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Due Process

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This questionnaire focuses on the limiting of a person's procedural rights based on the principle of procedural economy. First and foremost, it seeks to answer the questions whether Member States have regulated the simplification of procedure in resolving certain types of administrative disputes, and where is the line drawn between effective court procedure and the protection of a person's procedural rights.

The principle of effective judicial protection is a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union (joined cases C-402/05 P and C-415/05 P: Kadi, p 335; C-432/05: Unibet, p 37, and the case law referenced therein). The Court of Justice of the European Union (CJEU) has stated that the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented (C-199/11: European Union v. Otis NV and others, p 48).

On the other hand, it is the CJEU's settled case law that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (C-166/13: Mukarubega, p 53, and the case law referenced therein). In addition, the CJEU has stated that the principle of effective judicial protection does not only require that everyone should be able to exercise their right of access to court, but also that the administration of justice should be effective (F-3/11: Marcuccio, p 53). For instance, according to the CJEU, as long as the person can exercise their right to be heard, Article 47 of the Charter does not require an oral hearing in each case (see, for example, C-239/12 P: Abdulrahim, p 42; joined cases T-589/14 and T-772/14: Musso, p 59).

It follows from Article 52 subsection 3 of the Charter and the explanations relating to Article 47, that when defining the meaning and scope of the principle of effective judicial protection, it is also important to look at Article 6 of the European Convention for the Protection of Human Rights and the case law of the European Court of Human Rights (ECHR) on the topic.

According to Article 6 subsection 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of a fair trial also includes the format of hearing a matter. According to the case law of the ECHR, a court case generally has to be reviewed in an oral hearing by at least one court instance; however, Member States can implement simplified proceedings for smaller and less complex disputes. This can serve the interests of the parties by facilitating access to justice, by reducing costs related to the proceedings and by accelerating the resolution of disputes.

According to ECHR case law, simplified proceedings can generally mean written proceedings, except in cases when the court deems an oral hearing to be necessary or if a party to the proceedings requests a hearing (in which case the request may be refused by the court) (see Pönka vs Estonia, No. 64160/11, p 30; on the obligation to hold a hearing see also: Göç v. Turkey [Grand Chamber], No. 36590/97, p 47, ECHR 2002-V, and the case law

referenced therein; Miller v. Sweden, No. 55853/00, p 29, February 8, 2005). ECHR has accepted exceptional circumstances for foregoing an oral hearing in cases where the proceedings concerned exclusively legal or highly technical questions, and which by their nature are not complex (see Koottummel v. Austria, No. 49616/06, p 19, December 10, 2009, and the case law referenced therein, Allan Jacobsson v. Sweden (no. 2), p 49; Valová, Slezák and Slezák v. Slovakia, p-s 65-68, Varela Assalino v. Portugal (dec.); Speil v. Austria (dec.), Schuler-Zgraggen v. Switzerland, p 58; Döry v. Sweden, No. 28394/95, p 41; and contrast Salomonsson v. Sweden, p-s 39-40; Jussila v. Finland [GC], No. 73053/01, p-s 41–42 and 47–48). A case can also be heard in simplified proceedings or written proceedings if the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see Döry v. Sweden, p 37) or if written proceedings are more effective than oral ones (Jussila v. Finland [GC], p-s 41–42 and 47–48).

Simplified proceedings in the context of this questionnaire mean special arrangements in administrative court procedure (a type of procedure) that allow for the court proceedings to be carried out in a simpler or faster manner than usual (shortened proceedings, accelerated proceedings, simple proceedings or any other special arrangements for resolving an administrative case in administrative court). Simplified proceedings, their prerequisites and nature are dealt with in part A of this questionnaire. It must be noted that in part A of the questionnaire, simplified proceedings do not include written proceedings without any other simplification, nor limitations of the right to appeal. The possibilities for resolving administrative cases in written proceedings will be dealt with in part B of the questionnaire, which also briefly touches upon the possibility of conducting a hearing via videoconferencing.

If simplified proceedings do not exist as a separate type of procedure in administrative courts in your country, when answering please do consider whether there are other, specific possibilities to make procedures more effective in certain ways (for example, exceptions in taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, etc.).

For a better understanding, we want to explain, that since 2014, a so-called „9+2 model" adopted by the Austrian federal legislator, became effective, which meant that since 2014 one Federal Administrative Court ("Bundesverwaltungsgericht"), one Federal Fiscal Court ("Bundesfinanzgericht"), and nine Administrative Courts of the Provinces ("Verwaltungsgerichte der Länder") were established. Against the decisions of the aforementioned Administrative Courts, a complaint can be filed with the Supreme Administrative Court or the Constitutional Court.

Therefore, according to Article 133 para. 4 of the Austrian Constitution Law final complaint against the ruling of an Administrative Court is admissible, if the solution depends from a legal question of essential importance, in particular because the ruling departs from the case-law of the Supreme Administrative Court, such case-law does not exist or the legal question to be solved has not been answered in uniform manner by the previous case-law of the Supreme Administrative Court. If the ruling only is on a small fine, federal law may provide that the revision is inadmissible.

The aforementioned limited admission to the Supreme Administrative Court stipulates a simplification and serves the principle of procedural economy.

Part A

Efficiency of Court Proceedings (at the Expense of Procedural Guarantees)

1. Simplified proceedings

Does your administrative procedural law provide for the possibility of resolving administrative cases in simplified proceedings: on the level of the highest administrative court and/or in lower administrative courts? (YES/NO)

- If NO, then are there any other possibilities for simplifying administrative court procedures (are there exceptions in, for example, taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, etc.)? Have there been discussions about the creation of simplified proceedings as a separate type of procedure? What are the main positions on the issue?

There are no such simplified proceedings at the level of the Supreme Administrative Court or the Administrative Courts. However, there are several procedural possibilities for simplifying administrative court procedures.

*At the level of the **Administrative Courts,** there are the following simplifications:*

(i) The Proceedings of Administrative Courts Act foresees certain deadlines for filing a complaint. Pursuant to § 7 para. 4 leg.cit the period for filing a complaint against an administrative decision by an authority pursuant to Art 130 para 1 sub-para 1 of the Federal Constitutional Law, against instructions pursuant to Art 130 para 1 sub-para 4 of the Federal Constitutional Law or for unlawfulness of the conduct of an authority in executing the law pursuant to Art 130 para 2 sub-para 1 of the Federal Constitutional Law is four weeks. The period for filing a complaint against the exercise of direct administrative power and compulsion pursuant to Art 130 para 1 sub-para 2 of the Federal Constitutional Law is six weeks.

(ii) The regulation of the scope of the review also serves the principle of procedural economy whilst limiting a person's procedural rights. Unless an Administrative Court finds that there is unlawfulness on the ground of the authority's lack of jurisdiction, it shall review the contested administrative decision, the contested exercise of direct administrative power and compulsion and the contested instruction on the basis of the complaint or on the basis of the declaration on the scope of the complaint (§ 27 of the Proceedings of Administrative Courts Act).

(iii) According to § 24 of the Proceedings of Administrative Courts Act, Administrative Courts shall hold, upon request or if an Administrative Court deems it required, a public oral hearing.
However, unless otherwise provided in federal or provincial legislation, the Administrative Court can dispense with a hearing irrespective of a party's request if the files reveal that an oral discussion is not expected to further clarify the legal matter and if dispensing with the hearing is in conflict with neither Art 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette No. 210/1958, nor Art 47 of the Charter of Fundamental Rights of the European Union, Official Journal No. C 83 of 30 March 2010, p. 389 (§ 24 para. 4).

(iv) In accordance with the principle of procedural economy the Administrative Courts have to generally - with a few exceptions - decide on the merits of a case if the relevant facts have been established or the establishment of the relevant facts by the

Administrative Court itself is in the interest of expediency or results in substantial cost savings (§ 28 para. 2 and 3 of the Proceedings of Administrative Courts Act).

(v) *§ 29 of the Proceedings of Administrative Courts Act concerning pronouncement and copies of rulings states that (1) rulings shall be pronounced and issued in the name of the Republic. Reasons for the rulings shall be given. (2) If a hearing has taken place in the presence of parties, the Administrative Court, as a rule, shall immediately pronounce the ruling including the essential reasons for the decision. (2a) In case of an oral pronouncement, the Administrative Court has to issue or serve the minutes to the parties entitled to file a final complaint with the Supreme Administrative Court or Constitutional Court. The minutes have to implement the instruction (i) about the right, within two weeks after issuing or serving the minutes, to request the written copy of the decision according to para 4; (ii) about the fact, that a request of a written copy of a decision according to para 4 is a prerequisite for the permission of a final complaint with the Supreme Administrative Court or the Constitutional Court. (2b) In case the decision has already been pronounced to a party, a request for the written copy of the decision according to para 4 may already be filed from the date, on which the applicant becomes aware of the decision. A request according to para 4 is to be served to the other entitled parties. (3) The pronouncement of the ruling shall be dispensed with if (i) a hearing has not been held (continued), or (ii) the ruling cannot be made immediately after the end of the oral hearing, and it is ensured that everybody can inspect the ruling. (4) A written copy of the ruling shall be served on the parties. In the legal matters referred to in § Art 132 para 1 sub-para 2 of the Federal Constitutional Law, a written copy of the decision shall also be served on the competent federal minister. (5) In case the parties wave filing a final complaint with the Supreme Administrative Court or the Constitutional Court or in case within two weeks after issuing and serving of the minutes according to para 2a, respectively, no written copy of the decision is requested according to para 4 by at least one entitled person, the decision can be issued in a shortened form. The shortened form has to include the verdict of the ruling as well as a reference to the waiver or the fact, that no written copy of the decision according to para 4 had been requested.*

(vi) *Generally the Proceedings of Administrative Courts Act does not foresee an interdiction of novation. Certain material laws however entail such regulations. The BFA Procedures Act[1] (BFA-VG) entails a provision, which restricts the submissions in the appeals proceedings before the Federal Administrative Court (partial interdiction of novation § 20 para. 1 and 2 leg.cit.).*

At the level of the ***Supreme Administrative Court,*** *the following simplifications can be found:*

(i) *The Supreme Administrative Court Act 1985 foresees in its § 26 para. 1 a period of six weeks for filing a final complaint against a decision by an Administrative Court (period allowed for the final complaint).*

(ii) *According to § 25a (4) of the Supreme Administrative Court Act 1985, a final complaint for infringement of rights is not admissible, if, in an administrative penal matter or fiscal penal matter, (i) a fine of up to 750 euros and no prison sentence was allowed to be imposed and (ii) a fine of up to 400 euros was imposed in the decision.*

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[1] Federal Act on the general rules for procedures at the Federal Office for immigration and asylum for the granting of international protection, the issuing of residence permits for extenuating circumstances reasons, deportation, tolerated stay and issuing of stay terminating measures, furthermore the issuing of documents for aliens.

This provision also entails an inadmissibility of final complaints against certain orders of the Administrative Courts.

(iii) *In accordance with § 29 (5) of the Proceedings of Administrative Courts Act, a final complaint to the Supreme Administrative Court is not admissible, if, after the decision of the Administrative Court has been pronounced or served, it has explicitly been waived to file a final complaint. Such a waiver must be announced to the Administrative Court in a written way or explained on record. In case such a waiver was not given by a legal professional authorized by representation or in the presence of such a person, the waiver can be revoked within three days in a written way or explained on record. A waiver is only permissible, if the party had previously been informed about the consequences of such a waiver. In case the decision of the Administrative Court had been pronounced orally (§ 29 para. 2 of the Proceedings of Administrative Courts Act), a final complaint is only permissible after a request for a written copy of the decision according to § 29 para. 4 leg.cit. by at least one entitled person.*

(iv) *Contrary to the procedure before the Administrative Courts, the principle of interdiction of novation applies to the procedure of the Supreme Administrative Court. This principles is derived from § 41 of the Supreme Administrative Court Act 1985: The Supreme Administrative Court shall, unless it finds unlawfulness because of lack of jurisdiction of an Administrative Court or because of violation of procedural rules (§ 42 para 2 sub-paras 2 and 3), review the contested decision or the contested order on the grounds of the facts assumed by the Administrative Court within the scope of the points of the final complaint submitted (§ 28 para 1 sub-para 4) or within the scope of the declaration on the scope of the final complaint (§ 28 para 2). If it finds that for the decision on the unlawfulness of the decision or order in one of the points of the final complaint or within the scope of the declaration on the scope of the final complaint there may be relevant reasons which so far have not been notified to one of the parties, the parties shall be heard and, if necessary, the hearing adjourned.*

(v) *The Supreme Administrative Court Act 1985 also entails provisions regarding hearings before the Supreme Administrative Court (§§ 39 and 40 leg.cit.).*

(vi) *The decisions of the Supreme Administrative Court shall be pronounced and issued in the name of the Republic. Each decision shall contain the reasons, unless the legal issue is clear on the basis of decisions rendered so far, it is sufficient to just mention them (§ 43 para. 1 and 2 leg.cit.).*

- If YES, please answer questions 2–4.

2. Prerequisites of simplified proceedings

2.1 To hear a case in simplified proceedings, is the prerequisite:

a. that the dispute is in a specific area of law? Please specify which areas (for example, minor traffic violations, administrative fees, aliens' cases, extradition *etc.*);
b. a minor infringement? Please specify criteria for which infringements are considered minor (for example, is the breach of law in question of a low priority or is the amount of the claim small; is it characterised by a monetary limit and if so, what is it?). If possible, please submit the legal definition of a minor infringement or a small claim, as well as examples or definitions from case law;
c. that the solution to the case is clear and obvious;
d. something else (please specify)?

2.2 Have the possibilities of hearing a case in simplified proceedings been exhaustively defined in law or is it case law instead that has a decisive role in whether it is used (for example, a discretionary decision)?

2.3 Can the court use simplified proceedings regardless of whether the parties to the proceedings agree to it?

2.4 Can a person appeal the implementation of simplified proceedings separately from the final court decision?

2.5 Can simplified proceedings be carried over into general procedure and *vice versa*?

3. Nature of simplified proceedings

3.1 Which rules of administrative court procedure are mandatory in simplified proceedings (for example, hearing the parties, general principles of administrative court procedure, *etc.*)?

3.2 Which general rules of administrative court procedure do not need to be followed in simplified proceedings (are there exceptions, for example, in taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, public announcement *etc*.)?

See answers to question 1 (iii) and (v) regarding hearings and shortened decisions of Administrative Courts.

3.3 Are there differences in using simplified proceedings across the court instances?

3.4 What are the limitations on the right to appeal in case of simplified proceedings? Can an administrative case that is resolved in simplified proceedings be appealed up to the highest instance? If there are differences compared to general procedure, please describe how a case for which simplified proceedings are used moves through the court system (for example, the appeal might be submitted directly to the highest court, etc.).

In this regard see the listed limitation in the answer to question 1.

3.5 In simplified proceedings, can a court issue a judgment without the statement of reasons? (YES/NO)

See answers to question 1 (v) regarding hearings and shortened decisions of Administrative Courts as well as (vii) with regard to the Supreme Administrative Court.

- If NO, then why is such a possibility not provided?

- If YES, then:

  a. what kind of information does that judgment have to contain?
  b. do the parties to the proceedings have the right to demand for the judgment to be supplemented with the statement of reasons?

4. Simplified proceedings in court practice

Since there are no simplified proceedings as such, the following questions cannot be answered.

4.1 What is the share of cases resolved in simplified proceedings out of all resolved cases? (%)

4.2 Has the case law in your country pointed to any problems related to simplified proceedings, and if it has, what kinds of problems were they? Please give up to 3 examples.

Part B

Right to Public Hearing

1. Are there any types of administrative cases or any court instances in which only oral proceedings are allowed (i.e. written proceedings are prohibited)?

No.

2. Under which circumstances may cases be resolved in written proceedings? Can the justification be, for example:

a. exclusively legal questions;

Yes, the jurisprudence of the Supreme Administrative Court as well as of the Administrative Courts of the Provinces is in accordance with the jurisprudence of the ECHR; (for example Ra 2016/04/0117; 2004/06/0227; and VGW-111/026/12373/2015).

b. highly technical questions;

Same here: 2004/06/0227; 2007/06/0280; VGW-111/026/12373/2015.

c. the case raises no questions of fact or law that cannot be adequately resolved on the basis of the case file and the parties' written observations;

Yes, see § 24 (4) of the Proceedings of Administrative Courts Act, as mentioned above.

d. other bases, for example at the request of one of the parties to the proceedings?

3. Can oral proceedings also be carried out via videoconferencing (i.e. in a manner where either a party to the proceedings or their representative or counsel can be in a different place during the hearing and carry out procedural acts in real time, through an audiovisual transmission)? (YES/NO)

The procedure of the Supreme Administrative Court does not foresee such a possibility.
However, in the procedure before the Administrative Courts, oral proceedings can be carried out via videoconferencing.
According to § 25 para. 6a of the Proceedings of Administrative Courts Act, the Administrative Court may, whenever technically possible, carry out a questioning by using

technical equipment for transmitting images as well as sound, unless the personal appearance before the Court is more appropriate for reasons of procedural economy or necessary due to special reasons.

- If NO, then has the creation of such a possibility been discussed? What were the main positions on the issue?

- If YES, then:

    a. what are the legal limitations (for example, in which kinds of cases is it not permitted)?

Generally, video conferences are permissible in the administrative and penal procedures. However, the limitations result from reasons of procedural economy (for example very high costs of using video questioning) or special reasons (such as extensive use of documents or physical inspection of materials; or the necessity to visit a person at home, who is not transportable).

    b. have the risks of videoconferencing and the protection of a person's rights been discussed? What were the main positions on the issue?

4. Can oral proceedings also be carried out outside the court-room (in prison, hospital *etc*)? In which circumstances is this possible?

The General Administrative Procedure Act 1991, which is also subsidiarily applicable in the proceedings before the Administrative Courts, entails a provision regulating the possibility of conducting an oral hearing in conjunction with a judicial inspection at the concerned site (§ 40 para. 1 leg.cit.; see also the decision of the Supreme Administrative Court from 9.6.1994, 94/06/0085, regarding a construction procedure).

Thank you!