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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.).

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?

The Romanian legislation does not provide simplified proceedings or written proceedings for smaller or less complex administrative disputes.

According to the Civil Procedure Code, the court may decide on a request only after the summoning or appearance of the parties unless the law otherwise provides. In other words, in principle,all administrative litigations are judged in a public hearing, with the participation of the parties, who orally support their requests.

The meaning of the provisions “unless the law otherwise provides” regards the accesory applications judged in the council chamber, without the parties` summons, such as: the request for abstaining or refusal of a judge; the complaint concerning the delay of the settlement of the case; the application for enforcement; the request for seizure. It has to be underlined that this accesory applications do not solve the principal case. Also, it has to be mentioned that the Civil Procedure Code regulates that the parties have the posibility to request the case to be judged without their presence. Inclusively in that situation, the case will be judged in public hearing.

In the filed of the administrative litigations, can be held as a simplified procceding the preliminary complaint provided by the Law No.554/2004 on Contentious Administative. According to article 7 of this law, before

applying to the competent administrative disputes court, the plaintiff has to request to the issuing authority the withdrawal of respective act, totally or partially, within 30 days from the date of the act communication. Under certain circumstances and only in case of the unilateral administrative acts, the preliminary complaint may be filed even after this time period but within no more than 6 months from the issuing date of the act. The complaint may be as well applied to the superior body in the administrative hierarchical order, if such exists. The case-law established that the preliminary proceeding is compulsory only for the actions regarding the annulment of an administrative act, but not for the actions founded on the administration silence or the unjustified refusal of solving the petition, when the injured person is entitled to submit directly to the court. Yet, this preliminary administrative proceeding does not match the simplified proceedings or the writing proceedings referred to in the preamble of the questionnaire.

Regarding the goal of the mentioned proceedings for servings the interests of the parties by facilitating access to justice, by reducing costs related to the proceedings and by accelerating the resolution of disputes we have to mentioned the following issues.

For example, in the case of misdemeanours to the law on road traffic, in 2012, the law provided that the decision of the lower court on the complaint against the minutes for imposing the fine is definitive and it is not subject to appeal. This was a measure meant to simplified the trial considering it is a less complex dispute. In tha same year, 2012, the Romanian Constitutional Court (Decision no.500/2012) declared the measure unconstitutional for the following arguments: "*The State has an obligation to guarantee the effective nature of free access to justice and the right to defense. The lack of a remedy against the judgment given by the court as the first instance in the field of traffic on public roads is the impossibility of exercising effective judicial control over the principal and complementary sanctions, as well as the technical and administrative measures regulated by the law, the right of free access to justice becoming thus an illusory and theoretical right. […]The abolition of the judicial review of the court's judgment in the matter of contraventions to the traffic regime on public roads infringes […] the right of free access to justice and the right to defense while at the same time violating the requirements of a fair trial.*"

Also, the Civil Procedure Code from 2010, in force from 2013, comprise many provisions for simplifying the trial inclusively in the administrative courts. For example, in the case of the appeal in competence of the High Court of Cassation and Justice, it has to be mentioned the following two measures provided by the Civile Procedure Code , at least.

The most important measure is the procedure for filtering the appeals submitted to the High Court of Cassation and Justice.

The appeal filtering procedure is carried out without exception in the council chamber without the parties being summoned.

Within this procedure, the report on the admissibility in principle of the appeal is drawn up by the rapporteur (one of the judges who are part of the composition of the panel or the assistant-magistrate).

Based on the report, first of all, the High Court reviews the formal requirements of the appeal, such as: identification data of the parties, the contested decision, the existence of the grounds for illegality, signature of parties, representation by lawyer or legal adviser, stamp duty. If it is found that the appeal does not meet the formal requirements, the filter panel annuls the appeal by a reasoned decision which is not subject to any appeal.

In the second, reviewing the grounds for illegality, if it is found that the appeal is manifestly unfounded, the filter panel rejects the appeal by a reasoned decision which is not subject to any appeal.

The Romanian Constitutional Court (Decision No.485/2015) held that the provisions of the Civil Procedure Code regarding the obligation to formulate and support the appeal submitted to the High Court by legal persons through a lawyer or legal counselor are unconstitutional for the following arguments: *those provisions are contrary to the right of free access to justice and the rights of the defense, since the measure is excessive in relation to the legitimate aim pursued and leads to the impossibility of submitting the appeal; in the same sense, the European Court of Human Rights, interpreting Article 6 paragraph 1 of the Convention (Tricard v. France, paragraph 29) held that the rules on formalities for submitting an appeal seek to ensure the proper administration of justice and respect for the principle of legal certainty; however, those rules should not prevent the person concerned from using a remedy provided by law*.

Also, the Romanian Constitutional Court (Decision No.839/2015) held that the provisions that permit to the High Court to reject the appeal for the ground that it is manifestly unfounded are unconstitutional, for the following arguments: *rejecting of the appeal on the ground that it is manifestly unfounded presupposes the substantive examination of the appeal, while the procedure for examining the admissibility of the appeal must concern only purely formal aspects; thus, within this procedure the parties are not able to exercise the right of defense and the right to contradictory debates, so it is violated the right to a fair trial provided by article 6 paragraph 1 of the European Convention of Human Rights.*

- 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*.)?

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.).

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

- 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

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)?

As we mentioned before, according to Civil Procedure Code, all disputes – inclusively the administrative ones – are solved in a public hearing, with the participation of the parties, who orally support their requests. The Code also provides that the parties may expressely request the court to rule without their presence, on the ground of the documents submitted to the file.

When the parties request the case to be resolved without their presence, we could consider this is a kind of a written proceedings as long as the parties are not bound to be present for oral hearing and the court rules only on the basis of the written documents submitted to the file.

The only written proceeding provided by Civil Procedure Code is the appeal filtering procedure applicable in front of the High Court of Cassation and Justice.

Within this procedure, the High Court has the following possibilities:

- to reject the appeal as manifestly unfounded. As we mentioned before, this measure was declared unconstitutional by the Romanian Constitutional Court;
- to rule on the substance of the appeal if the question of law in the appeal is not controversial or is subject to constant jurisprudence of the High Court of Cassation and Justice. In this case, the Civil Procedure Code provides that parties must expressly agree that the appeal, when admissible in principle, should be settled by the filter panel. As far as we know, this possibility is not used in the High Court practice.

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

a. exclusively legal questions;
b. highly technical questions;
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;
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)

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

  There are no discussions regarding such possibilities.

- If YES, then:

  a. what are the legal limitations (for example, in which kinds of cases is it not permitted)?
  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 Romanian Legislation does not provide such a possibility.