built up with the other waves of accession. Justice has proved to be the weak point of the institutions in some countries, including Croatia (slowness, quality of service). Nevertheless, Croatia has taken effective measures to address these problems (training judges, cutting delays in handing down judgments, fighting corruption, introducing new procedures and amending the constitution). The country remains open to any recommendations that may be made based on the work of the conference (Dražen Bošnjaković). Austrian and German experts helped to draft the new Act on Administrative Disputes, which still has some room for improvement given the language barrier, i.e. problems understanding one another in a language which, while spoken by both sides (English), is foreign to their respective mentalities and cultures. Despite these difficulties, the text was harmonised somewhat with the requirements set by the European Convention on the Protection of Human Rights. Some proposals could be incorporated into the Croatian law, given the historical influence of the Austrian system and the slight French influence. The assets of the Croatian Administrative Court will enable it to avoid the stumbling blocks of this reform, which aims to raise it to a higher level. Furthermore, the exchanges that will result from this conference (which was attended by a respectable number of Member States) will allow it to broaden the scope of its deliberations (Eckart Hien). This conference is evidence of the European Commission's interest and support, and it is also a sign of recognition for Croatia: after all, the country is already a member of various European forums and its efforts to enhance its judicial system should be welcomed. In future, it will have to give plenty of thought to better access to justice, increased democratisation of justice and a more efficient justice system. And Croatia is moving in the right direction on all three points, as evidenced by the recent Commission report on the Croatian justice reform, which also expressed the wish that changes continue to be made (Jean-Marie Moreau). The new Croatian Act on Administrative Disputes is due to come into force on 1 January 2012. However, some clarification is still needed, especially with regard to the general concept of an administrative act, the legal system and, specifically, court treatment of statutory instruments. The provisions requiring greater clarification include Article 78 of the Croatian law, which relates to assessing legality and the court that has the power to rule on such matters. Distributing powers may still be a problem, and there is a risk that several courts may have authority to rule on the same case. Article 66 and the need for filters to avoid overburdening the court of appeal

are also a concern. In addition, Articles 3(2) and 32 should be clarified – they relate to the scope and reach of review of lawfulness concerning certain types of administrative act. The chosen solution in this case consists in having the administrative courts carry out review of lawfulness on only the statutory instruments (or general acts) of local authorities. There is a need for a clearer, more accurate definition of the respective powers of the Croatian Constitutional Court and Administrative Court. The Austrian system, which was suggested for use as a reference, is complex and does not provide solutions that can be transposed easily, especially if there is a preference for clearer, more ambitious new options. At present, there is one review of lawfulness for statutory instruments or general acts themselves and another for the individual measures for their application, and the reviews are not performed by the same court. There are also questions around the retroactive effect of judgments and the issue of whether – depending on the matters concerned – the judgment handed down should have a relative (*inter partes*) or general effect (*erga omnes*). A judgment may retroact in many areas, but there are also other areas where this is not the case. Finally, another matter that should be examined – other than that of filtering mechanisms for court appeals – is that of the problems posed by the areas under the exclusive jurisdiction of the supreme administrative courts, where political considerations are encountered in certain cases and appropriate solutions should be found for handling such situations (Martin Köhler).

After these preliminary remarks (which are just some of the remarks made by the first speakers), twelve 15-minute presentations were given on the four main themes being discussed at the conference. Below is a summary that aims to review these presentations as accurately and concisely as possible, along with some final proposals and recommendations for the Croatian lawmaker with a view to complementing and improving the current reforms.

1. REVIEW OF LAWFULNESS OF STATUTORY ADMINISTRATIVE ACTS BY THE HIGH ADMINISTRATIVE COURT OF CROATIA: ADMISSIBILITY CONDITIONS AND CONSEQUENCES OF AN ANNULMENT

1.1. In his presentation, Mr Mato Arlović, a judge at the Croatian Constitutional Court, began by emphasising the importance of the Conference's work: it covers respect for lawfulness, constitutionality and finally, human rights through the guarantee that must be given to citizens, namely, that they will be given equal treatment by the administrative courts. This guarantee is the main concern when rulings are made on government acts and people exercising public powers and when these acts are subjected to a compulsory review of lawfulness. Croatia, for its part, has a mixed system involving both the Constitutional Court and the Administrative Court. This opens up a range of questions about the respective areas of jurisdiction of the two courts and the matters each one handles, with the associated delimitations.

The speaker referred to his written text, which was more detailed, and tried to limit his presentation to a few specific aspects of this duality of jurisdiction. In fact, up until now, it was possible to have an act's lawfulness reviewed in the knowledge that for general acts, and objections of illegality, the matter can only be settled by the Constitutional Court upon referral by the administrative court. Obviously, the decision handed down is binding on the latter. If the individual act and the general act on which it is based are both vitiated by illegality, all the appellant can do is ask the author of the contested act to make a new decision and possibly apply for compensation for the damage caused.

There are plans to give the administrative court jurisdiction over general acts issued by local authorities only. The speaker wondered about the nature of these acts – are they administrative acts? In that connection, he felt that the Constitution and the new law differed on acts by local authorities and acts by individuals exercising public powers. In fact, the different arrangements for publicising these acts leads to the conclusion that local acts are not the same as other administrative acts (publication in the Official Gazette for one category, and publication according to the arrangements set down by law for local general acts).

The speaker also addressed the absolute need for review. On this point, however, he considered that it was difficult to separate review of constitutionality from review of lawfulness, despite the risk of

conflicting or overlapping jurisdiction or even contradictory judgments on the part of the Constitutional Court and the Administrative Court.

The law sets out criteria for the people allowed to commence proceedings to review the lawfulness of an act. Under the current Croatian system for review of lawfulness and the current setup for distribution of powers, there is a division between the administrative court, the judicial court and the constitutional court, as all three are authorised to hear appeals on the lawfulness of government acts.

When it comes to annulment decisions, decisions handed down by the Administrative Court do not have the same scope as decisions handed down by the Constitutional Court, and the Constitutional Court's decisions have more radical effects. This makes it difficult to harmonise the effects of judgments on review of lawfulness. The speaker also raised the issue of reports and the structure of appeals on misuse of powers and appeals brought before courts enjoying full jurisdiction. This latter form of appeal exists in theory, but such appeals are not often brought before or used by the administrative court. It should be better known and used more, both in the interests of litigants and with a view to enabling the administrative court to give better rulings. The Constitutional Court has already taken up a position on some issues that were on hold. It only reviews the lawfulness of general acts that set down limits or enact and does not handle internal measures. On this point, too, there should be a clear distinction between the two types of act, since their judicial treatment is not the same.

Finally, the speaker broached the subject of people exercising public powers, who may adopt general acts that must be consistent with both laws and the statutes of local authorities. He argued that in this domain, it was essential to clarify the concept of public powers and even that of public service, to the extent that there are questions about the lucrative nature of such activities (i.e. profit from and/or profitability of the tasks performed).

In conclusion, the speaker expressed his regret that the constitution had not clearly defined the areas falling under the respective jurisdiction of the Constitutional Court and the Administrative Court. In any case, he believed that an institution like the administrative court system absolutely must protect individuals, corporate bodies and local entities while ensuring that the law is respected in dealings with the government.

1.2. The report by Mr Michel Pâques, member of the Belgian Council of State, began by emphasising the importance of making a distinction between statutory instruments and individual acts. This is a key point insofar as several rules and principles depend on it. Statutory instruments can be identified using three criteria: they are general (apply to all types of situation), impersonal (do not name any specific people) and abstract (may be applied in future to any number of situations). It is not always easy to categorise acts as either individual acts or statutory instruments, since all of the criteria mentioned above cannot always be met and there can be mixed acts (e.g. permits to divide land into lots).

In Belgium (and Luxembourg), both court systems handle administrative actions. The authorities' involvement in a dispute is not in itself the deciding factor; the content and grounds of the dispute are more important. If a civil right is being claimed, the civil court will handle the dispute. If the objective lawfulness of the act is being challenged, the Council of State will handle the matter since this is a proceeding against an act. The Council of State holds a distinguished position at the top of the administrative court system and one of its duties is to hear actions for annulment. Appellants in such cases must have some interest in seeing the administrative act revoked so that their appeal does not fall into the category of *actio popularis*.

Having provided a general overview of the situation, the speaker focused on how statutory instruments are handled, reiterating that since complaints can be made about the indirect effects of a regulation vitiated by illegality, all courts can preclude the application of an illegal statutory instrument. While there are not many direct appeals against regulations (like in Luxembourg, where most appeals of this kind are made in relation to the environment or taxation), appeals against applicable individual acts could lead to the lawfulness of a regulation being questioned if that regulation is connected to the contested individual act (whether it is the legal basis for the act or the predominant reason for the act).

In Belgian law, direct actions for annulment may (mainly) be made against regulations by administrative authorities in general (whether or not they are described as such by law; it is enough for them to have been named by law). Interest – which must be personal, direct, certain, present and legitimate – in bringing proceedings is interpreted fairly broadly (it includes the collective interest of

associations with a legal personality). Besides, it is possible to contest not only the illegal act but also, under certain conditions, the government's failure to fulfil its role in making regulations.

Although there is a time limit for bringing direct actions for annulment (beginning when the act is published), legal certainty and lawfulness must be reconciled by making it possible to challenge the act after the deadline has elapsed. After all, it is the duty of all courts to refuse to apply an illegal act. This applies to all administrative acts, be they individual or statutory, regardless of the administrative authority that adopted them (the State or another body), but not to challenges to binding court decisions or laws. All standards with a greater value than the act being reviewed are counted as 'reference standards' for the administrative act. This is how review of lawfulness is performed, it being understood that any grounds may be used, whether based on the lawfulness of the act (both internal and external) or the principle of proportionality.

There is no time limit on review of lawfulness as long as complaints about the illegality of the regulation are introduced through an objection of illegality (*par voie incidente* is the term used in Belgium; *exception d'illégalité* is the term used in France). Before ordinary courts, the illegality of the administrative act to be applied has to be raised by the court's own motion. Before the Council of State, on the other hand, the argument of illegality (based on the illegality of the regulation) must be mentioned in the introductory application, unless the cause of the alleged illegality constitutes a ground of public policy. For the time being, Belgian law does not permit the government to withdraw an illegal act itself, and yet the Court of Justice of the European Union recommends that the government should withdraw such acts before any court appeals when it comes to upholding the principle of the primacy of European law.

As regards the sanction for statutory instruments recognised as illegal, the reach of the discovery of illegality varies. If the illegality of the act was discovered through an objection of illegality, the effect of the discovery is relative and the illegal decision continues to exist in principle. In the interests of legal certainty, the lawmaker may nonetheless decide to approve the regulation that was declared illegal (including retroactively), which is what happens in the case of ongoing disputes.

As regards the effects of a regulation's annulment on the secondary acts deriving from it, the Council of State's judgment has an *erga omnes* effect and is retroactive. But the illegality of regulations only has an effect if appeals are made against them, and any non-contested secondary acts remain in force. The potentially devastating effects of retroactive annulment led the Council of State to adjust the effects of invalidating a regulation in the interests of legal certainty. But the scope of the retention of the act's effects remains controversial and progress must still be made in the debate around the issue. The idea of 'consolidation' allows the lawmaker to either take action to correct the defect in the act, while maintaining the act's statutory nature, or to give the contested act retroactive effect (or not).

It has been recognised that illegality has an impact on liability, and ordinary law is applied, with judges competent in ordinary law hearing the case, once there is a fault and damage has been caused by it and a chain of causation has been established. Both the fact of issuing an act and the failure to do so can be viewed as errors and legal literature is divided on the matter, except in cases where it may be argued that the error was insurmountable. For the time being, however, there is no agreement on a requirement that could force the government to withdraw or repeal illegal administrative acts.

1.3. In his fairly concise report, Mr Georges Ravarani, President of the Administrative Court of Luxembourg, highlighted certain similarities between his country and the situation in Croatia. In a brief historical summary going back to the 19th century, he reiterated that where individual administrative acts are concerned, Luxembourg has had two tiers of judicial authority since 1856, but that this is not the case for general acts. Yet when it performed reviews, the Administrative Court could not apply provisions that went against the constitution. There were also issues as regards combining review of constitutionality and review of lawfulness, which forced practices to evolve, preventing the Council of State from holding two roles (since the European Court of Human Rights' judgment in *Procola v. Belgium* in 1995). As regards general acts, the question may be raised as to whether they need to be reviewed directly, given that statutory instruments may be reviewed and even neutralised when individual acts are being reviewed. There are various examples in case law (in contexts ranging from building permits to taxation) where the issue of reviewing general acts while reviewing the individual measures for their application has been broached. The problem here is that citizens' situations may be unequal depending on whether their appeal was introduced against the

individual measures implementing a general act. Besides, since appeals on misuse of powers are proceedings undertaken against acts and not proceedings undertaken against a party, it must be demonstrated that a right has been violated. While it is relatively easy to assess the relationship between individuals, it is more difficult to do so when one party is an ordinary citizen and the other is a public body, even before bearing in mind that there may be political aspects and considerations at the background of certain disputes, particularly where regulations are concerned. Another new problem in this context is that of the application and place of international conventions as sources of law, especially Community rules that have primacy and, in some cases, direct effect and applicability. The time limit for lodging actions for annulment differs from one country to another: it is one month in Germany, three months in Luxembourg and two months in France. It should not be possible to challenge general acts for an unlimited period, at least not directly. However, if we consider that some laws may be very old and that questions regarding their consistency with higher rules (which are subject to change themselves) may be raised long after their adoption, the situation for general acts cannot be otherwise.

To conclude, the Luxembourgish speaker pointed out that there are now two tiers of judicial authority for general acts and that the Supreme Court has been ruling on all such matters since this system was introduced. Nevertheless, it is still the case that it is not always to draw a distinction between general and individual acts, even though it is necessary to do so since the appeals lodged, the procedure to follow, jurisdiction and the court's powers all depend on the category of act.

2. APPEALS AGAINST DECISIONS BY COURTS OF FIRST INSTANCE: THE FILTER MECHANISM

2.1. In his opening presentation on the second topic for debate, namely filtering appeals, Mr Zoran Pičuljan, Secretary of State at the Croatian Ministry of Justice, began by highlighting the importance of the contribution of comparative and foreign law. As the coordinator of the experts' work on the Croatian Act on General Administrative Proceedings and the Act on Administrative Disputes, he had a good insight into just how crucial it is to develop (but also diversify) cooperation between legal practitioners, both within a single State and between countries. The aim is to restructure Croatian administrative law to facilitate its application and try to better ingrain European standards in the domain. More broadly, the relationships connecting the various branches of domestic law should be examined, and there should be discussions on how to change mentalities and practices within Croatian authorities, which must clearly begin by taking into account problems with training and go beyond technical discussions on how to reconcile the product of various traditions with the requirements of modernity.

The application of filters is a prerequisite for restructuring the administrative court system, with a view to avoiding overburdening the courts and clearing the caseload more quickly. A preliminary appeal to the authorities could act as a filter, although this presents problems as regards the time the authorities take to handle the case and the issue of a 'reasonable timeframe' for the administrative courts. The speaker explained that appeals are currently handled on four levels in Croatia: a preliminary administrative appeal lodged with the authorities, a judicial appeal before one of the four new administrative courts due to be established on 1 January 2012, an appeal before the High Administrative Court and a cassation appeal before the Croatian Supreme Court, which means that this last court is responsible for harmonising the court system as a whole and ensuring that it is consistent. This subject is extremely important, and yet there is no denying that administrative law is not only marginalised in terms of training legal practitioners in general and judges in particular, but also in view of the fact that the present reforms of the administrative court system attract little media coverage and even legal practitioners show little interest in these issues, despite the closure of a significant chapter in Croatia's accession negotiations depending on them.

2.2. In his concise and pragmatic oral presentation, Lord Stanley Burnton (Royal Courts of Appeal - England and Wales - Leave of appeal) identified several problems that he believes to exist with regard to filtering of appeals. The United Kingdom has a system of three levels of court, with specialised chambers within each court. When filtering appeals, one should first assess how likely they are to be successful. Interest in lodging appeals varies according to the domain. After assessing the

admissibility of an appeal, the grounds for the appeal should be examined. This means looking at the reasons behind the judgment made in the first instance and the way first-instance decisions are reviewed. In this connection, the judicial review system relies on a fairly developed set of expert first-instance courts. Furthermore, for an appeal to have some chance of being admitted, it must be based on compelling reasons and be in the public interest. As for the procedure, it comprises an oral application (of a limited duration) and more appeals are refused than granted. All the same, the urgency and complexity of cases is taken into account. At the end of the day, while lawfulness is often raised, many of the appeals made on the basis turn out to be unfounded or far-fetched and do not raise questions regarding principle, which explains the high refusal rate and the need for a filter.

2.3. Also on the topic of filtering, Mr Jon Stokholm, a judge at the Danish Supreme Court, pointed out that his country has a unified judicial system (no specialised administrative courts). There are no filters as such at the first instance, or for appeals. There is an independent commission (of which Mr Stokholm is a member) that hears all appeals. When discussing the matter of filters, one must first ask what a court of appeal actually is. If its primary purpose is to protect individual rights, access to it must be facilitated. If, on the other hand, the idea of a court of appeal is different, one must identify the areas and matters in which appeals should be facilitated. In Denmark, the aforementioned commission decides on the continuation of proceedings and has been working well for 12 years. Its members all have the status of judge – though they can also come from the academic world – are supported by assistants and have renewable terms of office. The commission has a president, who does not influence members at all, and meets once a week, working through tens of cases an hour. Most appeals do not progress beyond this stage, unless they relate to a new text of which the application may be problematic, or a new factual situation. However, there is a debate between the media and the Supreme Court regarding the transparency of these procedures.

Where filtering is concerned, the situation in Denmark is the same as in other countries where the courts hand down rulings. Moreover, decisions by the aforementioned commission may not be appealed. As regards the Croatian Act on Administrative Disputes, some provisions should be examined, especially Articles 66 and 78, the purpose of which needs to be clarified, as does their function (about which the speaker was sceptical). Similarly, the speaker foresaw some risks in terms of the consistency and unity of the case law emanating from the four new administrative courts. In his view, all parties should be able to make appeals in any domain, and a filtering mechanism should be used if necessary.]

3. EXCLUSIVE MATERIAL JURISDICTION OF THE HIGH ADMINISTRATIVE COURT

3.1. The case of France was explained by Mr Marc Gjidara, Professor Emeritus at the Université Panthéon Assas Paris-2. He began by briefly outlining the history and development of the Council of State, which started out as a general court until the 1953 reform, when it became a court of appeal before becoming mainly a court of cassation under the law of 31 December 1987. He also provided some explanations of terminology to ensure proper understanding of what is currently referred to as the Council of State's 'direct jurisdiction'.

In the first part of his presentation, the speaker detailed the development of direct jurisdiction, which was initially given to the high court, until the legitimacy and authority of the administrative courts as the first-instance courts competent to rule in matters of ordinary law was established (they were promoted to this role in 1953). This direct jurisdiction, whether temporary or permanent, that conferred upon the Council of State by texts was justified by the significance of some disputes (contesting the most important administrative acts, or acts by high-ranking authorities or institutions) or the need to remedy some anomalies arising from the normal application of the rules governing territorial jurisdiction (such as when no court has territorial jurisdiction, or when several courts do). At first, few cases fell under the Council of State's direct jurisdiction, and they were mainly appeals on the misuse of powers. Besides, direct jurisdiction was interpreted restrictively in case law. However, things changed a great deal over the years. Legislative and above all statutory texts gave the Council of State direct jurisdiction over more matters, and often expanded it to include full-jurisdiction appeals. Furthermore, case law began to give a broader interpretation of the importance of cases that could fall under the Council of State's direct jurisdiction. In the early 1980s, only 10% of the cases the

Council of State handled concerned matters under its direct jurisdiction, but this had doubled by the end of the decade and reached 28% in 1999 and 31% in 2009.

The second part of the presentation looked at efforts to restrict direct jurisdiction. First, the Administrative Justice Code, which came into force in 2001, listed ten areas coming under the direct jurisdiction of the Council of State. The Code set down that appeals on the misuse of powers and full-jurisdiction appeals are of the same nature and attempted to rationalise direct jurisdiction by giving it both a logical basis and a legal justification. Hence the Council of State's direct jurisdiction can be justified by the subject of the disputes in question or by the interests of proper administration of justice by the administrative court. Several years later, the decree of 22 February 2010 redefined the Council of State's direct jurisdiction by abolishing derogations that were no longer justified and refocusing the Council of State on its primary role as a court of cassation. This led to a reduction in the number of cases where the Council of State's direct jurisdiction was justified by the subject of the dispute (or the importance of the dispute). Matters under the Council of State's jurisdiction in the interests of proper administration of justice were reassigned to specific administrative courts (disputes arising abroad and acts with a scope of application extending beyond the jurisdiction of a single court). The redistribution was carried out according to clear, detailed criteria.

Finally, it should be noted that the French system has a quick, simple mechanism for resolving jurisdiction-related problems within the administrative court system if there is any doubt about which administrative court has jurisdiction, and it has been working well for over 30 years. As for the rest, the Council of State's distinguished position enables it to ensure both the coherence of the system and the unity of administrative case law in the interests of the public service of justice and of all citizens, who can be sure of being equal before the law, without forgetting the need to act in the general interest.

3.2. In his brief oral presentation and equally succinct written contribution, Mr Zdenek Kühn, a judge at the Supreme Administrative Court of the Czech Republic, outlined how the court's exclusive powers are understood and applied. The court, which is made up of 28 judges and is based in Brno, began work in 2003, with the 2002 law on administrative disputes having drawn on the Austrian administrative court system.

The speaker pointed out that there were many similarities with the Croatian system. Before the Czech Republic joined the European Union, it did not meet some of the requirements outlined in the European Convention on Human Rights given its administrative court system and the lack of a filtering mechanism for appeals. At present, the Supreme Administrative Court has exclusive competence over several categories of dispute. Disputes relating to electoral matters are divided between the Constitutional Court and the administrative courts, depending on the type of election. The power to monitor political parties, which has its roots in the history of the Czech Republic before the Second World War, has some similarities with the situation in Germany, where parties can be banned if they are not compatible with democracy. This power has been used against a neo-Nazi party that carried out anti-Roma actions. The Supreme Administrative Court also deals with several cases per year (fewer than ten) relating to the division of powers between various government bodies, or local and central authorities. As regards general acts, the matter has been debated for years but no one definition was adopted, so the definitions used in Germany and Austria were transposed. The matter is still relevant, relating as it does to common acts like zoning plans or even (more anecdotally) road signs.

3.3. In his oral presentation, Mr José Rosendo Dias, Vice-President of the Supreme Administrative Court of Portugal, began by outlining how administrative justice in Portugal has been organised since the reform of 2002 and 2003. Not counting the tax courts, there are 16 administrative courts ruling on matters of ordinary law in the first instance, monitored by two courts of appeal, with the Supreme Administrative Court ruling in the first instance on acts (or omissions) by various individual or collective authorities with national jurisdiction and on disputes about appointments to certain high-ranking positions. The Supreme Administrative Court sometimes acts as a court of appeal and is also a court of cassation, and it ensures the unity of case law by resolving questions relating to new laws (through preliminary ruling proceedings). With its conferred powers in the first instance, it may be

called upon to perform a review of lawfulness and award damages if an act's illegality has caused harm.

Review of lawfulness of general acts was first made possible by the 1984 Portuguese law on administrative disputes. The issue was that of identifying, in a functional way, general acts through the many judgments made in the domain. In principle, standards of this type do not target anyone in particular, but they may affect specific or identifiable individuals. There have been divergent interpretations, but it has been acknowledged that all general acts and regulations applying laws (or based on them) can be contested before the administrative courts with a view to checking their consistency with acts of greater value, namely general acts issued by the State's highest authorities, on which the Supreme Administrative Court rules in the first instance. There are four different ways to challenge such acts: two can end in a decision with effects that are restricted to the person bringing the action, while the other two can end in a decision with general effects.

With regard to the new Croatian Act on Administrative Disputes, the speaker commented that Articles 12 and 31, which deal with the jurisdiction of the High Administrative Court and the grounds put forward to support appeals, seemed both unclear and vague. He also believed that some clarification was needed as regards Articles 83 to 88 on the review of lawfulness of general acts. He felt that there should be more explanation of the details of appeals and who can bring them and whether a general act has to have individual measures applying it or whether a general act can be viewed as a self-executing norm, as in Portugal, and thus challenged directly. Comparison of the Portuguese and Croatian systems shows that there are some similarities, but there are also significant differences, especially with regard to the conditions for reviewing the lawfulness of general acts (very restrictive in Portugal when it comes to appeals by individuals). The speaker believed that in Croatia, a great deal depends on the interpretation given to Article 84, in particular, which relates to review of lawfulness of general acts and the effects of the decisions made in that domain.

4. ORGANISATION OF THE ADMINISTRATIVE COURTS OF FIRST INSTANCE: SETTING TARGETS AND EVALUATING JUDGES

4.1. In his contribution, Mr Ante Galić, President of the Administrative Court of Croatia, broached one of the major themes of the conference, highlighting that Croatia had inherited a system from the old regime (socialist self-management) that had led to a large number of courts being established. All major towns and regions want to have a court, and the example of commercial courts is symptomatic, with their number growing from seven to twelve. In a period marked by economic crisis and budget problems, it is important to merge and regroup. Following this reasoning, the number of municipal courts was reduced from 115 to 67. As regards the four new administrative courts, the solution is empirical and lessons will be learned from practice and the experiences of foreign courts. It remains to be seen whether the reform will lead to a surge in appeals before the new administrative courts and the High Administrative Court. At present, there are between 15,000 and 17,000 appeals, with a large number of pending cases linked to the raft of reforms being implemented at the moment, the aftermath of the war and the occupation, and privatisation. There has been no noticeable increase in the number of judges and the average time taken to resolve cases is around 30 months. The experts appointed by the European Commission recommend having fewer judges in the High Administrative Court (bearing in mind retirements), which would become an intermediate body.

Any measures taken with regard to the administrative court system are vitally important, given the effects that cases of this type have on the economy and jobs, plus the long time taken for judgments to be made, the sometimes tragic social consequences that administrative matters can have and the urgent social demand. Some of the new requirements may prove problematic, such as the need for oral proceedings, given the current number of judges. While each judge handles 80 cases a year in Slovenia, a judge in Croatia handles 270, meaning there is an issue with the speed and quality of the rulings. Judges' new duties include establishing the facts and ruling as part of a panel of three judges – a single judge can only rule in exceptional circumstances, and in simple cases. Some of the High Administrative Court's workload should be transferred to the new courts, with 43% going to the Administrative Court in Zagreb, 27% to the Administrative Court in Split and 15% each to the Administrative Courts in Rijeka and Osijek. The whole system should be up and running by 1 January 2012, and time is short. A great deal depends on the role played by the National Judicial

Council as regards the recruitment and selection of future judges. Many applications have been received for the 20 available positions, with applicants including judges from other courts and government workers. Selection criteria take account of the level of university education, attendance of colloquia and seminars and the score received at the end of training. Applicants' position on the final list will determine their progress. This recruitment and appointment procedure must be completed as soon as possible, in September 2011 if feasible, with a view to completing the training of the future administrative judges in the last few months of the year.

4.2. Mr Daniel Giltard, member of the French Council of State and President of the Nancy Administrative Court of Appeal, highlighted that for several decades, the administrative courts' (mainly quantitative) targets, which varied according to the level of the court, were set individually, following an old practice. Meeting targets consisted in complying with a 'standard', expressed as the number of cases to be handled each year. The rise in class action litigation led to the establishment of a uniform, transparent system covering the 42 administrative courts, the eight administrative courts of appeal and the Council of State, which manages the entire system.

The first stage of the evaluation is to set national targets for a three-year period, at the same time as the Finance Act is being prepared. The current period began in 2009, and three targets were set:

- reducing the time taken to pass rulings, linked to three performance indicators for each level of court (average projected time for a ruling to be passed in pending cases – average time taken for a ruling to be passed in ordinary cases – share of cases that have been pending for more than two years), with a fourth indicator for the Council of State (namely the average time taken for a ruling to be passed in cassation appeals);
- maintaining the quality of the administrative courts' decisions (measured by one performance indicator, namely the rate at which these decisions are revoked by courts of appeal and the court of cassation);
- boosting the efficiency of the courts, based on two performance indicators (the number of cases resolved per judge, varying according to the level of the court, and the number of cases resolved per court clerk).

Based on these national targets and performance indicators, each court draws up a three-year concerted court plan, which sets quantitative and qualitative targets, bearing in mind each court's situation and resources, and is updated each year. The procedure for developing this plan starts with a management conference, where the targets and the available (human and financial) resources are discussed with the general secretariat of the Council of State. The dialogue is concluded with a consensus of with settlement of the matter by the Secretary-General of the Council of State. The Secretary-General then sends an orientation letter to the head of each court, setting out the court's financial and human resources for the year and outlining the framework of the quantitative targets (cases registered, cases resolved, time taken to pass a ruling and pending cases). The head of court then holds a professional review meeting with each judge to determine (for each judge or panel of judges), on a case-by-case basis, targets expressed as an exact figure or with a variable margin (for example, 425 cases per year for a chamber of three judges at the Nancy Administrative Court of Appeal).

In the second part of his presentation, the speaker described the evaluation of the results, which is a far shorter procedure thanks to the computer tool that enables heads of courts to see the results in real time.

First, following the evaluation of individual results during the professional review, a report is written comparing the results achieved with the assigned targets and an evaluation of aptitudes and skills is produced. This details the relevant judge's aptitude for exercising judicial functions (knowledge, understanding of how the law is applied, quality of written and oral expression, participation in deliberations and decision-making ability), general professional aptitude (understanding of the context of the professional activity, ability to deal with change, respect for the collective organisation of work, autonomy and organisational skills), service (efficiency and effectiveness of work, sense of public service, involvement in the general operation of the court, interpersonal skills) and aptitude for performing support functions (ability to listen, anticipate and make suggestions, leadership skills, ability to exercise authority and public relations). Once the individual results have been evaluated, the head of court reports on the final results, which will be used to set the following year's targets, at the

management conference. The head of court also produces an annual activity report for the Vice-President of the Council of State. The administrative court inspection team inspects each court every three or four years.

This is the current system in France, but it is liable to change and should better integrate qualitative objectives and the evaluation thereof.

4.3. The last presentation was given by Ms M. A. A. Mondt-Schouten, member of the Dutch Council of State, who spoke about her previous experience as an administrative judge at the District Court of The Hague and briefly described how the Dutch administrative court system was organised. There is a rationalisation drive underway in the Netherlands too, aiming to close small courts with light workloads. The speaker pointed out that 50% of judges specialising in administrative law are women and reiterated that the overburdening of the administrative courts meant that each judge has to handle around 300 cases a year – fortunately, they are helped by assistants, who write the draft judgments. In 2010, the District Court of The Hague handled approximately 15,000 cases (of which around 5,000 related to aliens, almost 4,000 to finance and taxation and less than 6,000 to other matters) with a workforce of less than 30 judges, including women working part-time, supported by 58 assistants and 35 administrative support staff. Cases are normally resolved within a year, but this raises questions about the quality of the rulings made, inasmuch as a balance must be struck between speed and quality. As well as ruling quickly and well, judges must spend 30 hours a year attending ongoing training in their courts. Everything is evaluated, and internal review is important – judges from other courts attend each others’ hearings and are invited to evaluate a number of aspects, such as the sitting judge’s behaviour towards the parties involved and the applicants. There is no mechanism for filtering appeals, so to speak, but the General Administrative Act stipulates that the author of the contested act must be consulted before an appeal is brought before a court. The risk of divergence between panels of judges and courts is a particular problem. From a procedural viewpoint, settlements can sometimes be reached but if this does not happen, proof can be provided and questions asked. Appeals (covering around 7,000 cases) can lead to a total or partial annulment.

WORK SUMMARY

Summarising the oral presentations (which referred to written reports for further reading) and ensuing discussions in a bid to effectively establish any kind of overview is an impossible task given the significant differences between the national systems, despite any observed similarities, and the scale of the unresolved issues and questions in connection with the restructuring of the Croatian administrative court system and the amendment of the old and new texts on which it is based.

History, respective legal cultures, different national institutional contexts and inherited liabilities make mechanical or even partial transposition impossible. Consequently, we know that any existing compatibility between the donor state(s) and the recipient state must be random. As such, it is the responsibility of those actually instigating the reforms in Croatia to study the various European systems that could serve as benchmarks for administrative judicial review, to adopt their identified strengths with a view to establishing a corpus of effective rules and to unearth mechanisms tailored to modern-day needs and European requirements, in the knowledge that the presented foreign models have themselves more or less successfully overcome some of the problems facing (or about to face) Croatian administrative justice.

At the heart of the reform and the establishment of the new administrative court system in Croatia is the protection of individual rights in connection with the administration through respect for the principles of lawfulness and constitutionality. But the administrative courts must also be able to protect public interest and safeguard the vital interests and prerogatives of the state such as it is conceived by the Croatian constitution, and such that it must be organised and serve not only to meet

the challenges of social demand and impending accession to the European Union, but also to incorporate the European standards inherent to European law, for which the sources of inspiration are themselves multiple.

At present, Croatia has a mixed administrative judicial review system which regularly calls on the Administrative Court (in future the High Administrative Court responsible for ruling on appeal), the Constitutional Court responsible for both constitutionality and lawfulness (of general administrative acts in particular), and the judicial courts (for such issues as contracts and liability). The Supreme Court intervenes in cassation complaints, and the rulings of the Constitutional Court are binding on all other courts. This system – like many others – makes it inherently difficult to define jurisdiction and ensure unity and consistency of case law, especially since in many cases the definition of certain key legal concepts and administrative actions in Croatia is unsatisfactory.

ISSUES RAISED DURING THE CONFERENCE OR DEDUCED FROM THE WORK UNDERTAKEN

The featured reports and discussions focused on a number of quite specific points: several speakers addressed persistent issues regarding both their own national systems and the new Croatian law on administrative actions. The necessary explanations relate primarily to:

- the nature and method of reviewing general (or statutory) acts;
- the jurisdiction of the court in reviewing lawfulness;
- the impact of annulment rulings (retroactivity, *inter partes* or *erga omnes* effects, implementing measures);
- the need to maintain unity of case law to avoid differences between rulings;
- the crucial determination of the respective jurisdiction areas of the various courts responsible for intervening in administrative matters.

In the case of Croatia, it also transpired that some other basic concepts had to be clarified, i.e.:

- the concept of administrative acts;
- the concept of public service;
- the concept of persons in charge of public-service missions;
- the concept of public power (in the sense of the ‘public powers’ possessed by certain legal persons managing activities of general interest or carrying out public-service missions and likely to report to the administrative court in connection with some of their actions).

While the representative of the Constitutional Court of Croatia regrets that the constitution was not more accurate in its determination of the jurisdictions and respective intervention areas of the Constitutional Court and the Administrative Court, it is clear that in this regard: future dialogue between the national courts themselves (and between the national courts and the European courts) is vital to the successful operation of the future Administrative Court of Croatia and its future position within the state and its court system. A minimalist reform regarding the status of the High Administrative Court would complicate not only the allocation of exclusive jurisdictions – or jurisdiction in the first instance – to the relevant court (inevitable given the lack of experience possessed by the future administrative courts and the uncertainties around their recruitment and establishment), but also the system for resolving jurisdictional issues within the administrative court system, which is vital and must be quick and simple. Clearly, a certain category of more significant acts according to subject (acts for which the economic and social stakes or political context are sensitive, or which come from higher administrative authorities) can be dealt with only by a high-ranking court responsible for regulating the entire system.

Logically, the rank occupied by the High Administrative Court of Croatia will largely determine certain essential changes regarding:

- the powers of the administrative court and the less tentative, more effective use of full-jurisdiction appeals under the court’s unlimited powers;

- the possible adjustment of the impact of rulings (absolute or relative authority, retroactivity or not of annulments depending on the category of acts concerned and the various types of judicial appeal made);
- the investigational measures likely to be ordered by the courts;
- the submission for judicial review of all administrative acts considered sublegislative, especially with a view to promoting national legality and the primacy of Community rules over national norms in general;
- the need to break with the tradition and ideology according to which the authority and independence of courts was treated with suspicion (a subject raised by speakers from countries with similar pasts to that of Croatia and which have recently acceded to the European Union).

The example of countries where the judicial review of administrative acts is most extreme proves that it should be possible to enable the administration and the authors of general or individual administrative acts that have become illegal (due to legislative or factual changes) or illegal *ab initio*, to order the repeal or removal of such acts (before or after the intervention of the court), by drawing a distinction depending on whether the acts establish laws or not, and depending on the point at which the acts are removed (during the appeal or after its expiry). A more thorough assessment must also be conducted on: the criteria for distinguishing between statutory instruments and individual acts; the respective arrangements of those acts; the impact of the (direct or indirect) recognition of the illegality of the relevant statutory instrument; the concept of *locus standi* in direct action against acts of this type, and; the practicalities of publishing general acts, particularly those from local authorities, with a view to facilitating the monitoring of such publishing.

The ongoing reform in Croatia is truly a leap into the unknown, which could be seen as an argument for filtering appeals to some extent. The idea put forward – which involves referring the task of setting out the practical details of such screening to the Croatian constitution, on the grounds that constitutional rights may be involved in administrative disputes – does not seem likely to be adopted and is the result of an outmoded, simplistic view of the court's role (which has changed significantly in Europe), and of the ignorance of restrictive European sources governing rules as to procedure. By restructuring its administrative court system, Croatia is banking on a number of things: the effectiveness of the procedures and actions of the future administrative courts; a change in the behaviour of the (state and local) public administration; a prevailing legal and administrative culture. Speaking of experience in France, Daniel Giltard pointed out that only 12-18% of the rulings handed down by courts of first instance were appealed and that, as a result, systematic screening was not necessarily an issue at this stage. After all, it was at the cassation stage (before the Council of State of France) that such screening took place. In reality, 96% of rulings by administrative courts were neither annulled nor reversed. Several other speakers also expressed doubts about the need to screen appeals *a priori*, before establishing the actual risk of deviation.

It was also pointed out that in administrative proceedings in Croatia, there were two degrees of internal control before referral to the courts. However, the effectiveness of this mandatory preliminary internal control has yet to be verified (and there is a lack of statistics to this end). This leads one to question the role of legal practitioners within the administration and the legal training of administrative officers in general (those of the state and local communities), and particularly high-ranking officials (within ministries and their external departments).

The future administrative court system in Croatia must acquire the resources (both material and human) to deliver high-quality justice and reconcile the legal certainty of citizens with a reformed administrative court system that functions as effectively as possible.

While in some European states the responsibility to review regulatory acts is sometimes assigned to the constitutional court and sometimes shared with the supreme administrative court, in many other countries with longstanding administrative courts, all general acts, i.e. state and local acts (both being sublegislative), are subject to judicial review primarily by administrative courts. In this connection, several speakers referred to the wealth of experience amassed by Belgium and France in reviewing

statutory instruments. The speakers also stressed that, in principle, the constitutional court exerted an abstract control and did not rule based on the facts. They deemed that this called for extended control by a supreme administrative court, which would help in particular to avoid rulings on the lack of jurisdiction of the constitutional court (especially where the nature and criteria of the regulatory act are unclear), which further delay the final settlement of disputes.

CONCLUSIONS AND RECOMMENDATIONS

The role of administrative courts is to review the actions of national and local executive powers, local communities and bodies vested with public powers. They are at the heart of the relationship between citizens and public authorities and are sometimes called on to annul or even reverse the rulings made by authorities with executive powers, their officers or bodies under their control. Without a doubt, the societal and political stakes of their activities are high.

To truly subject the administration to law, the Croatian administrative court system as a whole must be able to:

- control the duration of rulings;
- exert efficient control;
- employ effective procedures;
- ensure the implementation of rulings handed down.

Given the imminent entry into force of the reform, urgent attention must be given to:

1. **the need to quickly ‘implement’ the new Act on Administrative Disputes (ZUS) by appointing administrative judges for the courts of first instance, to ensure there is enough time for their vital training so that they can fulfil their new roles as effectively as possible;**
2. **mapping out – in line with the recommendations made by the experts in connection with the CARDS 2004 project – the transformation of the Administrative Court of the Republic of Croatia into the High Administrative Court of the Republic of Croatia.**

It is clear from the work undertaken at the conference that the identified obstacles will be all the more easily overcome when the administrative court system, currently organised over two levels, is placed under the control of a single High Administrative Court which, in this instance, will be able to:

- better ensure the unity, consistency and predictability of case law;
- more effectively manage and evaluate the functioning of administrative courts and the actions of their members;
- resolve potential conflicts of jurisdiction within the administrative court system;
- review more effectively and with sufficient authority key administrative acts likely to fall under its exclusive (or direct) jurisdiction;
- better ensure the actions of administrative authorities with national jurisdiction as well as those of all bodies vested with public-authority prerogatives;
- truly follow up the precise implementation of rulings handed down by administrative courts;
- supervise better and with sufficient authority the actions of administrations in general;
- identify underlying procedural shortcomings and propose measures to correct them.

This transformation into a High Administrative Court will help to deliver better guarantees of high-quality justice by reconciling Croatia with the most widely used tried-and-tested models in Europe.
