

**Pre-trial Procedures in Administrative Justice Proceedings in  
England and Wales, France, Germany and the Netherlands**

*A comparative study with a view to the possible development of pre trial  
procedures in administrative law in Turkey*

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# CONTENTS

<b>SUMMARY .....</b>	<b>1</b>
Pre-Trial Proceedings in England and Wales .....	1
Pre-Trial Proceedings in France.....	2
Pre-Trial Proceedings in Germany.....	3
Pre-Trial Proceedings in the Netherlands.....	3
Comparative analysis.....	4
<b>I. PURPOSE AND SCOPE OF THIS STUDY .....</b>	<b>7</b>
<b>1. Introduction.....</b>	<b>7</b>
Judicial strategy .....	7
Expected Impact on economic and social development .....	8
<b>2. A short introduction to administrative procedure .....</b>	<b>8</b>
Public administration in a State bound by the Rule of Law .....	9
Legal protection against the administration and the European convention on human rights .....	10
<b>3. Terms of Reference.....</b>	<b>10</b>
<b>4. Method.....</b>	<b>11</b>
Comparative analysis .....	12
<b>II PRE-TRIAL PROCEEDINGS IN ADMINISTRATIVE LAW IN ENGLAND AND WALES</b>	<b>13</b>
<b>1. Introduction.....</b>	<b>13</b>
<b>2. Administrative practices concerning reconsideration of decisions .....</b>	<b>14</b>
Statutory inquiries .....	14
Reconsidering administrative actions.....	14
<b>3. Ombudsmen .....</b>	<b>15</b>
<b>4. The organisation of Administrative Adjudication.....</b>	<b>17</b>
The Tribunals Service and the Administrative Justice and Tribunals Council.....	21
<b>5. Tribunal Jurisdictions.....</b>	<b>22</b>
Standing/interested party/third party.....	22
Appeal of First-tier Tribunal decisions to the Upper Tribunal .....	23
Appeal against the Upper Tribunal decisions to the Court of Appeal .....	24
Judicial review by the Upper Tribunal .....	24
The relation between the decisions of the First-tier and Upper Tribunal and Judicial review by the High Court .....	25
<b>6. Tribunal Hearings and defense rights.....</b>	<b>26</b>
Organization of the hearings .....	26
Starting an appeal; time limits.....	26
The appeal form .....	26

After sending the appeal form.....	26
The enquiry form .....	27
After sending the enquiry form .....	27
Preparing for the tribunal hearing.....	28
The hearing; composition of the forum.....	28
The hearing event.....	28
The decision .....	29
After the hearing .....	29
Setting aside the decision .....	29
Appeal to the Upper Tribunal .....	29
Defense rights.....	29
Representatives .....	30
Directions.....	30
Expenses/costs/damages .....	30
<b>7. Evaluation.....</b>	<b>30</b>
Sources and literature .....	31
Annexes .....	32
Annex 1 - Flowchart of administrative legal protection in England and Wales.....	32
Annex 2 The Court structure of England and Wales.....	33
Annex 3 Statistics.....	34
Tribunals .....	34
Ombudsmen .....	35
<b>III. PRE-TRIAL PROCEEDINGS IN FRENCH ADMINISTRATIVE LAW .....</b>	<b>37</b>
<b>1. Introduction.....</b>	<b>37</b>
<b>2. Protection of the interested persons in pre administrative proceedings.....</b>	<b>38</b>
<b>3. Proceedings at Administrative Authorities – Recours administratif préalable .....</b>	<b>39</b>
Administrative authority – competences .....	39
Standing.....	41
Interested party/third party .....	42
Organisation of the proceedings .....	44
Defence rights.....	44
<b>4. Relation between pre-trial and judicial proceedings.....</b>	<b>45</b>
Recours administratif préalable facultatif (RAPF).....	45
Recours administratif préalable obligatoire (RAPO).....	45
Specific properties of the RAPO:.....	46
General time period in the case of RAPO .....	47
Sources of RAPO .....	47
Proceedings .....	48
<b>5. Proceedings before the Administrative Courts - Recours contentieux .....</b>	<b>50</b>
Possible claims of the individual.....	53
<b>6. Alternative dispute settlement .....</b>	<b>53</b>
Transaction .....	54
Mediation .....	54
Conciliation .....	55
Arbitrage.....	55
<b>7. Evaluation.....</b>	<b>57</b>
Literature and Other Sources .....	57

<b>Annexes</b> .....	<b>58</b>
Annex 1 - Flowchart of administrative legal protection in France.....	58
Annex 2 – Raw data – Tribunals Administrative .....	59
Annex 3 - Net data - Tribunals Administrative.....	59
Annex 4 - Raw data – Cours administratives d’appel .....	59
Annex 5 - Net data - Cours administratives d’appel .....	59
Annex 6 - Raw data – Conseil d’État .....	60
Annex 7 - Net data - Conseil d’État.....	60
Annex 8 – L’ordre judiciaire.....	61
Annex 9 – L’ordre administratif .....	62
<b>IV PRE-TRIAL PROCEEDINGS IN GERMAN ADMINISTRATIVE LAW .....</b>	<b>64</b>
<b>1. Introduction .....</b>	<b>64</b>
<b>2. The German Court System.....</b>	<b>65</b>
<b>3. Prejudicial proceedings .....</b>	<b>66</b>
<i>Procedural requirements</i> .....	67
<i>Filing the complaint</i> .....	67
<i>Standing</i> .....	67
<i>Who decides?</i> .....	68
<i>Rights of the defense</i> .....	68
<i>Suspensive effect and interim relief</i> .....	69
<i>Costs</i> .....	69
<i>The Widerspruchbescheid</i> .....	69
<b>4. The procedure before the administrative courts .....</b>	<b>70</b>
Competences of the courts .....	70
<b>5. Alternative dispute resolution .....</b>	<b>71</b>
Mediation .....	71
Ombudsman .....	72
Petition committee.....	73
The Ombudsman of Rhineland-Palatinate.....	74
<b>6. A Report From BAVARIA on an experiment with the Abolition of the Widerspruch in administrative procedure .....</b>	<b>74</b>
<i>Sources</i> .....	75
Annexes .....	77
Annex 1 Administrative procedures for redress within the German Administration.....	77
Annex 2 Flowchart of administrative proceedings in Germany .....	78
Annex 3 Statistical Information .....	78
<b>V. PRE TRIAL PROCEEDINGS IN DUTCH ADMINISTRATIVE LAW .....</b>	<b>81</b>
<b>1. Introduction .....</b>	<b>81</b>
<b>2. History of the development of Dutch administrative law .....</b>	<b>81</b>
<b>3. The current court system in the Netherlands .....</b>	<b>82</b>
<b>4. Dutch administrative law: main concepts .....</b>	<b>83</b>
<b>5. Legal Protection in the General Administrative Law Act.....</b>	<b>84</b>
Consequences of filing objections against a decision.....	85

Standing.....	86
Administrative Order .....	86
Administrative authority.....	86
Interested party/ third party .....	87
Organization of proceedings (administrative authority, advisory committee) .....	89
The logistics of informing parties, hearings and decisions .....	89
Who should conduct the hearing .....	90
The original decision was taken in mandate by a civil servant of the responsible administrative authority ...	90
The original decision was taken by the responsible administrative authority itself .....	90
Advisory committee.....	90
Exceptions to the obligation to organize a hearing .....	91
The decision following upon an objection.....	91
Defense rights.....	92
<b>6. Relation between the objection proceeding and court proceedings.....</b>	<b>93</b>
<b>7. Proceedings in administrative courts .....</b>	<b>93</b>
<b>8. Complaints and ombudsmen.....</b>	<b>94</b>
<b>9. Evaluation research on objection proceedings in administrative law .....</b>	<b>95</b>
<i>Literature and Other Sources</i> .....	97
<i>Annexes</i> .....	98
ANNEX 1 Flowchart of procedures of administrative legal protection in The Netherlands .....	98
Annex 2 Statistical data .....	98
<b>VI. COMPARATIVE ANALYSIS .....</b>	<b>100</b>
<b>1. Introduction .....</b>	<b>100</b>
<b>2. Legal protection .....</b>	<b>100</b>
Standing.....	101
Suspensive effect .....	101
Accessibility of the procedure .....	102
Rights of the defense.....	102
<b>3. Self correction.....</b>	<b>103</b>
<b>4. Law enforcement .....</b>	<b>105</b>
<b>5. Timeliness and efficiency .....</b>	<b>106</b>
<b>6. Auxiliary roles of ombudsmen .....</b>	<b>108</b>
<b>7. Intentions and effects: the need for periodic evaluation.....</b>	<b>108</b>
<b>VII. FINAL SECTION WITH RECOMMENDATIONS .....</b>	<b>110</b>
<b>Lessons and options for action .....</b>	<b>110</b>
Comparative Table .....	118

## Summary

The Turkish Ministry of Justice has identified the existing system of administrative justice without pre-trial procedures as an obstacle to the efficiency and effectiveness of the judicial services. The 2009 Judicial Reform Strategy and the Judicial Reform Action Plan call for a comparative study analyzing the experience in other countries to provide input into the policy debate in Turkey.

This study provides descriptions and analyses of approaches to the use of administrative pre-trial proceedings in **England & Wales, France, Germany, and the Netherlands**. It explains some foundational conceptions, provides four country reports that are structured similarly and then proceeds with a comparative analysis of the most relevant aspects in the countries under study. With some variations in the individual report, these aspects are:

- Function of administrative review
- The administrative bodies, their decision making competences and administrative review
- Procedural requirements
  - a. Timeliness
  - b. Effective conflict resolution
  - c. Defense rights
  - d. Protection of public and third party interests
  - e. Other
- Administrative courts and administrative pre-trial proceedings
- Other conflict resolution instruments (mediation, ombudsman, arbitration)
- Statistical information

### ***Pre-Trial Proceedings in England and Wales***

Initially, England did not have a separate field of administrative law, but recognized its existence over time. In principle, judges of the ordinary courts have the power to decide administrative cases (judicial review), unless Parliament has set up a further reaching statutory appeal procedure with full review. Pre-trial proceedings do exist in England as a patchwork of complaint procedures for redress of administrative decisions, within the discretion of the administration, administrative appeals, statutory inquiries and appeals to tribunals, next to appeals to courts for judicial review.

The growth of administrative law over time has had consequences for the organization of legal protection against the government. Nowadays, England has an Administrative Court,

which is part of the High Court. Its jurisdiction covers areas of administrative law as well as the supervision over inferior courts and tribunals.

The system is characterized by a multitude of tribunals of different kinds that handle about a million cases per year. Common but not always present features are: the ability to make final, legally enforceable decisions, subject to judicial review and appeal; independence from government departments, holding of a judicial public hearing, specialization, and a requirement to give reasons. In 2007, a reorganization effort established a system of administration of justice through tribunals of two levels: the first tier tribunal and the Upper Tribunal. The Administrative Court within the High Court, the Court of Appeal and the Supreme Court of the United Kingdom are the main courts for administrative law.

Although the tribunal procedures are not exactly pre-trial procedures as they exist on the European continent, they have in common with them that they are designed to provide simpler, speedier, cheaper, relatively informal, and more accessible justice than the courts. Rules about standing and the possibility for interested parties or a third party to appeal a decision by a public authority depend on the legislation creating specific jurisdiction for a tribunal. Despite some harmonization efforts, strong differences remain between the organization of different hearings, appeal procedures and related aspects, as tribunals still may set their own rules of procedure.

Ombudsmen can be found for many different public offices and private branches. Their recommendations are generally complied with. Court procedures in England and Wales are expensive because of the requirement of legal representation, and ombudsmen therefore take a substitute role to ensure citizens' access to redress.

### ***Pre-Trial Proceedings in France***

Since the 19<sup>th</sup> century, France has developed an administrative justice system adjudicating based on law and procedure largely established by legislation. The administrative courts hear cases against acts of public administration. Appeal instances are the administrative appeal courts, and the administrative supreme court is the Council of State (*Conseil d'Etat*). Citizens can settle disputes either by appealing a decision to the administrative authority, by challenging it in an administrative court, or by finding a solution through alternative dispute resolution mechanisms.

Pre-trial proceedings against administrative authorities give the administration a chance to revise its decision and therefore operate as a filtering mechanism so not all complaints end up in the courts. This procedure is generally optional (*recours administratif préalable facultatif*, or RAPF), but mandatory in certain cases (*recours administratif préalable obligatoire* or RAPO). In the latter case, the interested party, in order to be able to challenge the administrative decision before the administrative court, has an obligation prior to the court proceedings to complain before the administrative authority. These pre-trial proceedings are either directed to the authority that issued the act (*recours gracieux*) or to a superior authority (*recours hiérarchique*). In the absence of a general law on administrative procedure or litigation, most procedural aspects have been determined by case law.

Standing is generally limited to persons having a direct interest. The procedure is not subject to any formality unless required by legislation or case law. The pre-trial procedures are generally carried out in writing procedure. The scope of defense rights has been defined by case law. The relationship between RAPF and administrative court proceedings is loose. However, the RAPO is closely connected to the court proceedings, because evidence not introduced during the RAPO cannot be introduced during the court proceedings, and new arguments cannot be put forward either.

Alternative dispute resolution mechanisms in France comprise transactions. Signed transactions are an obstacle to introducing judicial proceedings in the same case. The



*Médiateur* is the French ombudsman, receiving around 72,000 submissions a year, out of which roughly two thirds are against administrative authorities. Conciliation procedures are also used in French administrative law. They are generally carried out by conciliation committees, but can also be used by an administrative judge. Arbitration is only of marginal importance in French administrative law.

### ***Pre-Trial Proceedings in Germany***

Germany has also developed an administrative justice system which, unlike the French system, is to a very large extent codified. The three tier court system comprises Administrative Courts, Higher Administrative Courts, and the Federal Administrative Court. In terms of informal remedies against administrative action, citizens can choose between remonstrance, complaint to a higher authority, or a disciplinary complaint. In terms of formal pre-trial procedures, there is the general procedure of objection (*Widerspruch*) as the most important formal remedy. Other procedures such as protest (*Einspruch*) and formal complaint (*förmliche Beschwerde*) are limited to acts related to the financial administration.

In general, the objection procedure is mandatory, but there are exceptions. The procedure serves three purposes: to give the administration a chance to correct its decision, to diminish the workload of the administrative courts, and to provide a cheap and speedy way for citizens to obtain redress. The objection procedure brings final closure in about 90 % of the cases. Generally, the objection is directed to the authority that has issued the decision. When it disagrees with the objection, the case is normally sent to a court-like objection committee (*Widerspruchsbehörde*) that will review the legality and expediency of the procedure. Recourse against its decision is open at the Administrative Court.

Empirical research undertaken over a two year period has assessed the impact of the objection procedure across various areas of law. The results show that, overall and despite room for some improvement, the objection procedure fulfills its role as effective and accessible recourse for citizens while alleviating the caseload pressure on the courts by operating as an effective filtering mechanism.

There are some procedural requirements to observe (timeframe, filing in writing). Standing is limited to the aggrieved party. The objection generally has a suspensive effect. Costs are refunded when the objection is successful. When a case goes to court, there is no limitation to the arguments and evidence used in court in relation to the objection procedure.

Alternative dispute resolution in administrative matters is not strongly developed. Ombudsmen (*Bürgerbeauftragte*) exist at the state level, but are not very common. However, the institution of the Federal Petition Committee is a well established institution and receives about 16000 petitions per year. Mediation is rarely used in conflicts between citizens and the administration.

### ***Pre-Trial Proceedings in the Netherlands***

Administrative law developed in the 19<sup>th</sup> century in the Netherlands and significant changes were triggered by the European Court of Human Rights finding the system that had evolved until 1985 to be in violation of the right to a fair trial. This triggered a reform and codification effort that revamped the entire administrative justice system.

The general first instance courts have divisions for administrative cases. The other instances, i. e. the appeal courts and the Council of State, are specialized administrative jurisdictions. Objection proceedings are generally mandatory. They are administrative appeal mechanisms addressed to the authority that took the original decision. They give the administration a second chance and provide a filtering mechanism before cases go the administrative law division of the first instance courts. The objection does not have a suspensive effect.

Some formalities (timeframe, submission in writing etc.) have to be observed. Standing is limited to those who have a direct interest in the challenged decision. The law recognizes the possibility that collective interest groups can be affected by administrative orders and grants them standing. The objection is generally decided upon by an external committee consisting of in majority of persons who do not work for the administrative authority that issued the challenged decision. Normally, public hearings take place. The objection procedure defines the scope of future administrative litigation.

Empirical research is currently undertaken in the Netherlands to assess the effectiveness of the existing pre-trial procedures. The results are yet to be published. Earlier empirical studies suggest that the pacification impact and filtering effect of the objection procedure against mass decisions produced by so-called “decision factories” (between 30,000 and 1.5 million decisions per year) is very high with 97 % of cases settled through this procedure. It is only between 25 and 50 % in the case of more complex decisions made in so-called “decision workshops” (space planning decisions, licenses for oil drilling etc.).

Alternative dispute resolution mechanisms comprise complaints to local or national ombudsmen. They are complaints instances receiving about 12000 submissions per year, but can also conduct inquiries at their own initiative.

### ***Comparative analysis***

The country reports show that there are many different ways to organize pre-trial proceedings. It is impossible to distill a single best practice from the findings in there. However, it is possible to discern certain points that require attention when designing a pre-trial procedure. There are a number of concerns that arise in all countries, and although there are different methods to address them, the fact that they must be addressed remains.

The first set of issues is related to the general design of the system of pre-trial proceedings: should there be legislation about pre-trial procedures, should there be a uniform procedure, when should such a procedure be obligatory, and what acts of the administration should be challengeable?

Codification and uniformity are desirable to improve legal certainty and transparency, but offer limited flexibility to the administration. Leaving too much flexibility can be counter-productive, as it forces the Courts to develop rules in their case law to ensure that pre-trial procedures comply with international norms. This will be equally limiting for the administration, but will not have the benefits in terms of legal certainty and transparency that codification has.

The next set of issues is related to the organization of the procedure. Which authority should be competent to decide in pre-trial proceedings, what administrative acts can be challenged, how should hearings be organized, what time limits should be set, and how must the costs of the procedure be dealt with? The organization of the proceedings should guarantee a fair procedure for the complainant, and comply with the prohibition of bias, which means that organizational details aim to prevent such bias on the side of the administrative authority that decides on the objection.

The third set of questions that needs to be addressed is related to the rights of complainants. After all, pre-trial proceedings should provide people with an easily accessible way to defend their rights vis à vis the administration. The procedure should be organized in such a way that complainants get this opportunity. To achieve this, careful consideration must be given to who will have standing to file an objection, what role legal representation should have in the procedure, whether *reformatio in peius* should be allowed, and whether initiating a pre-trial procedure should suspend the contended decision.

Based on the country reports and the analysis in the comparative section, it is possible to formulate a tentative roadmap with some options for action.

The goal of pre-trial proceedings is three-fold: (1) to provide an accessible and effective recourse for citizens without having to go to court, (2) to alleviate the case-load pressure on the courts by operating as a filtering mechanism, and (3) to provide a way for public authorities to reconsider their decisions. The comparative analysis of different approaches to pre-trial administrative justice mechanisms clearly shows that there is no one best practice model that could be adopted as such in Turkey. It is therefore important not to proceed with a big scale reform without having tested some of the available options in pilots. These pilots, if successful, can then be rolled out countrywide.

1. Pass a law allowing testing the introduction of pre-trial proceedings in selected representative court districts.

Since there is no single model that could be introduced in Turkey in a big bang approach, it is advisable to test different options and to identify those that are most suitable for the Turkish context. In order to provide a sound legal basis for this approach, it seems reasonable to pass a law allowing this kind of testing within the boundaries defined by the Constitution and International Treaties. This approach has been successfully adopted in Germany, for example, to test the functionality of pre-trial procedures in administrative proceedings.

2. Establish an Expert Committee to carry out the test and to formulate recommendations based on test results.

The Expert Committee should be composed of a small number of technical specialists to allow for effective work processes. The composition of the Committee should reflect the various institutional stakeholders such as the Civil Service, Ministry of Justice, Administrative Courts, the Statistics Office and others. The Expert Committee should receive a clear technical and apolitical mandate. The Expert Committee needs to receive the resources required to carry out its mission.

3. Establish baseline data by undertaking a statistical analysis of the caseload of pilot and comparator administrative courts to identify areas of law and the respective caseload they generate. Define parameters to be considered.

In order to ensure a timely and high quality analysis, a limited number of “average” pilot districts should be selected. A comparator group of similar districts where no pilots will be carried out should be determined. In all these districts an empirical analysis of the caseload in the administrative courts should be carried out. Goal of the analysis is to establish baseline data about the typology of cases, their trajectory into the courts, the parties initiating them, and other relevant aspects allowing for the future measuring of the impact of the pilots.

In this context, it is important for the Expert Committee to agree on a set of parameters to be considered to measure the impact. They should cover aspects relevant for the citizens (overall duration of proceedings from initiation to final outcome, pacification function based on litigation and appeal rates, success rates, costs for those seeking redress etc.) and for the authorities (filtering function based on litigation and appeal rates, staff costs etc.; and the volume of the relevant caseload). The empirical findings based on these parameters will ultimately determine the content of the recommendations.

<b>4. Scientifically test the introduction of various mandatory and voluntary objection procedures and measure impact.</b>
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Based on the analysis of the existing caseload and its characteristics, the Expert Committee can formulate a plan with different options for mandatory and voluntary objection procedures and other mechanisms to be tested. The various systems and the approaches described and analyzed in this comparative study may provide some inspiration for the development of such test options.

A considerable amount of data will have to be processed during and after the testing. Based on the parameters defined earlier, the impact of various pre-trial procedures on different types of cases and areas of law can be determined by comparing the relevant parameters in the pilot districts to those in the comparator districts.

Some flexibility should be built into the testing process to fine-tune approaches, correct mistakes, and incorporate lessons learned during the test phase.

<b>5. Formulate recommendations to Policy Makers.</b>
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The mandate of the Expert Committee is a technical one. A sound scientific approach to baseline data, piloting, and impact analysis is therefore key to come to recommendations based on objective findings. If value judgments are necessary, they should be clearly identified as such. As there may be a natural tension between some of the aspects considered (e.g. effective legal protection for the citizen, on the one hand, and low cost for the State, on the other hand), different options for policy makers may crystallize and the decisions may imply political choices. These different options as well as their implications for the relevant evaluation criteria should therefore be clearly identified and documented with as much relevant objective data as possible to inform the decision making process.

# I. Purpose and Scope of this Study

## 1. Introduction

Disputes between citizens or businesses and the State about respective rights and duties are at the core of administrative law. The ability for citizens and businesses to hold Government accountable for acting within the rule of law is a key element of good governance. It provides legal certainty and guarantees predictable and rule-based implementation of legal and regulatory frameworks across different sectors. It also provides Government with effective mechanisms to enforce these frameworks. An effective administrative justice system is therefore a crucial element to make sure all players follow the rules of the game. As such, it is an important aspect of a sound investment climate.

The Turkish Ministry of Justice has identified the absence of pre-trial procedures in the administrative justice system as a major obstacle to the efficient and effective delivery of judicial services to citizens, businesses, and the State. There are widespread complaints that administrative judges crumble after a heavy workload and that certain types of cases may be more effectively dealt with outside of the courts. This would make dispute resolution for citizens, businesses, and the State more effective and would alleviate the workload of the administrative courts.

Current dysfunctions also affect Turkey's ability to live up to its commitments under the European Convention for Human Rights. Its article 6 grants those seeking justice the right to a fair trial within reasonable time. Citizens and businesses bring complaints to the European Court of Human Rights which has the power to condemn signatory States for non-compliance. This has financial implications as a country found in violation of this Convention has to pay compensation. Beyond the financial implications, though, it negatively affects the image of the Turkish justice system abroad and particularly in Europe, which casts a cloud over European Union accession negotiations.

## Judicial strategy

The focus on pre-trial proceedings in administrative procedure relates to the judicial strategy formulated by the Turkish ministry of justice to ensure 'effective implementation of measures to prevent disputes and improving alternative dispute resolution mechanisms'<sup>1</sup>. Part of this strategy is to establish Courts of Appeal in the administrative judicial system and making them operational, so as to unburden the Council of State from an excessive workload<sup>2</sup>. Another part of this strategy is to develop and implement pre-trial dispute resolution procedures in administrative proceedings.<sup>3</sup> The filter mechanism of administrative pre-trial proceedings is mentioned explicitly:

“Likewise the civil and criminal judiciary, pre-trial resolution methods for conflicts will also be developed in administrative judiciary by creating new application methods. The fact that certain conflicts (such as disputes between students and education institutions about grades), which fall under competence of the administrative judiciary and which are resolved by means of having conducted expert witness examination, an obligation of examination by a commission established under structure of the administration (like

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<sup>1</sup> Ministry of Justice, Judicial Reform Strategy, Ankara 2009

<sup>2</sup> Judicial reform Strategy, p. 27

<sup>3</sup> Judicial Reform Strategy, p. 50.

universities or the Ministry of Education) will be introduced. After the examination of this commission, persons concerned may still resort to the administrative judiciary if they wish. Those commissions will serve as filters for cases to come before the administrative judiciary.”<sup>4</sup>

### **Expected Impact on economic and social development**

An effective and efficient system of legal protection of business and citizens also in the field of public administration will keep administrative authorities and citizens alike within the borders of their competences, and rights and obligations respectively. Effective and efficiently operating administrative courts are essential to achieving that objective. They enable citizens and businesses to hold administrative authorities accountable for their actions. That is a basic feature of the rule of law. As the rule of law enhances legal certainty and therefore predictability of the exercise of competences by administrative authorities, effective law enforcement by the courts and an effective execution of their judgments by administrative and judicial authorities, are conditions sine qua non for enhanced economic and societal development.

Pre-trial procedures in administrative law may help to achieve that objective, because they are likely to help allocate those cases to the administrative courts that predominantly require the skills and knowledge of administrative judges. Thus they may help to filter out all the cases where administrative errors can be repaired easily by the administration itself. This will make the time spent by the courts on deciding disputes between citizens and the administration much more efficient and effective. Proceedings in the context of administrative law therefore are likely to speed up. Such measures will help the Republic of Turkey to live up to the demands of fair trial and timeliness under article 6 of the European Convention for Human Rights to which it is a party and to which it also is committed by the jurisprudence of the European Court for Human Rights.

## ***2. A short introduction to administrative procedure***

Administrative law is the system of regulations and decisions by which the government of a country and administrative authorities can take decisions affecting persons, organizations, businesses and society as a whole. Choices as to what rights and obligations persons have or will be given are usually based on legislation of the highest possible status, which means a statute act decided by parliament. Within the continental idea of the rule of law such statute acts must fit the constitutional rules that create offices and assigns competences to these offices. Usually constitutions follow the separation of powers concept one way or another. This means that a distinction is made between the functions of legislation, administration and adjudication, and that provisions are given to organizationally separate administrative and judicial functions. Furthermore, a constitution within the concept of the rule of law attributes basic rights to citizens, persons and businesses in order to delineate a separation between the public sphere of the state and the private sphere of citizens and business. Those basic rights limit the competence of the legislative and administrative powers, and gives guidance to the legislative, administrative and judicial powers under what condition and in how far the legislator and the administration may limit the rights of citizens, persons and businesses.

To date, this conception of administrative activity within the concept of the rule of law is about 200 years old, even although the theories on separation of powers date back to 17th

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<sup>4</sup> Ibidem. p. 50

century England<sup>5</sup> - and earlier. It may be considered outdated, because the separation between public and private is a typical western idea, and also because constitutionalism is linked to the nation state. To date, globalization of trade, travel and war are challenging constitutionalism because the origin of the competences to install rights and obligations for governments, legislators, citizens, natural persons and businesses is partly transferred to international organizations by treaty or contract. Examples are the contracts made by the Federation of International Football Associations with host countries for the world championships, the International Criminal Courts and also the international cooperation to fight piracy in the Indian Ocean. Other examples are the International Monetary Fund and the World Trade Organization, and last, but not least in the context of this report, the jurisprudence of the European Court for Human Rights based on the European Convention on Human Rights.

### **Public administration in a State bound by the Rule of Law**

However, this does not mean that national, regional or local state-based administration has become irrelevant. Public administration basically is the state related activity by which offices represented by office holders make choices on the regulation of activities of citizens and businesses. Social security, grants for sport clubs, licenses for driving a car, for mining, space planning and building construction, licenses for activities that risk endangering the environment etc, etc. The number of activities subject to administrative regulatory control is countless and covers virtually all aspects of life, from birth to death, from schooling and education to properties. Administrative law is everywhere and administrative authorities have the tasks to create and maintain order in all societal activities. This involves making choices, granting rights and obligations concerning an activity to one person or business and imposing and enforcing prohibitions of activities on others.

Administrative law is about the organization and limitation of their competences, and the different ways controls on the execution of those competences is exercised and by whom. Usually, administrative authorities are subject to democratic and juridical accountabilities. It is the task of administrative authorities to make choices and take decisions with some kind of legal effect. Mostly, they cannot and will not avoid making choices, because a person or a citizen is legally entitled to an authority taking a decision, one way or another. Such authorities are e.g. a minister, a regional council or mayor and alderman of a municipality. It may also be a taxation officer or a competition authority. Most of these choices are subject to political control of a democratically elected representative body anyway. Usually, because this holds for administrative authorities with a territorial jurisdiction within state territory. A county or municipality will have a council and a presiding officer and/or an executive body. Sometimes, agencies and authorities are installed with a highly specialized task that cannot be combined very well with direct political controls, like the president of a national bank or a competition authority.

No matter what task has been assigned to an administrative authority, before taking any decision it has to weigh the interest of citizens, persons and businesses involved in the choices to be made against each other. Demolition of a neighborhood in order to construct a metro in a city is an example of a highly complex context demanding for many decisions falling within the scope of administrative law. Decisions on social insurance benefits or taxation are often much less complex, but they also fall within the scope of administrative law.

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<sup>5</sup> J.C. Vile, *Constitutionalism and the separation of powers*, Oxford, 1967.

## **Legal protection against the administration and the European convention on human rights**

These decisions have in common, that they must be taken within the delimitation of legality. The administrative authority may not act whatsoever beyond the scope of its legally attributed competences. Also the weighing of interests is restricted to those limitations. Of course, administrative authorities have discretion as they have to make interpretations of vague wordings in legislation, and also need to decide if the conditions for the exercise of a competence are fulfilled. Some of these choices often are publicly contested. Building a new rail road, or licenses for oil drilling in a nature reservation may affect a lot of people. But other choices affect only one person or one business. The demands for legality are similar, but the decisions affecting larger groups of persons are much more likely to receive political attention from democratically elected representative bodies than decisions with relatively small effects and which usually taken in a context of bureaucratic routines. For the development of a system of legal protection of persons and businesses against decisions of administrative authorities an important question is how the system of legal protection is related to the organization of democratic political control. This relates to the extent of judicial control of administrative actions and court competences to review decisions of administrative bodies. At the basis of these choices on how to organize legal protection against administrative decisions are conceptions of the separation of powers doctrine. In Europe, there are also some limitations to these choices, as the European Court for Human Rights has decided that also with regard to actions of an administrative authority, citizens and businesses do have the right to a fair trial. The Convention on Human Rights directly grants citizens of the states party to the treaty several human rights, one of them being the right to a fair trial and as a consequence they can invoke these rights in court. The right to a fair trial based on article 6 of the ECHR gives them the right to access to an independent court to have their case reviewed and to receive a final decision within a reasonable time.

In this report the choices as they have been made in Germany, England, France and the Netherlands concerning the organization of legal protection of persons and businesses against actions of administrative authorities are described. Those four countries and Turkey are a party to this treaty and it therefore defines the minimum standard of legal protection to which all countries should comply. The focus will be especially on the phase of proceedings between the outcome of the processes leading to the original administrative decision and the organization of the access of persons and businesses to an independent court as defined by the European Convention on Human Rights and by the ECtHR. While doing so, it is inevitable to also refer to the relation between pre/trial proceedings and court proceedings against administrative actions.

### ***3. Terms of Reference***

Referring to the Terms of Reference for this assignment, the work should focus on: “the authority, procedures and processes used by administrative agencies and/or other institutions to resolve administrative disputes with citizens before the disputes are taken to a court”.

And:



The Comparative Study should provide a clear description of the following:

- a) the legislative and/or regulatory authority which supports non-judicial review and resolution of disputes between administrative agencies and citizens;
- b) the procedures and rules that govern the non-judicial dispute resolution process, including the use (if any) of alternative dispute mechanisms such as mediation or arbitration;
- c) the institution(s) or individual(s) charged with conducting or leading the non-judicial dispute resolution process, their qualifications and training requirements (if any);
- d) the procedures and processes for appealing pre-judicial dispute decisions in courts;
- e) any available data on the impact of the pre-judicial dispute resolution procedures on the caseload of administrative courts in the countries; and
- f) an analysis of the costs and benefits, advantages and disadvantages of each of the non-judicial administrative dispute resolution systems.

The choice of countries was limited to England or the USA and to France, plus two other European countries. The Comparative Administrative Justice Study should include English translations of the legislative and/or regulatory foundations for the pre-judicial administrative dispute resolution processes and procedures from the comparator countries as annexes where these translations exist.

#### **4. Method**

For reasons of relevance to the Turkish context the administrative law systems of England & Wales, France, Germany and the Netherlands were chosen as object of description, analysis and comparison. Each researcher was assigned to a country's administrative law system and gathered information on legislation and its system of pre trial procedures in administrative litigation. Sources are academic literature, websites approved of by the government or the relevant court, rules for court procedures, and legislation on administrative procedure, where possible. The subjects dealt with are the following:

- Functions of administrative review
- The admin bodies, their decision making competences and administrative review
- Procedural requirements,
  - ③ Timeliness
  - ③ Effective conflict resolution
  - ③ defense rights
  - ③ Protection of public and third party interests
  - ③ Other
- Admin. Courts and administrative pre-trial proceedings
- Other conflict resolution instruments (mediation, ombudsman, arbitration).
- Statistical information

The description of the pre-trial proceedings for each country was put into the perspective of its system of legal protection against the government.

Depending on the administrative law system in each country, deviations from this order were inevitable. Especially the English system is very different from the continental approach to administrative law, and therefore the report follows a different order.

The reports were individually drafted and checked and partially redrafted by the other researchers.

### **Comparative analysis**

The comparative analysis is based on the reports and describes the most important choices to be made with a view to designing pre-trial proceedings in administrative law. This was done by referring to choices apparent from the country reports and by discussions amongst the researchers. These choices are based on the systems of pre-trial proceedings in administrative law of the four countries studied. It should be noted that administrative law conceived of as procedures for administrative decision making, in relation to procedures for review of administrative decisions before appealing to (an administrative) court and in connection to procedures for review of administrative decisions by and independent court are immensely complex. Within the context of this assignment it was not possible to show a full comparative overview of all those choices.

## **II Pre-trial Proceedings in Administrative Law in England and Wales**

### ***1. Introduction***

England and Wales have an historically developed system of protection of citizens against government and the administration in general. This means that there is not a real system as a result of a design process. On the contrary, ways to find redress against administrative decisions cannot be defined based on a systematic oversight, but have to be identified within specific fields of government activity. Housing, healthcare, town and country planning, social insurances, taxation etc., they all have their own legislation, their own administrative authorities and their own specific way of redress, within the administrative domain, possibly with simple applications for reconsideration, sometimes with statutory inquiries. Outside the domain of the administration are the appeals at tribunals and, eventually the appeals to a court for judicial review. Apart from that there are ombudsmen who may be addressed following complaints proceedings at administrative authorities allegedly responsible for errors of many different kinds.<sup>6</sup>

In England and Wales, like in all western countries, a lot of legislation has been issued to organize, steer or change societal developments and this legislation and administrative practices at least quantitatively have become far more important for redress of citizens against the administration than judicial review of administrative actions. The courts have played an important role in the development of the content of administrative law. But for legal protection against the administration filing proceedings at the ordinary courts has become far too expensive for ordinary citizens. During the last century up until now, the English government has sought to develop other ways to enable citizens to find redress for errors of administrative authorities. Within the English tradition, Parliament and administrative authorities have created a patchwork of statutory inquiries, administrative appeals and complaint proceedings.

England has the following mechanisms for achieving redress against actions of the administration:

- customer complaints procedures;
- appeals and tribunals systems;
- references to independent complaints handlers or ombudsmen; and
- resort to judicial review (and other forms of legal action).

In this report we will describe pre-trial proceedings like administrative, non judicial appeals and complaints proceedings, but we will not consider judicial review on its own merits. We will begin this report as an overview.

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<sup>6</sup>[http://www.nao.org.uk/publications/0405/citizen\\_redress.aspx](http://www.nao.org.uk/publications/0405/citizen_redress.aspx)

## **2. Administrative practices concerning reconsideration of decisions**

Terminology in English administrative law is complicated, because different words refer to similar concepts and decision making proceedings are not laid down in one general piece of legislation as in Germany and the Netherlands. One of the concepts in this regard is ‘statutory inquiry’. For continentals this is a blurred concept, because it refers to different procedures, either aiming at the preparation of decisions or at procedures for redress once a certain decision has been taken. The common basis for these different types of proceedings for redress within the administration is to give the administration the opportunity to check a given action or decision before a tribunal or court is addressed.

### **Statutory inquiries**

Statutory inquiries take place e.g. in the field of town and country planning, both for the preparation of decisions with a larger effect like planning a motorway or developing a housing area, and for appeal when one does not agree with the scheme decided upon. Appeals against decisions based on the Country and Town planning act can be made at the Planning Inspectorate.<sup>7</sup> Statutory inquiries for initial decision making and for redress follow specific rules of procedure, where fair trial rights should be granted for interested parties. However, although decisions must fall within legal parameters, administrative discretion is safeguarded and this may involve the absence of the possibility of any redress to a tribunal, as in the case of town and country planning.

### **Reconsidering administrative actions**

Apart from statutory inquiries there also exist possibilities to complain about certain decisions, not always explicitly based on legislation but also as good administrative practices, within the discretion of the administration, very much like the French *recours gracieux*. Administrative bodies are able to change their decision before the dispute reaches the courts proceedings or even before it reaches the tribunals stage. One of the examples of this practice is the practice of the Department for Work and Pensions that enables a complainant to challenge its decision in several ways. The complainant has four possibilities:

- He or she can ask the Department (and some other bodies<sup>8</sup>) for a spoken or written explanation;
- He or she can ask the Department to *reconsider its decision*;
- He or she can ask the Department for a ‘written statement of reasons’ if this was not given in the decision or;
- He or she can appeal against the decision of the Department.<sup>9</sup>

The complainant can ask the Department to *reconsider its decision* if:

- He or she has received a spoken explanation about the decision but he/she still thinks it’s wrong, or
- He or she has received a letter or a written statement of reasons telling him/her about a decision but he/she is unhappy with it.

<sup>7</sup> <http://www.planning-inspectorate.gov.uk/pins/index.htm>

<sup>8</sup> For example the Child support Agency or the HM Revenue & Customs

<sup>9</sup> “If you think our decision is wrong”, DWP, 2010, p. 3

If he/she will do it the Department has a possibility to look at the decision again and reconsider it. If the complainant thinks that the decision of the Department is wrong, he/she can ask the Department to explain it. If he/she still thinks it is wrong after they have explained, the Department will look at it again.<sup>10</sup> However, there are certain requirements that have to be met as well:

- The complainant has to ask for reconsideration within a timeframe of *one month*<sup>11</sup>. If due to special circumstances he/she cannot contact the office within one month, then he/she should tell the office about these circumstances when he/she does contact them. The office may still be able to change the decision.
- He or she must also send the office any evidence to support his/hers case.<sup>12</sup>

If the complainant asks the office to reconsider a decision, they will check whether they have made the right decision. A person at the office who was *not* involved with the original decision will usually do this. They will consider any evidence the complainant gives them to support his/hers opinion that the decision is wrong. If they decide the original decision was wrong, they will change it. Still, if the complainant disagrees with the new decision, he/she can ask the office to reconsider it (again) or he/she can appeal against it. In the cases mentioned the complaint to administrative bodies is only facultative. And this practice however is *not general*.

In April 2010, the Department for Work and Pensions prepared a document “*If you think our decision is wrong*”, in which it describes the steps the complainant can take if he or she is not content with the decision formed by an administrative body (DWP in this case). Such step of the Department can help complainants to protect their interests and to inform them how to deal with their dissatisfaction.

Administrative authorities usually also have special complaint procedures. These procedures are connected only with the complaints against the assistance, behavior or conduct of administrative bodies. However these complaints are not directly connected to the pre trial proceedings since their goal is different. In these cases a complaint to an Ombudsman is more suitable.

### **3. Ombudsmen**

England and Wales have a host of Ombudsmen for many different Public offices and private branches. Here we only consider the most important Public Ombudsmen, which are the Parliamentary and Health Services Ombudsman<sup>13</sup> and the Local Government Ombudsmen.

England and Wales have a Parliamentary Ombudsman who deals with complaints against the central government. The structure of this complaints instance is similar as in France, as the complaints are delivered to the Parliamentary Ombudsman through members of Parliament. The ombudsman is independent and appointed by Parliament.

The competence of the Parliamentary Ombudsman is restricted to mediation and reporting to Parliament. She will not take a complaint in consideration, if the same case is pending in

<sup>10</sup> <http://www.dwp.gov.uk/contact-us/complaints-and-appeals/#ac>

<sup>11</sup> The same time limit is to appeal to tribunal. However the appeal may still be treated as in time after that date but the complainant has to explain why was not he able to appeal in this time limit. In the end the time limit to appeal might be prolonged to 13 months from the date on the decision letter. (Ibid, p. 10)

<sup>12</sup> Ibid, p. 8

<sup>13</sup> <http://www.ombudsman.org.uk/>

Court, or in a Tribunal. In general, case files remain confidential, and the commissioner tries to solve complaints through negotiations, that is, if the complaint appears justified. However the Ombudsman will assess complaints by the following self-created set of principles of good administration:

1. Getting it right
2. Being customer focused
3. Being open and accountable
4. Acting fairly and proportionately
5. Putting things right
6. Seeking continuous improvement

Those have been designed in simple and comprehensible way. Especially the first one, 'getting it right' refers to the importance of the law, both for administrative authorities and for the assessment of complaints. This is stressed by the fact that a report of the Ombudsmen (Parliamentary alike Local Government) can be challenged in the High Court in judicial review proceedings.

The Local Government Ombudsmen<sup>14</sup> have a different position as the three of them deal with complaints against local administrative authorities, or as they say: "to provide independent, impartial and prompt investigation and resolution of complaints of injustice caused through maladministration by local authorities and other bodies within jurisdiction."

The Local Government Ombudsmen have developed principles of good administrative practice which they use to assess complaints. We cite some of them here:

1. Understand what the law requires the council to do and fulfill those requirements.
3. Formulate policies which set out the general approach for each area of activity and the criteria which are used in decision making.
8. Consider any special circumstances of each case as well as the council's policy so as to determine whether there are exceptional reasons which justify a decision more favorable to the individual customer than what the policy would normally provide.
9. Ensure that decisions are not taken which are inconsistent with established policies of the council or other relevant plans or guidelines unless there are adequate and relevant grounds for doing so.
10. Have regard to relevant codes of practice and government circulars; and follow the advice contained in them unless there are justifiable reasons not to do so.
12. Ensure that adequate consideration is given to all relevant and material factors in making a decision.
13. Give proper consideration to the views of relevant parties in making a decision.
14. Use the powers of the council only for their proper purpose and not in order to achieve some other purpose.
19. Carry out a sufficient investigation so as to establish all the relevant and material facts.<sup>15</sup>

Also reports of the Local Government Ombudsmen can be challenged at the High Court. This means that they just as administrative authorities have to operate within the framework of English law.

The services of the Ombudsmen are free of charge.

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<sup>14</sup> <http://www.lgo.org.uk>

<sup>15</sup> Good administrative practice Guidance on good practice<sup>2</sup>, <http://www.lgo.org.uk/publications/guidance-notes/>

It should be noted that, because court proceedings require legal representation, they are rather expensive in England and Wales. The ombudsman therefore carries out even more than on the continent the function of instances of redress. If maladministration is found, the ombudsmen will quite often recommend a financial compensation. Administrative authorities mostly accept these recommendations<sup>16</sup>. Therefore the Local Government Ombudsmen for England and Wales seem to be a good alternative for court proceedings.

#### ***4. The organization of Administrative Adjudication***

England has two systems of legal protection in the field of administrative law: judicial review and statutory appeal. There is only a right to statutory appeal, if the law (Acts of Parliament) grants a right of statutory appeal. Either a tribunal, a court or a minister has to decide in a statutory appeal case. If an Act of Parliament grants you a right of statutory appeal, then you first have to use this right before appealing for judicial review. In this case you cannot file a claim for judicial review, because of your statutory right of appeal. If there is no (further) possibility for statutory appeal, there is always the possibility to file a claim for judicial review at an ordinary court. The disputed decision can be reviewed fully in a statutory appeal procedure, but it can only be reviewed in a limited way in a judicial review procedure. Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.<sup>17</sup> The difference in the way of reviewing a decision in the two different procedures is the consequence of the doctrine of Parliamentary sovereignty. If Parliament grants a right of statutory appeal, then it is logical that a decision can be reviewed in full, because Parliament created this competence. Review by independent courts is restricted to points of law only.

The procedure of statutory appeals is organized along the following lines. Nowadays a part of the High Court is the Administrative Court. The High Court consists of the Queens Bench Division, The Family Division and the Chancery division. Since 2000, the Administrative Court is established as a part of the Queens Bench Division. In practice the Administrative Court consists of High court judges with some specialization, but who also participate in criminal and civil cases. The Administrative court deals with original appeals against actions of the government and ministers, but it also has supervisory jurisdiction over inferior courts and tribunals. Decisions of the Administrative court can be appealed against at the Civil Division of the Appeal Court, and the highest instance is the Supreme Court, which replaces the House of Lords as highest judicial body of England since 2007.<sup>18</sup> The supervisory jurisdiction is exercised mainly through the procedure of judicial review. It covers persons or bodies exercising a public law function - a wide and still growing field comprising all fields of government activity.

Tribunals since their creation until the reform in 2007 were “somewhere between administrative bodies and administrative courts”. They were usually created ad hoc and

<sup>16</sup> In the case of Parliamentary Ombudsman is this number really high reaching more than 95%.

<sup>17</sup> [http://www.judiciary.gov.uk/judgment\\_guidance/judicial\\_review/index.htm](http://www.judiciary.gov.uk/judgment_guidance/judicial_review/index.htm)

<sup>18</sup> The functions and competences (legislator and court of cassation) of the House of Lords have been divided between different institutions (House of Lords and Supreme Court) by the Constitutional Reform Act 2005.

backed up by the Departments, on the outside they acted as independent bodies and they decided on appeals against the administrative decisions. They were acting as “de facto” judicial bodies although they were not judicial bodies in strict sense. After the reform in 2007 they gained formal independence from administrative authorities and as such they become “officially” a part of the machinery of adjudication. Because of that fact, the position of the tribunals is closer to the position of the courts than to the position of the administrative bodies or other bodies (e.g. committees or commissions).<sup>19</sup> However the tribunals in English conditions constitute an intermediary stage between administrative authorities and the administrative courts. For this reason a thorough analysis of the tribunal system, which is based on the TCE Act 2007, will be made in following paragraph.

Tribunals play an important role in the procedure of statutory appeal. Many of these tribunals have been installed on *ad hoc* basis as a result of well fare state legislation after the World War II. They are based on separate statutes, have their own procedure rules and they have separate jurisdictions in which they exercise different competences. Tribunals deal with a wide range of subject matter areas, such as social security, taxation, property rights, immigration, mental health, allocation of pupils to schools and so on. It is possible to articulate a number of ‘properties’, which tribunals generally possess. These properties are:

- independence from any department of government
- their specialization and expertise
- they have their own procedure rules
- their competence to hear cases in public
- the ability to make final, legally enforceable decisions,
- the obligation to give reasons for their decisions
- from their decisions there is a right of appeal to the High Court on points of law

Tribunals do not form part of the administration; they form part of the machinery of adjudication. This is unequivocally recognized by the Tribunals Courts and Enforcement Act 2007<sup>20</sup> and it was a major objective for its enactment. Tribunals in the literature are regarded as ‘substitute (inferior) courts’. Their members form part of the judiciary.

The tribunals system has developed in/over the 20<sup>th</sup> century and was very complex. There was a tendency in the United Kingdom to create a new tribunal for every field of law. Each tribunal had its own procedural rules. It differed from tribunal to tribunal whether there was a right to appeal against its decision. If there was a right to appeal, then it differed which body had the competence to deal with the appeal. It was possible that another tribunal had this competence, but there was also the possibility that a minister was competent or a court, like the High Court.

The system of tribunals has been reorganized in 2007. The objective of this reorganization was to create a more comprehensive system. This reorganization was based on Sir Andrew Leggatt’s report, ‘*Tribunals for users. One system, one service*’ from august 2001<sup>21</sup>. The Tribunal Service is established in 2006. This Service, which is part of the Ministry of Justice, is responsible for the organizational functioning of (most of) the tribunals.

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<sup>19</sup> For a critical analyses of the formalization of proceedings before administrative tribunals, see: Gavin Drewry, The Judicialisation of ‘Administrative’ Tribunals in the UK: from Hewart To Leggatt, , *Transylvanian Review of Administrative Sciences*, No. 28 E Si/2009 Pp. 45-64

<sup>20</sup> Article 3 (5) TCE Act 2007 declares the Upper Tribunal to be a superior court of record. This ensures that its decisions will not be subject to judicial review. The only remedy for those dissatisfied with a decision of the Upper Tribunal will be by way of appeal to the Court of Appeal.

<sup>21</sup> <http://www.tribunals-review.org.uk>



Parliament has enacted the Tribunals, Courts and Enforcement Act 2007 (TCE Act 2007) in 2007. Its enactment had three goals. First, it recognizes that tribunals are part of the system of adjudication. Second, the Act arranges for the independence of the judicial panels of the tribunals. Third, it tries to create a systematic structure of tribunals. The TCE Act 2007 chooses for a system of administration of justice in two instances. In first instance the newly created *First-tier Tribunal* is competent. There is a right of appeal on 'points of law' to the newly created *Upper Tribunal*. The functions/jurisdictions of many pre-existing tribunals have been integrated in this new structure. Tribunals, which will be established in future, will also be integrated in this new structure.

The TCE Act 2007 enables the creation of chambers within the First-tier Tribunal, as within the Upper Tribunal. Because of this the judges have the opportunity to specialize in a certain field of law. Each Chamber still has its own procedural rules, in this respect the reorganization apparently has had the character of a compromise, but they can be amended by the procedures committee of the Tribunal Service.

Its internal structure is organized as follows<sup>22</sup>:

### Internal structure of the First Tier Tribunal:

	Chambers of the first Tier Tribunal					
	Social Entitlement Chamber	Health, Education and Social Care Chamber	War Pensions and Armed Forces Compensation Chamber	The General Regulatory Chamber	Immigration and Asylum Chamber	Tax Chamber
<b>Jurisdiction over:</b>	<a href="#">Asylum Support</a> ;  <a href="#">Social Security and Child Support</a> ; and  <a href="#">Criminal Injuries Compensation</a>	<a href="#">Care Standards</a> ;  <a href="#">Mental Health</a>  <a href="#">Special Educational Needs &amp; Disability</a> ; and  <a href="#">Primary Health Lists</a>	<a href="#">War Pensions and Armed Forces Compensation</a>	<a href="#">Charity</a> <a href="#">Claims Management Services</a>  <a href="#">Consumer Credit</a>  <a href="#">Environment</a>  <a href="#">Estate Agents</a>  <a href="#">Gambling Appeals</a>  <a href="#">Immigration Services</a>  <a href="#">Information Rights</a>  <a href="#">Local Government Standards in England</a> ; and  <a href="#">Transport</a>	<a href="#">Immigration and Asylum</a>	Taxes

The Upper Tribunal is currently divided into four chambers: the Administrative Appeals Chamber, the Tax and Chancery Chamber, the Lands Chamber and the Immigration and Asylum Chamber.<sup>23</sup> Here also each chamber has its own procedural rules; they are also prepared and made by the tribunal procedures committee of the tribunal service<sup>24</sup>. The Upper Tribunal has two functions. First, it has the function of court of appeal. The Upper Tribunal deals with appeals against decisions from the First-tier Tribunal. Further, the Upper Tribunal is competent to deal with judicial review cases. The functions/tasks of the Upper Tribunal are quite similar to those of the High Court; both the Upper Tribunal and the High Court have the obligation to deal with appeals and judicial review cases. Judges of the High court will preside over Upper Tribunal cases when necessary.

### Internal Organization and jurisdiction of the Upper Tribunal

<sup>22</sup> <http://www.tribunals.gov.uk/Tribunals/Firsttier/firsttier.htm>

<sup>23</sup> <http://www.tribunals.gov.uk/Tribunals/Upper/upper.htm>

<sup>24</sup> <http://www.tribunals.gov.uk/Tribunals/Rules/tribunalprocedurecommittee.htm>

	<b>Chambers of the Upper Tribunal</b>			
	The Administrative Appeals Chamber	The Tax and Chancery Chamber	The Lands Chamber	The Immigration and Asylum Chamber
<b>Jurisdiction over:</b>	<b>Appeals</b> from first tier tribunal	<b>Appeals</b> from first tier tribunal	<b>Appeals</b> from first tier tribunal	<b>Appeals</b> from first tier tribunal
	<b>Judicial Review</b> of decisions of First-tier Tribunals England and Wales:  where there is a procedural decision of a First-tier Tribunal which has no right of appeal in Criminal Injuries Compensation Appeals decided by the First-tier Tribunal  cases may also be transferred to the Upper Tribunal from the High Court. <sup>1</sup>			

## **The Tribunals Service and the Administrative Justice and Tribunals Council**

The Tribunals Service was created on 3 April 2006 as an executive agency of the Ministry of Justice (MoJ). The Tribunals Service provides administrative support for the tribunals' judiciary who hears cases and decides appeals. The Senior President of Tribunals is the judicial head of the Tribunals' judiciary. All judges and members of tribunals are independent of the Government. The administration and the judiciary work in partnership with one another to ensure that the public at large have an opportunity to exercise their rights to seek effective redress against Government decisions.

The Administrative Justice and Tribunals Council (AJTC) is the 'think tank' in the administrative justice system in the United Kingdom. It is the task of the AJTC to keep the administrative justice system under review and it has to consider ways in which that system may be made accessible, fair and efficient. It may report on the constitution and working of tribunals in general and in particular and make proposals for changes in the system, including changes in legislation relating to tribunals and proposed procedural rules made for tribunals. It reports annually to the Lord Chancellor.

The AJTC has between eleven and sixteen members, mostly appointed, but with the Parliamentary Ombudsman as an ex officio member. The Lord Chancellor appoints the chairman out of one of the members.<sup>25</sup> . The recent developments in the tribunal system in the

<sup>25</sup> <http://www.ajtc.gov.uk/>

UK suggest that the government and the minister of justice pursue policies with the intention to further rationalize the tribunal system, also in relation to administrative justice. These processes of change evolve rather slowly, as may be expected in professional fields like adjudication.

## ***5. Tribunal Jurisdictions***

The TCE Act 2007 does not mention/address the *jurisdiction* of the First-tier and Upper Tribunal. Article 30 TCE Act in combination with Schedule 6 of this Act only states from which pre-existing (to the enactment of the TCE Act 2007) tribunals the *functions* have been transferred to the tribunals system of the TCE Act 2007. The jurisdiction of (the different chambers) of the First-tier and Upper Tribunal is still based on the specific statutes originally giving jurisdiction to previously separate tribunals. Jurisdiction concerns not only the question which decisions may be scrutinized by the Tribunals, but it also concerns the question which decision the Tribunals can take on the appeal (the powers of a Tribunal). In general tribunals can take three different decisions on an appeal. Firstly, it can reaffirm the disputed decision of the public authority. Secondly, it can quash the disputed decision in whole or in part. Lastly, it can substitute the disputed decision for all or for part.

If a statute on which a disputed decision is based, grants a right of appeal and if the functions of the competent tribunal mentioned in this Act have been transferred to the First-tier and Upper Tribunal by the TCE Act 2007, then one of the chambers of the First-tier Tribunal in first instance is competent and it will decide the case on the basis of the jurisdiction of the specific statute. The fact that a specific statute still mentions pre-existing tribunals as competent tribunals instead of the First-tier Tribunal is the consequence of the *principle of implied repeal*, which is a particularity of British constitutional law. This is also the case for provisions regarding timing, appeals from the pre-existing tribunal, procedural rules, fees of the judicial panel, the right to legal assistance, and so on. These matters are nowadays covered and unified by the TCE Act 2007.

### **Standing/interested party/third party**

The competence of the First-tier Tribunal is based on decisions of public authorities. As mentioned before, there is no general right of appeal against decisions of public authorities. Each Act makes clear to which decisions (that are based on this Act) there is a right of appeal. A decision concerns a legal act. This legal act might be beneficial for the addressee (e.g. granting a social security allowance) or burden the addressee (e.g. withdrawal of a driver's license). Many of the rights of appeal which have been transferred to the First-tier Tribunal concern decisions that have been taken on the application of the claimant.<sup>26</sup> Some rights of appeal concern decisions which have been taken on the initiative of the responsible public authority.<sup>27</sup> A notice of an appealable decision must always inform the person to whom it is

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<sup>26</sup> Article 55 (1) of the Financial Services and Markets Act 2000 states for example: An applicant who is aggrieved by the determination of an application made under this Part may refer the matter to the Tribunal.

<sup>27</sup> Article 55 (2) of the Financial Services and Markets Act 2000 states for example: An authorized person who is aggrieved by the exercise of the Authority's own initiative-power may refer the matter to the Tribunal.

given of his right to refer the matter to the Tribunal.<sup>28</sup> It even has to give this person an indication of the procedure of this reference.

Generally, the tribunals system does not know the principle of prohibition of *reformatio in peius*, meaning that an appellant may not be worse off as a consequence of his appeal. In the context of the UK tribunal system, a claimant (certainly in the field of social security benefits) always has to bear in mind that the decision in appeal might leave him worse off.

The Acts which provide the First-tier Tribunal with its jurisdiction do not know a general concept/definition of the interested party. In the same way as each Act makes clear to which decisions (that are based on this Act) there is a right of appeal, it also makes clear who has the right to appeal. Since many of the rights of appeal which have been transferred to the First-tier Tribunal concern decisions that have been taken on the application of the claimant, it will often be limited to the applicant to whom the right of appeal is conferred. You will find a wide range of different terms defining the appellant.<sup>29</sup> In general the right to appeal will be limited to the addressee of the disputed decision. This is the consequence of the fact that in most of the fields of law which are dealt by the Tribunals system, third parties do not play an important role. The Tribunal system has no competence regarding the right of appeal against building permits or environmental permits (classical fields of law in which third parties play a major role). If a third party has a right of appeal against a certain decision, this party will be defined in the Act regulating both the competences of the administrative authority and the jurisdiction of the related tribunal. For example, Article 62 (4) of the Financial Services and Markets Act 2000 states: If the Authority decides to refuse an application, each of the interested parties may refer the matter to the Tribunal. Article 62 (5) defines the term/concept 'interested parties': The interested parties, in relation to an application are: (a) the applicant, (b) the person in respect of whom the application is made ('A') and (c) the person by whom A's services are to be retained, if not the applicant.

If there is no statutory right of appeal for such a party ('out of jurisdiction'), it might ask permission to an ordinary court for judicial review. The Supreme Court Act 1981 states that a claimant has to have *sufficient interest*.

As shown above, the first tier tribunal can receive appeals against quite different categories of administrative decisions. Each chamber has its own procedural rules. The tribunal can review those decisions and it may correct accidental errors, amend the reasons given or set the decision aside. It may then make the decision again. The statute does not specify the grounds on which the tribunal may set the decision aside.

The TCE Act contains an interesting array of mechanisms for checking decisions made by the First-tier Tribunal and the Upper Tribunal, which connect the Tribunals to the Court System of England and Wales.

## **Appeal of First-tier Tribunal decisions to the Upper Tribunal**

A party to a case generally has a right of appeal on a point of law against a decision of the First-tier to the Upper Tribunal.<sup>30</sup> This right of appeal is subject to permission given, by either

<sup>28</sup> Article 259 (10) of the Financial Services and Markets Act 2000 states for example: A notice given under subsection (8) must inform the person to whom it is given of his right to refer the matter to the Tribunal.

<sup>29</sup> Issuer, applicant, interested parties, a person against whom a decision to make a prohibition order is made, etc.

<sup>30</sup> Article 11 TCE Act 2007

the First-tier Tribunal or the Upper Tribunal. There is however no right of appeal against decisions which are excluded from the right of appeal. The list of ‘excluded decisions’ is set out in article 11 (5) TCE Act 2007. The Lord Chancellor has the power to specify who may or may not be treated as being a party to a case for the purposes of making an appeal from the First-tier Tribunal to the Upper Tribunal.

Article 12 TCE Act 2007 specifies the powers of the Upper Tribunal when it decides that an error of law has been made by the First-tier Tribunal. Article 12 (2) states that the Upper Tribunal may ‘but not need’ set aside the decision of the First-tier Tribunal. If the Upper Tribunal decides that the error of law does not invalidate the decision of the First-tier Tribunal it can leave that decision unchanged. If the Upper Tribunal decides to set aside the decision, it has two options. It can remit the case back to the First-tier Tribunal with directions for reconsideration, and the Upper Tribunal may direct that a different judicial panel reconsiders the case, and give procedural directions in relation to the case. The alternative option is for the Upper Tribunal to make the decision which it considers should have been made, and in doing so it can take any decision that could have been taken if the First-tier Tribunal were making the decision. The Upper Tribunal can also make finding of facts.

### **Appeal against the Upper Tribunal decisions to the Court of Appeal**

Article 13 (12) TCE Act 2007 provides for a right of appeal to the relevant appellate court – Court of Appeal for England and Wales in this case on any point of law arising from the decision made by the Upper Tribunal, other than an excluded decision. This right of appeal is subject to permission being granted by the appellate court, or the Upper Tribunal on an application by the party. The time limits within which such appeal can be made are specified in rules of court.<sup>31</sup> The Lord Chancellor has the power to specify who may or may not be treated as being a party to a case for the purposes of making an appeal. It is also open to him to restrict appeals to cases where the Court of Appeal or the Upper Tribunal considers that the proposed appeal would raise an important point of principle or practice, or that there is some other compelling reason for the appeal to be heard.

Article 14 TCE Act 2007 specifies the powers of the relevant appeal court in deciding an appeal under article 13 TCE Act 2007. If the appeal court finds an error on a point of law it ‘may, but not need’ set aside the decision of the Upper Tribunal. If the Appeal Court sets aside a decision of it has the same options as the Upper Tribunal has (see above).

### **Judicial review by the Upper Tribunal**

The inherent powers of judicial review are vested in the High Court. The TCE Act is however innovative in that it has vested judicial review powers in the Upper Tribunal.

Article 15 (1) TCE Act 2007 empowers the Upper Tribunal to grant mandatory, prohibiting and quashing orders, and a declaration and an injunction, in the circumstances described below. The Upper Tribunal can also grant restitution or monetary relief, if satisfied that the High Court would have done so. The Upper Tribunal must apply the principles of judicial review developed by the High Court and by higher courts including former House of Lords.

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<sup>31</sup> There are different time limits for different appeals to the Court of Appeal. Generally, an appellant has 21 days to file an appeal. Time limits depend upon the type of order the appellant wants to appeal. Generally, these vary between 7 days and 6 weeks from the date of decision he or she wants to appeal. The Court of Appeal has the power to grant an extension of time for filing an Appellant’s Notice. <http://www.hmcourts-service.gov.uk/cms/1290.htm#timelimits>

Applications under Article 15 TCE Act 2007 are subject to the same hurdles as they would be if judicial review were sought before the High Court: permission for leave to appeal is required, the applicant must have a sufficient interest and there are provisions concerning undue delay.

The circumstances in which the Upper Tribunal can exercise powers of judicial review are set out in 18 TCE Act 2007, which specifies four conditions.

The first condition is that the application does not seek anything other than the relief that the Upper Tribunal is able to grant under Article 15 (1) TCE Act 2007, monetary award under Article 16 (6) TCE Act 2007, interests and costs. The second condition is that the application does not call into question anything done by the Crown Court. The third condition is that the application falls within a class specified for the purposes of Article 18 (6) TCE Act 2007, in a direction given in accordance with the Constitutional Reform Act 2005. The last condition concerns the status of the judge presiding at the hearing of the application.

If all these conditions are not met the judicial review application is transferred to the High Court. In case that all the four conditions are met and the application is made to the High Court, it must be transferred to the Upper Tribunal.

If the Upper Tribunal makes a quashing order it can in addition remit the matter to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal. It can alternatively substitute its own decision for the decision in question, provided that the decision was made by a court or tribunal, the decision was quashed for error of law, and without the error, there would have been only one decision that the court or tribunal could have reached.

### **The relation between the decisions of the First-tier and Upper Tribunal and Judicial review by the High Court**

A claimant may seek judicial review of a decision by the First-tier Tribunal before the Queens Bench Division of the High Court. Such a claim will fail if the matter is one which satisfies all the conditions for the Upper Tribunal to exercise judicial review (see before). The claim may also be turned down, because the High Court decides that the claimant should exercise his or her statutory rights to the Upper Tribunal. There is extensive case law on the circumstances in which statutory appeal must be used rather than judicial review. It is likely that the High Court will insist that the claimant has to use his or her right of statutory appeal to the Upper Tribunal.

A claimant may also seek judicial review of a decision made by the Upper Tribunal. The policy of the TCE Act 2007 is that any onward appeal should be to the Court of Appeal (statutory appeal), and then only where the Court of Appeal or the Upper Tribunal considers that the proposed appeal would raise some important point of principle or practice, or that there is some other compelling reason for the appeal to be heard, where the claimant has already had the case considered by both the First-tier Tribunal. The High Court is unlikely to allow this policy to be circumvented by allowing the claimant to bring a judicial action against the Upper Tribunal to the High Court. If the Upper Tribunal has exercised its judicial review powers and the claimant wishes to contest this finding, recourse should be had to the Court of Appeal.

## ***6. Tribunal Hearings and defense rights***

### **Organization of the hearings**

Article 22 (1) (a) of the TCE Act 2007 states that there are to be Tribunal Procedural Rules governing the practice and procedure to be followed in the First-tier Tribunal. Ex article 22 (3) of the TCE Act 2007, Schedule 5 part 1 of this Act makes further provision about the content of these Tribunal Procedural Rules. It should be stressed that insofar as there is a need for different procedural rules for different subject matter areas this can be accommodated by tailoring procedural rules to the chambers that deal with them. The Tribunal Procedural Rules are to be made by the Tribunal Procedure Committee and allowed by the Lord Chancellor.

### **Starting an appeal; time limits**

The time-limits regarding the right of appeal will be found in the different procedural rules of the different Chambers. They differ from Chamber to Chamber, are tailor-fit to the type of cases being dealt with. For social security and child support appeals, the addressee has one calendar month to file an appeal, starting from the date on which the official letter giving the decision was sent to him. Under the jurisdiction of the Asylum Chamber a notice of appeal has to be given not later than 10 days after he is served with notice of decision. A claimant finding himself outside the time-limit can under some jurisdictions ask for an extension in writing. He has to explain why his appeal is late and why he had good reasons to be late. If the public authority accepts that there are special circumstances for the delay, it can agree with an extension. If the public authority does not agree, the appeal will be forwarded to the Tribunal Services for the Tribunal to decide whether to grant an extension or not. If the Tribunal grants an extension, the appeal may go ahead. If the Tribunal refuses an extension, the appeal ends there. An appeal is not regarded as made, until it has been received by the office that made the disputed decision. Under some jurisdictions the notice of appeal has to be sent to the competent Chamber directly.

### **The appeal form**

An appeal can only be made in writing. An appeal form or a letter can be used. In this letter the claimant should specify the decision he is appealing against by referring to the date of the decision. He also has to give the grounds of appeal. These grounds of appeal do not have to be written in legal language. Information or evidence supporting the appeal should be included. This may increase the claimant's chances of having the decision changed in his favor by the authority without the need to take the appeal any further. If the public authority considers that the grounds of appeal are insufficient, they may ask for further information. If they are still not satisfied, they will forward the appeal to the Tribunals Service for the Tribunal to rule whether it can go ahead. If the Tribunal is satisfied that sufficient information has been given, the appeal may proceed. If not, the appeal ends there.

### **After sending the appeal form**



As mentioned above the public authority has the option, at any time up to the tribunal hearing, of changing the decision under appeal. If they decide to *revise the decision* to claimant's advantage, the appeal will automatically lapse. If the claimant is not satisfied with the revised decision, he will have to make a fresh appeal against it. If on the other hand, the decision has been revised, but not to the advantage of the claimant, his appeal does not lapse but continues against the decision in its revised form.<sup>32</sup>

Where the public authority is of the opinion that there is a defect in the claimant's appeal, for example because it is against a decision which does not carry a right of appeal, they will forward the appeal to the Tribunals Service for a ruling whether the appeal may go ahead or not.

Where there are no preliminary problems, the public authority will prepare their 'response' to the appeal. This arrives as a bundle of papers, which can contain up to 150 pages. The bundle includes: the disputed decision, a summary of the relevant facts, the reasons for the decision, extracts from the relevant law, a copy of claimant's appeal form or letter and copies of documents relevant to the appeal (medical reports, etc.).

The purpose of the response is to present the case to the Tribunal, as the public authority sees it. The job of the Tribunal is to decide what the correct facts are and how the law should be correctly applied to them. The public authority will send one copy of its response to the claimant and one copy to the Tribunals Service. This may be some weeks after sending the appeal.

## **The enquiry form**

This is a two-page form which has to obtain information from the claimant that will help the Tribunal Services to organize a suitable hearing. The form should be returned within 14 days. The main decisions which a claimant has to make:

-Does he want to continue his appeal? – An appeal can be withdrawn at any time, right up to the tribunal hearing.

-Does he want a hearing? – At a hearing the claimant and the public authority meet the Tribunal to present the case in person (oral hearing). The alternative is having the case decided without a hearing. The Tribunal comes to its decision on the basis of what is included in the appeals papers (paper hearing). A hearing will only be arranged if one of the parties asks for it or as the Tribunal itself decides that a hearing would be more appropriate than deciding the case on the papers. More than twice as many appeals are successful with a hearing than being decided on the papers.

The Tribunal Service holds appeal hearings at a national network of over 100 locations in England, Scotland and Wales. A hearing will take place at the claimant's nearest location.

Like the courts, Tribunals insist on using independent, professional interpreters and signers. The appellant is entitled to have a representative of his/hers choice. The representative does not have to be legally qualified.

## **After sending the enquiry form**

Relatively straightforward cases will proceed directly to a tribunal hearing. Where an appeal is rather more complex, there may be some interim steps to complete. In that case the Tribunal may give directions (see below).

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<sup>32</sup> How to appeal step-by-step guide, Tribunal Service, Social security and Child Support, 2009, p. 13

## **Preparing for the tribunal hearing**

A claimant has to think what evidence he needs to support his case, since most appeals involve some dispute over the facts. It is unusual for the public authority to produce new evidence on the hearing. There are three types of evidence. First, there are statements of the parties. Second, there are statements of witnesses. And last, there are other documents. Documents sent to the Tribunal will be copied and sent to the other party. A notice of hearing will be sent to the claimant giving the time, date and place of the hearing.

## **The hearing; composition of the forum**

Each of the First-tier Tribunal chambers, and the Upper Tribunal consist of its judges and other members, states article 3 (3) TCE 2007. The articles 4, 5 and 6 TCE in combination with Schedule 2 and 3 TCE 2007 deal with membership and composition of tribunals. Members of the new tribunals created by the 2007 Act are appointed by the Lord Chancellor (First-tier Tribunal) or by Her Majesty (Upper Tribunal) (on the recommendation of the Lord Chancellor). There are two types of members of the tribunals: legally qualified members (judges) and other members (experts, such as accountants or GPs). Appointments to these offices will only be made after the Judicial Appointments Commission has made its recommendations. There is thus no remnant of appointment by a minister of a 'sponsoring department', which was often the case before the enactment of the TCE Act 2007. Tribunal members must take the oath of allegiance and the judicial oath. The composition of the tribunal is set by law; an applicant does not have the right to choose its members. The composition of the tribunals varies according to the type of case. In some type of cases, the tribunal will consist of a judge alone. In other cases the judge will chair the judicial panel. The same members who heard the evidence must give the decision. Where a tribunal has power to use an assessor, and does so at an oral hearing, the assessor must sit with the tribunal throughout that part of the hearing in which the evidence is given on which his assistance is required.

Hearings are open to the public.

## **The hearing event**

The Judge will introduce everyone and establish the part they will play in the proceedings. The judge will take a formal note of the proceedings, 'the record of proceeding'.

The Tribunal Judge will summarize the issues in the appeal according to the papers and agree with both sides what ground needs to be covered in the hearing and in what sequence.

The Judge is responsible for asking question during the hearing.

A medical examination is not permitted as part of the tribunal hearing.

Witnesses will be heard in the hearing.

After the evidence has been completed, the Judge will invite closing statements. This is an opportunity for representatives for each side to sum up the case.

## **The decision**

The Tribunal will consider the evidence and statements in private. In most cases the claimant will be invited by the Judge to wait while the Tribunal reaches its decision. However, if the Judge thinks it is unlikely that a decision can be reached fairly quickly, the claimant will be advised that the decision will be posted to him a few days later. The Tribunal will tell the complainant in its decision about:

- His right to ask for a statement of its findings and the reasons for the decision (this is called a 'statement of reasons'), and
- What to do if the complainant disagrees with its decision.
- If the First-Tier Tribunal changes the decision appealed against, they will send the public authority a 'decision notice'. This will tell the public authority what it should do to put the decision right.

## **After the hearing**

### **Setting aside the decision**

A claimant may apply to have the decision of the Tribunal set aside and a new hearing arranged in limited circumstances:

- if a document relating to the proceedings was not sent or received in time;
- if a hearing had been arranged but the claimant did not attend;
- if there has been some other procedural irregularity.

## **Appeal to the Upper Tribunal**

The Upper Tribunal is independent of the First-Tier Tribunal and has the authority to overturn the First-Tier Tribunal's decision, but only if it is wrong in law (for example, if the tribunal failed to keep proper procedures).

Before the complainant appeals to the Upper Tribunal, he has to apply to the First-Tier Tribunal for a statement of reasons for its decision. If he still wants to appeal after considering the reasons, he must ask the First-Tier Tribunal for permission. If it refuses permission, he can still ask the Upper Tribunal direct for permission to appeal.

## **Defense rights**

Defense rights are to be found in the Tribunal Procedural Rules (TPR).

For this paragraph we will compare the procedures of the Social Entitlement Chamber (SEC) and the Asylum and Immigration Chamber (AIC) of the First-tier Tribunal, since most cases of the First-tier Tribunal are decided by these chambers.

## Representatives

Article 11 of the TPR of the SEC states that a party may appoint a representative to represent that party in proceedings. This representative does not have to be legally qualified. It is not mandatory to appoint a representative, but it might be helpful. There is no state-supported legal aid available before the SEC. Legal representation is allowed before the AIC, but it is not mandatory. The entitlement to state-supported legal aid is strictly limited.

In general we could conclude that there is no compulsory legal representation before the Chambers of the Tribunals system. State-supported legal aid is strictly limited by the Judicial Aid Act 1999 and only available to some types of cases.

## Directions

Article 6 of the TPR of the SEC and article 45 AIC makes it possible for the Chambers to give directions on the application of one or more of the parties or on its own initiative. Directions are helpful instructions in cases that are less straightforward.

For example, the responsible department might have in its possession, papers relating to a previous benefit claim that would shed light on the current appeal. The tribunal might direct the department to produce those papers.<sup>33</sup>

## Expenses/costs/damages

Many Chambers will make a contribution towards the claimant for expenses in attending the tribunal hearing, such as travelling allowances, loss of wages during the attendance of the hearing, costs of child-minding, etc. Unlike going to court, there are no fees or risk of costs involved. The Tribunal Service is a free service. Tribunals do not have the power to award costs either against you or in favor of you. Nor can it award compensation or damages. Damages suffered from an unlawful decision can only be awarded in an *ordinary civil procedure*. This is also partially possible in a judicial review procedure. However damages are available as a remedy in judicial review in limited circumstances. Compensation is not available merely because a public authority has acted unlawfully. For damages to be available there must be either:

- (a) A recognized 'private' law cause of action such as negligence or breach of statutory duty or;
- (b) A claim under European law or;
- (c) A claim under the Human Rights Act 1998.<sup>34</sup>

## 7. Evaluation

The organization of giving citizens redress against alleged administrative errors has followed the pragmatism of English public administration and of its legislature. Only recently efforts have been made to develop more consistency in the tribunal system. One can say that

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<sup>33</sup> Ibid, p. 18

<sup>34</sup> Remedies in judicial review, The Public Law Project, PLP Information Leaflet, p. 3

administrative authorities do their very best to inform citizens of their rights and about procedures. The approach is absolutely customer friendly. But because this patchwork of redress possibilities is closely connected to typical features of English law and public administration, it is quite difficult to assess in how far elements of this system could be useful elsewhere. Furthermore, evaluations take place within the specific domains of government activity. Therefore it is quite difficult to have an overview of the functioning of the entire domain of redress against administrative actions in England.

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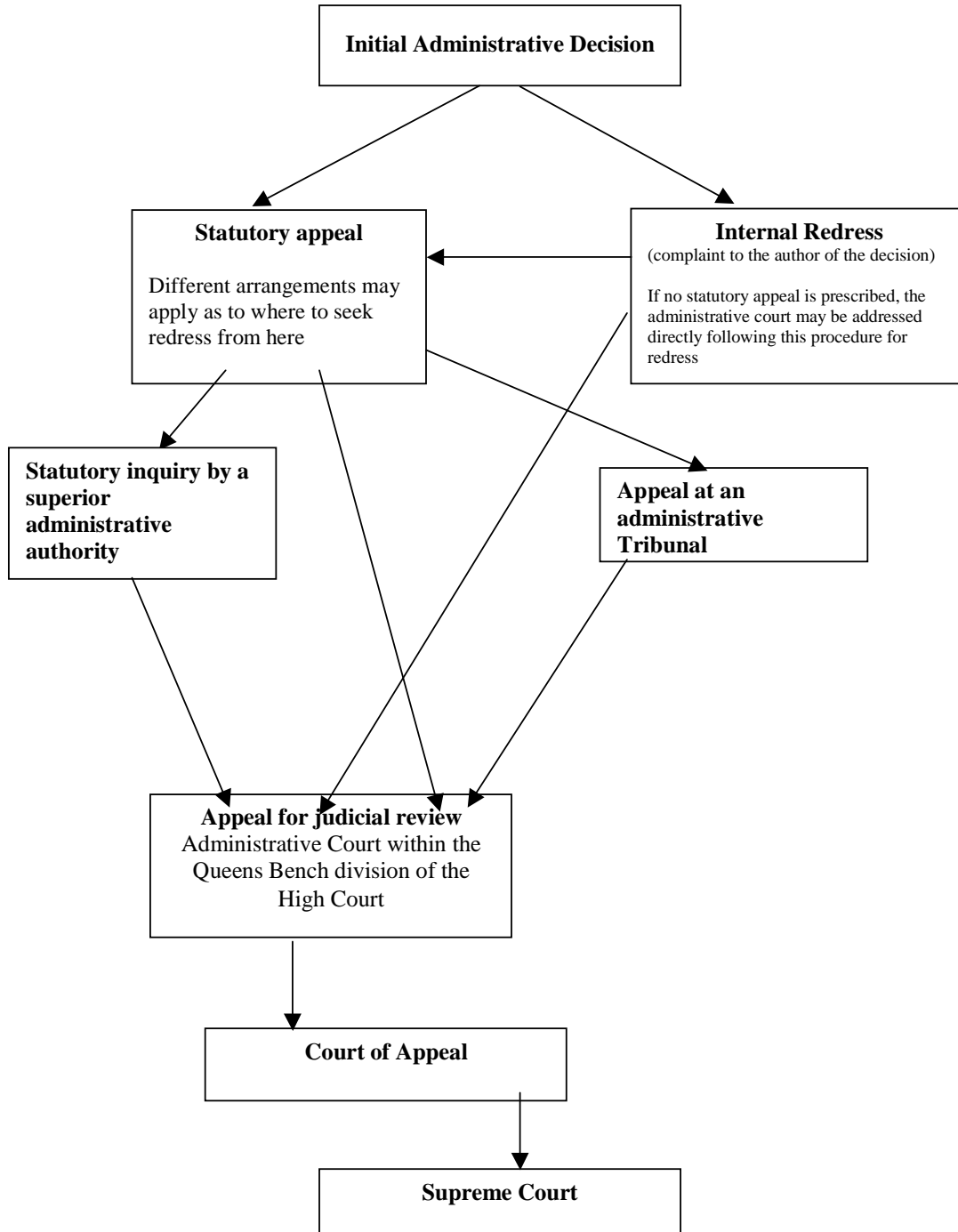
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## Annexes

### Annex 1 - Flowchart of administrative legal protection in England and Wales<sup>35</sup>



<sup>35</sup> It should be noted that following each step in this chart, the competent tribunal or competent administrative authority may take a decision that for appellants finalizes the conflict.



## Annex 3 Statistics

The major part of administrative disputes will be decided within the tribunals system. The tribunals deal with about one million cases a year. The number of cases dealt with by the Administrative Court (as part of the High Court) is rather small compared to this. The Administrative Court dealt with around 11000 cases in 2007. 7000 of these cases regarded claims for judicial review. The majority of the remaining cases regarded statutory appeal cases. These numbers put the English doctrine into perspective, which says that an ordinary (civil) judge should have the ability to decide administrative cases. It is common for 'ordinary' citizens, which have a dispute with the administration, to bring their case before a tribunal. However it needs to be noted that the complainant has to go a long way before he reaches the jurisdiction of the Administrative Court.

### Tribunals

The process of appealing before the First-tier Tribunal takes on average between three and eight months, depending on the type and complexity of the case (from start to finish).

#### *First-tier Tribunal (Asylum Support)*

Statistical data for 2008/09 Financial Year

Judicial Pool: 25

Days Sat: 555

Receipts: 1,974

Withdrawn: 841

Decided: 2,010

Outstanding: 43

Success Rate: 19%

Oral Hearings: 65%

Waiting Times: 12 working days from receipt to determination of case.

Days Sat: 19,964

Receipts: 22,964

Withdrawn: 10,393

Decided: 14,998

Outstanding: 1,792

Success Rate: 14%

Oral Hearings: 100%

Waiting Times: no information available

#### *First-tier Tribunal (Immigration Services)*

Statistical data for 2008/09 Financial Year

Judicial Pool: 10

Days Sat: 19

Receipts: 9

Withdrawn: 5

Decided: 5

Outstanding: 2

Success Rate: 10%

Oral Hearings: 70%

Waiting Times: no information available

#### *First-tier Tribunal (Criminal Injuries Compensation)*

Statistical data for 2008/09 Financial Year

Judicial Pool: 56 (Eng), 1 (Wal)

Days Sat: 1,741 (Eng), 84 (Wal)

Receipts: 2,210 (Eng), 60 (Wal)

Withdrawn: 187 (Eng), 10 (Wal)

Decided: 2,715 (Eng), 112 (Wal)

Outstanding: 1,481 (Eng), 49 (Wal)

Success Rate: 43% (Eng), 56% (Wal)

Oral Hearings: 75% (Eng), 66% (Wal)

#### *Upper Tribunal*

Statistical data for 2008/09 Financial Year

Judicial Pool: 36

Days Sat: 302

Receipts: 1,762

Withdrawn: no information

Decided: 2,114

#### *First-tier Tribunal (Mental Health)*

Statistical data for 2008/09 Financial Year

Judicial Pool: 999



Outstanding: 922  
Success Rate: 16

Oral Hearings: no information  
Waiting Times: no information

## Ombudsmen

### *Parliamentary and Health Services Ombudsman*

In 2008-09 the Parliamentary Ombudsman received 7,608 enquiries related to 7,990 complaints about government departments, agencies and public bodies (excluding health). There was an increase of 8.8 per cent in the number of complaints. Comparing to previous years the top 5 departments complained about usually remain unchanged. The most significant increases are in complaints about the Home Office (up 61.3 per cent) and the Ministry of Justice (up 35.3 per cent). The number of complaints about HM Revenue & Customs fell in 2008–09 by 7.8 per cent.<sup>37</sup>

### *Local Government Ombudsmen*

The table below shows the number of complaints per subject filed at the Local Government Ombudsmen

**TABLE 2: Subjects of complaints and enquiries received 2008/09 by the local government Ombudsmen<sup>38</sup>**

	Adult care services	Children and family services	Education	Housing	Benefits	Public finance (inc. local taxation)	Planning and building control	Transport and highways	Other	Total
Premature complaints and enquiries	310	298	134	1,637	379	595	960	544	1,117	<b>5,974</b>
Advice given (exc premature advice)	155	164	304	738	177	244	540	416	1,610	<b>4,348</b>
Forwarded to inv team (resubmitted premature)*	82	90	64	583	112	150	641	254	551	<b>2,527</b>
Forwarded to inv team (new)	362	340	1,757	1,387	261	300	1,705	758	1,293	<b>8,163</b>
<b>Total</b>	<b>909</b>	<b>892</b>	<b>2,259</b>	<b>4,345</b>	<b>929</b>	<b>1,289</b>	<b>3,846</b>	<b>1,972</b>	<b>4,571</b>	<b>21,012</b>

<sup>37</sup> Source : annual report 2008-2009, [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0009/1017/Annual-Report-2008-09.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0009/1017/Annual-Report-2008-09.pdf), p. 25.

<sup>38</sup> Source : <http://www.lgo.org.uk/publications/annual-report/>



### III. Pre-trial Proceedings in French Administrative Law

#### 1. Introduction

According to Article 1 of the Constitution of the French republic of 4 October 1958, France shall be an indivisible, secular, democratic and social Republic that inter alia shall be organized on a decentralized basis.

In the last decades of the 20<sup>th</sup> century, France has undergone the reform of its administration system. Thanks to the reform of 1982<sup>39</sup> which was later in 2003 upheld by the constitutional reform, France has become a decentralized country. According to Article 72 of the Constitution, the territorial communities of the Republic shall be the Municipalities (Communes), the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities (*collectivités d'outre-mer régies*). There are 22 Regions (and four overseas), 94 departments (and four overseas) and 36,679 Communes in France. The *Code général des collectivités territoriales* of 2000 redefines the rights and obligations of these local subjects and their bodies. Regions may levy their own taxes and they have competence in education, public transport, funding universities and secondary education (lycées), and in economic development. The relevant bodies in Regions are the regional council, the economic and social committee and the regional council's chairman. The departments have competence in health and social services, rural capital works, departmental roads, and the capital expenditure and running costs of colleges. Communes exercise their powers in services, including local plans, building permits, social affairs, building and maintenance of primary schools and collèges, waste disposal and some welfare services.

The extension of the administration brings the extension of the objections against it which leads to the development of the administrative judiciary and the French judicial system clearly distinguishes two different types of jurisdiction. On one hand is *l'ordre judiciaire* (ordinary) and *l'ordre administratif* (administrative) on the other one. The courts of law have their jurisdiction to settle the disputes between private legal entities and to punish violators of penal laws. The administrative courts decide the disputes between individuals and the State, local authority, public body or private body that exercises public services or disputes among these entities. Both of these systems are organized in a pyramid structure with three instances. The ordinary courts of the first instance are the courts for civil cases and for criminal cases e.g. the *Tribunal de commerce* or the *Tribunal d'instance* and the *Tribunal de police* or the *Tribunal correctionnel* respectively. Their decisions might be appealed to the *Cour d'appel*. The highest court authority of the state is the *Cour de cassation*. The system of administrative courts is comparable with but separate from the ordinary court system. The first instance courts are administrative tribunals (42). Their decisions may be appealed to the administrative courts of appeal (8). And the supreme administrative court is the *Conseil d'État*. It has two sections. One has an adjudicative function; the other one has an advisory function towards the French government. The latter examines and expresses opinions on the most important draft legislation and draft decrees that are submitted to it.

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<sup>39</sup> Law of 2 March 1982 de décentralisation

The administrative courts hear all cases against acts and decisions of various branches of public administration. They hear cases against acts of the state, regional councils, departments, municipalities. They even deal with actions for damages against administrative public services and disputes relating to contracts with the state. Last but not least they also decide the disputes concerning taxes and municipal and cantonal elections and employment disputes within the public service. The *Conseil constitutionnel* has a special status within the court system, because it may rule on the conformity of legal acts with the Constitution, although we cannot consider it to be a court *strictu sensu*. Its control is limited to the period prior to the promulgation of the act concerned.<sup>40</sup>

The most important legal acts dealing with the issue of administrative proceedings are the:

1. *Constitution* of 4 October 1958
2. *Code de justice administrative* of 4 May 2000
3. *Code général des collectivités territoriales* of 1996/2000
4. Law n°2004-809 du 13 August 2004 *relative aux libertés et responsabilités locales*
5. Law n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations*
6. Law n°87-1127 of 31 December 1987 *portant réforme du contentieux administratif*
7. Law n°79-587 of 11 July 1979 *relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public*
8. Law n°78-753 of 17 July 1978 *portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal*
9. Decree n°2006-672 of 8 June 2006 *relatif à la création, à la composition et au fonctionnement de commissions administratives à caractère consultatif*
10. Decree n°83-1025 of 28 November 1983 *concernant les relations entre l'administration et les usagers*
11. Decree n°65-29 of 11 January 1965 *relatif aux délais de recours contentieux en matière administrative*

## ***2. Protection of the interested persons in pre administrative proceedings***

If an individual does not agree with adopted administrative decisions, the French system provides different three different ways that in the end could lead to reversing or changing of the impugned decision or to settle the dispute between administrator and administrated. An individual may:

1. ... direct the objection<sup>41</sup> against the administrative decision to the administrative authorities (Proceedings before the administrative organs). In some cases an individual has an obligation to do so;
2. ...direct the objection against the administrative decision to the administrative court (Proceedings before the administrative courts); or

<sup>40</sup> Article 61 of the French Constitution

<sup>41</sup> We use the word 'objection' for a legal action against a legal act under public law at an administrative authority in order to make a distinction with the word 'complaint', which refers to a broader range of actions against a broader range of administrative behavior.

3. ...try do solve his problem outside the system of administrative courts and administrative authorities by the use of other alternative dispute settlement possibilities (Alternative dispute settlement).

### ***3. Proceedings at Administrative Authorities – Recours administratif préalable***

In general, the French administrative law system offers administrative authorities “the second chance”. An individual may file an objection against the administrative decision to an administrative authority. In order to avoid court proceedings the administrative authority may change, quash or reconsider its former decision. In this case we talk about *recours administratif préalable* (administrative objection or application for reconsideration). This procedure is in general optional (facultative) but in exceptional cases it can be obligatory. The administrative authority may, following this *recours administratif préalable* procedure, adopt a new administrative decision, so that the complainant will not start proceedings before the administrative court. Because of this quality of the *recours administratif préalable* it may be stipulated that it is considered an alternative *interne* dispute settlement by the administrative authority itself. By re-examination of the case the administrative authority can successfully avoid court proceedings i.e. proceedings that commence by the *recours contentieux* (administrative appeal or application for a judicial review of the administrative decision). The *Recours administratif préalable* procedure thus on one hand helps to create a broader dialogue between the administration and those that are administered and on the other one is helps to decrease the amount of cases directed of the administrative courts that in the last years became very busy.

#### **Administrative authority – competences**

In connection to the *recours* procedure the administrative authorities have certain competences. Since the issue of the *recours administratif préalable* is not included in general legal acts these competences may differ. However according to the case law of the *Conseil d’État* there are two major competences of the administrative authority:

- to quash (*annuler*) the decision (and substitute it by a new one) and;
- to change (*réformer*) the decision.

After the administrative authority receives the *objection*, it can change the decision entirely or partially. However there is a difference in the procedure of the administrative authorities. If the decision creates a certain right the internal consultation of the administrative authority is necessary. On the other hand if the decision does not create these rights but it is for example only declaratory and there is only a clerical mistake in an administrative document (for example drivers licence) then the administrative authority may change it without internal consultation. This was confirmed by the *Tribunal Administratif de Poitiers*, that stated in its decision that: “...taking into the consideration, on one hand, the part that is undisputed, that Mr. N. has not received a same or higher grade than 10 of 4 modules of training that followed; thus, under these provisions, the diploma of sports instructor ... could not be attributed to him; on the other hand the decision by which the *Ministre de la jeunesse et des sports* issued to him, by mistake, this decision was a decision purely declarative towards which the administration has no discretion; and because of that the Minister was required to draw the consequences of the failure of Mr. N to pass the tests for sports instructor and could

lawfully withdraw the diploma that had been issued in error”.<sup>42</sup> The similar cases were also discussed by the courts in *Tribunal Administratif de Rennes*, M. et M<sup>me</sup> B of 13 February 1991 or in *Tribunal Administrative d’Amiens*, M<sup>lle</sup> V of 1 March 1991. In general, the decision that is adopted by the administrative authority in reaction to the objection must be motivated, unless it is stipulated otherwise in the special legal act.<sup>43</sup>

With respect to the competences of the administrative authorities we can distinguish between different types of administrative objections (*recours*). The first criterion is that of the subject to which the individual should submit the objection. In this case, there is a distinction between:

1. *Recours gracieux* (an objection that is addressed to the public body that adopted the decision (*l’auteur de l’acte*)), and
2. *Recours hiérarchique* (an objection is addressed to the public body that is superior to the public body that adopted the decision). In this case it needs to be noted that the *Conseil d’État* considers the hierarchical control of the administrative decisions as a general principle of law.<sup>44</sup> Therefore it is only the law that may exclude this type of *recours* as a remedy. The law may exclude the existence of this remedy, either explicitly<sup>45</sup> or by creating an administrative authority without a superior body i.e. by creating an independent administrative body (*autorités administratives indépendantes*)<sup>46</sup>.

The second criterion for division of administrative objections in the French administrative system is the character of the *recours administratif préalable*. This is important especially in order to be able to commence the courts proceedings. In this case a distinction can be made between:

2. *Recours administratif préalable facultatif* (the complainant, in order to be able to challenge the administrative decision before the administrative court, has a possibility prior to the court proceedings to file an objection before the administrative authority), and
3. *Recours administratif préalable obligatoire* (the complainant, in order to be able to challenge the administrative decision before the administrative court, has an obligation prior to the court proceedings to file an objection before the administrative authority)<sup>47</sup>.

The “*règle de la décision préalable*” – the rule of the prior decision<sup>48</sup> means that the complainant needs a decision by the administrative authority against which he or she can then

<sup>42</sup> See TA de Poitiers, 9 February 2000, n°9801027-3 : « *considérant, d’une part, qu’il n’est pas contesté que M. Noblet n’a pas obtenu une note égale ou supérieure à dix sur vingt dans deux des quatre modules de la formation qu’il suivait ; qu’ainsi, en application des dispositions précitées, le diplôme de brevet d’éducateur sportif ... ne pouvait lui être attribué ; que, d’autre part, l’acte par lequel le ministre de la jeunesse et des sports lui a délivré, par erreur, ce diplôme, constitue une décision purement reconnitive à l’égard de laquelle l’administration ne dispose d’aucun pouvoir d’appréciation ; que le ministre était tenu de tirer les conséquences de l’échec de M. Noblet aux épreuves du brevet d’éducateur sportif et a pu légalement lui retirer le diplôme qui lui avait été délivré par erreur* ».

<sup>43</sup> CE, 7 March 1947, *Bornet* : Rec. CE, p. 706. - 23 May 1947, *Couty* : Rec. CE, p. 215. - 29 October 1993, *Min. agr. et forêt c/ M. et Mme Cousin et a.*, req. n° 121543 : Juris-Data n° 046798

<sup>44</sup> See CE, 30 Juny 1950, *Quéralt*, p. 413

<sup>45</sup> For example Article L. 121-10 of *Code rural* excludes all *recours administratif* against the decisions of the departmental commissions on land development (commissions départementales d’aménagement foncier)

<sup>46</sup> See CE, 13 Juny 1969, *Bussy*, p. 309

<sup>47</sup> This issue will be discussed further in the text.

<sup>48</sup> Gustave Peiser, *Contentieux administratif*, 14e édition, Dalloz, Paris, 2006, p. 126

file an objection in the *recours* procedure<sup>49</sup>. This rule was designed for three reasons: 1. to warn the administration of the existence of a dispute, 2. to allow it to take a position before court proceedings are listed and 3. in order to decrease the number of cases that reach the courts. Nevertheless it also creates a privilege of the administration to delay the involvement of the court in the administrative proceeding at hand. This action generally involves the existence of an administrative decision. The rule of the prior decision (*décision préalable*) proves to be very important in the case of judicial proceedings, especially in those where this procedure is obligatory.<sup>50</sup>

The French legislator wanted to order obligatory pre-trial administrative proceedings in order to ease the burden of the administrative tribunals. And it announced the generalization of this procedure in Article 13 of the Law of 31 December 1987, which says that: “*The decrees rendered to the Conseil d’État shall determine under what conditions contractual disputes concerning the State, local governments and their public institutions, as well as the actions involving contractual liability should be submitted prior the arbitration or courts proceedings, to a preliminary procedure of recours administratif or to conciliation.*” This article thus announced the generalization of the obligatory pre-trial proceedings at least in the case of the contractual disputes concerning public entities and in the case of extra-contractual responsibility of administration. However, according to the sources available such general codification has not taken a place yet.<sup>51</sup>

## Standing

The issue of the standing in the pre-trial proceedings before the administrative authority concerning the question who may commence and participate in this type of proceedings deserves a closer look. Since there is no general legislation that would describe it, this issue is to a large extent only defined by rules established through case-law of the administrative courts. In general it is possible to say that a person has standing only if there is a personal interest in or grievance caused by the decision<sup>52</sup>. In some cases, the person is explicitly mentioned in special legal acts. In order to be able to use this administrative objection procedure the complainant has to fulfill several *conditions*:

a) The *objection letter* has to be submitted to the administrative authority within the general term (*délai*) of 2 months since the notification of the decision of the administrative authority<sup>53</sup>. This period is the general period in which an individual may apply to the court for a judicial review of the administrative act. Thus *recours administratif* has to be submitted within the timeframe for a *recours contentieux*. Challenging of the administrative decision within this period before the administrative authority prolongs the period for challenging the decision before the court.

<sup>49</sup> CE, 8 January 1997, *Sté des grands magasins de l’Ouest*, p. 1005 or EC, 8 August 1990, *Min. de l’Agriculture c. Djaout*, p. 243

<sup>50</sup> CE, 21 February 1997, *M. Quile*, RFDA, 1997, p. 422

<sup>51</sup> “*Des décrets en Conseil d’Etat déterminent dans quelles conditions les litiges contractuels concernant l’État, les collectivités territoriales et leurs établissements publics, ainsi que les actions mettant en jeu leur responsabilité extracontractuelle sont soumis, avant toute instance arbitrale ou contentieuse, à une procédure préalable soit de recours administratif, soit de conciliation.*” Article 13 of Law n°87-1127 of 31 December 1987 portant réforme du contentieux administratif

<sup>52</sup> Most of the time it is the person that is directly affected by an administrative decision.

<sup>53</sup> Article R 421-1, the *Code de Justice Administrative*

- b) The *objection letter* should require quashing (*l'Annulation*) or changing (*Reformation*) of the decision in question, not just require the explanation or information<sup>54</sup>;
- c) The *objection letter* should be addressed to the competent public authority (however this condition was partially changed in 2000 when an obligation was created for addressed public bodies which are not competent to decide on the objection, to transfer the *objection letter* to the competent administrative authority)<sup>55</sup>; and
- d) The *objection letter* should be aimed against the administrative decision that is can be subjected to this kind of *recours* i.e. an act that is open to retroactivity (*Retrait retroactif*).<sup>56</sup>
- e) The *objection* should be made in writing (paper application), but an application via fax or via email is also accepted. However these applications have to be supported later by a signed paper versions<sup>57</sup>. The issue of the email has been confirmed also by the decision of the *Conseil d'État*, where it decided that it is possible to file an objection by email, but the initiator has to confirm that he is the author of the email.<sup>58</sup> However, some legal acts require precise form for the *recours*.<sup>59</sup>
- f) The objection *letter* may be submitted by the interested person or by his/her legal representative.<sup>60</sup>

### Interested party/third party

As written above the pre trial administrative proceedings could be initiated by the person that has a personal interest in the case. Interested party is the party towards or against which the administrative decision is directed. According to the *Conseil d'État* the questioning of the rights of third persons is statistically rare.<sup>61</sup> Most of the decisions have only individual effect (refusal of visas, refusal to consult the administrative documentation). The other cases that concern more people are not that clear. The issue of the interest of the third persons is indeed a delicate one, especially in the case when their interest is not easy to determine explicitly. The *Conseil d'État* did not distinguish between the persons that are considered having an interest in accordance to the legal provision act and third persons that might eventually have some personal interest to exercise the *right to file objections*, i.e. the right to file objections is not limited only to interested persons enumerated in legislation but it applies to any person aspiring to contest the initial administrative act.<sup>62</sup> However this rule has been changed in 2006 with an exception of administrative decisions adopted by professional bodies. The

<sup>54</sup> Médiateur, (n. 6)

<sup>55</sup> Article 1, Law of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations*

<sup>56</sup> Médiateur (n. 6), p. 3

<sup>57</sup> *Ibid.*, or Article 16 of Law n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations*

<sup>58</sup> CE, 28 December 2001, n° 235784, *Élections municipales d'Entre-Deux-Monts*, “*Considérant qu’il résulte de l’instruction, et notamment de l’accusé de réception émis par la préfecture que la protestation de M. G., dirigée contre les opérations électorales qui se sont déroulées dans la commune d’Entre-Deux-Monts le 11 mars 2001, a été transmise à la préfecture du Jura par un courrier électronique reçu le 16 mars 2001, et que M. G. a ultérieurement confirmé être l’auteur de cette protestation par lettre adressée au tribunal administratif de Besançon ; que cette protestation était ainsi recevable.*”

<sup>59</sup> See for example the further description of *recours* procedure according to *Code de la Défense*.

<sup>60</sup> CE, 10 March 1965, *Möller*, p. 157, DA 1965, n°177

<sup>61</sup> Les recours administratifs préalables obligatoires, Conseil d'État, La documentation française, 2008, p. 46

<sup>62</sup> CE, 28 September 2005, *Loius*; “...lorsque des dispositions législatives ou réglementaires organisent une procédure obligatoire de recours administrative préalable à l'intervention d'une juridiction, le respect de cette procédure s'impose à peine d'irrecevabilité du recours contentieux à toute personne justifiant d'un intérêt pour introduire ce recours contentieux; qu'il en va ainsi même dans le cas où les dispositions régissant la procédure de recours administrative préalable, dans l'énumération qu'elles donnent des personnes susceptibles de le former, auraient omis de faire figurer toute autre personne justifiant d'un intérêt suffisant pour l'exercer.”



*Conseil d'État* returned back to a rather restrictive position and pre trial objections may be submitted only by persons that are explicitly mentioned in the legal act. This rule is strictly applicable within the obligatory administrative objection procedure.<sup>63</sup> At the same time the *Conseil d'État* suggests that it is not desirable that obligatory pre trial administrative procedure in general be extended also to the third persons. The *Conseil d'État* enumerates various reasons; for example the conditions of publicity of the decision, complexity of contradictory proceedings or logic of the pre trial system.<sup>64</sup>

Unless particular legal provisions say so the administrative *objection* is not subject to any formality. However, the complainant has to prove that he or she has submitted the *objections* to an administrative authority.<sup>65</sup> It should be noted that the administrative authority has to confirm to a complainant that it received the administrative *objection*. Article 19 of the Act of 12 April 2000 provides that "*any request to an administrative authority is the subject of a receipt issued under conditions set by decree rendered to the Conseil d'Etat ... The limited term to file a objection can not be used against the complainant if the receipt has not been sent to him or it does not contain the information required by the decree mentioned ...*"<sup>66</sup>. The administrative authority in most of the cases replies to the *objection* of the complainant. But if that does not happen i.e. when the administrative authority does not reply to the complainant within the general or another explicitly stipulated timeframe, then the lack of response of the administrative authority is considered a rejection of the objection<sup>67</sup>. The general timeframe in which the administrative authority has to answer to the complainant following the *objection letter* was shortened from 4 months to 2 months in 2000. The *objection* has to be submitted to the administrative authority within this time period because of:

1. The power of the administrative authority to withdraw or change this particular decision and;
2. The possibility to initiate the procedure before the courts if the administrative authority rejects the objection. And indeed the objection must be submitted to the administrative authority within the period for bringing proceedings to the court (*recours contentieux*), in order to preserve the benefits of this period for the complainant in case of its rejection.<sup>68</sup> However a delayed *objection* cannot interrupt the term for bringing the proceedings to the court (*recours contentieux*).<sup>69</sup>

<sup>63</sup> CE, 10 march 2006, *Leroy Merlin*; " ... sous réserve du cas où, en raison tant des missions conférées à un ordre professionnel qu'à son organisation à l'échelon local et au plan national, les dispositions législatives ou réglementaires prévoyant devant les instances ordinaires une procédure obligatoire de recours administratif préalablement à l'intervention d'une juridiction doivent être interprétées comme s'imposant alors à peine d'irrecevabilité du recours contentieux à toute personne justifiant d'un intérêt lui donnant qualité pour introduire ce recours contentieux, une procédure de recours administratif préalable n'est susceptible de s'appliquer qu'aux personnes qui sont expressément énumérées par les dispositions qui en organisent l'exercice..."

<sup>64</sup> Les recours administratifs préalables obligatoires (n. 23), p. 48 - 49

<sup>65</sup> See <<http://www.sports.gouv.fr/francais/metiers-et-formations/reglementation/la-reglementation-des-diplomes/brevets-d-etat-d-educateur-sportif/jurisprudence-des-examens-sportifs/complements/recours-administratifs-recours>> accessed on 5 June 2010

<sup>66</sup> Law n° 2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations*

<sup>67</sup> Article 1, Decree n°65-29 of 11 January 1965 *relatif aux délais de recours contentieux en matière administrative*

<sup>68</sup> See « doit être introduit dans le délai du recours contentieux pour conserver à son auteur le bénéfice de ce délai au cas où il ferait l'objet d'une décision de rejet » (CE 20 April 1956, *Ecole professionnelle de dessin industriel*)

<sup>69</sup> See CE 30 November 1994, *Syndicat national du patronat moderne et indépendant de la Réunion*

So in order to be able to protect her or his rights also in the later stages i.e. before the court, the complainant has to submit this “administrative objection” within the prescribed timeframe.

### Organization of the proceedings

In general, the pre trial administrative proceedings before the administrative authority are carried out in writing. The complainant has to send the administrative authority her or his objection including evidence and wait for the reply of the administrative authority which is also in writing. In the case of pre trial proceedings oral hearings are an exception. However if the administrative authority considers it necessary or a legal act says so, it may summon the complainant for an oral hearing. The lack of a general legal norm on pre trial administrative proceedings makes it almost impossible to describe its precise organization. Since there are more than 140 special pre trial administrative procedures<sup>70</sup> the generalization is very difficult. Some procedures are before responsible ministers<sup>71</sup>, others before different commissions<sup>72</sup> or before committees<sup>73</sup>. At the same time the legal acts describing these *recours* procedures are usually silent on the issue of the organization of the proceedings as well as accessible written sources. Because of that it is possible to presume that the organization of the proceedings depends on the discretion of the administrative authority or its internal documents, within the limits set by the case-law of the administrative courts and existing legislation.

### Defense rights

When it comes to defense rights of the individuals in the pre-trial proceedings, the most important one is the general right to complain about the administrative decision and begin pre-trial proceedings. The issue of defense rights similarly to the issue of organization of the proceedings is not generally regulated in the legal acts. One of the reasons might be the written character of the *recours* procedure. Nevertheless some general legal acts grant the complainant some defense rights, for example the right to be represented by a representative of her or his own choice. The representation does not necessarily have to be a legal representation. Although it is not a rule, it is usually the legal representative of the individual who communicates with the administrative authority or administrative court. In the case of an oral hearing the legal act may require some criteria to be fulfilled by the representative.<sup>74</sup> Since most of the pre trial proceedings are in general written the representation as such is not very visible. Other frequent defense rights in administrative proceedings such as the right to consult the case file, the right to submit new evidence during the proceedings (including witnesses), the issue of bias or other rights that complainant has in regular administrative proceedings are not mentioned in the sources available.<sup>75</sup>

<sup>70</sup> Les recours administratifs préalables obligatoires, (n. 23), p. 15

<sup>71</sup> For example administrative objections stemming from the works on historic monuments are assessed by Minister of culture in accordance with the *Code du Patrimoine*.

<sup>72</sup> For example administrative objections stemming from university elections are assessed by *Commission de contrôle des opérations électorales* in accordance with Decree 85-59 of 18 January 1985.

<sup>73</sup> For example administrative objections in sport disputes are assessed by *Comité national olympique et sportif français* in accordance with Law n°92-652 of 13 July 1992.

<sup>74</sup> For example he has to be an advocate or a member of the armed forces etc.

<sup>75</sup> For rights of defense (droits de la défense) in administrative proceedings see for example *Analyse comparée du droit administratif, La procédure administrative non contentieuse en droit français* European Public Law Series vol. XIV, ed. Michel Fromont, Esperia publications ltd., London, 2000, p. 114

#### **4. Relation between pre-trial and judicial proceedings**

As mentioned above the *recours* procedure, its conditions, its timeframes, or its qualities are not included in a general legal act on administrative judicial procedure. Nevertheless it is possible to find a relation between pre-trial and judicial proceedings. Although the general legal act does not exist, there are many legal acts with status of *lex specialis* that require pre-trial proceedings for the complainant to be able to challenge the administrative decision before the administrative court. In this case two major types of administrative objection proceedings should be distinguished *recours administratif préalable facultative* (facultative pre-trial administrative proceedings) and *recours administratif préalable obligatoire* (obligatory pre-trial administrative proceedings). Next to that the procedures before administrative courts and before administrative authorities are disconnected from each other. According to the case law of the *Conseil d'État* the complainant may follow them consecutively or simultaneously.<sup>76</sup> The Administrative authority is thus not precluded from dealing with the matter that is also pending before the administrative court. It is even obliged to quash without any delay an illegal act unless Statute Act says otherwise.<sup>77</sup> If the administrative court decides the case before the administrative body does then the administration has to respect the decision of the judge and on the other hand if the administrative body is faster than the administrative court and it changes or quashes the act then there is no need for administrative court to deal with the case if the reason for the objection has disappeared.

##### **Recours administratif préalable facultatif (RAPF)**

This type of RAP is more common. In general every administrative act might be challenged by means of a *recours* procedure. However, it is necessary to point out that there is no legal act in the French legal system that would describe this type of *Recours* in general terms. Still the legal academic literature, some special legal acts, decisions of the *Conseil d'Etat* and practice of many public bodies (for example the documents of *Médiateur de la République* mention it) attest its existence i.e. this type of *recours* is almost completely based on the administrative experience and unwritten rules of law. In the case of the RAPF, the relation between administrative pre trial proceedings and judicial proceedings is very loose. The complainant has a possibility to decide whether he or she applies to the administrative authority or whether he or she directly challenges the administrative decision before the administrative tribunal.

##### **Recours administratif préalable obligatoire (RAPO)**

On the other hand there are situations where the administrative authority should have a possibility to reconsider its decision before the administrative courts may assess it. The *recours administratif* is obligatory if it is required by the law.<sup>78</sup> The obligatory pre-trial *recours* procedure is not a general procedure for all of the administrative actions, although there were efforts to impose this procedure for all of them but these efforts have not yet been successful. This procedure is not, similarly as the facultative procedure, covered by one

<sup>76</sup> CE, sect., 28 January 1938, *Maire* : Rec. CE, p. 98

<sup>77</sup> CE, 16 June 1958, *Min. Agriculture.* : Rec. CE, p. 314

<sup>78</sup> CE, 28 September 2005, *M. Louis*, ADJA 2006, p. 103

general legal act. However, the references to this procedure might be found in different legal acts that have a status of *lex specialis*. This obligation was presupposed by the reform of the administrative judiciary in 1987. According to the academics the RAPO procedure is more and more frequent.

### Specific properties of the RAPO:

- The use of RAPO procedure is obligatory in order to be able to present the case before the court<sup>79</sup>,
- The courts would oppose any objection if the complainant did not use this procedure<sup>80</sup>.
- This procedure stems from special legal acts<sup>81</sup>.
- The period in which the individual has to submit the case to the administrative authority varies. If the particular legal act does not stipulate this period the general 2 month period applies.<sup>82</sup>
- This procedure might be used by every person that has an interest against the administrative decision.<sup>83</sup>
- The legal period for applying to the court may be preserved more than once.<sup>84</sup>

There are three *general consequences* of the RAPO<sup>85</sup>:

First, the administrative authority that deals with the RAPO has to appreciate that it has to decide the case in accordance with the situation (law, facts) at the time it takes the new decision. The administrative authority has to take into account changes in law and the facts that have occurred since the date when the contested decision was taken.<sup>86</sup>

Second, the decision that has been provoked by the RAPO substitutes in all the cases the decision that had been contested by the complainant; both in case of revision or confirmation of the decision.. At the same time, because the contested decision was substituted by the new one, the mistakes that were initially put forward by the objection do not influence the legality of the new decision and it is not possible to use them in case of a new objection procedure against it. In other words they are inoperative.<sup>87</sup>

Third, the RAPO has the effect of “crystallization” of the possible case before court i.e. it presupposes what could be used in proceedings before the court. This has two aspects. The first one concerns the evidence of the *recours* which means that the complainant can not ask the court to decide on evidence different from what he or she had already mentioned in the pre trial objection procedure. For example only the evidence submitted to the Departmental Commission on land development may be invoked before the judge.<sup>88</sup> The second one concerns the claims of the *recours juridictionnel* i.e. that the complainant can not invoke in the judicial proceedings other claims than those that were already invoked in the *recours préalable*. For example the court will not decide on other claims than those that were submitted to the Commission of the control<sup>89</sup>. The unacceptability of new claims or new

<sup>79</sup> For example Article R229-27 of the *Code de l'environnement* or Article R 600-1 of the *Code de l'urbanisme*

<sup>80</sup> CE, 28 September 2005, AJ 2005, p. 1869, *obs. M.- C. de Montecler*

<sup>81</sup> See for example Article R229-27 of the *Code de l'environnement*

<sup>82</sup> This issue would be described further in the text.

<sup>83</sup> CE, 28 September 2005, AJ 2005, p. 1869, *obs. M.- C. de Montecler*

<sup>84</sup> CE, 29 May 1963, *Maurel*, p.334

<sup>85</sup> These three general consequences were described by René Chapus, in *Droit du contentieux administratif*, 12e edition, Montchrestien, Paris, p. 396-97

<sup>86</sup> CE, 13 November 1991, *Girer*, p. 392

<sup>87</sup> CE, 27 February 1956, *Assoc. des proprietaires du Chesne*, p. 92

<sup>88</sup> CE, 17 February 1997, *Mme Chartier*, p. 420

<sup>89</sup> CE, 11 October 1972, *Elect au Conseil*, p. 628

evidence stems from the logic of the obligation of the *objection* proceedings. It is intended to examine and repair the case before the courts proceedings. This logic would be undermined if the court had to decide anew based upon until then unknown claims or evidence. However, some scholars suggest that so far it is not possible to find in French jurisprudence an explicit general principle of that claims or evidence should be refused by the courts when they have not been submitted in the *recours* procedure.<sup>90</sup> It should be noted that these two principles are not absolute, because there is a possibility that the court will accept new evidence. That is the case when there is an evidence of “*ordre public*” that may be invoked during the whole course of the proceedings.<sup>91</sup>

### General time period in the case of RAPO

The general time period of 2 months is applicable also here. However as stated above, the time limits may vary because the special legal acts may require the different period which may be as short as 5 days in some cases.

### Sources of RAPO

The obligations of the RAPO may stem from two different sources; from legislative provisions or from contractual clauses.

#### *Contractual clauses*

The entries of the public procurement (*cahiers des charges*) may include that the parties that concluded the contract with administration may address the court only after they submitted the objection to the administrative authority<sup>92</sup>.

#### *Provisions in Legal Acts*

In some cases the obligation to initiate an administrative objection is explicitly included in the legal acts. The administrative objection procedure is obligatory *inter alia* in the following cases<sup>93</sup>:

1. in the cases of orders of revenue or demands for payment issued to ensure the recovery of debts of a foreign state and in the area of taxes, the legal texts specify that, before submitting the case to court, the taxpayer must submit her or his claim to the tax officer who was in charge of the order of revenue.<sup>94</sup>
2. in other cases where legal provisions say that the complainant has to submit the *objection* to a specified administrative authority before submitting it to the administrative court:
  - *recours* against the outcome of academic elections. In this case it is necessary to submit a RAP in 3 or 8 days before the *commission de contrôle*<sup>95</sup>;
  - *recours* against the elections au *Conseil National de Universités* has to be submitted to Minister or president of the University<sup>96</sup>;
  - *recours* against the pecuniary sanctions imposed by the *Préfets* under the application of the *Code rural* should be presented in the period of one month to the *Commission des recours* that is created according to that act<sup>97</sup>,

<sup>90</sup> Chapus, (n. 32), p. 397

<sup>91</sup> CE, 16 November 1998, Ep. *Bravy*, p. 1120)

<sup>92</sup> CE, 18 December 1981, *Denic et Queinnec*

<sup>93</sup> However this list is not exhausting.

<sup>94</sup> Article 62, Décret n°62-1587 du 29 December 1962 portant règlement général sur la comptabilité publique

<sup>95</sup> Article 39, Décret n°85-59 of 18 January 1985 *fixant les conditions d'exercice du droit de suffrage, la composition des collèges électoraux et les modalités d'assimilation et d'équivalence de niveau pour la représentation des personnels et des étudiants aux conseils des établissements publics à caractère scientifique, culturel et professionnel ainsi que les modalités de recours contre les élections.*

<sup>96</sup> Article 4, Décret n°92-70 du 16 January 1992 *relatif au Conseil national des universités*

- *recours contentieux* of the civil servants and the military servants against the decisions regarding their personal situation should be preceded by the *recours administratif préalable* according to the decree rendered to the *Conseil d'État*<sup>98</sup>;

- a similar condition is also set in the *Code de la Défense* that requires the military complainant in personal issues to submit the objection to the Committee before applying to the court .

In order to give an example of how such proceedings should legally evolve, the military personnel objections proceedings will be described in greater detail below.

## Proceedings

Since there is not a *lex generalis* that describes the *recours administratif préalable* procedure in general terms we would like to offer at least a short description of the procedure included in a *lex specialis*. The following description stems from the Part 4, Book 1, Title II, Chapter V (Article R4125-1 and following) of the *Code de la défense*.

1. According to the Code, every *recours contentieux* brought by a military personnel against the administrative act related to his personal situation shall be preceded by a *recours administratif*, under penalty of inadmissibility of *recours contentieux*.<sup>99</sup>

2. The *recours administratif préalable* is reviewed by the Commission of the military objections, placed within the Ministry of Defence. The referral to the commission preserves the deadline for lodging the *recours contentieux*.<sup>100</sup>

3. The obligation to submit the *recours administratif* is not applicable against certain administrative acts (for example in the case of military recruitment or disciplinary dispositions).<sup>101</sup>

4. The *recours administratif* may be submitted only by the person who is touched by the decision. The person must be a member of the military forces. He may challenge only the administrative act related to his personal situation<sup>102</sup>.

5. The *recours administratif* must be submitted in the period of 2 months since the notification or publication of the action that is challenged.<sup>103</sup>

6. The *recours administratif* must be sent to the Secretariat of the permanent commission placed under the authority of the president of the commission.<sup>104</sup>

7. The *recours administratif* must be sent by registered mail with return address.<sup>105</sup>

8. The *recours administratif* must include the copy of the impugned act. If it is not included, then the complainant has the right to be notified by the Secretariat of the Committee to

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<sup>97</sup> Article R-331-8, *Code rural et de la pêche maritime*

<sup>98</sup> Article 23, Law n°2000-597 of 30 June 2000 *relative au référé devant les juridictions administratives*

<sup>99</sup> Article R4125-1, I., *Code de la Défense*

<sup>100</sup> Ibid.

<sup>101</sup> Article R4125-1, II., *Code de la Défense*

<sup>102</sup> This condition stems from the wording of the *Code de la Défense*.

<sup>103</sup> Article R4125-2, *Code de la Défense*

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

produce these documents in the period of 2 weeks. If the complainant does not supply the documents within this period the *recours administratif* is *ex lege* deemed to be withdrawn. If that is the case, then the complainant has the right to be notified about it.<sup>106</sup>

9. If *recours administratif* procedure is initiated after the end of the period mentioned in the first paragraph, the Chairman of the Committee notes the foreclosure of the case and notifies the person concerned.<sup>107</sup>

10. The administrative authority that issued the challenged act as well as persons concerned have a right to be informed that the *recours administratif* has been submitted.<sup>108</sup>

11. The Chairman of the Committee shall transmit the *recours administratif* to the competent authority if it does not fall under its jurisdiction and he shall inform the persons concerned. Any authority that receives a *recours administratif* which falls within the jurisdiction of the Committee shall transfer the *recours* without delay to the Committee and it informs the complainant.<sup>109</sup>

12. The exercise of a *recours administratif* before the commission does not suspend execution of the act in question. However the author of the act can suspend it until the responsible minister decides upon the *recours*.<sup>110</sup>

13. The *recours administratif* procedure is written. The Committee shall decide only after the person has submitted comments in writing. If considered necessary, the Committee may summon the person for an oral hearing. The complainant has a right to be heard at such an oral hearing. He may be assisted by a member in the active service of his choice.<sup>111</sup>

14. The Committee then recommends to the competent minister to either dismiss the *recours* or to accept it partially or in total. However its opinion does not bind the competent minister.<sup>112</sup>

15. The complainant has a right to be informed within four months by the commission on the decision of the competent minister. The decision on his *recours* replaces the original decision. Such notification must be sent by registered mail; the return receipt is requested. Absence of the notification of the decision by the expiration of four months period is considered to be a decision of rejection of the *recours* by the minister. This notification should include *inter alia* a reference to the possibility to complain against the initial decision before the administrative tribunal and the period for submitting the case to the tribunal.<sup>113</sup>

16. The administrative authority has a right to receive a copy of the decision.<sup>114</sup>

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Article R4126-3, *Code de la Défense*

<sup>109</sup> Ibid.

<sup>110</sup> Article R4126-4, I., *Code de la Défense*

<sup>111</sup> Article R4125-8, *Code de la Défense*

<sup>112</sup> Article R4125-9, *Code de la Défense*

<sup>113</sup> Article R4125-10, *Code de la Défense*

<sup>114</sup> Article R4125-11, *Code de la Défense*

The *recours administratif procedure* can also be found in other legal acts such as the *Code de l'environnement*, the *Code de la santé publique*, the *Code de l'urbanisme* or the *Code de l'éducation* although the legal provisions included in these legal acts are not very elaborate.

However some procedural rights of the complainant might be found in other legal acts that try to describe some procedural aspects of the administrative procedure in general terms and it is possible to say that these general rules are applicable to *recours* proceedings.

- According to Article 24 of Law n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations* the decision of the administrative authority has to be reasoned. The individual has a right to submit her or his written observations and if the administrative authority considers it important also to give oral observations. He or she has the right to be represented by an advocate of her or his choice.

- According to Article 23 of this act an individual has a right to have the administrative decision changed because of its illegality by the administrative authority within the timeframe for *recours contentieux*. The administrative authority may change this decision after the *recours contentieux* has been submitted. According to Article 25 an individual has a right to know the reasons for the decision, the ways to have the decision changed, the timeframes to do so, conditions that enable her or him to submit her or his written or oral observations and the possibility to be represented by an advocate of her or his choice. These obligations are based on case-law about social security and on cases involving the social insurance agriculture fund of salaries.

- According to Law n°79-587 of 11 July 1979 *relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public* individuals have a right to be informed about the motives of the administrative decisions that are not in their favor.

A problem related to describing the *Recours préalable* is that both the *recours hiérarchique* and the *recours gracieux* are not based on legislation but on administrative practices and jurisprudence<sup>115</sup>. There is no legal act that in general terms describes the *recours* procedure to which the complainant may resort, but since long practice and experience of administrative authorities and administrative courts, and also the *leges speciales* that describe (at least partially) this procedure, this procedure is one of the most used ways to avoid courts proceedings.

## 5. Proceedings before the Administrative Courts - *Recours contentieux*

The reform of the administrative justice in France harmonized the legal acts that dealt with administrative justice into one code i.e. Code of Administrative Justice. The Code entered into the force on 1 January 2001. However procedural rules are missing in the Code.

There are some specific features of the French administrative *contentieux* system.

1. The Administrative courts are arranged in a classical pyramidal structure.

Most of the cases are decided by the administrative tribunals (the courts of first instance), whose decisions can be appealed at the administrative courts of appeal. The supreme administrative court is the *Conseil d'État*.

2. The proceedings before the administrative courts are written (*procédure écrite*).

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<sup>115</sup> Compare CE 20 April 1956, *École professionnelle de dessin industriel*, p.163; CE 13 June 1969, *Ministre de Armées c Busy*, p. 438 or CE, 6 January 1989, *Renaud et a*, p. 3



The parties submit their conclusions, observations and requests to an administrative court only in written form. Public, oral hearing before administrative courts do not exist except where the law makes it obligatory. But still these procedures are very limited. In an oral hearing before an administrative tribunal the parties have a possibility to develop their new proposals but it is necessary that they are developed in writing before the beginning of the conclusions of the *Commissaire du Gouvernement*.<sup>116</sup> The judges decide the case in general on the basis of the written evidence included in the case file.

3. The proceedings before the administrative courts are inquisitorial.

This means that it is the administrative judge who leads the proceedings. The judge directs and organizes the proceedings and the parties do not have the initiative. The court takes upon itself the task of fact finding as far as it considers this necessary in regard of the submissions of the parties.

4. The proceedings before the administrative courts are contradictory.

In the proceedings before the administrative courts each side must be given an opportunity to contradict what the other party has said.

5. The proceedings before the administrative courts are partially secret.

However the secrecy of administrative proceedings is relatively limited. The secret character of the proceedings means that third parties can not consult the case file and public oral hearings are held only when statute presumes it explicitly. For example, the *Conseil d'État* decided that cases of disciplinary proceedings are dealt with without presence of the public<sup>117</sup>, although this practice was changed because of the decision of the ECHR. After that the *Conseil d'État* accepted that the general public may be present in certain cases.<sup>118</sup>

6. The *recours contentieux* to the courts does not suspend the challenged decisions.

That means that the administrative decision challenged by the *recours contentieux* may be executed.<sup>119</sup> Unless the law says so, the *recours* procedure does not have a suspensory effect.<sup>120</sup> This rule is a consequence of the *privilege du préalable* as enjoyed by the administrative authorities.<sup>121</sup> Of course there are some rare exceptions to this rule. For example the *recours* has a suspending character against the decisions of the *Préfet* on the deportation of non-citizens<sup>122</sup>.

7. The proceedings before the courts are not complicated and inexpensive.

Being written, without specific court fees and guided by the court a complainant does not have to worry about the proceedings as such.

8. The individual should not be represented by the advocate in all of the levels of the administrative proceedings before the courts.

Representation of the individual is obligatory only before certain administrative courts or in certain types of the proceedings. In the proceedings before an administrative tribunal, it is mandatory that the complainant be represented by a lawyer especially in the cases when the complainant sues the State or one of its public institutions for damages<sup>123</sup>. In other cases, recourse to a lawyer is optional. In the proceedings before *Conseil d'État* representation by an advocate in general is obligatory. However, the choice of advocate before the *Conseil d'État* is not fully free. The complainant has to choose one of the *Avocats au Conseil d'Etat et à la Cour de Cassation* i.e. special advocates who have a “monopoly” for the proceedings before

<sup>116</sup> CE, 5 January 1962, *Rietzch*, p. 11

<sup>117</sup> CE, 30 March 1990, *Botazzi*, RFDA, 1990, o. 472

<sup>118</sup> CE, 14 February 1996, *Maubleu*, p. 159

<sup>119</sup> Article L 4, *Code de Justice Administrative*

<sup>120</sup> Article L 4, *Code de Justice Administrative*, “Sauf dispositions législatives spéciales, les requêtes n'ont pas d'effet suspensif s'il n'en est autrement ordonné par la juridiction.”

<sup>121</sup> CE, 2 July 1982, *Huglo*, p. 253

<sup>122</sup> Article L 776-1, *Code de Justice Administrative*

<sup>123</sup> Articles R. 431-2, *Code de Justice Administrative*

the supreme courts of the state. A complainant may apply for legal aid. He or she must do that within the timeframe for *recours contentieux*.

9. The proceedings before the administrative courts are generally rather inexpensive.

There are usually some costs of proceedings. They include the costs of necessary actions (e.g., expert's fees whose expertise has been sought). Also, fees of legal representation have to be paid. The only other fee that needed to be covered was the "*droit de timbre*" fee which was an obligation to pay a certain sum to the court for each *recours* (100 francs/15 euro)<sup>124</sup>. This fee was abolished in 2003.

10. The administrative courts may award the complainant with damages.

In this case the rule of prior decision plays a significant role. A right to bring an action for damages against the administration does not exist simply because some event caused damages. It is necessary to obtain a decision by the administrative authority. This decision may either deny an award to a complainant or the award granted by the decision may be deemed insufficient by the complainant.

11. Individual must have a personal interest in the proceedings.

The Conseil d'État has been rather reluctant to admit the *actio popularis* which would enable every individual to challenge an administrative act. Complainants thus must have a personal interest to have standing in proceedings before administrative courts.<sup>125</sup>

12. The administrative courts may annul (quash) the administrative decision and return the case back to administrative authority to decide it.

However in rare cases the administrative court may go further. It may change/substitute (*réformer*) the administrative decision. The law on rare occasions permits the judge not just to annul but also to change the decision that has been submitted to it. The *Conseil d'État* for a long time remained negative about this extensive power of the administrative courts. So even if the proceedings based on the excess of power leads to the annulment of the decision: it has to be up to the administration and not up to the judge to replace the illegal act.<sup>126</sup> Only the cases of *contentieux de pleine juridiction* with pecuniary condemnation as an outcome, escape this rule.

In order to be able to use the court proceedings there are several conditions the complainant should meet.<sup>127</sup>

1. The objection has to be written in French language. It has to include the identification of the complainant including her or his signature. It has to include certain documents such as a copy of the challenged decision; and last but not least it should be reasoned.

2. The objection letter should be sent by regular mail, but it is possible to send it via telegram, telex, fax or email.<sup>128</sup>

3. As mentioned above, the complainant should have a personal interest.

4. Existence of prior administrative act.

The jurisdiction of administrative courts is restricted to existing administrative acts (administrative decision or administrative contract) emanating from an administrative authority. Individuals have to appeal against existing administrative acts.<sup>129</sup> The second possibility is an administrative appeal against an 'implicit' decision, especially in

<sup>124</sup> Order n°2003-1235 of 22 December 2003 relative à *des mesures de simplification en matière fiscale et supprimant le droit de timbre devant les juridictions administratives*

<sup>125</sup> Compare CE, 9 December 1996, *Assaupamar*, p. 479 or CE, 14 January 1998, *Comm. De Toulon et Cie des Eaux et de l'ozone*, p. 8

<sup>126</sup> R. Chapus, *Droit administratif*, Tome 1, 15e edition, Montchrestien, Paris, 2001

<sup>127</sup> Article R 441-1, *Code de Justice Administrative*

<sup>128</sup> CE, 13 March 1996, *Diraison*, p. 78; or CE, 28 December 2001, *Elect. mun. d'Entre-Deux-Monts*, p. 1086, D 2002

<sup>129</sup> CE, 16 October 1970, *Pierre c. EDF*

circumstances of expiration of a certain time limit without a reply from administrative authority.

#### 5. Time period for the *recours contentieux*

An individual has to direct her or his objection to the court within a general period of 2 months since the notification of the decision of the administrative authority.<sup>130</sup>

#### 6. Obligation of the RAP

If the legal provision requires it, the complainant has to use the *recours administratif obligatoire* procedure before applying to the court.<sup>131</sup>

### **Possible claims of the individual**

In general theory there are four different actions that can be brought by the complainant. Complainant may ask the court to recognize the illegality of the administrative decision and annul the decision (*contentieux de l'annulation*). The main type of this group is *recours pour excès de pouvoir*. The complainant may further ask the administrative court to use all its powers and award and determine her or his rights or entitlement which might go beyond quashing and annulling (*contentieux de pleine juridiction*). Prejudicial questions or particular demands, or the need to interpret the legal norm or pronounce the legality of the administrative decision are cases of *contentieux de l'interprétation* or *contentieux de légalité*. Last but not least the administrative court is competent to punish certain persons that infringed certain legal provisions (*contentieux de la répression*), in this case the administrative court acts as a criminal court.

The administrative courts have these different competences. The most important competence of the administrative courts is their possibility to quash and reformulate (substitute) the decisions made by the administrative authorities.

#### *Length of the proceedings and caseload*

- In 2008, the administrative tribunals decided more than 183 000 cases. The expected average time trial, which were more than 20 months in 2000, have been reduced to less than 13 months.

- Around 16% of judgments rendered by administrative tribunals are subject to appeal to the administrative courts of appeal (the appeal of some disputes remain within the Conseil d'État). Administrative courts of appeal in Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes, Paris and Versailles decided more than 27,000 cases in 2008, and the average time trial which was over 3 years in 2000 dropped down to less than 13 months.

- Deciding about 10,000 cases a year, the *Conseil d'État*, like other administrative courts, has made considerable efforts to reduce delays ruling predictable ways, which have been reduced to less than 10 months today.<sup>132</sup> The caseload is included in greater detail in the Annex to this part.

## **6. Alternative dispute settlement**

<sup>130</sup> Article R 421-1, *Code de Justice Administrative*

<sup>131</sup> See for example Article 600-1, *Code de l'urbanisme*

<sup>132</sup> *La justice administrative, en bref*, Conseil d'État, p. 4, 2009

Apart from court proceedings, French administrative law also recognizes other means of dispute settlement like Conciliation, Mediation, Transaction or Arbitration. With the exception of the Mediation, these alternative dispute settlement measures are used in the administrative proceeding rather reluctantly. Most of them are based on provisions of Civil law.

## Transaction

Transaction is an agreement according to which the parties should settle their (existing or possible) disputes. It is one of the internal procedures of dispute settlement and it does not require the participation of the third person. Although it is enshrined in Article 2044 of the *Code Civil*<sup>133</sup>, in certain situations it can be used in the disputes with administrative authorities. Various decisions of the *Conseil d'État* and legal norms of legislator<sup>134</sup> recognized transaction as one of the means of dispute settlement. Of course not all of the principles of civil transaction are applicable in circumstances of administrative dispute. Transaction in administrative law is limited only to the cases of *plein contentieux*<sup>135</sup>. Transaction is excluded in the case of *excès de pouvoir*. Also the administrated subject can not renounce in advance his right to challenge an administrative decision.<sup>136</sup> The effects of the transaction in administrative law are however similar to civil transaction. It produces an agreement and the parties to the agreement that do not comply with their obligations may be sanctioned by the administrative court.<sup>137</sup> However signed transaction has a quality of *res judicata* and it creates an obstacle to judicial proceedings in the same case.<sup>138</sup>

## Mediation

Mediation implies an intervention of a third person to a dispute. A mediator's function usually is to bring a solution to a dispute and therefore his active participation to the dispute is required. In the French legal system, the Mediation is a well known form of alternative dispute settlement. The institution of the *Médiateur de la République* was provided for by law of 3 January 1973, but it is not embodied in the 1958 Constitution. The French *Médiateur* carries out the functions of ombudsman. Subjects of control by the *Médiateur* are government bodies, local administrative authorities and other bodies vested with a public service mission. The criteria for exercising his control are defined through a "failure of an authority to accomplish its public missions"<sup>139</sup>. Any person (legal and natural) has the right to demand an investigation. However, the actual control procedure can be started only by a Member of French Parliament who can refer the complaint to the *Médiateur*. Because of that fact a person, in order to effectively complain before the *Médiateur* has to submit his or hers complaint to a Member of Parliament. This "MP filter" of ombudsman is known also in the

<sup>133</sup> *La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître.* Article 2044, the Code Civil

<sup>134</sup> See for example Law of 2 March 1982 *relative aux droits et libertés des communes, des départements et des régions*

<sup>135</sup> *Le service public et l'exigence de qualité*, Lucie Cluzel-Métayer, Nouvelle Bibliothèque de Thèses, Dalloz, Paris, 2006, p. 352

<sup>136</sup> CE, Ass., 19 November 1955, *Andréani*, Rec. p. 511

<sup>137</sup> CE, 5 May 1971, *Ville de Carpentras*, Rec. p. 326

<sup>138</sup> CE, 8 February 1956, *Dame Germain*, Rec. p. 69; CE, 18 January 1998, *Borg Wagner*, Rec. p. 20

<sup>139</sup> *Toute personne physique ou morale qui estime, à l'occasion d'une affaire la concernant, qu'un organisme visé à l'article premier n'a pas fonctionné conformément à la mission de service public qu'il doit assurer, peut, par une réclamation individuelle, demander que l'affaire soit portée à la connaissance du Médiateur de la République.*, Article 6 of the Law of 3 January 1973 instituant un Médiateur de la République

United Kingdom. Even if the *Médiateur* accepts the complaint he is not obliged to investigate it. The complaints procedure is not subsidiary, but it has to be preceded by appropriate action within the authority concerned. Filing a complaint with the *Médiateur* does not suspend or interrupt time limits for challenging the case before the court or before administrative authority. The proceedings before the *Médiateur* are free of charge. The *Médiateur* has extensive rights of accessing files and viewing documents. When he considers a claim to be a justified he shall make recommendations that he considers necessary to settle the dispute and recommend any solution that shall lead to an equitable solution. If the administrative authority does not follow his recommendations he may disclose his recommendations. The *Médiateur* receives yearly thousands of submissions. In 2009 he received more than 72,000 submissions out of which more than 43,000 were objections against administrative authorities.<sup>140</sup>

## Conciliation

Similarly to mediation, conciliation also implies intervention of a third person who will propose a legal solution to the parties in a dispute. Conciliation requires an active participation of the third person who tries to lead the parties in the dispute to an agreement that should form the finalization of their disagreement. The French legal system knows two types of conciliation; 1. conciliation by special administrative authorities and 2. conciliation by a judge. In the first case, legal acts since beginning of the 20<sup>th</sup> century create committees that help to solve the disputes in special areas of public life<sup>141</sup>. One of the examples is the *Comités consultatifs de règlement amiable des différends ou des litiges relatifs aux marchés publics* that helps to deal with disputes in the area of public commerce<sup>142</sup>. The use of these conciliation committees *inter alia* suspends the time limit to submit the case to an administrative tribunal<sup>143</sup>. In the abovementioned Article 13 of Law of 31 December 1987 (p. 5), the legislator tried to generalize the use of these committees. However similarly as in the case of obligatory pre-trial administrative proceedings the generalization of conciliation proceedings have not taken place yet and is still limited to specific areas of public life. Still, in some cases, the use of a conciliation procedure is obligatory.<sup>144</sup> Conciliation by an administrative judge is also possible. Article L211-4 of the *Code de justice administrative* expressly alleges that *les tribunaux administratifs peuvent exercer une mission de conciliation*. The administrative courts had since the incorporation of conciliation into the *Code de justice administrative* quite a few possibilities to use it. However, the conciliation (administrative or judicial) is not used as often as mediation.

## Arbitrage

Arbitrage has only a marginal importance in administrative proceedings. Arbitrage is a procedure by which the parties to the dispute agree to submit the dispute to an independent arbiter and to consider his decision as binding. Arbitrage is faster, less difficult and less formal than court proceedings. An arbiter to the case can say what the law is but he is not in position to order a decision to be enforced. In the case of public entities the arbitrage was

<sup>140</sup> For precise numbers see Annual Report 2009 of the Médiateur (p. 8)

<sup>141</sup> Decree of 24 December 1907, created consultative committees at the ministries of the state, that should help an amiable dispute settlement in different areas including the area of public works.

<sup>142</sup> Decree of 18 March 1981

<sup>143</sup> Lucie Cluzel-Métayer, (n. 94), p. 355

<sup>144</sup> For example Article 19 of Law of 16 July 1984 *relative à l'organisation et à la promotion des activités physiques et sportives*

prohibited by the *Conseil d'État* already at the end of 19<sup>th</sup> century.<sup>145</sup> The principle of prohibition of arbitrage has been elevated to the level of general principle of law by the opinion of the *Conseil d'État* in the case of construction of the Eurodisney park.<sup>146</sup> However, there are cases where the intervention of the legislator breached the principles of court and permitted arbitrage.<sup>147</sup> Nevertheless, Arbitrage is not employed as often as other means of alternative dispute settlement.

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<sup>145</sup> CE, 17 July 1896, *Clouzard c Département de l'Yonne*, Rec. p. 584

<sup>146</sup> CE, Section des travaux publics, Opinion, 6 March 1986, *Eurodisneyland*, E.D.C.E., 1987, n 38, p. 178

<sup>147</sup> For example Article 25, Law n°82-1153 or 30 December 1982 *d'orientation des transports intérieurs*

## 7. Evaluation

The French system of pre-trial proceedings in administrative litigation has developed based on practices and on jurisprudence. Only a limited number of statute acts makes pre trial proceedings mandatory. The point of departure for the French system of legal protection against the government appears to be the right to challenge administrative decisions in court. Standing in these proceedings is granted to those with a personal interest with the contested decision, and collective interest groups generally are excluded from standing. Even though the French administrative law has a long standing tradition, pre trial proceedings in administrative law appear not to be based on a grand design, but on peace-meal decision making by the *Conseil d'État*, administrative practice and on specific legislation. It seems to be also a peculiarity of French administrative law that no empirical evaluations take place to feed the developments of policies to adapt the system of legal protection in administrative law to demands of efficiency and timeliness.

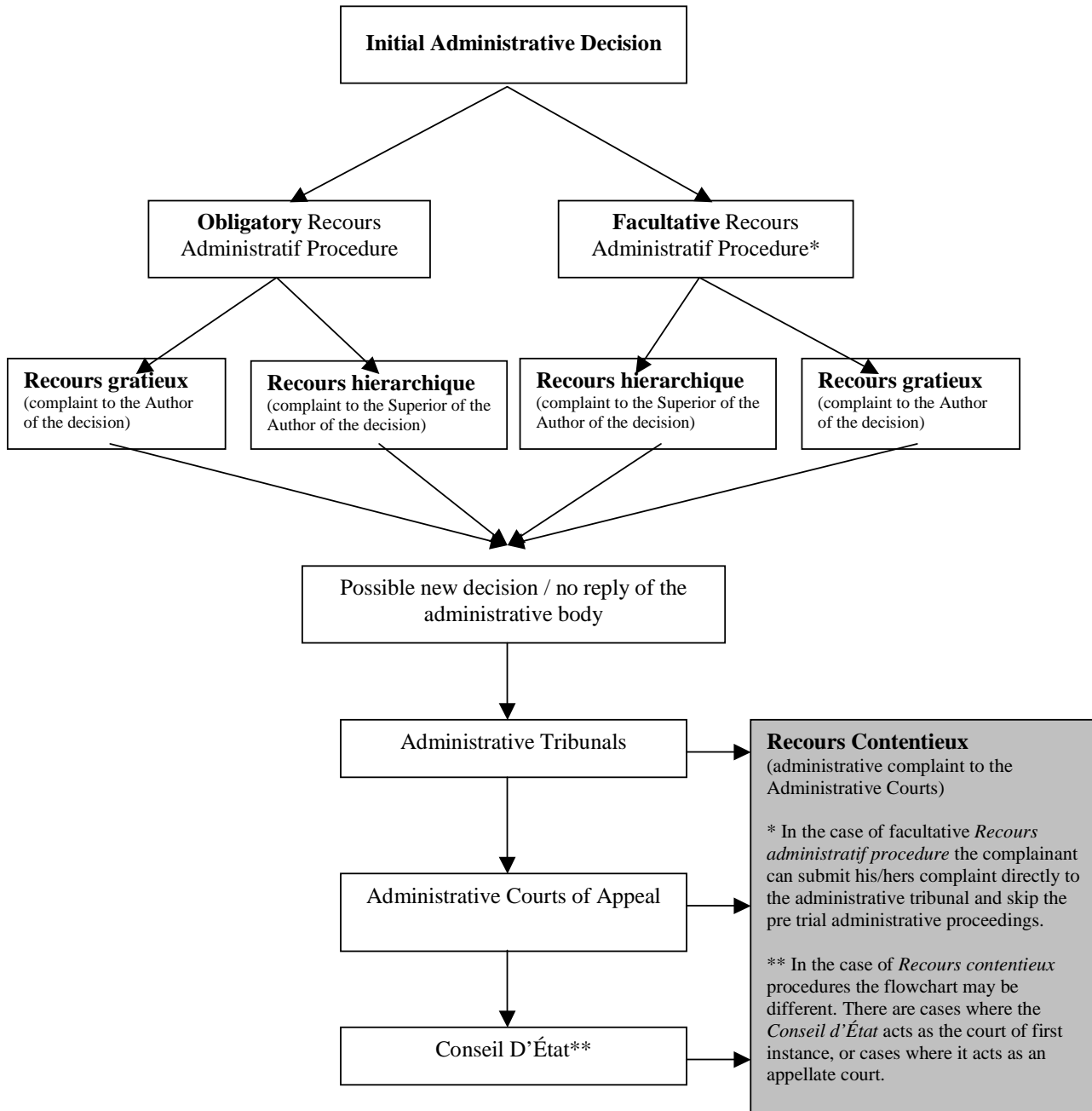
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## Annexes

### Annex 1 - Flowchart of administrative legal protection in France





**Annex 2 - Raw data - Tribunals Administrative**

	2005 <sup>148</sup>	2006 <sup>149</sup>	2007 <sup>150</sup>	2008 <sup>151</sup>	2009 <sup>152</sup>
Registered cases	167 150	172 557	175 165	181 815	180 246
Decided cases	166 512	173 907	192 109	192 109	195 908
Pending cases	229 368	228 265	220 616	210 459	195 108

**Annex 3 - Net data - Tribunals Administrative**

	2005	2006	2007	2008	2009
Registered cases	156 994	166 785	170 014	176 313	172 195
Decided cases	155 562	164 342	175 011	183 811	187 236
Pending cases	210 043	211 990	206 676	198 791	184 623

**Annex 4 - Raw data - Cours administratives d'appel**

	2005	2006	2007	2008	2009
Registered cases	20 527	21 602	26 554	27 802	28 059
Decided cases	24 385	26 414	25 716	27 485	29 307
Pending cases	32 705	27 959	28 495	30 918	31 087

**Annex 5 - Net data - Cours administratives d'appel**

	2005	2006	2007	2008	2009
Registered cases	20 208	21 083	26 908	29 733	29 268
Decided cases	23 553	25 890	26 443	27 235	28 202
Pending cases	21 861	27 153	28 062	28 825	28 814

<sup>148</sup> All the data for year 2005 are compiled from Rapport public 2007, Rapport d'activité, p. 22

<sup>149</sup> All the data for year 2006 are compiled from Rapport public 2007, Rapport d'activité, p. 22

<sup>150</sup> All the data for year 2007 are compiled from Rapport public 2009, Rapport d'activité, p. 24

<sup>151</sup> All the data for year 2008 are compiled from Rapport public 2010, Rapport d'activité, p. 33

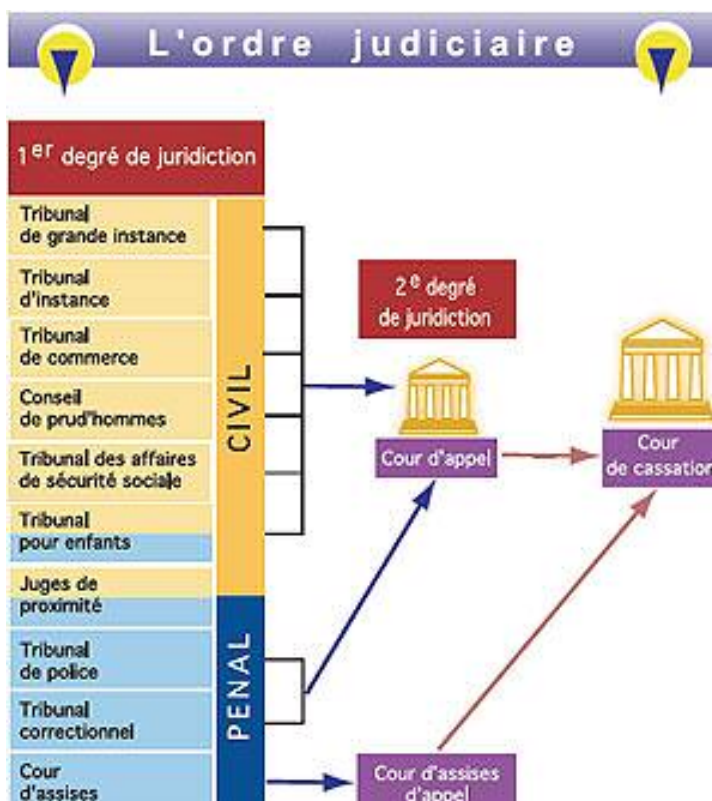
<sup>152</sup> All the data for year 2009 are compiled from Rapport public 2010, Rapport d'activité, p. 33

**Annex 6 - Raw data – Conseil d'État**

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Registered cases	12 572	11 578	11 745	11 840	11 361
Decided cases	12 076	12 625	12 462	11 680	11 033
Pending cases	11 363	9 789	9 072	9 174	9 553

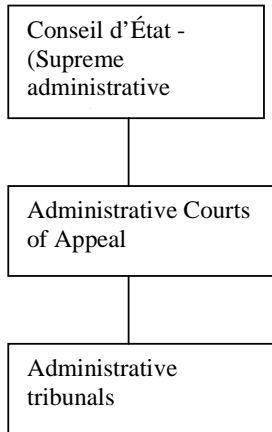
**Annex 7 - Net data - Conseil d'État**

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Registered cases	11 196	10 271	9 627	10 250	9 744
Decided cases	11 222	11 198	9 929	10 270	9 986
Pending cases	10 089	8 567	8 201	8 149	7 916

Annex 8 – L'ordre judiciaire – [www.justice.gouv.fr](http://www.justice.gouv.fr)

**Annex 9 – L'ordre administratif - [www.justice.gouv.fr](http://www.justice.gouv.fr)**

## Administrative courts





## IV Pre-Trial Proceedings in German administrative law

### 1. Introduction

Germany is a Federal State, meaning that government power is divided between the Federation (Bund) and the States (Länder). The German Basic Law (Grundgesetz) strongly limits the power of the Federation, especially its administrative powers, and makes administration first and foremost a competence of the States. Article 87f of the Basic Law attributes to the Federation the power to administer in the fields of Federal finances, foreign affairs, transport, railways, waterways, post and telecommunications, and national defense. All powers that are not explicitly attributed to the Federation remain with the States.

The States are further subdivided into districts (Kreise) and municipalities (Gemeinden). These are part of the *mittelbare Landesverwaltung*, which means they independently execute some of the tasks of the States, without being their hierarchical subordinates. This means that unlike in France and Turkey, the German administration is decentralized to a large degree. The districts have primary administrative functions in specific areas, such as highways, hospitals and public utilities. The municipalities have two major responsibilities. First, they administer programs authorized by the federal or state governments. Second, Article 28(2) of the Basic Law authorizes them to regulate on their own responsibility all the affairs of the local community within the limits set by law.

The German administration is organized in a strongly hierarchical way. Usually an administrative body is comprised of three hierarchical layers, where the majority of the decisions are taken at the lowest level, and the higher levels have mostly supervisory powers. An example on the federal level would be the *Wasser- und Schifffahrtsverwaltung*, which consists of the *Bundeministerium*, the *Regierungspräsident*, and the *allgemeine Verwaltungsbehörde der Landrat*.

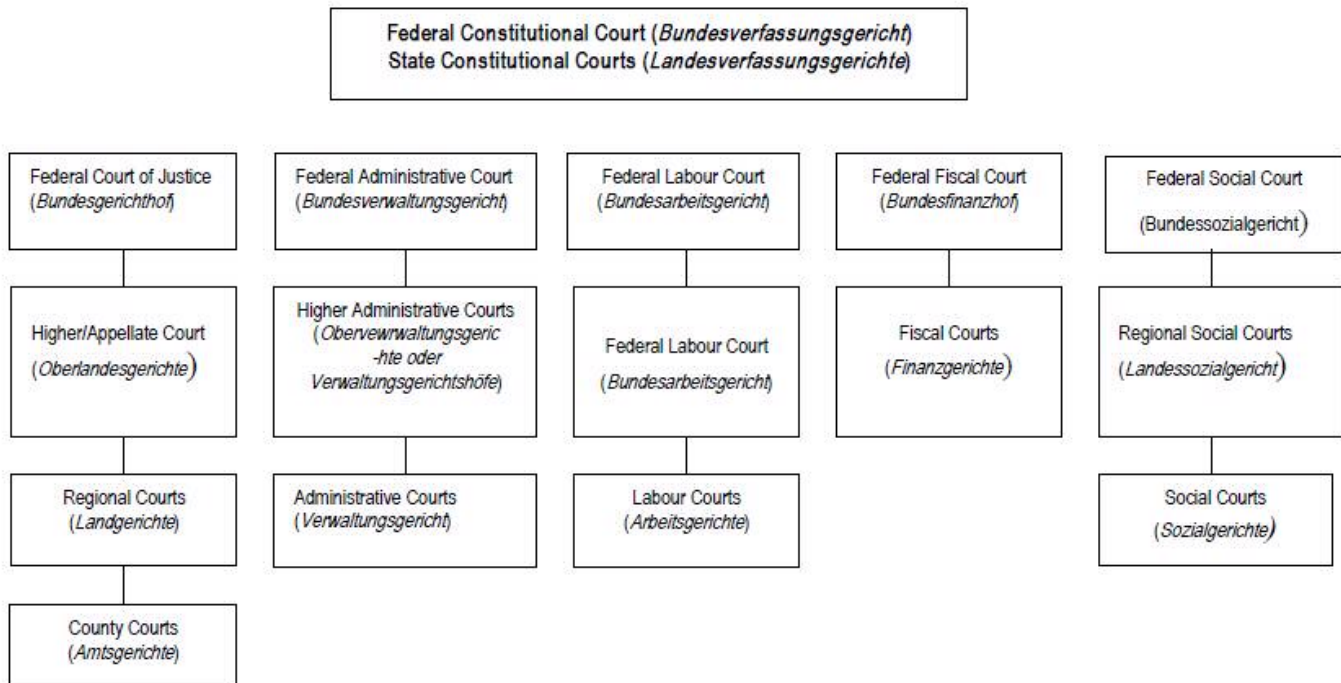
The administrative powers of the Federation are regulated in chapter 8 of the Basic Law, as well as in the Law on Administrative Procedure (Verwaltungsverfahrensgesetz). Article 19(4) of the Basic Law guarantees that everyone will receive effective legal protection against any action or omission of a public authority. This right is made operative in the Law on Administrative Courts (Verwaltungsgerichtsordnung), which regulates access to and procedures before the administrative courts. In here, we also find the rules about prejudicial proceedings. The Law on Administrative Procedure applies to the extent that matters aren't covered by the Law on Administrative Courts.

The guarantee of effective legal protection in Article 19(4) of the Basic Law requires that every action or omission of an authority can be challenged and reviewed by an appeal to an independent court. Usually, this will be the administrative court.

The German judiciary is divided into five separate branches, which are completely independent of each other. An overview can be found in the chart below. The ordinary courts, starting with the county courts and with the Federal Court of Justice as the highest authority, rule on civil and criminal cases. The general administrative courts are competent in all kinds of non-constitutional public law matters, unless there's a statute that explicitly assigns it to the social or fiscal courts. Examples of the cases that are brought before the administrative courts are those concerning asylum, building permits, traffic, municipal revenue, subsidies, public

welfare, education, and environmental matters. However, the administrative courts are unable to award damages, and so cases about public liability are heard by the ordinary courts. The administrative courts are completely independent of the executive and do not have an advisory function.

## 2. The German Court System



(Schröder 2002)

Most cases are heard in first instance by the Administrative Courts, with the possibility to appeal to the Higher Administrative Courts. However, an appeal is only admissible when the court that gave the contested ruling gives leave to appeal. The task of the Federal Administrative Court is mainly to preserve the unity of the law, and therefore it only rules on matters of law, not on matters of fact.

Access to the Courts for those of limited means is guaranteed through a legal aid system. The court that hears the case also decided on an application for aid, and it can refuse an application if a case has been filed for malicious reasons. The aid is granted in the form of an interest-free loan, which has to be paid back in monthly installments for at most 48 months. The height of the installments depends on the income and the assets of the applicant. If those are below a certain minimum, the applicant does not have to repay the loan at all. Legal aid is also available for extra-judicial advice and legal representation.

The main aspects of prejudicial proceedings are codified, as are administrative non-litigious procedure and administrative litigation procedure. The relevant laws are the

Verwaltungsverfahrensgesetz or General Administrative Procedure Act (VwVfG) and the Verwaltungsgerichtsordnung or Code of Administrative Justice Procedure ((VwGO).

### ***3. Prejudicial proceedings***

When a citizen disagrees with an action or omission of the administration, he or she has several options available. There are a number of informal, form-free, remedies. However, the citizen has no 'right' to claim them, which basically means the authorities are under no obligation to respond.

If a citizen seeks recourse to a formal remedy, this places an obligation on the administration to review the legitimacy and the expediency of its decision. The protest and formal complaint procedures are limited to financial administration, leaving the objection or *Widerspruch* as the most important formal remedy. When challenging an administrative act a citizen is usually obliged to launch an objection with the administration before he can have recourse to the court, but there are a number of exceptions to this rule (§ 68 VwGO).

The first category of exceptions is those found in statutes. Second, when someone wants to bring an *Untätigkeitsklage*, which is an action before the administrative courts about the failure of the administration to respond to an application, he does not need to file an objection with the administration.

Third, one can go to the court directly when the complaint is about the decision of the highest administrative authorities of the Bund or the Länder.

Fourth, it is not necessary to file an objection when you disagree with the outcome of an objection procedure, while you did not file an objection to the original decision because you did agree with the initial decision.

Finally, decisions taken after formal administrative proceedings are excluded from the obligation to file an objection before going to the court (§ 70 VwVfG).

The objection procedure serves three purposes. The first is self-control of the administration. The objection procedure allows the administration to correct its own errors. This saves both the administration itself and citizens valuable time and costs, because it means errors can be corrected without an expensive and time-consuming procedure before the courts.

The second purpose of the objection procedure is to diminish the workload of the administrative courts. Indeed, it is very effective in achieving this goal, as only 10 percent of decisions taken at the end of an objection procedure are challenged before the court.

Finally, the objection procedure offers a cheap and fast means of providing legal protection to citizens. The citizen benefits from a relatively fast procedure: there are many *Widerspruchsbehörde*, the authorities that deal with objections, and not so many courts. In addition, the administration can review all aspects of its decision, including policy aspects. The courts cannot do that.

Some authors also mention the role of the objection procedure in improving the acceptance of public policies.

A citizen can file an objection both against a decision of an administrative authority, and to the failure to take such a decision.

To initiate a *Widerspruch* procedure, the plaintiff must file an objection with the administrative authority that took the initial decision, or that was supposed to take a decision.



This will allow it to correct any errors. After the objection is received, the administration has to review the legality and expediency of the initial decision in full. If the administrative authority agrees with the objection in full, it can deal with it itself. It will either withdraw or change a decision it took, or take the requested decision.

If on the other hand it disagrees with the objection, in whole or in part, it has to send the objection on to the *Widerspruchsbehörde*. This is usually the next higher authority. However, sometimes the administrative authority that took the initial decision is also the *Widerspruchsbehörde*. Examples are municipalities acting in their capacity of independent administrators.

The *Widerspruchsbehörde* will review the legality and the expediency of the procedure. It is not bound by the arguments or evidence the complainant gives, but will decide the case at its own discretion, taking into account whatever arguments and evidence it deems relevant.

If it agrees with the complaint in full, it will withdraw or change the decision as requested and the procedure will end there. Otherwise, the affected citizen has recourse to the administrative courts.

## ***Procedural requirements***

### ***Filing the complaint***

To initiate the *Widerspruch* procedure, one must lodge a complaint in writing with the administrative authority that took the initial decision. If the complaint is lodged with the *Widerspruchbehörde*, the authority that is competent to decide on the complaint if the authority that took the initial decision stands its ground, it has to send it on to the latter. The rationale for this is that the authority that took the initial decision must have a chance to correct any errors it may have made.

There are few formal demands the complaint has to meet. It has to be in writing; oral complaints are inadmissible. It is not necessary that the complaint is explicitly designated as a *Widerspruch*: as long as it is clear which administrative act it concerns, and that the person who lodged the complaint disagrees with that act and wants it changed or withdrawn.

To be admissible, the complaint must be lodged within a month of the announcement of the original decision. However, when the original decision lacks a reglementary *Rechtsbehelfsbelehrung* – an explanation of how and when the decision can be challenged – this term will be one year. When the decision has not been communicated at all, there is no term at all. In case of inculpable exceeding of the term, it is possible to 'revert to the earlier state.' Otherwise, if the term is exceeded, the administration can elect to deal with the objection anyway (BVerwGE 15, 306 (310)), as long as there are no third party interests at stake (BVerwG, DVB1 1982, S. 1097(1097)). In other cases, an inadmissible *Widerspruch* will be treated as an *Aufsichtsbeschwerde*, an informal complaint. This procedure allows the authority that took the initial decision to review it again, but it doesn't oblige it to do so, and does not allow access to the court after its conclusion.

### ***Standing***

Not everyone can file an objection. The plaintiff must have standing before the administrative court, otherwise his *Widerspruch* is inadmissible. This requires the administrative act to infringe his or her rights (§ 62(2) VwGO). This will always be the case for the addressee of an adverse administrative act. Third parties will have standing if they claim that the administration has infringed provisions that serve to protect not only the general public, but also their individual rights (*Bär*). This means that it is not enough that their rights are infringed; the infringement must result from the violation of a legal norm that serves to

protect those rights. If an individual does not have standing before the administrative courts, his objection will be inadmissible as well.

### ***Who decides?***

There are no specific rules on who can decide on a *Widerspruch*, besides that the authority that took the initial decision can usually not reject an objection itself, but has to send it on to the *Widerspruchsbehörde*. In addition, the general rules from the *VwVfG* do apply. These rules can be found in § 20 and 21. § 20 Lists categories of persons who cannot act on behalf of an authority in administrative proceedings. The list includes participants in the proceedings, their relatives, participants' representatives and their relatives, their employees and managers, and any person who has furnished an opinion or has otherwise been active in the matter outside of his official capacity.

§ 21 Contains a more general provision to help prevent prejudice. Based on this section, the head of an authority can require anyone about whom a fear of prejudice exists to refrain from involvement in the current proceedings. If fear of prejudice relates to the head of the authority, the supervisory authority shall request him to refrain from involvement.

If the *Widerspruchbehörde* is the same authority as the one that took the initial decision, it might decide to establish a 'gerichtähnlicher Widerspruchsausschüsse,' a court-like objection committee, either within its own organization or in a hierarchically superior organization (Schneider § 28, 124). However, they are not obliged to do so, and there are no rules for its organization, apart from § 20 and 21 *VwVfG*.

### ***Rights of the defense***

Usually, when an authority intends to take a decision which has adverse effects for one or more parties, it has to hear them (§ 28 *VwVfG*). In *Widerspruch*, an oral hearing is often not necessary, because it has already been held before the initial decision was made. There are a number of exceptions to this rule. When there is new information which was not taken into account when the original decision was made, a new hearing should be held. Likewise, when a *Widerspruch* raises an objection which was not raised before the initial hearing was held, there should be a new hearing. Finally, if the new decision that the administration wants to take has adverse effects upon a party's interests, whilst the original decision did not, or did so in a different way, it has to hear that party (§ 71 *VwGO*). This provision is also taken to mean that a *Reformatio in peius* is possible during a *Widerspruch* procedure, a view that has been accepted by the *Bundesverwaltungsgericht* (BVerwGE 14, 175 (178)). If the authority that took the original decision failed to hear an interested party, in violation of Article 28 *VwVfG*, this failure can be corrected during the objection procedure.

More detailed rules for hearings are given in § 66-68 *VwVfG*, but these apply only to so-called 'formal administrative procedures'.

§ 29 On the inspection of documents by participants applies to *Widerspruch* procedures as well. This article requires the authority to allow participants to inspect any documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests. This requirement suffers some exceptions: documents can be kept secret when this is required by law, or when making the documents public would disadvantage the country as a whole or one of the *Länder*, or to protect the rightful interests of participants or third parties.

§ 14 VwVfG allows participants in administrative proceedings to let themselves be represented by a person authorized for that purpose. In addition, § 14(4) gives a participant the right to appear in negotiations and discussions with an adviser (BVerfGE 38,105; this is a right that flows from the Rechtsstaatprinzip, which requires administrative proceedings to be fair. Denying it will violate that principle. The fact that proceedings are not public cannot be used as a justification for denying participants this right.).

### ***Suspensive effect and interim relief***

Another mechanism to protect the rights of parties who are affected by an administrative decision is the suspensive effect of filing an objection. Before 1997 a Widerspruch automatically has suspensive effect. However, this has been changed to prevent illusory objections, only intended to delay proceedings. In the case of Anfechtungsklage, an action brought against an adverse decision, the standard is still that Widerspruch has suspensive effect, but there are many exceptions to this rule.

The suspensive effect will last until a decision has become final, or when an appeal with the administrative court was unsuccessful, three months after the end of the legal term within which the motivation of the appeal at the higher courts must be sent in. The Court can extend the suspensive effect.

If an objection has no suspensive effect, the plaintiff can ask for interim relief, which will be granted if there's a danger that a change in the current situation will result in the loss of a right of the petitioner or if the realization of that right will be substantially impeded; or to prevent 'wesentliche Nachteile oder drohende Gewalt', or if it is necessary on other grounds.

The Court will usually grant interim relief only when the decision concerned according to his provisional judgment is illegitimate, or if he has grave doubts about its legitimacy.

In the literature two theories about suspensive effect are discerned. The first assumes that the legal force of the decision is suspended. The second theory holds that the administration is prohibited from executing its decision. In the latter case, which is accepted in the case law, third parties objecting to a decision granting rights don't gain any protection from the suspensive effect, as it doesn't prohibit e.g. the holder of a building permit to build a shack in their garden, or the holder of a license to cut down the ancient tree in the town square.

### ***Costs***

The Widerspruchsbehörde or, in the case of an Abhilfentscheidung, the authority that took the initial decision, have to decide on the costs as well. In the case of a Widerspruchbescheid, it is the Widerspruchbehörde that decides on the costs. The costs will be refunded when the appeal is successful, and when the appeal is unsuccessful only because the infringement of a prescription as to form or procedure is insignificant under § 45 VwVfG.

If the appeal is not successful, the person entering the appeal has to refund the costs of the authority which issued the disputed administrative act.

### ***The Widerspruchbescheid***

The procedure before the Widerspruchbehörde has to result in a Widerspruchbescheid, which must be served by writ upon the plaintiff. It must contain the final decision, a motivation for that decision, and a Rechtshilfebelehrung. In addition it must contain a decision on the costs.

#### ***4. The procedure before the administrative courts***

As said, citizens have the right to challenge any action or omission of the administration. That means they are not limited to challenging formal administrative acts, the Verwaltungsakten. In fact, there are five different actions that can be brought by the claimant. Those are the rescissory actions (Anfechtungsklage), directed at the annulment of an administrative act; actions for mandatory injunctions (Verpflichtungsklage) which are directed at the issuance of an administrative act; declaratory actions establishing the existence or non-existence of a particular legal relationship (Feststellungsklage); general actions for performance (Leistungsklage) instructing public authorities to perform an activity other than an administrative act in the strict sense, and actions for annulment of non-parliamentary law (Normenkontrollantrag).

The Verpflichtungsklage can be further subdivided into an action after a public authority's refusal to take a decision (Vornahmeklage) and an action against a public authority's failure to respond to a request to take a decision (Untätigkeitsklage).

A plaintiff is obligated to file an objection with the administration before he can bring an Anfechtungsklage or a Vornahmeklage before the court, but as we have seen there are many exceptions to this rule. Even if one of those exceptions applies, it is still possible to follow an informal complaint procedure, but the time limit for initiating court proceedings will not be stayed by this. Nevertheless, these procedures might have advantages over formal court proceedings that lead citizens to elect to follow them anyway; they are faster, cheaper, and offer the option to review the expediency of the decision.

After the outcome of the objection procedure has been notified, parties have one month to file a suit in the administrative court. If the administrative authorities fail to decide on a Widerspruch, a plaintiff can file a suit with the court three months after he filed his objection with the administration. In this case there is no term within which the complaint needs to be filed.

There are no formal requirements to file an action before a first instance courts. Everyone can either file an action himself, or get the help of a court clerk to record his action. Before the courts of first instance, the parties do not need legal representation, although in appeals they need to be represented by a professional attorney or a university professor of law.

The plaintiff must have standing before the administrative court, otherwise his action is inadmissible. The rules are the same as for the Widerspruch procedure. The administrative act must infringe the rights of the appellant (§ 62(2) VwGO). This will always be the case for the addressee of an adverse administrative act. Third parties will have standing if they claim that the administration has infringed provisions that serve to protect not only the general public, but also their individual rights (Bär). If an individual does not have standing before the administrative courts, his objection will be inadmissible as well.

#### ***Competences of the courts***

When an action is brought before an administrative court, the court has a limited array of possibilities. Usually, it will only annul a decision. If this happens, in most cases the court annuls the original decision as well as the Widerspruchbescheid. Sometimes only the Widerspruchbescheid will be annulled. This will be the case when only the latter decision is challenged before the Court, which can happen if the action was brought by a party who had

not problems with the initial decision, but whose interests were harmed by the decision taken after the objection procedure. A successful *Verpflichtungsklage* will result in an order to take a decision. The Court cannot dictate what decision should be taken, nor can it take a decision itself. However, it can give criteria that the decision to be taken has to meet, and these criteria can be so strict that there is only one decision left that can be taken. In the case of a *Feststellungsklage*, the court can make a declaration about a legal status. The German administrative courts cannot award damages, so if someone wants to hold the government liable for an illegal act or omission, he should bring an action before the civil courts. This is a 'historical accident', and an extra complication for judicial proceedings.

The courts can also grant interim relief, although in many cases that will not be necessary. In many cases actions brought before the administrative court have suspensive effect, unless the contested administrative act has been declared provisionally enforceable by the issuing public authority. In the latter case the suspensive effect may be restored by way of interim relief.

In general, interim relief will be granted if there is a danger that a change in the current situation will result in the loss of a right of the petitioner or if the realization of that right will be substantially impeded; or to prevent 'wesentliche Nachteile oder drohende Gewalt', or if it is necessary on other grounds.

The Court will usually grant interim relief only when the decision concerned according to his provisional judgment is illegitimate, or if he has grave doubts about its legitimacy.

The Court is not limited to the arguments and evidence that were used in the objection procedure. A plaintiff can bring new arguments and evidence for the first time during the court proceedings.

## ***5. Alternative dispute resolution***

Alternative dispute resolution is not strongly developed in Germany. Although a number of *Länder* have ombudsmen, most do not, and there is no ombudsman on the Federal level. There are parliamentary petition committees that citizens can address, but they are not necessarily an effective way to deal with complaints. Mediation, although a theoretical possibility, is not heavily used, except in a number of specific fields. However, in 1999 a federal statute was enacted that allowed the *Länder* to make mediation compulsory in specific cases. This led to an increase in the number of cases where mediation was applied, but the system has been heavily criticized, because its compulsory character and focus on legal fact-finding is hard to reconcile with the nature of mediation.

### ***Mediation***

Mediation is rarely used in conflicts between citizens and the administration, with the notable exception of environmental law. There is no regulation about this kind of mediation, but there are a number of conditions for mediation, and a number of 'success factors'. In the latter category we find the requirement that all interested parties must be involved, that participation must be completely voluntary, and that the administrative authority involved in the mediation process must have some discretion. Mediation is impossible if one of the parties is completely inflexible.

Obviously, the parties cannot step beyond the boundaries of the law.

Mediation is not bound to a particular phase of the decision making process, and can be used throughout the process, from the initial policy making stage to conflict resolution after the initial decision is taken.

Mediation does in principle not diminish one's right to judicial protection. However, parties involved in the mediation who have consented to certain limitations during the mediation cannot fight those in court. The judicial protection for parties not involved in the mediation procedure remains fully intact.

In 1999 Germany tried to stimulate the use of mediation as a dispute resolution method, in order to reduce the caseload of the first instance courts. This allowed the Länder to introduce mandatory court-connected mediation in financial disputes up to a value of  $\square$  750,-, certain neighborhood disputes and defamation disputes where the alleged defamation has not occurred through the media. Although this is mainly relevant with regard to civil cases, the effects of trying to stimulate mediation through legislation are likely applicable to administrative law as well.

Bavaria was the first state to introduce a mediation law, the Bayerisches Schlichtungsgesetz. This law introduces mandatory mediation for the cases mentioned above. Lawyers and notaries are to mediate those disputes. A mediator cannot later take part in court proceedings if the mediation fails. The mediator has to convene an oral hearing, although in exceptional cases a written procedure can be followed. Only the parties themselves take part in the mediation, accompanied by their legal representatives if they so wish. If all parties agree there can be witnesses and this will not cause an unreasonable delay.

If the mediation is successful, the mediator will draw up a record of the agreement, which should include details of how the costs of the mediation will be split.

If the mediation fails, or if the mediator decides the case is unsuitable for mediation, he issues a certificate of failure, after which the parties can choose to bring the case before a court.

The Bavarian law has been heavily criticized, because of its focus on the clarification of the facts and its 'very legalistic and evaluative understanding of mediation.' (Funken 2002) This, and the compulsory character of the procedure, might negate the well-known benefits of mediation, such as achieving a win-win solution and preventing damage to the relationship between the parties.

Despite its shortcomings, since the introduction of the mediation law the number of dispute resolution services has increased, and the German Bar Association has established a committee on mediation.

### ***Ombudsman***

Germany does not have a national Ombudsman, but there is an equivalent for military matters (Wehrbeauftragter or Parliamentary Commissioner for the Armed Forces) and there are a number of regional ombudsmen (Bürgerbeauftragte) in the Länder. The first of those was installed in 1974 Rhineland-Palatinate, but nowadays there are also ombudsmen in Mecklenburg-Western Pomerania and Thuringia. Schleswig-Holstein has a specialized Ombudsman for social issues.

The task of the Ombudsmen is to support the Petition Committees, which are much older institutions which give effect to the right in article 17 of the Basic Law that every person has the right individually or jointly with others to address written requests or complaints to

competent authorities and to the legislature. The Petition Committees are part of their respective Landtag. There is also a federal petition committee attached to the Bundestag.

### ***Petition committee***

Article 45c of the basic law establishes the Petition Committees. Their powers and procedures are further regulated by the By-law of the German Bundestag (Geschäftsordnung des Deutschen Bundestags), § 108-112, and the Act on the powers of the Petition Committee of the German Bundestag (Gesetz über die Befugnisse des Petitionsausschusses des Deutschen Bundestags). The Committee has created additional rules in the Rules of Procedure of the Petitions Committee (Verfahrensgrundsätze des Petitionsausschusses über die Behandlung von Bitten und Beschwerden).

The Petition Committee of the Bundestag, comprised of members of the Bundestag, consists of 25 members and 25 deputy members, who hold a seat in the Bundestag. The task of the Committee is to supervise the Federal Government, federal authorities and other institutions discharging public functions. The Head of State and the courts are excluded, and so is the penitentiary system, as this falls within the competence of the Länder.

All citizens have a right to petition the Committee. This is a political right rather than a legal right, but petitioners do have the right to be informed about the way his petition was dealt with and the reasons therefore. There are no formal requirements, other than that the petition should be in writing. However, illegible and ambiguous letters can be put aside.

The Petition Committee can review the legality of administrative action and their compliance with principles of good administration. It can only conduct an investigation after a complaint has been received.

The complaints are handled by the Petition Committee Service, which prepares a proposal for the further handling of the complaint which it transmits to the rapporteurs. The competent rapporteur examines the proposal and suggests to the rest of the Committee the further treatment of the petition, which then decides about the recommendation of a resolution to the Bundestag within three weeks.

The Bundestag may refer the issue to the Federal Government for remedial action or re-examination, as background material or as a simple referral. The Government must reply within six weeks, but there are no sanctions for non-compliance.

The petitioner must be informed about the way his petition has been dealt with and the reasons therefore.

Administrative organs are required to supply all relevant information, unless it must be kept secret pursuant to legal requirements or other compelling interests.

The Committee can hear the petitioner, experts, and witnesses. It may require an individual to appear before it and can enforce such a request.

The Federal Petition Committee receives over 16.000 requests and complaints each year. In 2006, 20.000 petitioners approached the Committee. The Committee is a well-established part of the German constitution, and its work is appears to be appreciated: 'The logic of its recommendations, rapid proceedings and critical analysis of the answers rendered by the authorities are deemed to be decisive factors for the efficiency of the Committee's work.' (Kofler)

Not everybody is that enthusiastic: ‘the significance of such petitions must not be overestimated. Parliament has very limited possibilities of practical action. Of all petitions for 2006, Parliament advised government in 29 cases to take action to remedy the complaint and recommended government in 32 cases to consider redress.’ (Bär)

### ***The Ombudsman of Rhineland-Palatinate***

The Federal Petition Committee only takes action in a small fraction of the cases which it is confronted with. In Rhineland-Palatinate, the Petition Committee is assisted by an Ombudsman. He is called into existence by Article 11 of the Regional Constitution of Rhineland-Palatinate, and his work is regulated in the Act on the Ombudsman, the Landesgesetz über den Bürgerbeauftragten des Landes Rheinland Pfalz.

The Ombudsman is a permanent representative of the regional Petitions Committee. All petitions directed at the Parliament or the Committee must be forwarded to the Ombudsman. He is fully independent though, and not bound by any instructions. He can be dismissed by parliament, but only with a two-thirds majority.

The Ombudsman's task is to monitor the regional Government, all regional authorities and all entities under public law which are subject to the supervision of the Land. The Courts and the prosecution authorities are excluded from the Ombudsman's authority, unless the complaint is concerned with a delay in proceedings. Anyone can file a complaint with the Ombudsman, free of charge. He is under an obligation to investigate all complaints that he receives, except unclear or ambiguous complaints.

The Ombudsman will review the legality and the *zweckmässigkeit* of administrative action. Upon the conclusion of an investigation, the complainant is to be informed about its conclusion in writing.

All entities subject to the ombudsman's control are required to give assistance. He can request oral and written explanations from these institutions and has access to all files and premises. However, he has no means to enforce the duty of cooperation.

When confronted with a complaint, the Ombudsman will first try to achieve an amicable settlement. If this is not possible, he can send a report to the Petitions Committee, or he can send a recommendation to the respective institution, which is to report within a reasonable period on the measures taken, progress or outcome of the issue.

The Ombudsman cannot investigate a complaint if this would interfere with pending court procedures, nor can he review a court judgment.

## ***6. A Report from BAVARIA on an experiment with the abolition of the Widerspruch in administrative procedure<sup>153</sup>***

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<sup>153</sup>[http://www.stmi.bayern.de/imperia/md/content/stmi/service/gesetzesentwuerfe/abschlussbericht\\_gutachten.pdf](http://www.stmi.bayern.de/imperia/md/content/stmi/service/gesetzesentwuerfe/abschlussbericht_gutachten.pdf)



From halfway 2004 until halfway 2006, the government and legislature of Bavaria, one of the States of the German Federation, undertook an experiment with the *Widerspruch* procedure in the regions of Mittelfranken and Schwaben. The purpose of the experiment was to find out about the advantages (easily accessible proceedings, cheap, unbureaucratic and fast way of legal protection; self control of the administration, contribution to peaceful conflict resolution and unburden the workload of the administrative courts –filter function). Furthermore interested persons and the authority are fully informed about the reasons and outcomes of the procedure. The possible disadvantages are lengthy proceedings and a low success rate of objection proceedings in a certain area of law (meaning that the outcomes of objection proceedings do not convince citizens not to go to court), and therefore not a lower workload for the courts.

In Mittelfranken the *Widerspruchverfahren* was (temporarily) abolished; the region Schwaben functioned as control group, and there the *Widerspruch* procedure was not abolished. From both regions data were gathered at administrative authorities and at the regional administrative court (*Verwaltungsgericht Ansbach*). For several areas of administrative law the number of objections were measured and the number of appeals to the administrative court, as well as the numbers of successful objections and the time necessary from filing the objection until the decision of the court.

In the region Mittelfranken, about 2% of administrative acts is contested, in the region Schwaben this is 3%. The number of cases filed at the administrative court rose in the first year with 182% and in the second year with 152%. The court dealt with these cases on average on about 6 month in the first year and on average in about 7 months in the second year. The control court took on average 9 and 10 months in the same period, and the difference can be explained by the fact that in a *Widerspruch* procedure all the simple cases are filtered out, mistakes are corrected etcetera. In Schwaben this was about 50% of all objections! Only the more complicated cases make it to court, and therefore the court on average needs more time to prepare, hear and decide these cases.

For that reason, for the total length of proceedings between filing objection and court decision did not make a great difference as the average time to decide on objections by administrative authorities was about 3,5 months.

An outcome of this experiment is that in the areas of law where objections are filed in high numbers, the *Widerspruchsverfahren* makes sense, as a citizen friendly way of dealing with their problems with the administration. However in other areas, e.g. concerning water, animal protection and waste treatment, the objection proceedings did not have such effects and therefore the advise was given to abolish objection proceedings in these areas altogether.

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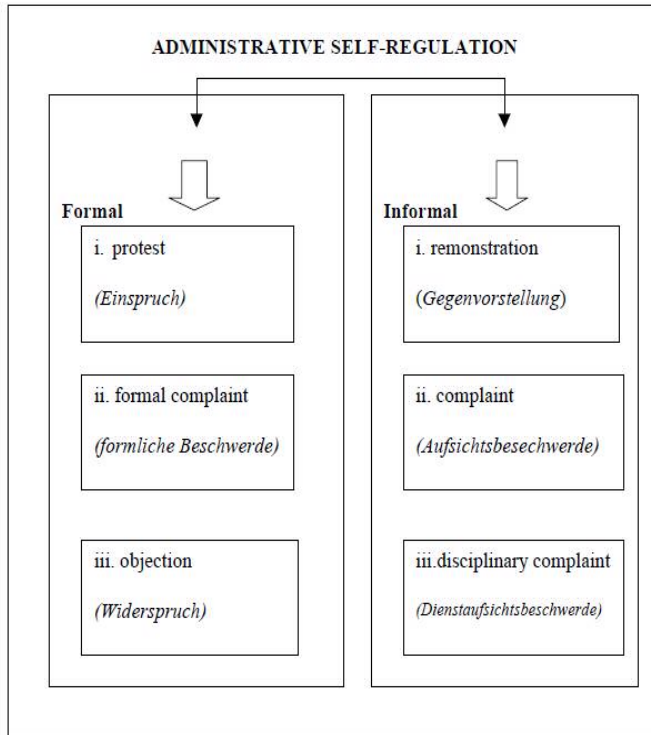
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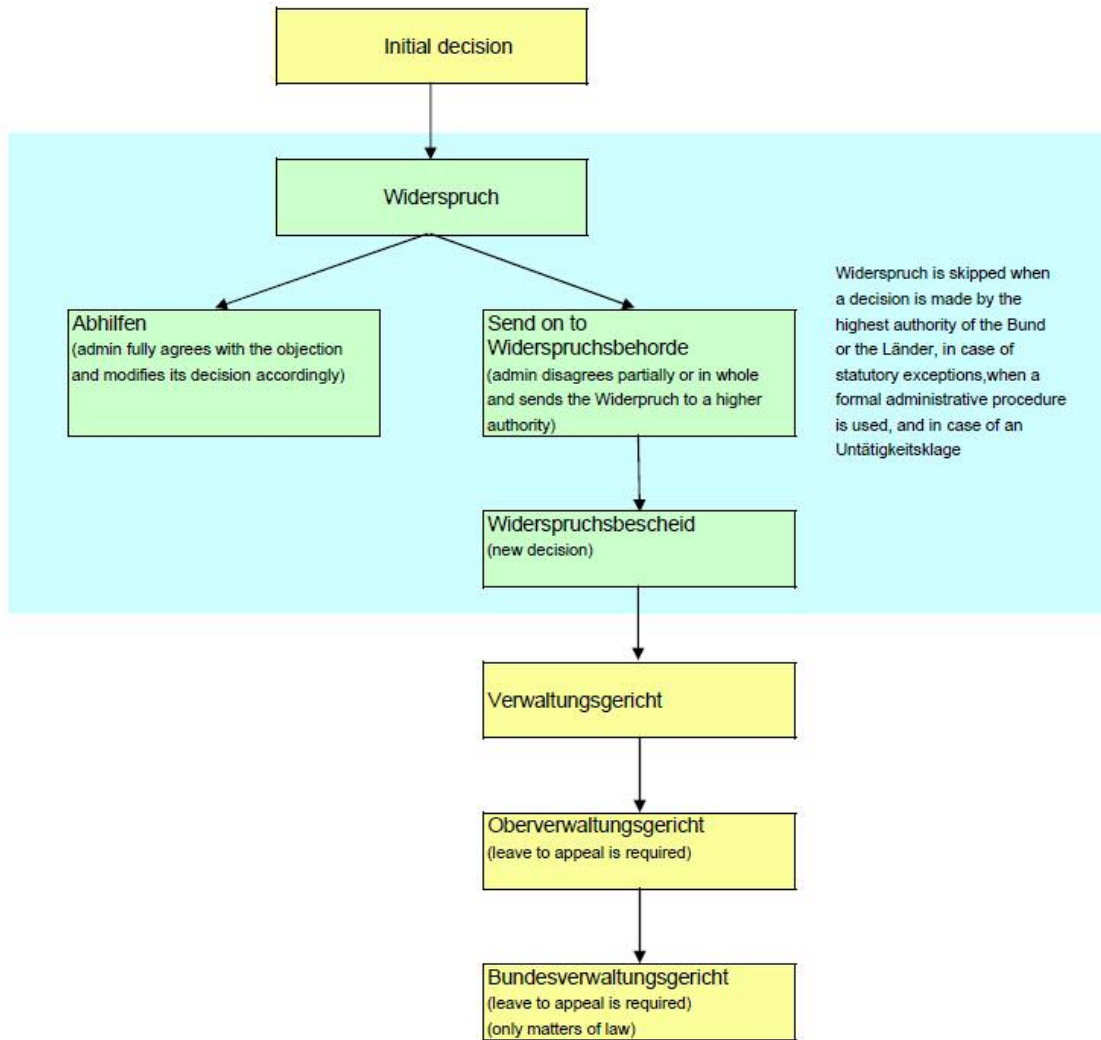
## Annexes

### Annex 1 Administrative procedures for redress within the German Administration



Source: Buck 2004

## Annex 2 Flowchart of administrative proceedings in Germany



**Annex 3      Statistical Information**

*Percentage of cases successfully resolved:*

Widerspruch:	90%
Ombudsman:	73%
Mediation:	unknown
Petitions:	negligible

*Average length of proceedings before the Bundesverwaltungsgericht:*

2007:	10 months
2008:	10 months
2009:	12 months

*Number of judgments by the Bundesverwaltungsgericht:*

2007:	2097
2008:	1848
2009:	1709



## V. Pre trial proceedings in Dutch Administrative Law

### *1. Introduction*

In this country report we will describe the history of legal protection against the administration in the Netherlands, which culminated in the General Administrative Law Act of 1994. This history is relevant because the most important changes were stimulated by jurisprudence of the European Court of Human Rights. Next, we will describe the pre-trial objections procedure contained in the GALA, by focusing on the following aspects:

The administrative body; its competences under public law; standing (decision); interested party/ third party; the organization of proceedings (admin body, advisory committee), defense rights, and the relations between pre-trial and judicial proceedings. We will conclude this report with some data on evaluation of administrative objection procedures and a translation of the General Administrative Law Act.

### *2. History of the development of Dutch administrative law*

The Netherlands has a civil law system, brought by Napoleons' armies. Administrative law has developed since the last decades of the 19<sup>th</sup> century and came to full maturity 100 years later: in the 1990's. When it was apparent that administrative law would become a major issue, rational proposals to install a system of legal protection against administrative acts were developed and discussed even before 1920. However, there was a lot of resistance against administrative courts having the competences to control administrative decisions. There were two basic arguments for this resistance. First, the opponents argued that the administration could be trusted and that a system of internal appeals was sufficient to guarantee the legal position of citizens. Second, judges would not have enough expertise to be able to actually assess administrative acts. The proposals were eventually withdrawn and a situation evolved where the civil courts had jurisdiction over administrative acts. It was standard jurisprudence of the Dutch Court of Cassation that appeals to specialized administrative tribunals and to the Contentieux division of the Council of State were adequate alternatives to court proceedings which guaranteed a fair trial to citizens, even though the result of proceedings of the Council of State was not a decision, but an advice to the government. As a result, the civil courts only had jurisdiction when neither the Council of State nor an Administrative Tribunal did. Internal administrative appeals and appeals to specialized administrative tribunals were prescribed in specialized legislation. Within this context the Court of Cassation ("de Hoge Raad") developed the principles of proper administration, mainly following the French examples.

In 1976 an administrative judicial division was installed at the Council of State. This division acted as a general administrative court for decisions (an order which is not of a general nature) under public law of decentralized administrative bodies and of the central government, when there were no specialized administrative tribunals that had jurisdiction. Pre-trial administrative proceedings were obligatory before a case could be filed at the judicial division of the Council of State.

Between 1900 and 1994 a tribunal system developed. There were tribunals for social insurances (appeals councils), there was the industrial relations appeals tribunal, there were

courts of taxations and students' grants and loans courts, and many more. They all had their own rules of procedure, and were considered specialized instances.

In 1985 the appeal proceedings at the contentieux division of the Council of State were declared contrary to the fair trial rights of article 6 ECHR, because the Council was not an independent court, as it could only advise the government on how to decide on the appeal.<sup>154</sup>

Later the Trade and Industry Appeals Tribunal was also judged not to be an independent court, because the minister of economic affairs had the formal competence to reverse the decisions of this tribunal.<sup>155</sup>

This has eventually led to the drafting of the General Administrative Law Act (GALA), which made administrative proceedings uniform for all administrative courts, and which entered into force in 1994. Along with the GALA, a major reorganization of the system of legal protection against the government was introduced. In the 19 first instance courts administrative law divisions were installed, with possibilities for appeal to the Central Appeals Council and to the judicial division of the Council of State. The General Administrative Law Act regulates more than just legal protection though. It provides the mainframe of concepts for the entire body of Dutch administrative law. It should be noted that maintaining this position while ministries provide for specialized legislation on for example railroads, education, nature preservation, competition, taxation, agriculture etc. is not an easy task, because GALA does not have a superior legal status compared to specialized Statute Acts. But there should be no confusion: special administrative legislation concerning specific subjects as mentioned above should follow the definitions of the General Administrative Law Act (GALA). Legislation on specific subjects is attuned to the General Administrative Law Act by means of internal guidelines, known as the 'instructions for designing legislation', to be applied by the separate legislative departments of the different ministries of the Netherlands. Therefore the legislative department of the Ministry of justice must be consulted by other ministries on all legislation relating to administrative decision making and to legal protection against the government. They guard the compliance of legislation prepared by other ministries with the legal definitions of concepts like: 'administrative authority', 'decision' and 'interested party'.

### *3. The current court system in the Netherlands*

The latest developments are related to organisational arrangements and specialization within the courts, and date back to 2002. There are 19 first instance courts, with separate divisions ('sectors' or 'chambers') for criminal, civil, administrative and for small crimes / small claims cases. Within each division, different procedures are possible. For civil and criminal cases, appeals can be lodged at the appeal courts, as it can for taxation cases. The other administrative cases can be appealed at either the Central Appeals Court or the Council of State. Civil, Criminal and Taxation decisions of the Appeal Courts can be appealed against at the court of cassation, the "Hoge Raad", as is shown in the graphic below:

**Civil and Criminal  
Jurisdictions  
Family law included<sup>157</sup>**

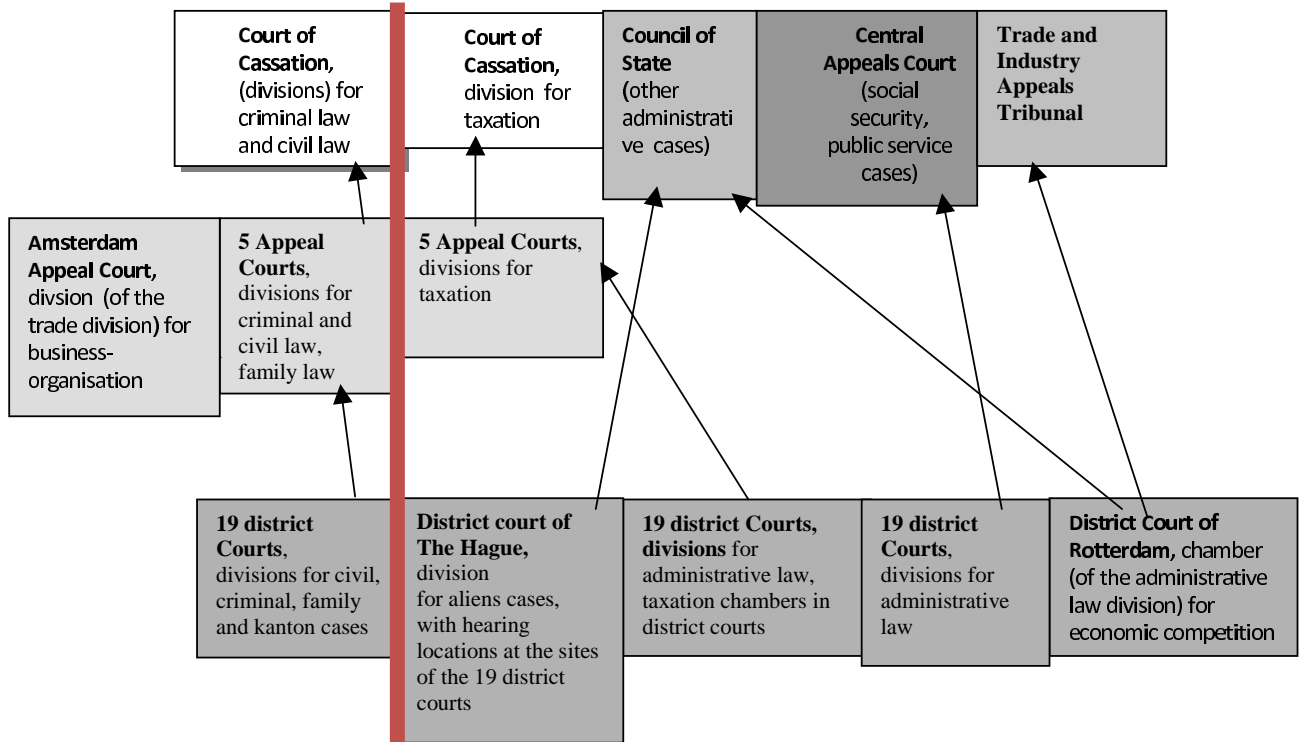
**Administrative jurisdictions<sup>156</sup>**

<sup>154</sup> ECtHR October 23, 1985, AB 1986 no. 1/Publ. CEDH, Série A, Vol. 97

<sup>155</sup> EHRM 19-04-1994, NJ 1995, 462 Van den Hurk, CEDH Série A Vol. 288

<sup>156</sup> The chart does not show the first and only instance competences of the three highest administrative courts.





Explanation:

Division = organisational part of a court (sector)

Chamber = organisational part of a court division

Apart from the first instance courts with their administrative divisions<sup>157</sup>, there are specialized courts. The ordinary courts deal with almost all types of cases but there is a special chamber for competition cases at the Rotterdam District Court, with the possibility to appeal to the Industrial appeals tribunal. The judicial division of the Council of State deals with first instance environmental law cases and space planning cases.

Furthermore the Central Appeals Tribunal functions as a specialized secondary appeal court in social insurance cases. For tax cases the first instance courts have jurisdiction, but appeals of their judgments must be lodged at the tax division of the ordinary Appeal Courts. The Judicial Division of the Council of State is the secondary appeal court in all cases that fall outside specialized jurisdictions.

#### **4. Dutch administrative law: main concepts**

As indicated above the General Administrative Law Act is a milestone in 100 years of development of Dutch administrative law. It regulates the decision making process, for administrative court proceedings, for pre-trial proceedings (so called objection-proceedings)

<sup>157</sup> The military courts as sub-units of the Arnhem district Court and the Arnhem Appeal court are not included in this chart.

<sup>158</sup> According to the Dutch judicial organization act, these divisions are called 'sectors'.

and proceedings of administrative appeal. The GALA contains several chapters on initial administrative decision making and on administrative law enforcement for all administrative authorities in the Netherlands. They concern e.g. inspection and law enforcement, subsidies, but also a general normative chapter, and a chapter on mandate and delegation of administrative competences.

These chapters use common definitions of the concepts of “administrative authority”; “administrative decision” and “administrative order”, and of “interested party”. These definitions create a complicated legal language game:

E.g: article 1.1 states:

1. 'Administrative authority' means:

- (a) an organ of a legal entity which has been established under public law, or
- (b) another person or body which is invested with any public authority.

article 1.3 states:

- 1. 'Order' means a written decision of an administrative authority constituting a public law act.
- 2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.

And article 1.2 states:

- 1. 'Interested party' means a person whose interest is directly affected by an order.
- 2. As regards administrative authorities, the interests entrusted to them are deemed to be their interests.

Thus it is possible to substitute words used by their definitions:

“interested party” means a person whose interest is directly affected by a written decision of an organ of a legal entity, which has been established under public law, constituting a public law act.

These definitions are important because they define if and in how far a decision making process should comply with the demands of GALA, if there is decision, and if the affected person or organization will have standing in an administrative court. The latter also determines whether this person or organization will have standing in pre trial objection proceedings with an administrative authority, as the GALA states in article 7.1 that the interested party that has a right to appeal against a decision at an administrative court must first file an objection at the administrative authority that took the contested decision.

## ***5. Legal Protection in the General Administrative Law Act***

Because administrative appeals (= appeal to a higher administrative body) have become a rarity, in this report we will focus on objection proceedings only. These can be described as an obligatory administrative appeal at the administrative body that took the original decision.

Article 7:1 of GALA states that those who have a right to file an appeal at an administrative court must first file an objection with the administrative authority that took the contested decision.

The main purposes of objection proceedings are:

- Legal protection of interested parties, and;
- Prolonged decision making.

Prolonged decision making refers to the possibility for the administrative authority to correct errors in the original decision, and to supervise civil servants with a mandate to issue administrative orders. Many decisions by administrative bodies are taken by civil servants in accordance with a legal mandate. Objection proceedings draw the attention of higher level functionaries within the organization to the issued order. The objection proceedings can sometimes remedy errors that are the consequence of the mandate construction. There is also a learning function, because the objection procedure gives the administrative authority the opportunity to compensate and improve their possible earlier mistakes. It should be noted that e.g. taxation decisions and decisions on social insurance benefits or aliens concern decision making in large numbers (many thousands each year). These services sometimes are called ('decision factories'). A number of their decision will inevitably contain mistakes and objection proceedings can remedy those.

To a certain extent objection proceedings also function as a way to prevent interested parties from going to court, either by convincing them that the contested decision was legally inevitable, or by correcting mistakes and satisfying complainants entirely or in part. The aim is not to deny citizens the way to justice but to provide an alternative dispute resolution mechanism. The procedure also serves to make as clear as possible what a conflict entails and what the facts and circumstances are that should be taken into consideration. Of course, if an interested party is not satisfied with the outcome and not convinced by the reasons provided for the decision, they can file a case at one of the 19 district courts. The territorial jurisdiction of the administrative law divisions of the district courts is organized in accordance with the place of residence of the appellant.

Nevertheless in 2004 a new provision was issued for GALA, article 7.1a, stating that if both the administrative authority and the party filing an objection agree, they can appeal to court immediately. The evaluation of this provision in 2005 showed that parties, advocates and administrative authorities have shown great reluctance in using this provision, especially because they value the meaning of objection proceedings.<sup>159</sup> Apparently this provision did not serve its purpose to reduce administrative burdens for administrative authorities.

### **Consequences of filing objections against a decision**

A basic feature of the system of legal protection of GALA is that appeal or objection proceedings do not suspend the legal effect of a contested decision. However, the risk of starting to use a license that is contested is for the addressee. So if a license is withdrawn in objection proceedings or quashed in appeal, the addressee of the decision may be liable to

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<sup>159</sup> B.M.J. van der Meulen, mr. ir. M.E.G. Litjens, A.A. Freriks, *Prorogatie in de Awb, Invoeringsevaluatie rechtstreeks beroep, WODC DEN Haag 2005*

third parties. If a third party wants to prevent the licensee from using the license during objection proceedings, he may start summary proceedings as an annex to objection proceedings with the administrative court, asking for suspension of the legal effect of the contested decision (usually until the 6 weeks term of appeal against the decision on objections has passed). The same holds of course for the addressee of the decision to impose a non pecuniary sanction under the threat of immediate execution.

### **Standing**

From a formal point of view it makes sense to distinguish between the competence of the court and the standing of the appellant. In practice however, the courts do not state their competence (e.g. when there was no decision within the context of GALA, but a civil legal act). This can be explained by the fact that the right to appeal is formulated in terms of there being a decision within the context of GALA and explicitly denying this right concerning civil legal acts.

Before being able to file a case to an administrative court, one has to follow the objection proceedings. Standing in the objection proceedings therefore follows the same conditions as standing for an administrative court. Standing is related to four factors:

There should be an *order*, of an *administrative authority* and the appellant should have a *directly related interest* in the decision. Furthermore, the objection should be filed within the statutory *time limit* following the decision. We repeat here that an order is a legal act under public law. Contracts with the government or with a legal person within the state are therefore not orders within the meaning of GALA.

### **Administrative Order**

An administrative order is a legal act under public law, issued by an authority within the context of GALA. An 'administrative decision' is an order which is not of a general nature, including the rejection of an application for such an order.

This concept focuses on the existence of some legal act. The rejection to perform such an act is also defined as an administrative decision. The distinction between an administrative order and an administrative decision is relevant, because an administrative order comprises not only decisions for individual-concrete cases but also delegated legislation. Such general rules are cannot be appealed before an administrative court. And where the enactment of delegated legislation cannot be appealed, the refusal to enact delegated legislation or to change it can also not be appealed before an administrative court.

So a plaintiff will have standing with regard to decisions and orders as far as they do not contain general rules or policy rules. If there is no legal act but a real act, the administrative court is not competent to hear the case and will declare the appeal inadmissible.

### **Administrative authority**

The Dutch state is organized relying on the concepts of legal persons, administrative authorities and civil servants. The state is the legal person, but the ministers and the government are administrative authorities. Municipalities are legal persons, but their organs, the representative council, mayor, mayor and aldermen are administrative authorities. The same holds for the province and its provincial council, deputies of the council and the queen's commissioner. Of course other authorities have been instituted by law, such as the authorities

for market competition, for financial markets, but also for Food and Consumer Product Safety etcetera.

Administrative authorities are represented by their office holders. The office holders exercise the competences of their office; civil liability for actions of authorities rests with the legal person they belong to. Civil servants can exercise competences of the authority that employs them if these competences have been transferred to them by a legal mandate. This does however not affect the legal accountability of the authority itself, the mandate only stipulates that the civil servant represents and legally acts for the authority. Sometimes statute acts create a special competence for civil servants, e.g. for a taxation officer, who has the competence to impose a certain tax on a person. In such a case the taxation officer is an administrative authority in the sense of the GALA. Last but not least, sometimes a specific competence is attributed to a functionary of an organization under civil law. Two examples should suffice here: the director of a private school may take decisions on exceptional leave for a pupil under the compulsory education law; and the garage manager may provide a certificate on a periodic motor vehicle test. In both cases these functionaries perform a legal act under public law, and they are considered administrative authorities for the performance of this task.

### **Interested party/ third party**

An interested party is a person whose interests are directly affected by an administrative order. Still it is almost impossible to give a full, positive definition of what ‘directly affected’ means in this context, because the courts and especially the Council of State and the Central Appeals Tribunal have developed the concept on a case by case basis.

Of course, and first of all, the addressees of administrative orders are interested parties to that order. Think of taxation decisions, or social benefit decisions.

‘Directly affected’ means that the interest should be:

- personal
- objectively verifiable
- currently existing and certain (not in a possible future)
- causally directly affected by the administrative order.

This applies equally to legal persons and to natural persons. GALA also recognizes the possibility that collective interest groups can be affected by administrative orders and grants them standing: As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objectives and as evidenced by their actual activities. This opens the possibility for environmental organizations to contest administrative orders (e.g. licenses to drill for oil in the Wadden Sea, a nature reserve).

Further examples may clarify this:

- My neighbor receives a permit to start a pub. I live next door, and no one asked me what would be the consequences of that administrative act for me. Would this be an infringement on my “rights and legitimate interests”? I think so, because it affects my interest directly, it is objectively verifiable, the hindrance is not imaginary, and there may be a direct causal relationship between the decision and the hindrance near my home.

- The municipality decides to cut down a beautiful two hundred years old chestnut- tree in front of my house, and gives itself a license to do so based on a general regulation that wants to protect the ‘green lungs’ of town. The tree is on the street and the street is owned by the municipality. Would this directly affect my “rights and legitimate interests”? Probably, because the tree provides shade, maybe a certain value for my house. That is objectively verifiable, and there is causality. Therefore it is likely that I will have standing in objection proceedings (if my objections will be upheld by mayor and alderman is another question, the answer to which depends on the reasons for the decision, e.g. the tree is old and dangerous, the sewer system should be renewed, etc).
- The municipality decides to cut down the same kind of tree, and gives itself a permit, but now it is not in front of my house but it is in another street where I walk every day and where I enjoy and admire this magnificent tree. Would this be a violation of my “rights and legitimate interests”? I do not think so. Of course, such an administrative act influences my daily experience, but a question is if administrative law should protect something personal and subjective like that. There is no direct relation between my legitimate interests and the decision.
- The municipality decides to cut down the same Chestnut tree in front of my house, and gives itself a permit to do so. In my town happens to be a foundation (a legal person) which has the aim to protect the natural environment and especially the conservation of old trees (this aim was laid down in the statute of the foundation). The board of this foundation lodges a complaint against this administrative act (the permit). Would this administrative act directly affect the “rights and legitimate interests of this foundation? Under GALA this foundation certainly would have standing in objection proceeding. (Again, it is questionable whether the objections will be upheld by the administrative authority, but that is another matter).

It should be noted that giving general interest groups standing may have the effect that important political questions are brought before the court. On the other hand, giving standing to general interest groups also facilitates judicial control of the administration. From a designer’s perspective, the question is to what extent environmental groups should use political lobby rather than legal protection to achieve their aims.

## Relativity

Currently, a debate that was instigated by politicians is taking place amongst lawyers about whether the right to appeal should concern only the interest of the party whose interest is protected by the legislation the decision was based on, or that an interested party may rely on other interests as well. The building construction Act for example gives the Mayor and Aldermen of municipalities the competence to grant building licenses. There is a connection with space planning, but if space planning permits, they can grant the license, taking into account the construction process, the safety of the building design and the ‘looks’ of the building. Imagine that a supermarket company has applied for a building license on some site. A relevant question is whether a competing supermarket company should have standing to contest the building license in order to protect its economic interests. The primary purpose of the building construction act is not to protect economic interests, but to enhance safe building constructions. The competing supermarket is not interested in enhancing the safety of building construction, but wants to protect its economic interests. The question is whether it should be allowed to use a court procedure to this purpose. On the one hand, giving the competing supermarket standing enhances judicial control and law enforcement, also against the administration. That the competing supermarket has ulterior motives does not matter: the court still gets to review whether the relevant legislation has been complied with. On the other hand giving such a party standing will delay decision making. From a strict legal protection angle, granting standing is not necessary, as the competing supermarket is not defending an interest that is recognized in the applicable legislation. Whether and when such parties should

have standing remains a point of dispute. However, more restrictive rules about standing in court proceedings will inevitably lead to a lower number of appeals at the administrative courts.

It should be noted that the right to appeal to an admin court entails an obligation (the right is implied) to file objection proceedings at the admin authority that gave the administrative order. A decision by an administrative authority concerning standing of an interested party can therefore be reviewed by an admin court.

### **Organization of proceedings (administrative authority, advisory committee)**

In this paragraph we explain the organizational demands and the logistic aspects of objection procedures. We will deal with the question of who will take the decision on objections and who may conduct the hearings. In a later paragraph we will describe the defense rights of the parties.

The GALA insists on pretrial proceedings, unless a special procedure for the initial decision making was used. An objection should be filed with the administrative authority that took the contested decision. This authority will review its earlier decision and take a new one. The new decision must take account of both matters of fact and of law as they are at the moment of decision on the objection. This is important, because there may be up to 4 months or even longer between the filing of the objection and the decision on the objection.

There are a few exceptions where there is no obligation to file an objection:

- the admin body agrees to skip the objection proceedings upon request of the plaintiff
- a special public procedure for the preparation of decision making was followed (with guaranteed access to participation of interested parties), or
- the appeal is directed at the administrative body's failure to take a decision.

### **The logistics of informing parties, hearings and decisions**

The objection should be submitted in writing and must be received within a timeframe of 6 weeks after the original decision was taken. No fee may be charged for filing an objection, and representation by an advocate is allowed, but not obligatory. The objection received should be registered by the administrative authority. An objection can be delivered electronically if the administrative authority has chosen to give the possibility to do so.

Interested parties should be informed of the objection and the admin body must organize a hearing. Parties should be informed about time and place of the hearing, and the person or the committee which will actually conduct the hearing. In addition,, they should be informed about the possibility to give (further) reasons for their objections, including the delivery of proof, until 10 days before the hearing date. Furthermore, the announcement should state where interested parties can view the relevant documents. The admin authority should offer this possibility for at least one week during the period before the hearing date, but the parties can declare they take no interest in it.

### **Who should conduct the hearing**

The rule that the administrative authority must decide on the objection has several consequences for the organization of the objection procedure which will depend on who took the contested decision de facto. Many administrative decisions are taken by civil servants under a legal mandate of the administrative authority. Parties have a right to be heard, also in objection proceedings. The question is who should conduct the hearing. This organizational question is also related to the important norm that bias or appearances of bias in the objection proceedings should be prevented. Several situations may occur:

#### **The original decision was taken in mandate by a civil servant of the responsible administrative authority**

In order to prevent bias, the civil servant that took the original decision on behalf (mandate) of the responsible administrative authority should not participate in the objection proceedings. However, the decision making competence in objection proceedings may be given in mandate to another civil servant, provided this civil servants did not function in the same organizational hierarchy as the civil servant that originally took the decision.

#### **The original decision was taken by the responsible administrative authority itself**

If the original decision was taken by the responsible administrative authority itself, the decision in objection proceedings must be taken by the authority itself as well; mandate to a civil servant is not allowed.

### **Advisory committee**

There are two different types of committees that can conduct the hearing in objection proceedings: internal and external committees. An *internal* committee usually consists of civil servants working under responsibility of the administrative authority. GALA demands however that the hearing be conducted by a chairperson who was not involved in the original decision making, and if the committee consists of several persons, the majority should consist of persons who were not involved in the original decision making. An internal committee delivers an advice or may take a decision on objections in mandate, provided the authority did not take the original decision itself.

The administrative authority may install an *external advisory committee* to conduct the hearing and advise on how to decide on the objections. If the authority chooses to install an external advisory objections committee, it is obliged to take the advice explicitly into account when taking a decision on the objection. If it deviates from the advice, the advice should be sent to the parties, together with the decision and its reasons. Usually such advisory committees are installed on a permanent basis, for example as an advisory committee for the mayor and aldermen and of the council. In accordance with the Municipalities Act, office holders may be a member of such an advisory committee. However, the chairperson of the committee must be someone who does not work under responsibility of the administrative authority. Therefore the chairperson often is a judge or an advocate or an academic with expertise in administrative law, or a person working for another administrative body. Members often are specialists in e.g. space planning or social benefits or may have other expertise.



Based on evaluation studies, there is evidence that external committees often resort to a court-like hearing and evaluation of objections filed, whereas the tasks of such committees is to assess the objection both from a legal and a policy point of view; they deliver an advice, and it is up to the administrative authority to take a decision.

The internal organization of the objection procedure determines the time frame within which the administrative authority needs to take a decision on objections:

- For objection proceedings heard by the administrative authority or by an internal advisory committee the time frame is six weeks with the possibility of prolongation with six weeks (max. twelve weeks).
- For objection proceedings heard by an external advisory committee, the time frame is twelve weeks with the possibility of prolongation with six weeks (max. 18 weeks).

Unfortunately, decisions on objections are seldom rendered within the legal timeframe, whereas redress has been difficult so far. To remedy this, a new amendment to the GALA has entered into force. It requires administrative authority to pay a fine of €20 for each day by which one of its bodies exceeds the time frame for taking a decision on objection, with a maximum of 42 days.

### **Exceptions to the obligation to organize a hearing**

It will be not necessary to organize a hearing if the objection is self evidently not admissible, e.g. because the party has no legal interest, or there is no public legal act. It is also possible to abstain from a hearing if it's self-evident the objection must be rejected, or if the interested party has declared that a hearing is not necessary. A hearing can also be omitted if the administrative authority announces it will take a decision on the objection which fully meets the objection made.

### **The decision following upon an objection**

After the hearing an advice may be given to the administrative authority, and otherwise the administrative authority or the civil servant holding the mandate must take a decision itself. This decision must be taken based on the facts and on the law pertaining to the situation as it is at the time of the decision. Therefore, not only can mistakes be corrected but new information can be taken into account as well. In the three to four months between the filing of an objection and the decision, circumstances, policies and the law may change. So, even if the original decision was not flawed, the decision on objection may still change the original decision. If the authority considers changing the content of the decision, parties with an interest in that change should be given a fair chance to react to the proposed change and therefore they too should be given enough time to react.

If the objection is considered to be justified, or if circumstances or policies have changed, the original decision will be *recalled* and replaced with a new one. We use the word recalled here, because the administrative authority is unlikely to *quash* its own original decision.

As a consequence, the decision on objection needs to be well reasoned, and take all relevant aspects into account. In principle the interested party that filed the objection may not become worse off because of the objection. E.g. if a theater company receives a grant, but it is not

satisfied with the amount, it can file an objection, but this may not result in a lowering of the grant (we call this: *prohibition of reformatio in peius*). Other parties might be worse off though: if a third party filed an objection against such a grant, it may well be that the addressee of the original decision will be worse off because of the decision on the objection filed by the third party.

The demand that a decision, especially a decision on an objection, should be well reasoned is directly linked to the defense rights of interested parties. Only if the reasons for the decision are transparent, can they be contested effectively before an administrative court. If the conflict cannot be solved, the objection proceedings will also function to crystallize the conflict, building a file and making clear on what point the parties do not agree.

### **Defense rights**

The GALA was designed, on the one hand from the perspective that the government should be able to take decisions, in order to maintain public order, but also in order to realize policy objectives. On the other hand it is based on the perspective that citizens, natural persons, and organizations should be able to defend their interests vis à vis the administration. At the basis of GALA is the idea that the administration is politically and judicially accountable for its actions. The balance is on the side of the administration as far as the terms for objections and appeal is limited to 6 weeks. Beyond that time limit interested parties will not have standing (with some exceptions). On other points, the balance is on the side of the citizens, because administrative orders and decisions must be made public, they must be reasoned and basically interested persons must be heard if a decision under preparation will affect them negatively. In their contacts with the administration citizens have a right to legal representation. However, in principle in objection proceedings they have to hire such representation at their own expenses. This might not be desirable though, because administrative law has become a very complicated legal field. Interested parties are at liberty to deliver proof concerning their claims and the administrative authority must take proof-based arguments into account. The check on these rights of the citizens and these obligations of administrative authorities is the possibility to appeal to an administrative court that has effective competences to uphold the law against citizens but also against the administration. If necessary a court can quash an administrative decision on objection proceedings, but it cannot replace it in most cases. Instead, the administrative authority must take a new decision on the objection. Of course, this offers new opportunities for the administrative body to take a better decision, especially as circumstances, policies and law may have changed in a year's time.

Based on the jurisprudence of the ECtHR the reasonable time limit of Article 6 ECHR requires that a final decision is taken within 4 years after the first objection was made. Administrative authorities and courts usually manage to do it within that time limit.<sup>160</sup> In fact, most administrative divisions of the district courts decide a case within one year after filing. This means on average there may be less than 2 years between the initial decision and a possible new decision on objection following a judgment of the district court. This is still considered too long, but the courts do not manage to handle a case in less than 46 weeks on average.<sup>161</sup>

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<sup>160</sup> For the Netherlands, ECtHR 9 December 9 1994 , Schouten and Meldrum v. The Netherlands, A -307, is relevant because it stated that the reasonable time limit starts with filing an objection and ends with the finale execution of the judgment.

<sup>161</sup> Council for the Judiciary, Annual report 2007, p. 23.

## 6. Relation between the objection proceeding and court proceedings.

An issued license has immediate legal effect. Filing an objection does not suspend it. Summary proceedings at the administrative Court are directed at suspending the legal effect. They may be filed at the court at the same time as the objection with the administrative authority. Such suspension will only be granted by the court if there is a clear interest with the suspension and if there are indications that the contested administrative order will not be upheld in ordinary court proceedings. The presiding judge must balance the required speed with the involved interests, as article 8:81 GALA states.

With regard to the main proceedings in the administrative courts it is important to notice that the reasons against the decision that were used in the objection proceedings determine the scope of the conflict before the court. This is judge made law, and the exact lines are yet unclear. This also has to do with the position of third parties. If a license is granted as a result of objection proceedings, the third party may come up with new reasons in appeal *as far as it did not have a chance* to assert them in the earlier objection proceedings. But if the license was rejected, the party that applied for the license cannot come up with entirely new arguments in appeal.

As a general rule, the scope of the conflict in objection proceedings defines the scope of the conflict in appeal at the administrative court.

## 7. Proceedings in administrative courts

Proceedings in administrative courts are also regulated in the General Administrative Law Act, in chapters 8 and 6. The administrative courts are the next instance, following objection proceedings. With the (written) decision on objection, the administrative authority must state where the interested party can appeal the decision and within what time frame. The normal timeframe to file an appeal is within 6 weeks after the publication of the decision on objection. A court fee must be paid in order for the appeal to be admitted. Parties need not be represented by a lawyer. Of course, the appeal must be motivated. After the case is registered, the administrative authority is requested to send in the file of the decision on objection. Parties can exchange views and documents until 10 days before the court hearing which is oral and, in principle, of a public character. Based on the important article 8:69, the court has discretion to conduct a further inquiry into the facts, but it is obliged to supplement the legal grounds for the appeal. This is especially relevant where there are legal provisions of “public order”, like legal time frames and defense rights, which must be upheld by the court.

Administrative courts have competences to review a decision on objections only on points of law. The judgment must be reasoned. As a result, the court can reject the appeal, or it can quash the decision on objection. If it quashes the decision on objection, the consequence is that the administrative authority needs to take a new decision on the objection. Only if there is no discretion left for the administrative authority the court may replace the decision on objection with its own decision. This will never happen in cases where there are third party interests. These cases often are about licenses that require technical knowledge, and generally judges do not have such knowledge and skills. It can however happen in social insurance cases. Often, such cases are a matter of recalculation of entitlements and then sometimes an administrative court does replace the decision appealed against.

Of course, when a case should have been declared inadmissible by the administrative authority, the court can declare the decision void and replace the decision with the judgment that the objection is inadmissible, e.g. because the person had no standing or there was not an administrative decision.

In general, if the administrative authority loses the case, it has to compensate in part the costs of the citizen. If the appellant loses the case, every party bears its own costs.

## 8. Complaints and ombudsmen

The GALA contains a chapter on complaints proceedings. They are not directed at any legal effect, but at restoring a good relation between the administration and citizens. Virtually all administrative authorities fall within the scope of the National or a local ombudsman. Local administrative bodies can choose to have their own ombudsman or to use the National ombudsman. The four largest cities in the Netherlands (Amsterdam, The Hague, Rotterdam, Utrecht) have their own ombudsmen. They have the same competences as the National ombudsman, based on chapter 9 of the GALA. The intention is that all administrative bodies in the Netherlands fall within the scope of an ombudsman.

The National Ombudsman is a complaints instance, but he can also conduct an inquiry at his own initiative. The office of the National Ombudsman is embedded in the Dutch Constitution: he is a High Office of State, just like the Parliament, the King, the Supreme Court and the Council of State. He is appointed by the Lower House of Parliament for a six year term. Everybody with a complaint against an office, officeholder or civil servant within his jurisdiction can contact the National Ombudsman office in The Hague, or the local ombudsman. A complaint will only be admissible when the complainant has first filed the complaint with the administrative authority that caused the distress. It should be stressed that a complaint is not an objection in GALA terminology!

A complaint to the National Ombudsman will only be accepted after the administrative authority has been given the opportunity to deal with the complaint itself. So, e.g. complaints about the conduct of a policeman should be dealt with first by the police organization.

The National Ombudsman is competent in the case of national public bodies, and in the case of decentralized public authorities, as far as they have indicated the National Ombudsman as their local Ombudsman. Otherwise, they have to appoint an ombudsman of their own.

The work of the National Ombudsman is closely related to the terms and concepts of the General Administrative Law Act. This act defines legal concepts like: ‘administrative authority’; ‘decision’ and ‘complaint’, and also operates and legally defines most principles of good governance. The competence of the Ombudsman is linked to the definition of these concepts, and, by his reports, he also contributes to the development of administrative law in the Netherlands.

The legal definition of a complaint refers to a written document; however, oral complaints may be delivered at the office and will be written down by Ombudsman staff. The Ombudsman may not conduct an inquiry into complaints about decisions of administrative authorities that are suitable for legal action against, or for civil law suits against the public body concerned. In practice the ombudsmen operate their jurisdiction in a very flexible way. They only withhold themselves from an inquiry if the complainant has the same case pending in court, or if an objection has been filed.

In case of a complaint, the ombudsman tries to solve the case. He does this by means of a mediation effort, which is called “intervention”. If the mediation does not end with a friendly

solution, or of the case is of substantial societal relevance, the ombudsman will consider publishing a report. Out of about 12.000 complaints per year, only about 400 reports result. This is an indication of the success of informal solutions for complaints. A solution can take many forms, e.g. an excuse for misbehavior, sometimes with some flowers, or a small voluntary compensation in money, or just an explanation why something went wrong within the administration and what was done to prevent the mistake from happening again.

The result of an inquiry by the Ombudsman is of a restricted nature: if the Ombudsman delivers a report, a judgment of 'proper' or 'improper' is given. The Ombudsman is not able to perform any legal act as a response to complaints, although the outcome of an inquiry may be used as proof in court proceedings, e.g. in a civil lawsuit for damages against the government. The evaluation of that proof remains a judicial responsibility, however. The fact that the ombudsman cannot give any binding decision but just recommend a certain solution is the most important difference between the ombudsman and a court.

Normally, a report will contain a detailed description of the events that led to the complaint, a description of the internal complaints procedure, an extensive description of the applicable law, and an elaborate check on the lawfulness or unlawfulness of the behavior that is the of the complaint. The ombudsman may also make some recommendations to the public authority concerned. During the last 5 years, the local and the National ombudsman have worked with a clear set of good governance norms, "ombudsnorms". The ombudsmen assess administrative behavior based on these principles, thus a body of "ombudsprudence" has developed that helps to understand what good governance means in countless administrative practices. It also shows that next to a legal assessment of administrative behavior, a meaningful ethical assessment of administrative behavior is also possible.

## 9. Evaluation research on objection proceedings in administrative law

*Recent empirical* research on the filtering effects of objection proceedings and on user satisfaction on a national scale has not been published yet. In the past, evaluation research has been done and published, especially as part of evaluations of the General Administrative Law Act. K.Sanders also conducted a research on objection proceedings, published in 1999<sup>162</sup>. More recently published studies, conducted on assignment of the Ministry of justice are of a more exploratory nature. From those studies it appears that the context in which a decision was taken affects the filtering effect of objection. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1,5 million and 30.000 per agency, annually). These organizations are called "*decision factories*". These decisions very often are made with the help of ICT. This means that presumptions may be faulty, because of administrative mistakes. The objection procedure helps the administration to correct its mistakes or to explain the decision to the citizen in these cases. The effect is huge, as only about 3% of addressees of all original decision start court-proceedings after decisions on objections.

Other types of decisions are taken in much lower quantities and depend on much more complex decision making processes. This is the case for e.g. space planning decisions, but also for licenses under environmental law. One can imagine how complex a license for oil drilling on the North Sea can be. The organizations that deliver these decisions are called "*decision workshops*". Here the filtering effect of objection proceedings is much less. We

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<sup>162</sup> K.H. Sanders, *De heroverweging getoetst: een onderzoek naar het functioneren van bezwaarschrift procedures*, Deventer: Kluwer, 1999

estimate that between 25 and 50% of the decisions on objections against 'workshop decisions' are probably appealed. These numbers are based on research of more than 10 years ago, so their accuracy to date may be questionable, but that is the trend. This is confirmed by an evaluation study on the possibility to skip objection proceedings if administrative authority and citizens agree, because this possibility is only rarely used.

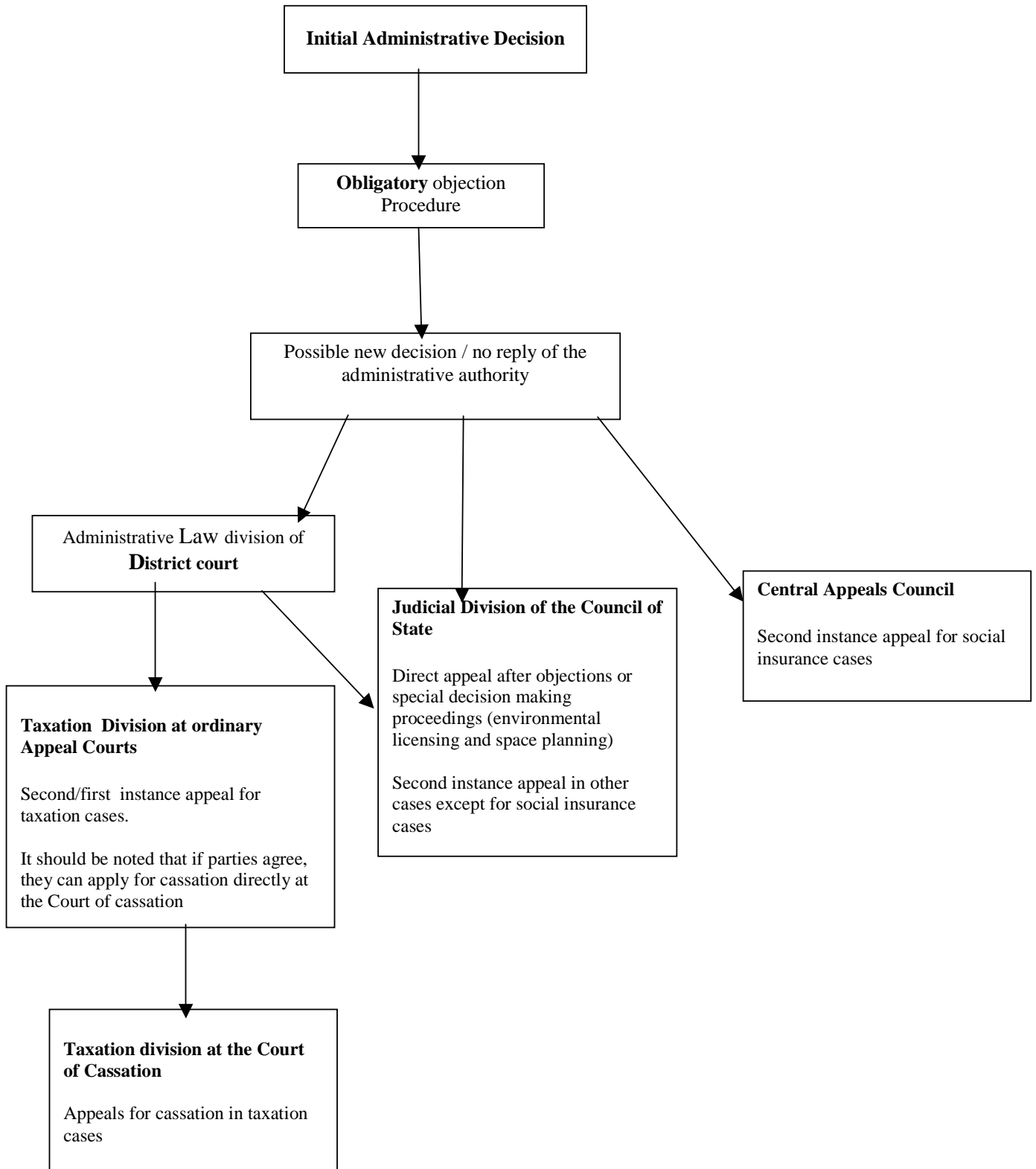
We can conclude that pre-trial proceedings require some fine tuning as to where they are really helpful and for what kind of decisions they maybe can be missed. This can only be done accurately based on periodic empirical evaluations.

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## Annexes

### Annex 1 Flowchart of procedures of administrative legal protection in The Netherlands





## Annex 2 Statistical data

No statistical data on objection proceedings are available. However, a commonly accepted feeling is that about 15 % of decisions in objection proceedings is appealed against at a court.

	Production in 2009	Number of objections
Admin. Law divisions district courts <sup>163</sup>	113.550	
Special tribunals <sup>164</sup>	8570	
Tax courts	3370	
Council of STATE	1951	
Total:	127441	

These numbers are a little bit flawed because we should only count First instance appeals and the numbers of the Central Appeals Council also contain second instance appeals. The other numbers are accurate however. Based on this assumption, the number of objection proceedings in the Netherlands in 2009 was about 850.000. Again, this is a rough estimate, also because the production of the courts is also based on cases that were filed in 2008, and the definition of ‘objection’ may differ from organization to organization (e.g. ‘decision factories’ versus ‘decision workshops’, as for their annual reporting they are not obliged to follow GALA terminology).

Ombudsman	2009 <sup>165</sup>
complaints	12222
interventions	3550
Reports	295
Referred	6630

<sup>163</sup> Sources: De rechtspraak, jaarverslag 2009, page 61; Jaarverslag Raad van State 2009, p 264.

<sup>164</sup> The Central Appeals Council and the Industrial Appeals Tribunal.

<sup>165</sup> Source: Jaarverslag Nationale Ombudsman 2009.

## VI. Comparative analysis

### 1. Introduction

Although all countries we included in the project have some form of prejudicial procedure, differences abound. There are many possibilities to organize administrative review, from the highly systemized German *Widerspruch* to the often facultative and form-free procedures in France. Where Dutch administrative procedure has become advanced due to the General Administrative Law Act, England and Wales have an unsystematic patchwork of paths for legal protection against the administration. There are large differences in when such procedures are obligatory, in the extent to which they are regulated, and in their accessibility.

What they have in common are their goals. They offer the administration the opportunity to correct its own mistakes – including the opportunity to review the merits of its decision, they offer a measure of legal protection to affected citizens, and they alleviate the burden on the administrative court system. At the same time, the pre-trial proceedings should not place a disproportionate burden on the organs competent to handle them, either in terms of time or costs. These goals can conflict with each other: the burden on the courts for example may be best alleviated by compromising on the protection of citizens' rights. These goals are best realized in different ways then, and often there are choices that must be made about the organization of administrative review procedures where the different goals have to be balanced against each other. This means that there is no single best practice that can be distilled from the country reports: when designing a pre-trial procedure one can choose to give standing to a wide range of parties, in the interest of offering maximum legal protection, and at the expense of efficiency – such broad standing would after all result in a larger number of procedures that need to be dealt with. This can be balanced by obliging complainants to bring all their arguments to the fore during the objection proceedings, and not allowing them to bring new arguments before the court. Arguably this goes at the expense of legal protection, but it increases the efficiency of the procedure as a whole. The point is that the different goals need to be balanced somehow: it is impossible to afford maximum legal protection, and to have a highly efficient, low cost procedure at the same time. Somehow, a balance must be struck.

### 2. Legal protection

An important function of prejudicial trial proceedings is to protect the rights of individuals, both natural and legal persons, from unjust interference by the administration. To accomplish this, the legality of administrative decisions is reviewed in prejudicial proceedings in all countries involved in the project. However, the effectiveness of the protection of individual rights is dependent on the specifics of these procedures. The three main factors are *standing* (who will have the legal position to challenge a decision), *procedural guarantees* that ensure the rights of citizens are respected during the procedure, and the *formal and substantive requirements* placed upon participants in administrative proceedings.

## **Standing**

It is only the rights of those individuals who can actually challenge a decision that are protected. It is therefore very important who can initiate pre-trial proceedings.

In the French facultative proceedings the administrative organ has some discretion in this matter, as long as it stays within the boundaries set in the case law, which does seem to require that a plaintiff has some interest in the decision. In the obligatory proceedings, only the interested party – usually only the addressee of the decision – is involved. This does not mean that legal protection is limited to the addressee though: third parties whose interests are affected by the decision can generally go directly to court. They miss out on the expediency review that can only be conducted by the administration, but the legality of the decision can still be fully reviewed by the administrative court.

In the UK, third parties can address administrative tribunals only in as far as a statute act enables them, but they can go to the ordinary court. This results in the possibility of two simultaneous procedures being conducted about the same facts, which in turn yields a need for at least some coordination between the tribunal and the court.

In the Netherlands, anyone who has a personal and direct interest in a particular decision can challenge a decision before the administrative court, and anyone who can go to court, can file an objection as well. Third parties are relatively well-off, but the system is under pressure.

In Germany, the system is similar to the Dutch one: anyone who has standing before the court will have to initiate an administrative objection procedure first. The rules for standing before the court are different though. The general rule is that a decision must affect your personal rights. This will automatically be the case for the addressee of a decision. Third parties must not only have an interest in the decision, they must also show that the violation of this interest is the result of the administration violating a norm which aims to protect that interest. An adverse effect on your interest is in itself not enough to give you standing. This mechanism somewhat limits the number of parties who can engage in objection procedures, and therefore the number of procedures that will be initiated.

An interesting aspect of the German system is the power of administrative bodies to ignore the fact that an objection was filed too late. Although such a plaintiff will no longer have standing before the courts, the administrative authorities can elect to deal with the objection as usual, provided no third party interests are involved.

So who should have the right to appeal? Strong limitations will result in not enough legal protection. A generous right to appeal will enhance the possibilities for reviewing the compliance of administrative decision with the law, but will also lead to an increase in the number of objections filed.

There is no need to have a one-on-one relation between standing before the courts and standing in objection procedures though, so one might consider some sort of objection procedure as an alternative to court proceedings for certain parties, such as interest groups.

## **Suspensive effect**

If initiating an objection procedure has suspensive effect, this will prevent people's rights being harmed by unlawful decisions. From the perspective of legal protection it is therefore desirable that when an objection is filed against a decision, it will be suspended. However, it is fairly rare for this to happen automatically. The counter-argument for suspensive effect is that it might give rise to fake objections, which are filed with the sole purpose of delaying the implementation of a decision.

In Germany, filing an objection often still results in the impugned decision being suspended, although not as often as used to be the case. The consequences of this approach are somewhat

ameliorated by the fact that the decision still has legal effect – it is only the administration that is prevented from executing it. This means that when a third party objects to the granting of a building license, the holder of the license can still legally start building.

In the Netherlands filing an objection has no suspensive effect, but when someone files an objection he can subsequently approach the administrative court to suspend the decision. In France it is the same, and in Germany, when suspensive effect is not automatic, the court can be approached as well. This allows the courts to suspend the decision only where this appears to be justified, i.e., in cases where the decision appears to be illegal, and adverse consequences cannot be reversed. Usually a decision will no longer be suspended when it has been upheld by a first instance court. Again, this is to prevent illusory appeals, only aimed at slowing down the administrative process.

### **Accessibility of the procedure**

Ideally, to grant a maximum of legal protection, both objection procedures and court procedures should be as accessible as possible. However, that might have a negative impact on the efficiency of the procedure. Again, some choices need to be made.

The costs of pre-trial procedures are generally kept low. Even so, plaintiffs can often still apply for legal aid, and might get their costs refunded if their objection was successful, or nearly so.

In all countries the administrative authorities are obliged to give guidance to possible complainants. A decision should indicate how the addressee can challenge it. If it fails to do so, this will have consequences. In Germany for example, it will result in the time limit for filing an objection being extended.

In all countries, an authority that receives an objection which should have been addressed to another authority is obliged to send it on. This may stay the period for filing an objection, or it may not.

If filing an objection is an easy, form-free affair, like in Germany, everyone is able to get legal protection. This aspect of the German system is further magnified by the fact that there is no real connection between the arguments one uses in the objection procedure and those used before the courts. One can always introduce new facts and arguments.

This is very different in France, where the objection should be accompanied by all relevant arguments and documents, and the Courts will not accept new arguments, but decide based on the file formed during the objection procedure. The Dutch system is somewhere in between. Needless to say, the German authorities have a lot more work on their plate than the Dutch and the French.

If there are a lot of substantive requirements to filing an objection, the use of standardized forms, like in the UK, is advisable. This will ensure that a citizen knows what points he should address in his appeal.

### **Rights of the defense**

If a procedure is to grant legal protection, it has to respect the rights of the defense, which enable individuals to effectuate their rights vis à vis the administration. This obligation is firmly enshrined in the case law of the ECtHR on articles 6 and 13 of the ECHR. Those rights are generally accepted to have a double effect though: they also improve the quality of the decision-making process – although not necessarily its speed. In practice, they might be experienced as a burden by the administration.

An important element of the rights of the defense is the right to be heard, which essentially applies when and administrative authority wants to take a decision that negatively impacts

someone's interests. There is very little consensus about what this means for objection procedures. In France, the objection procedure is usually conducted in writing, and there oral hearings are exceptional. In Germany, the authorities will hear someone if he has new information or new arguments, or if the decision they intend to take in the objection procedure has an adverse effect on someone's interests that the original decision had not. In the Netherlands, hearing a complainant is the norm, and the administration can only deviate from this if the complaint is obviously void. The benefits of conducting a hearing are clear: the administration will be able to gather new information, and the complainant will be able to express his objections and concerns in a direct and personal way. He will likely feel that he and his arguments are taken into account, and this may help enhance the acceptance of the decision even if the final decision turns out to be negative. On the other hand, hearings take some organization, and require time and resources, which may help explain the wide variety we found.

Another element of the rights of the defense is that the complainant should be granted access to the file. After all, if a complainant successfully wants to challenge an administrative decision, he must know on what information the administration based this decision. In France for example, this is effectuated by granting a right to complainants to respond to all arguments and evidence brought to the fore by the administration. However, there may be good reasons to keep certain information secret, like general interests such as public safety, or third party interests, as is the case for business secrets in public procurement procedures. The solution is usually that there is a general right to access the file, but that the administration can balance this against other interests. The courts can review this decision.

Legal council is not obligatory in pre-trial proceedings, but it is allowed. Usually, some sort of financial compensation is available, at least when the plaintiff is successful. One might argue that legal council is more essential to achieve effective legal protection in strict systems, like in France, than in lenient ones, like Germany. After all, it might be sensible to require people to use legal council when the way in which they conduct the objection procedure determines the proceedings before the Court. Alternatively, hiring legal council could be stimulated by being more generous with the granting of legal aid, or other financial compensation. However, our findings do not support that such a link exists.

### ***3. Self correction***

Prejudicial trial proceedings offer the administration the opportunity to correct its own errors. Providing the administration with this opportunity can prevent unnecessary court cases. This will save both the administration and the citizens time and money, and it allows the administration to learn from its errors, and improve its future decisions. If an administrative authority shows that it is willing to correct its own errors, this may also improve citizens' trust that subsequent decisions will be correct. In the long term, providing generous opportunities for self-correction might therefore lead to an increase in trust in the administration. Unfortunately, it is hard to measure such an effect.

In France, the opportunities for self-correction are relatively limited. The facultative procedure leaves it to the interested parties to decide whom to appeal to. If they choose to file an objection with the administrative authority that took the initial decision, they allow that

authority to correct its errors. However, they can also opt to file their objection to a higher authority, or approach the administrative court directly.

If there is an obligatory objection procedure, the applicable legislation determines what body complaints must be addressed to. In the majority of cases, this is a different body from the one that took the initial decision, and the control function appears to be more important than the chance to correct errors internally. However, this procedure does have the benefit of offering a speedy, low-cost solution to conflicts between the administration and its constituents.

In the UK the procedure before the administrative tribunal doesn't offer much opportunity for self-correction. After all, the goal of the pre-trial procedure is to provide simpler, speedier, cheaper, relatively informal, and more accessible justice. The procedure before the tribunals is more a pseudo-court procedure than an administrative review. The tribunals do have the option to correct their own decisions though. In addition, the less-regulated internal administrative review procedures do offer the administration the possibility to correct its own decisions.

In Germany on the other hand, the authority that took the initial decision always gets the chance to review its own decision. If a plaintiff files an objection to the higher administrative body designated as the *Widerspruchsbehörde*, this will have no impact on his rights. However, the *Widerspruchsbehörde* cannot review the decision yet. Instead, it is obligated to send it on to the authority that took the initial decision, to allow it to correct any mistakes it might have made. If it feels its decision was correct, it has to send the objection on to the *Widerspruchsbehörde*, who will review the decision in full.

The initial decision-maker always gets its second chance, but not at the cost of an impartial review by a higher authority. Of course, this does potentially lengthen the administrative proceedings.

In the Netherlands the objection is always filed with the authority that took the initial decision, allowing the Dutch administrative authorities plenty of room to correct their mistakes, and learn from them for the future.

Unlike in the German system, there is usually no higher administrative authority that will review the case when the original authority does not agree with the objection. The Dutch procedure has fewer steps than the German one. It is potentially more time-efficient, but does not offer higher administrative authorities the opportunity to control the decisions of lower authorities (e.g. ministers, provinces, municipalities, water boards).

In the Netherlands and Germany, administrative authorities are given a chance to correct their errors even after the procedure before the Court has started. The rationale is that it is better to have them correct their decisions during the procedure, so that there will be a final decision at the end of it, than to punish them for their errors by quashing a decision and force them to take a new decision. This new decision would be subject to objection and appeal again, and this might lengthen the procedure considerably.

In all jurisdictions the decision taken at the end of the objection procedure must be motivated and communicated to the complainant. This means the administrative body gets another chance to explain the reasons behind its decision, but it also enables the citizens who files an objection or complaint to actually challenge such a decision elsewhere - possibly in court. Giving elaborated reasons for a decision on objections is constitutive for the defense rights of citizens and businesses with an interest in that decision.

#### ***4. Law enforcement***

Objection procedures also serve to improve the legal quality of decisions and thus it contributes to legal certainty and the predictability of administrative decision-making. To this end, the competent authorities will always review the legality of a decision during the pre-trial procedure. In Germany, the additional review by the *Widerspruchsbehörde* is considered particularly important to achieve this. As the *Widerspruchsbehörden* usually employ experienced lawyers, their decisions will be of a high legal quality, comparable to that of the courts. The Dutch system allows for advice by external committees, and they use these very often. The British administrative tribunals have a clear focus on legal aspects rather than policy aspects and score high in this respect as well, even although internal redress function precedes the appeal to tribunals. The accessibility of the tribunals stimulates administrative authorities to reconsider their decisions from a legal point of view, even although internal redress is within the discretion of the administrative authority. In so far there are similarities with the French *recours gracieux*. Even so, in France, the situation is highly dependent on the applicable procedure. When there is a compulsory objection procedure, the competent authority will often be a specialized body, and in those cases the legal quality of its decision will likely be high.

However, a strong focus on the legality of the decision might lead to the formalization of the pre-trial procedure, and friendly conflict resolution might become difficult. In the German system, this problem is alleviated by the two-tier system of the *Widerspruch* procedure. In France, the voluntary nature of many objection procedures could have a similar effect. If a citizen has faith that the administrative authority that took the initial decision will listen to his pleas, he can approach that authority. If he feels that the authority is just plain wrong, he can file his objection with a superior authority instead. In most other countries, there are alternative dispute resolution mechanisms, such as Ombudsmen or mediation, which focus on the friendly resolution of conflicts.

A second option to improve the legal quality of administrative decisions is to grant the right to challenge them to a larger group of constituents. In the Netherlands, this is achieved by granting standing to interests groups in cases where the interests they defend are at stake. In Germany there is a similar option, although only for environmental organizations, in the defense of environmental interests. In France, this is usually not an option, unless an administrative authority grants such a right in a facultative objection procedure, taking into account the relevant case law. In the UK, one needs to have a sufficient interest to go to Court, and only the addressees of a decision can approach a Tribunal.

The problem with granting standing to interests groups is that it will increase the number of procedures. It also carries the danger that the courts will be confronted with what is essentially a political struggle. However, this is an effect of the relation between court proceedings and the objection procedure in terms of standing that exists in the Netherlands and Germany. As objection procedures are a suitable forum to review the policy aspects of a decision, there is no reason to exclude interests group from objection procedures. Denying them standing in Court would suffice.

So who should decide about the objection? If this is the same authority that took the initial decision, the possibilities for self-correction are the largest. If the emphasis is on administrative control by a higher administrative body, it makes sense to file objections there.

The inclusion of trained lawyers in a committee that decides on objections will help achieve a high level of legal quality.

Combinations are possible, like in Germany, but they may delay proceedings.

## ***5. Timeliness and efficiency***

Article 6 of the ECHR requires that cases do not linger on forever. This is not only in the interest of the addressee of a decision, but also brings certainty for the administrative authorities and any third parties. So, although thorough pre-trial proceedings may result in high quality decisions, their being too thorough might result in overly long procedures, and thus be undesirable as well.

Although pre-trial proceedings can resolve many conflicts, and thus prevent many court cases, if they do not lead to the resolution of the conflict, they will mostly just lengthen the proceedings. Even in those cases though, they do have some function, because the courts will have an elaborate file specifying what the case before them is about and what arguments have been exchanged already. This file-building function is best served by conducting the procedure in writing, like in France. In case of an oral hearing, minutes should be taken.

However, when the chances of successful conflict resolution are slim or non-existent, it might be better to skip the objection procedure entirely. Those jurisdictions when pre-trial procedures are compulsory do offer this option. In Germany there is no obligatory *Widerspruch* procedure for the decisions of high authorities, which are deemed to be sufficiently thoroughly prepared. Likewise, if the so-called special administrative procedure has been followed, the preparation for the decision is deemed to have been so thorough that there is no need for a 'second chance'.

In the Netherlands there are also a number of exceptions to the general obligation to file an objection before going to court. There is no such obligation when the elaborated procedure has been followed, and the obligation to file an objection can be waived by the administrative authority if it deems it unlikely that an objection procedure will resolve anything.

In France, the objection procedure is usually voluntary, so the problem is less pressing. However, unlike in Germany, when a complainant voluntarily files an objection, the period within which he has to go to court will stop running. Even voluntary procedures can cause a delay. The French system appears to counter the delaying effect of the objection procedure by limiting the options available to a plaintiff before the administrative court: when he has used a compulsory objection procedure before going to court, he cannot change his claim, and he cannot bring up new issues before the court. It is unclear whether this also holds if he has followed a facultative objection procedure.

In general, pre-trial proceedings can be skipped for complex administrative decisions which have been prepared using special procedures that guarantee that the views of interested parties are already taken into account. Such cases will be resolved in pre-trial proceedings only rarely. For other cases, it is probably the parties themselves that are best suited to determine whether pre-trial proceedings are likely to lead to a satisfactory outcome. The Dutch system, in which pre-trial proceedings can be skipped if the parties agree to it, is based on this idea. Alternatively, empirical research into the effectiveness of pre-trial proceedings can be used to determine which categories of decisions should be exempted from (obligatory) pre-trial proceedings.



Similarly, the duration of proceedings can be limited if the administration is allowed to skip steps in the procedure that it deems to be unnecessary. The organization of a hearing is often optional in objection proceedings. Although the data on England and Wales show that it is usually not in the interest of the applicant to skip the hearing, this problem can be remedied if the administrative court can subsequently review whether it was justified to skip the hearing.

Another way to limit the total length of proceedings is to set time limits for both complainants and administrative bodies within which they have to undertake certain actions. This will only have the desired effect if there is some way to force them to stick to those limits. For complainants, this is not a problem. If they are too late with their objection, the administrative authorities are usually at liberty to ignore their complaint, or they may even be obliged to do so, e.g. because third party interests are at stake. If a complainant fails to meet a time limit, but there are weighty reasons to respond anyway, the administrative authority can or should often do so. This shows that usually, efficiency considerations cannot trump the interests of legal protection and good administration.

There is no such easy way to force the administration to keep to the time limits that have been set. In most countries, if the administration does not respond to an objection, after a set period of time the complainant can file his case with the court. This might not be sufficient though. In the Netherlands, recent legislation imposes a fine upon administrative authorities who exceed the time limit set for responding to an objection. Because of its recent introduction, it is difficult to say what the effects are.

The timeliness and efficiency of procedures can also be increased by limiting the arguments a plaintiff can bring before the Court. In France, and to a limited extent in the Netherlands, a plaintiff can use arguments in appeal only if he relied on them in the objection procedure as well. This will limit the scope of the case before the Court and will probably shorten the total length of the proceedings. The disadvantage of this system is that people will often not have legal representation during pre-trial proceedings and may make errors that cause them to be unable to effectively defend their rights before the courts at a later stage.

In theory, it would be convenient if the courts had the power to end a procedure, by taking a final decision in the case brought before them. However, this is only possible in exceptional circumstances in France, the UK and the Netherlands, or, as in Germany, not at all. The reason behind that is that the administration usually exercises discretionary powers, and there are several decisions they can take that comply with the law. It is not for the courts to determine which of those decisions should be taken.

In those jurisdictions where the courts can replace the decision of the administration with their own, they can only do this when there is only one decision that is legal, or when the administration informs the court of the decision it would take if it were to take the decision itself. Usually, the administration will have to take a new decision, which will be liable to objection and appeal again.

Alternatively, the court can allow the administration to change its decision during the court proceedings. This will also lead to there being a final decision upon conclusion of the proceedings before the court, while still giving interested parties the opportunity to comment on it and the court to review it.

Most pre-trial procedures also have some sort of safeguard to prevent them from being abused. Such procedures should allow people to defend their legitimate interests, but they shouldn't be allowed to use them for the sole purpose of delaying administrative procedure, or averting the course of justice.

One way to avoid this is to have the complainant bear the costs of the procedure in case of obviously ill-founded objections, as is the case in Germany. Another option is to deny suspensive effect to filing an objection or an appeal in such cases. Finally, an insincere litigant might be liable for damages.

One could wonder whether it is better to have a uniform general procedure, like in Germany and the Netherlands, or to have many procedures tailored to a specific type of decision, like in France and the UK. The latter allows tailoring the procedure to the nature of the decision, whereas the former is more desirable in terms of legal certainty and transparency. Note though that in the countries where there is a uniform procedure, there is still some flexibility in the design of that procedure, the time limits that apply, and even whether the objection procedure needs to be followed. It is often left to the administrative body to determine the specifics of the procedure. An example from Dutch law would be that it is up to the administration to decide whether a hearing should be conducted, whether to extend the time limit for responding to an objection, and even to decide that the objection procedure can be skipped.

## ***6. Auxiliary roles of ombudsmen***

Ombudsmen fulfill an important auxiliary role in the relation between citizen and administration. They offer a most accessible possibility to get a helping hand when seeking redress for (alleged) administrative wrongs. It should be noted that the ombudsmen can only fulfill a mediating function. Only the gravest mistakes are made public, but even so these reports have an advisory character for the administrative authority concerned. Because ombudsmen base their evaluations of complaints and administrative conduct not only on law but also on norms of administrative propriety, they can become moral authorities. Therefore they are not courts. However, following the well reasoned advices of ombudsmen is also a matter of proper administration. In so far, the fact that most ombudsman reports are followed up upon by administrative authorities in Western Europe shows that they fulfill an important intermediary role between the administration and the citizens, next to the lines of legal protection of citizens against the administration.

## ***7. Intentions and effects: the need for periodic evaluation***

Based on the limited sources we could find and use concerning administrative pre-trial proceedings in Germany, the Netherlands and England, pre-trial proceedings need monitoring and maintenance. If pre-trial proceedings are considered proceedings which give addressed citizens and third parties a fair chance to have their grievances redressed and anyway seriously considered by the administrative authority that took the contested decision, there is a good chance that the simplest cases, in the largest numbers are kept out of court. This may be different for more complicated decisions. But also here the rule is that if parties can be convinced that the hearing and decision making in pre trial proceedings are fair and open, they may refrain from going to court with their case. In the end that is up to them.

It takes integrity and diligence, but also good and responsible administrators to make this work. If people do not trust their administration, they may be willing to go to court anyway. Also for that reason, monitoring objection proceedings and periodic evaluations of objection proceedings in different areas of government activity may be necessary to maintain access to justice and also to maintain timeliness of legal proceedings



## VII. Final Section with Recommendations

### *LESSONS AND OPTIONS FOR ACTION*

Although it is impossible to distill a single best practice from the findings in the country reports, it is possible to discern certain points that require attention when designing a pre-trial procedure. There are a number of concerns that arise in all countries, and although there are different methods to address them, the fact that they must be addressed remains.

The first set of issues is related to the **general design** of the system of pre-trial proceedings: should there be legislation about pre-trial procedures, should there be a uniform procedure, when should such procedure be obligatory, and what acts of the administration should be challengeable?

Our first concern is the **codification** of pre-trial procedures. Should there be legislation that prescribes if and when there should be a pre-trial procedure, and how it should be conducted, or can such matters be left to the administrative authorities?

The advantages of codification in terms of legal certainty, transparency, and access to justice are obvious, and in most cases there is indeed legislation about pre-trial procedures. However, the voluntary objection proceedings in France remain unregulated to this day. This theoretically allows the French administrative authorities a maximum of freedom to organize these proceedings in the way they think is most effective. Unfortunately, if pre-trial proceedings are not regulated in legislation, the courts will be forced to set the boundaries within which the various administrative organs are allowed to organize their own pre-trial proceedings. Such proceedings have to comply with the requirements of international law, mainly article 6 ECHR. As happened in France, this will result in **rules developed in case law**, which will be less accessible than similar rules contained in legislation, while not leaving the administration more wiggling room.

The second choice that must be made is whether to adopt a **uniform procedure**, or to have a variety of **specific procedures** for different kinds of decisions. The first option ensures a high degree of transparency and legal certainty, the second allows for the tailoring of the pre-trial procedure to specific categories of decisions and circumstances.

Even if there is a uniform procedure it will be possible to adapt to the demands set by specific decision-making processes though. This can be done in two ways. First, the uniform procedure can leave certain matters to the discretion of the administration. In this case, it will merely provide a framework for the procedure. There will be some requirements, but a number of aspects of the organization of the procedure in a specific case will be left to the discretion of the administration.

Second, even if there is a uniform procedure, the legislator can enact specific legislation that deviates from the general act. Both options will diminish the legal certainty and transparency resulting from having a uniform act: an increase in flexibility will carry a cost.

The third question that must be addressed is when pre-trial procedures should be **obligatory**. The underlying issue is when pre-trial procedures are helpful, and when they are not, and who is fit best to answer this question. Ideally, the legislator or the administration will decide after empirical analysis when pre-trial procedures are likely to contribute to conflict resolution, and make them compulsory in those cases. The applicable legislation might leave the administration the option to skip pre-trial proceedings in particular hopeless cases.

In the case of **voluntary pre-trial proceedings** in France, the procedure is considered to be a right for citizens. Here, the option to skip proceedings has little to do with the effectiveness of the procedure.

Quite contrary, since the compulsory procedure is still the exception, the right to voluntarily file an objection ensures that complainants always have a cheap alternative to court proceedings. Of course, if they expect no solution from pre-trial proceedings, they can decide to skip them.

Finally, it must be decided **what kind of administrative acts can be challenged**. Usually, most specific legal acts can be challenged. General rules are usually excluded from the pre-trial procedures. In addition, because in many systems claims for damages resulting from administrative acts and claims about administrative contracts are adjudicated by the civil courts, and are therefore also exempt from pre-trial proceedings.

The next set of issues is related to the **organization of the procedure**. Which authority should be competent to decide in pre-trial proceedings, what administrative acts can be challenged, how should hearings be organized, what time limits should be set, and how must the costs of the procedure be dealt with? The organization of the proceedings should guarantee a fair procedure for the complainant, and comply with the **prohibition of bias**, which means that many organizational details aim to prevent such bias on the side of the administrative authority that decides on the objection.

The first question is of course what the **competent administrative authority** should be. There are three basic choices: the authority that took the initial decision, its hierarchical superior, or some external body. The first option is desirable from the point of view of administrative self-correction and learning, but the risk that the authority will appear biased – especially if it stands by its original decision – is very real. This can be countered by enacting strict procedural rules about who can be involved in the decision-making, and maybe even more about who can not be involved. The third option has the advantage that the decision maker in the pre-trial procedure is fairly distant from the original decision-maker, but it fails to offer the option of self-correction. The second option is somewhere in the middle and has the additional benefit of enhancing hierarchical administrative control.

All legal systems set **time limits** within which objections have to be filed. Likewise, there are time limits for the administration that determine when it should respond to an objection. The actual length of these limits varies between countries and procedures, but their existence is crucial. When complainants exceed these limits they lose their rights, but the administrative authority usually has some options to repair this failure and conduct the proceedings anyway, provided third party interests are given due regard.

It is harder to enforce time limits imposed on the administration. The usual solution is to allow complainants to file their case with the administrative court if the administrative authority fails to respond to their objection. However, in the Netherlands an administrative authority that exceeds the time limits will be liable to pay a fine.

There appears to be a strong preference for pre-dominantly **written** pre-trial proceedings. Indeed, there are considerable advantages to this approach. If the case goes to court, there will be a written file, which will allow the court to review how the pre-trial procedure was conducted, and give it a comprehensive picture of what the conflict is about. This will ensure that even if the objection procedure does not lead to a satisfactory solution, it will speed up the proceedings before the court. On the other hand, it also has benefits to include an **oral** hearing in the procedure. This will help to communicate to the complainant that he or she is taken seriously, and – as was found in empirical studies in the UK – it has a large impact on the outcome of the procedure. If a complainant got an oral hearing, he or she was much more likely to sway the administration. From the point of view of protecting individual rights, an oral hearing is highly desirable.

That does not mean that **oral hearings** should be mandatory in all cases; in fact, there is no country where such a requirement exists. Usually, it is left to the administrative authority to determine whether a hearing is necessary, with the applicable legislation offering criteria for the decision. Again, to avoid any appearance of bias, it is necessary to pay some attention to who conducts the hearing. This should

be someone who was not involved in the original decision making. The legislator might elect to set additional requirements with regard to his or her professionalism and impartiality.

Finally, the **costs of the procedure** must be considered. There is **no fee** that has to be paid to initiate pre-trial proceedings anywhere. That would be at odds with the purpose of the pre-trial procedure as an easily accessible alternative to court proceedings. There are two other decisions that must be made though: should complainants be reimbursed for their costs, and, if they are wrong, should they be made to compensate the costs of the administration? If the latter option is chosen, people will be discouraged from filing objections with the sole purpose of delaying the decision-making process, but some sincere complainants may also be deterred for fear of having to pay those costs. Even if a complainant is right, he or she might not get the costs refunded. However, since legal representation is not compulsory, these costs will usually not be very high, and refunding them might be more trouble than it is worth.

The third set of questions is concerned with the **rights of complainants**. After all, pre-trial proceedings should provide people with an easily accessible way to defend their rights vis à vis the administration. The procedure should be organized in such a way that complainants get this opportunity.

The first question that needs to be addressed is who will have **standing** to file an objection. To realize the goal mentioned above, only those parties whose rights are affected need to be able to challenge a decision. This always includes the addressee. Third parties need to show that their specific personal interests are affected. An option to limit the number of parties that have standing is to introduce a *Schutznorm*. In this case, a third party can only file an objection if he is adversely affected because the administration violated a norm which aims to protect his rights. This means that e.g. an economic competitor cannot appeal to a law that aims solely to promote public health to defend his economic interests. On the other hand, standing can also be widened to include organizations that promote a public interest. This stimulates that such interests can be brought to the attention of the administration in pre-trial proceedings, and will help improve the legal quality of decisions. However, it also carries the risk that political fights are brought to the court room, and that the number of procedures increases.

To ensure that complainants are able to effectively protect their interests, they are allowed to have **legal representation**. Representation is not compulsory in pre-trial proceedings, and often, the authorities do not reimburse the costs, even if a decision is withdrawn or changed. Legal representation is not compulsory because administrative pre-trial proceedings are supposed to be easily accessible and understandable. In practice, the average citizen might not always experience it that way, and he or she might make mistakes that have to be corrected at a later stage, i.e., during the court proceedings. It is worth considering making legal representation compulsory in complicated cases, or to stimulate its use through reimbursement of the costs in the case of a successful objection.

Another matter that will have considerable impact on the rights of interested parties is whether a **reformatio in peius** (i. e. a revision of the decision to the disadvantage of the claimant) is allowed or not. In court proceedings, this is prohibited everywhere, but in pre-trial proceedings it is allowed in Germany, and it can effectively happen in the Netherlands as well. Allowing this can have a negative impact on the interests of the addressee of a decision, and might violate her or his legitimate expectations. However, it is perfectly reconcilable with the nature of pre-trial proceedings, which require the administration to fully reconsider its original decision, taking into account new legislation, policy and factual circumstances.

If pre-trial proceedings aim to guarantee that the complainants' legal rights are respected, filing an objection would ideally have **suspensive effect**. When a decision that might be wrong is executed despite the fact that a pre-trial procedure has been initiated, the rights of the addressee may be violated, and the violation may be irreversible. Giving suspensive effect to the filing of an objection will prevent this. However, such a feature might lead to abuse of the pre-trial procedure: a party might initiate a procedure only to delay the execution of a decision that is detrimental to him. Therefore, it is

quite rare for pre-trial procedures to automatically result in the suspension of the original decision. In Germany, where suspensive effect is still automatic in many cases, insincere complainants are deterred in another way: they are liable to pay the costs of the administration. In the other countries, complainants can start summary proceedings to have the initial decision suspended. A suspension will usually only be granted if the consequences of the decision are irreversible, and if the objection is likely to be successful. This way, insincere complainants can be filtered out.

Finally, a matter that does not fall into the other categories deserves attention. This is whether the administrative court should be able to replace an administrative decision with one of its own. If the courts are able to do this, there will be a final decision at the end of the court proceedings, and this will prevent potential new pre-trial and court proceedings. This will potentially shorten the total length of the decision-making process considerably. However, the options to do this are usually limited, because the administration often has some discretion in reaching its decision, and the courts cannot interfere with that. Nevertheless, it is a good idea to give courts this option when it is appropriate – that is, when the administration has no discretionary room left, because in those cases, it will shorten proceedings without having negative effects.

The box on the next page gives an overview of the main points that require attention when designing pre-trial procedures.

## Points for attention in designing pre-trial procedures

### General design

*Flexibility v. legal certainty*

Codification  
Uniform procedure  
Obligatory nature  
Challengeable acts

### Organization of pre-trial proceedings

*Prohibition of bias*

Competent authority  
Time limits  
Written procedure  
Organization of hearings  
Costs

### Protecting complainants' rights

Standing  
Legal representation  
Reformatio in peius  
Suspensive effect

### Other

Decision-making by the courts

Based on the analysis in the previous chapters and the points for attention highlighted above, it is possible to formulate a tentative roadmap with some options for action.

The goal of pre-trial proceedings is three-fold: (1) to provide an accessible and effective recourse for citizens without having to go to court, (2) to alleviate the case-load pressure on the courts by operating as a filtering mechanism, and (3) to provide a way for public authorities to reconsider their decisions. The comparative analysis of different approaches to pre-trial administrative justice mechanisms clearly shows that there is no one best practice model that could be adopted as such in Turkey. It is therefore important not to proceed with a big scale reform without having tested some of the available options in pilots. These pilots, if successful, can then be rolled out countrywide.

1. Pass a law allowing testing the introduction of pre-trial proceedings in selected representative court districts.



Since there is no single model that could be introduced in Turkey in a big bang approach, it is advisable to test different options and to identify those that are most suitable for the Turkish context. In order to provide a sound legal basis for this approach, it seems reasonable to pass a law allowing this kind of testing within the boundaries defined by the Constitution and International Treaties. This approach has been successfully adopted in Germany, for example, to test the functionality of pre-trial procedures in administrative proceedings.

**2. Establish an Expert Committee to carry out the test and to formulate recommendations based on test results.**

The Expert Committee should be composed of a small number of technical specialists to allow for effective work processes. The composition of the Committee should reflect the various institutional stakeholders such as the Civil Service, Ministry of Justice, Administrative Courts, the Statistics Office and others. The Expert Committee should receive a clear technical and apolitical mandate. The Expert Committee needs to receive the resources required to carry out its mission.

**3. Establish baseline data by undertaking a statistical analysis of the caseload of pilot and comparator administrative courts to identify areas of law and the respective caseload they generate. Define parameters to be considered.**

In order to ensure a timely and high quality analysis, a limited number of “average” pilot districts should be selected. A comparator group of similar districts where no pilots will be carried out should be determined. In all these districts an empirical analysis of the caseload in the administrative courts should be carried out. Goal of the analysis is to establish baseline data about the typology of cases, their trajectory into the courts, the parties initiating them, and other relevant aspects allowing for the future measuring of the impact of the pilots.

In this context, it is important for the Expert Committee to agree on a set of parameters to be considered to measure the impact. They should cover aspects relevant for the citizens (overall duration of proceedings from initiation to final outcome, pacification function based on litigation and appeal rates, success rates, costs for those seeking redress etc.) and for the authorities (filtering function based on litigation and appeal rates, staff costs etc.; and the volume of the relevant caseload). The empirical findings based on these parameters will ultimately determine the content of the recommendations.

**4. Scientifically test the introduction of various mandatory and voluntary objection procedures and measure impact.**

Based on the analysis of the existing caseload and its characteristics, the Expert Committee can formulate a plan with different options for mandatory and voluntary objection procedures and other mechanisms to be tested. The various systems and the approaches described and analyzed in this comparative study may provide some inspiration for the development of such test options.

A considerable amount of data will have to be processed during and after the testing. Based on the parameters defined earlier, the impact of various pre-trial procedures on different types of cases and areas of law can be determined by comparing the relevant parameters in the pilot districts to those in the comparator districts.

Some flexibility should be built into the testing process to fine-tune approaches, correct mistakes, and incorporate lessons learned during the test phase.

<b>5. Formulate recommendations to Policy Makers.</b>
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The mandate of the Expert Committee is a technical one. A sound scientific approach to baseline data, piloting, and impact analysis is therefore key to come to recommendations based on objective findings. If value judgments are necessary, they should be clearly identified as such. As there may be a natural tension between some of the aspects considered (e.g. effective legal protection for the citizen, on the one hand, and low cost for the State, on the other hand), different options for policy makers may crystallize and the decisions may imply political choices. These different options as well as their implications for the relevant evaluation criteria should therefore be clearly identified and documented with as much relevant objective data as possible to inform the decision making process.



## Comparative Table

		France	Germany	The Netherlands	The United Kingdom
1.	<b>Facultative pre-trial admin. proceedings (PTAP)</b>	Yes	Yes, in exceptional cases	No	Yes
2.	<b>Obligatory PTAP</b>	Yes, in prescribed cases	Yes, but with exceptions	Yes, but with exceptions	Yes
3.	<b>Objection to the author of the decision</b>	Yes	Yes	Yes	Yes
4.	<b>Objection to the superior admin. body</b>	Yes	Automatic if the author does not agree with the objection	Yes, but very rarely	Tribunal
5.	<b>Objection to other body (committee, council, etc.)</b>	Yes, in prescribed cases	No	Rarely	Yes, in prescribed cases
6.	<b>Right to file objections</b>	Person affected by the decision, right of third persons is limited	Person affected by the decision, parties whose interests are protected by the norms the administration violated	Person affected by the decision, parties with direct interest, organizations that specifically promote an interest affected by the decision	Person affected by the decision; third parties can file their case at a court.
7.	<b>General time limit to start the PTAP</b>	2 months since the notification of the decision of the admin. body	1 month	6 weeks	21 days since
8.	<b>Time limits for the admin. body</b>	2 months, or see lex specialis	3 months	Either 6 or 18 weeks, prolongation possible	Depending on statute or practice rules
8.	<b>Suspensive effect of the PTAP</b>	No	In general not, but there are countless exceptions. If suspensive effect is not automatic, a complainant can start summary proceedings, or ask the admin authority to suspend the decision.	No, but a complainant can ask for it in summary proceedings	unknown
9.	<b>Self-correction of admin. body</b>	Sometimes, if an objection is filed with the author of the decision.	Yes, all objections are handled by the authority that took the initial decision first.	Yes, all objections are handled by the authority that took the initial decision.	Yes, if the optional internal review procedure is used
10.	<b>Type of proceedings</b>	Mostly written	Mostly written	Mostly written	Oral or written
11.	<b>Oral hearings</b>	If the admin. body considers it necessary and if the legal act requires it	Only if there was no hearing earlier, or if new circumstances or arguments have come up.	Yes, unless there are reasons why a hearing is not necessary.	If the admin. body considers it necessary, if the party to the proceedings requires it or if the legal act requires it
12.	<b>Administrative fee</b>	No	No	No	No
13.	<b>Representation during the PTAP</b>	Facultative	Facultative	Facultative	Facultative
14.	<b>Exclusivity of PTAP</b>	No in the case of facultative PTAP, Yes in the case of obligatory PTAP	Yes	Yes	Yes
15.	<b>Prohibition of reformatio in peius</b>	Yes	No	Yes, but third party objections can lead to the addressee of a decision being worse off.	No
16.	<b>The PTAP are in general terms described in legal act</b>	No	Yes	Yes	No
17.	<b>Existence of National Ombudsman</b>	Yes	No	Yes	Yes

