

**Universal Decimal  
Classification 327.3**

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**National Administrative Procedure Law under EU Requirements,  
with Focus on Public Participation**

I. EU principles affecting Member State administrative procedure law

This article takes the perspective of a Member State (MS) authority, be it a legislative body, a judge or an administrator who, when introducing or applying administrative procedure rules, must respect certain requirements of EU law. Its focus will be on rules on public participation and court review of administrative decisions if such rules were infringed ,

Administrative procedure was not allocated to the EU as a competence and thus remains in principle a matter of domestic law. However, the MS are obliged under the general rule to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”.<sup>109</sup> This rule requires not only simply applying any substantive obligation of EU law but also providing procedural tools, including appropriate administrative procedures to implement the substantive obligations.

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<sup>109</sup> Article 4 (3) TEU. See also article 291(1) TFEU which mandates MS to “adopt all measures of national law necessary to implement legally binding Union acts.”

These tools range from long-standing classical requirements, such as the right to be heard, the prohibition of bias, the duty to give reasons, the withdrawal of unlawful permits, the protection of legitimate expectation, etc., to more modern ones, including the right of access to information and public participation. Procedural rules are often breached, so that the question arises whether affected persons have standing before a court concerning procedural infringements. If standing is accepted, it must be clarified if any procedural failure requires the quashing of the decision, or if there are reasons for keeping it in force. Another question of court procedure concerns interim measures, and whether an excluded person can apply for immediate admission while the procedure is pending.

The general principle that MS are obliged to take appropriate implementation measures does not give much guidance to answer these questions. Rather, a layer of middle range principles has been developed by EU legislation and jurisprudence which flesh out the general principle without questioning the basic MS procedural autonomy. These more precise principles and rules can be found in EU legislation or in judge made law. They can also be derived from international law which is binding on the EU. Such international law influences national law via EU law in various ways: by transposition into EU legal acts which must be directly applied or transposed by MS authorities, and without a transposition into EU law by direct application (if the preconditions of precision and unconditionality are fulfilled) or consistent interpretation by MS authorities.<sup>110</sup>

EU legislation often attaches specific requirements of administrative procedure to its substantive commands. For instance, in environmental legal acts, a standard requirement consists in subjecting certain activities to an authorisation or registration regime which often implies that certain kinds of information must be submitted by the applicant, the authority must elaborate an assessment report (in particular, under EIA legislation) the public must be given rights of participation, procedures must be coordinated by responsible agencies, agencies must supervise sectors, offences must be prosecuted, and so on. Such requirements have, as does all EU

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<sup>110</sup>See for the two latter ways ECJ C-240/09 (*Lesoochranské*), paragraphs 44 and 51. While the case concerns Art. 9 (3) of the Aarhus Convention, i.e. the right to challenge acts or omission, the principles developed by the court are also applicable to provisions concerning administrative procedures before a decision is taken. See further the chapters by Moreno (Direct Effect) and Macrory and Vedén (Consistent Interpretation) in this book.

law, supremacy over MS rules.<sup>111</sup> They must be directly applied by MS authorities if contained in regulations. If contained in directives or decisions addressed to MS, the national administrative authority can wait for the transposition into domestic law, unless the preconditions of direct effect are present.<sup>112</sup> If national procedural law exists which conflicts with the EU requirements, the national law must be interpreted consistently.<sup>113</sup> If, because of clear wording, consistent interpretation is not viable, the supremacy of EU law demands that the national rule be set aside.

In the lack of precise legislation, more general principles apply. In particular, according to Article 41 of the EU Charter of Fundamental Rights everyone has the right to be heard before a decision, in which adverse effect is taken, to have access to his/her file and to ask for the reasons for an administrative decision. Although these principles are primarily addressed to the EU institutions, they must also be respected by MS authorities when implementing EU law.<sup>114</sup>

More principles have been developed as judge made law by the Court of Justice of the EU. One core principle, often called the REWE principle, is that of effectiveness and equivalence: When implementing EU law, national procedural law must be effective and at least equivalent to the law implementing national law. The principle was first stated by the ECJ as follows:

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.<sup>115</sup>

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<sup>111</sup>ECJ Case 106/77 (Simmenthal), ECR 1978, 630. See the formulation of the supremacy principle in paragraph 17: "Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions."

<sup>112</sup>See further the chapter by Krämer in this volume.

<sup>113</sup>See further the chapter by Macrory and Madner in this volume.

<sup>114</sup>Art. 51 (1) 1<sup>st</sup> sentence ChFR.

<sup>115</sup>ECJ Case 33/76 (Rewe Zentralfinanz) ECR 1976, 1989, paragraph 5.

REWE effectiveness not only relates to remedies of national courts but also includes administrative tools. This, in particular, was developed in relation to the repayment of aid provided by the MS in violation of EU law requirements<sup>116</sup>, but is also applicable to participation procedures.

In addition, the subjective right to an effective remedy before an independent and impartial tribunal (hereafter called the right to legal protection) was introduced after a history of jurisprudence of the European Court of Human Rights, comparison of MS constitutional traditions and finally the codification in Article 47 EU Charter of Fundamental Rights and Art. 19 (1) 2<sup>nd</sup> sentence TEU. According to Art. 51 of the Charter this right must also be respected by MS when they implement EU law.

The relationship between the REWE and legal protection principles has yet to be systematically elaborated upon in the jurisprudence of the Court of Justice of the EU. Prechal/Widdershoven suggest that the REWE principle should be regarded as the “outer limit” framework and the legal protection principle as a specification.<sup>117</sup> I would rather suggest that both operate on the same level of generality but overlap to a certain extent. Concerning litigation about objective duties not involving individuals (such as if one governmental body files a court action against another, or in the case of association action), the right to legal protection is not applicable. There is, however, an overlap of the principles of effectiveness and legal protection in relation to litigation based on subjective rights. Furthermore, in no case does ‘legal protection’ express itself on equivalence.

Table 1: REWE effectiveness and right to judicial review

|                          | Subjective rights | Objective duties |
|--------------------------|-------------------|------------------|
| REWE equivalence         | X                 | x                |
| REWE effectiveness       | x )               | x                |
| Right to judicial review |                   | -                |

<sup>116</sup>ECJ Case C-94/87 (Commission v Germany - Alcan I), ECR 1989, 175. The court does not elaborate on possible differences between courts and administration stating in paragraph 17: “It must be added that, in so far as the procedure laid down by national law is applicable to the recovery of an illegal aid, the relevant provisions of national law must be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration in the application of a provision which, like that relied upon by the German Government, requires the various interests involved to be weighed up before a defective administrative measure is withdrawn.”

<sup>117</sup>Sacha Prechal, Rob Widdershoven, Redefining the Relationship between ‘Rewe-effectiveness’ and Effective Judicial Protection, REALaw 4/2 2011 31-50.

In the area of overlapping scope, the two principles nevertheless have different meanings, and it will be up to future jurisprudence to further elaborate on this. While the legal protection principle stresses that subjective rights must be taken seriously, REWE effectiveness can be interpreted to mean that the protection of subjective rights also serve the ‘objective’ implementation of EU law.<sup>118</sup> This is important for the scope of court review. REWE effectiveness can be understood as to require the court, when checking the legality of an administrative act, not only look at those provisions which protect the individual interest of the plaintiff but also those which protect the general public interest.

A further difference between the two principles is of course that the legal protection principle only applies to court procedures while the REWE principle also extends to administrative proceedings.

In conclusion the EU principles for national administrative procedure comprise the following:

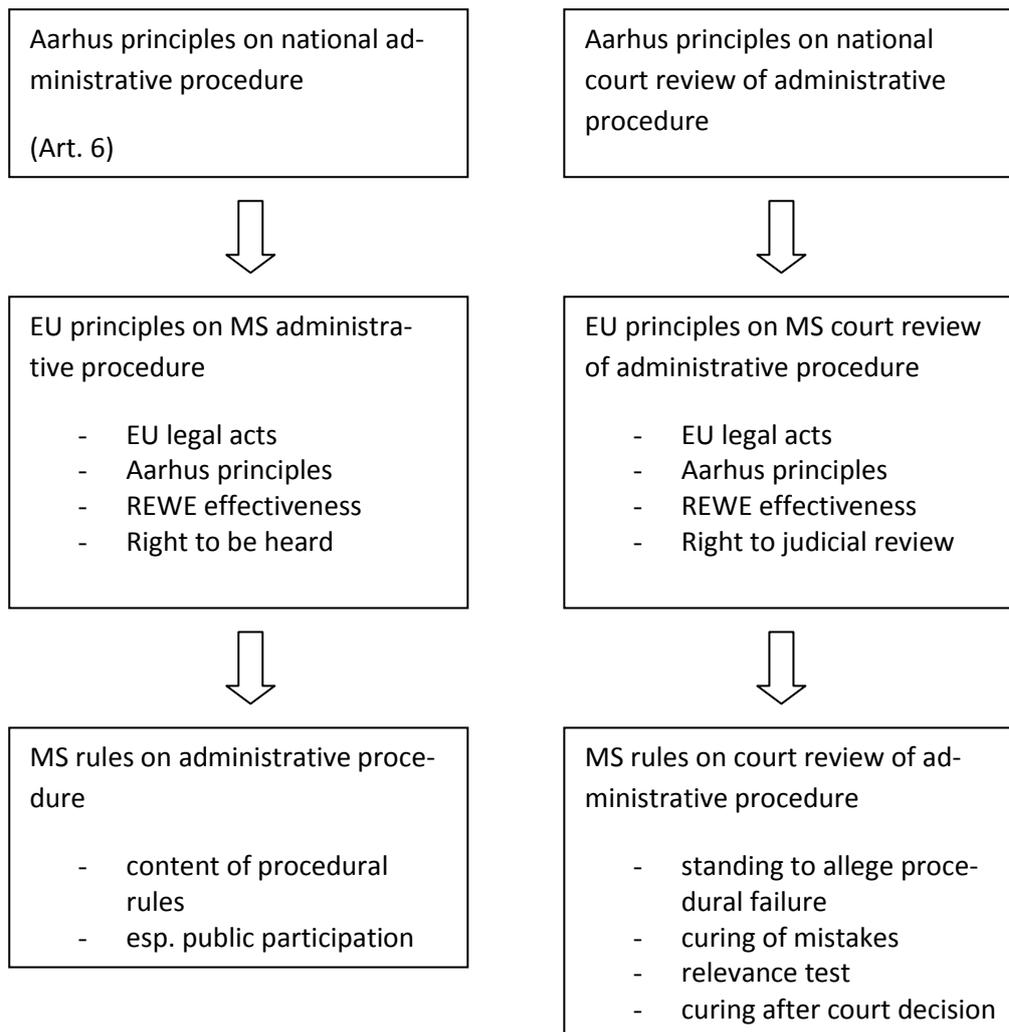
- directly applicable procedural standards laid out by EU legal acts
- directly applicable procedural standards laid out by international law binding the EU
- consistent interpretation with EU legal acts on procedures
- consistent interpretation with international law on procedures binding the EU
- effectiveness and equivalence of implementation of EU law
- right to be heard, right to access to files, obligation to give reasons
- fundamental right to effective legal protection

Table 2 is an attempt to give an overview of the law levels and contents that are discussed in this chapter.

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<sup>118</sup> It seems that Prechal/Widdershoven would be prepared to support this when they argue that “in a more daring scenario, the principle of Rewe-effectiveness could develop into an additional and more stringent standard” (op. cit p. 49).

Table 2: Law levels and contents concerning administrative procedure



## II. Towards EU standards on the right to be heard and public participation

The listed principles should be further elaborated towards a profile of EU standards for various procedural elements and their review by administrative courts. As indicated, the focus will be on requirements concerning the right to be heard and rights of public participation.

### 1. The right to be heard

In the environmental law context, the right to be heard is the classical right of users of environmental resources who are regulated by administrative law. This right is also provided by EU law: As mentioned before, according to Art. 41 (2) (a) of the EU Charter of Fundamental Rights, everyone has the right to be heard before a decision with adverse effect is taken.

The provision is especially important in relation to supervisory activities of MS authorities which in case of offences may result in rectification orders. Before such an order is taken, the concerned person must be given the opportunity to submit his/her views.

One example which has recently been publicly debated concerns the designation of protected areas in the Natura 2000 regime. In cases concerning the designation of SPAs, the Spanish Supreme Court indicated that there is no need to guarantee the right to be heard because the Directive does not mention it (judgment of 20 May 2008, appeal 2719/2004).<sup>119</sup> The classification of specially protected areas (SPAs) according to the Bird Directive<sup>120</sup> can however be regarded as an adverse decision for farmers whose land is affected. They must be heard before the decision is taken. The same applies to the establishment of the protection regime for special areas of protection (SACs) according to the Habitat Directive. It is debatable whether or not the submission of a list of designated SACs can already be seen as a decision requiring prior hearing given the fact that the submission elicits a stand-still obligation for activities impairing the future protection objectives.<sup>121</sup>

## 2. The right to public participation

I will address three aspects of public participation: the content of rights to participate, the scope of application and the possibility of preclusion of objections.

### a) The content of rights to public participation

Rights to public participation generally address third parties. They are expounded in a number of EU legal acts, most notably in the EIA and IPPC Directives.<sup>122</sup> A difference is made between the public (at large), which shall be informed about the application and the public concerned, which shall have access to detailed information on the project and be enabled to comment. This concept is called the cone model because the first step (publication of the application) involves the general public and the second step (details and comment) involves a restricted public. The last step (publication of the decision taken) reopens the cone for the general

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<sup>119</sup> See the chapter by García Uretra and Moreno Molina in this volume.

<sup>120</sup> DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (OJ L 20, 16.1.2010, p. 7, Art. 4 (1) subpara 3.

<sup>121</sup> It is true that the ECJ denied the standing of farmers before the General Court arguing that the submission and listing of sites do not yet have a direct effect on the farmers (ECJ 23.4. 2009 C-362/04P (Sahlstedt)). This could be interpreted to also exclude the applicability of the right to be heard. But the judgment in the case was not convincing because it disregarded the ECJ's own stand-still jurisprudence (see ECJ C-117/03 (Dragaggi) para. 27).

<sup>122</sup> DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L

public. Of course, these provisions must be respected by national authorities in the sectoral areas addressed by the directives.

In *Križan*, the ECJ has somewhat specified the content of these procedural requirements.<sup>123</sup> The case concerned the authorisation of a waste landfill. The authorisation presupposed an urban planning approval of the location of the landfill. This approval existed but was not disclosed in the proceeding for reasons of commercial confidentiality. It was controversial whether the IPPC Directive (in the applicable version<sup>124</sup>) required the disclosure of the location, and whether confidentiality was rightly assumed. Citing Art. 6 (6) of the Aarhus Convention which states that “all information relevant to the decision-making” must be made accessible, the ECJ held that information about the location of the landfill is relevant information, and that this cannot be confidential.<sup>125</sup> In more general terms, the ECJ took a broad approach on the scope of information that must be disclosed for public participation. Practicing consistent interpretation with the Aarhus Convention, it imported the formula “all information relevant to the decision-making” which was not present in the text of the IPPC Directive.

b) The scope of application of participation rights

Concerning the scope of activities that shall be subject to public participation, it is debatable whether a more general principle may be derived from the sectoral EU legal acts. Such principle could require that all high risk activities must be subject to public participation, be it in the cone form or another. Various considerations may support this interpretation.. Insofar as participation addresses the public concerned, a basis may be found in the right to be heard as established by Art. 41 of the Charter of Fundamental Rights. It is true that the right to be heard was modelled on the bilateral relationship between an administrative body and an adversely affected individual, but the idea of prior hearing is also applicable if an administrative decision has adverse side effects on third parties. In the EIA Directive, such broad interpretation of the traditional right to be heard is resounded in Consideration no. 19 which reads:

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<sup>123</sup>ECJ Case C-416/10 (*Križan v Slovenská inšpekcia životného prostredia*).

<sup>124</sup>COUNCIL DIRECTIVE 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26, last amended by Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006, OJ L 33, 4.2.2006, p. 1.

<sup>125</sup>ECJ Case C-416/10 (*Križan v Slovenská inšpekcia životného prostredia*), paragraph

Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

A basis for participation of the public at large could be found in the principle of effective implementation: public participation enhances the quality of the decision because the administrative body is confronted with additional and controversial information. It also raises the awareness of and support for environmental issues in the population. This line of thought – the mobilisation of the citizen as support for effective policy implementation – has characterised EU policy in general and specifically environmental policy for a long time.<sup>126</sup> It has led, for instance, to the doctrine of supremacy of EU law and the direct effect of directives, but it also includes public participation, as can be seen from Consideration no. 16 of the EIA Directive which reads:

Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

As a third basis, the principle of democratic legitimacy of government may be considered. This aspect is somewhat expressed in the notion of accountability and transparency mentioned in the citation above. The concept of democracy would however not be supported if it is understood to imply that the legitimacy of the executive is only to be founded on parliamentary legislation and ministerial accountability. But this restrictive view, hailed as it still is, by many constitutional lawyers, and especially in Germany<sup>127</sup>, is unable to address the plurality of legitimacy mechanisms which are needed to fill the parliamentary default areas which have particularly emerged in the transnational arena in the field of complex modern technologies.<sup>128</sup> Democracy in this new design is not yet well structured and the catchwords the Commission

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<sup>126</sup> Johannes Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts : europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht*, Berlin: Duncker & Humblot, 1997.

<sup>127</sup> Cf. Winfried Kluth, *Demokratie*, in Reiner Schulze, Manfred Zuleeg, Stefan Kadelbach (eds.) *Europarecht Baden-Baden: Nomos 2 nd edition 2010*, paras 34 and 35.

<sup>128</sup> See the contributions in Olaf Dilling, Martin Herberg, Gerd Winter (eds.) *Transnational Administrative Rule-Making. Performance, Legal Effects and Legitimacy*, Oxford: Hart Publishing 2011.

has proposed in its governance concept - transparency, participation, accountability, effectiveness and coherence<sup>129</sup> – are easier promulgated than put into practice, But public participation in administrative decision-making would certainly be a core element to any such design of modern, transnational democracy.

Looking at international law, Art. 6 (2) Aarhus Convention must be consulted, and holds that, in addition to public participation in decisions on the activities listed in the Annex to the convention, each party

shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions.

Following the ECJ reasoning in *Lesoochranárske*<sup>130</sup>, this provision must guide the interpretation of national law. It may even be considered to be directly applicable, because its formulation is unconditional and reasonably precise.

This means that activities not listed in the Annexes to the EIA and IPPC Directives must be subject to participation of the public (or at least of the public concerned) if they pose significant risks. The level of risks caused by the listed activities could serve as a guide to identify the relevant projects.

The implication of such principle would be that, apart from dangerous point sources, most of which are already captured by the lists to the EIA and IPPC Directives and the annex to the Aarhus Convention, diffuse sources can also be encompassed.. Most importantly the manufacture and bringing on the market of dangerous products would be subjected to public participation. For instance, a single authorised pesticide, if widely distributed, can cause much greater damage than an individual dangerous installation. The relevant EU legal acts do provide for a notice and comment procedure addressed to the general public in product related proceedings. For instance, in the procedure of approving an active pesticide substance, the application dossier and the draft assessment report are made accessible for the public and open for com-

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<sup>129</sup>European Commission, European governance - A white paper, COM/2001/0428 final, OJ C 287, 12.10.2001, p. 1–29.

<sup>130</sup>ECJ Case C-240/09 (*Lesoochranárske zoskupenie*) paragraphs 50-51.

ments.<sup>131</sup> However, the provisions only concern proceedings on the EU level, which finally result in a Commission decision. No participation procedure has been prescribed in relation to the authorisation of pesticide products by MS authorities.<sup>132</sup> The EU sectoral legislator thus leaves procedures to the discretion of the MS. This does not however exclude that the general EU principles on EU law implementation apply. It is true that Art. 41 (2) of the Charter of Fundamental Rights would not fit as a basis because the decision to authorise the manufacture and bringing on the market of a pesticide product does not yet determine who will be negatively affected. But the principle of effective implementation does fit as a basis, as well as the emerging principle of transnational democratic legitimation.

### c) The preclusion of participation rights

As a last consideration concerning the design of public participation as a requirement of EU law, one should discuss whether rights of participation can be precluded if their holder fails to make use of them. For instance, German law provides that a comment will be precluded if a comment is filed after the expiry of the deadline for comments.<sup>133</sup> The preclusion is called ‘formal’ if it is related to the ongoing administrative proceedings and excluding a comment from further discussion at a subsequent hearing or second instance of administrative review. It is called ‘material’ if related to a review procedure before a court. In Germany material preclusion was discussed as a constitutional question. It was alleged that the right to legal protection was breached since the holder of a substantive right, like a third party claiming adverse effects on their health, was excluded from the court review of the relevant administrative decision. The BVerfG, however, rejected this reasoning. It argued that the preclusion effect drives third parties to submit their information at an early stage into the process, thus allowing the administrative authority to take the decision in view of all concerns. This would even serve the legal protection of third parties.<sup>134</sup>

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<sup>131</sup>REGULATION (EC) No 1107/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ L 309, 24.11.2009, p. 1), Arts. 10, 12 (1) 2<sup>nd</sup> and 3<sup>rd</sup> sentence.

<sup>132</sup>DIRECTIVE 98/8/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 1998 concerning the placing of bio-cidal products on the market (OJ L 123, 24.4.1998, p. 1).

<sup>133</sup>§ 10 (3) 5<sup>th</sup> sentence Federal Emission Protection Act (Bundesimmissionsschutzgesetz-BImSchG) for dangerous installations; § 73 (3a) VwVfG for infrastructure projects. To the same effect: section 6:13 Dutch General Administrative Law Act. Cf Jans in this volume.

<sup>134</sup>BVerfGE 61, 82, 114-117.

Concerning the compatibility of this analysis with the principle of effectiveness and the right to effective court review the situation is still open. The Court of Justice of the EU has not yet ruled on the matter. It is true that the ECJ in *Djugarden Lilla* held that the EIA Directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Article 6(4) thereof.

Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.<sup>135</sup>

This statement however concerns the inverse question whether access to the court can be restricted because an objector already has ample opportunity to bring their views at the administrative stage. Of course this must be denied because the administrative body may decide to disregard the objections, and the court's role is precisely to remedy this. By contrast, preclusion means that a person fails to use her chances at the administrative stage. The German Federal Administrative Court expressed itself on the matter in a case concerning the construction of a highway.<sup>136</sup> It stated that some of the plaintiffs were excluded from alleging violation of air pollution and nature protection standards because they had not raised claims of pollution and damage to protected species during the administrative proceeding. The court cited the ECJ in *Preston* where the ECJ argued that legal protection is not an absolute right but must be weighed against legal certainty which especially allows the setting of deadlines for filing an application to an administrative body.<sup>137</sup> This, the BVerwG said, "can without doubt be transferred to the national legal concept of preclusion of objections."<sup>138</sup> My own view is that this interpretation disregards the difference between two party situations involving just the applicant and the administrative body and three party (or multi parties) situations. Considering three party situations preclusion creates a misbalance between the rights of an operator on the one and concerned third parties on the other. While operators are entitled to feed information into the proceedings

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<sup>135</sup> ECJ Case C-263/08 (*Djugården-Lilla Värtans Miljöskyddsförening*) ECR 2009 I-9967, paragraphs 48-49.

<sup>136</sup> BVerwGE 139, 150.

<sup>137</sup> ECJ Case C-78/98 (*Preston*), ECR 2000, I-3240, paragraph 33.

<sup>138</sup> BVerwGE 139, 150, 159.

without any deadline, third parties would be denied this right.<sup>139</sup> In addition, legal certainty is hardly a reason for preclusion. Any applicant for a permit must be aware that they cannot be certain about its status until the end of the last court proceedings. Preclusion appears rather to be a means to reduce the workload of courts. This however is no grave concern if weighed against the principle of effectiveness.<sup>140</sup> In conclusion, there is no problem to set deadlines for the submission of comments, and wise objectors will make use of them in order to influence decision-making at an early stage. But the preclusion of late comments remains incompatible with the principle of effective implementation.

## **II. EU standards on court review of procedural infringements**

### **1. Procedural infringements**

What a procedural infringement is of course depends on the content of the rule violated. In legal systems with precise codification of procedure this is easier to determine than in less regulated ones. But there are certainly also open questions in codified procedural law. One example is the relationship between public participation and policy decisions. Often, in proceedings on highway construction, the traffic demand justifying the new project is put into question by objectors. Is there a duty of the hearing officer to allow discussion and even presentation and cross-examination of experts or not? In Britain the question was denied in the *Bushel* case because the court considered national traffic forecasts at least as a matter of policy and not appropriate for cross-examination by objectors at a local inquiry.<sup>141</sup> German courts, by contrast, regard traffic demand as a question of determinable fact and legal appreciation.<sup>142</sup>

### **2. Consequences of procedural failure**

#### **a) Overview**

If the procedural rule is clear and found to have been breached, the question arises as to the effect this has on the final decision. Does the mistake render the decision unlawful, and

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<sup>139</sup> Bernhard Wegener, *Neue Formen der Bürgerbeteiligung? Planung und Zulassung von Projekten in der parlamentarischen Demokratie*, 69. DJT 2012, vol. II, M 57 et seq., at 67.

<sup>140</sup> It may be added that the BVerwG set aside its obligation to submit the problem as a preliminary question to the ECJ.

<sup>141</sup> *Bushel v Secretary of State for the Environment* [1980] 3 WLR 22.

<sup>142</sup> BVerwGE 75, 214, 232.

must the decision be annulled if appealed? National law and jurisprudence answer these questions differently, depending on how seriously they take procedures. EU case law has also emerged on the issue, but more so in relation to EU administrative procedures, not as rules addressed to MS procedures. It appears advisable to first explore MS practices and then relate them to available or to be developed EU standards.

aa) MS law and jurisprudence

French administrative law, for instance, classifies the procedural and formal provisions of administrative decision-making into “formalités substantielles” and “formalités accessoires”. Only the first category can – and must - lead to annulment of the decision. French court jurisprudence has developed certain criteria which shall help to identify the substantial value of a procedural provision, such as whether it provides citizens with a right and whether it is designed to have an effect on the outcome. There is also a general excuse of “formalité impossible” if the circumstances were such to exclude to observe a procedural requirement.<sup>143</sup>

English law has adopted a more pragmatic approach. An analysis of court practice concerning the right to be heard concludes that it is divergent case law even on core questions such as what elements of fair procedure are binding in informal and formal administrative proceedings, whether the neglect of an element can be cured through appeal proceedings, and whether a relevance test applies in cases of incurable procedural failure.<sup>144</sup> Courts often asked themselves whether procedural compliance would have made any difference to the final decision, but in 2001 in the *Berkeley* decision of the House of Lords<sup>145</sup> (then the UK’s highest court ) argued that where EU law was involved (here the failure to consider whether EIA was needed for an Annex II project) the discretion of the court not to quash the decision was extremely limited if not non-existent because of the court’s overriding duty to ensure that EU was effectively applied. Recently the Supreme Court (which replaced the House of Lords as the highest court in 2009) has called for a re-evaluation of this approach, arguing that provided an applicant was

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<sup>143</sup> Jean Waline, *Droit administratif*, Paris: Dalloz 22nd ed. 2008, p. 605.

<sup>144</sup> Carol Harlow, Richard Rawlings, *Law and Administration*, Cambridge: Cambridge University Press 2<sup>nd</sup> ed. 2006, 505.

<sup>145</sup> *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603

able in practice to enjoy any rights under European legislation, national courts still had considerable procedural discretion as to whether to quash a decision or not.<sup>146</sup>

German administrative law has developed a more systematic doctrine, which is, as usual, highly complicated. After centuries of indolence concerning procedure it has opened itself for taking procedures more seriously since the 1970s. But since the early 1990s, with the upcoming preoccupation with what was called the removal of investment barriers, mechanisms have been gradually adopted that help to save unlawful decisions from quashing for procedural reasons. Meanwhile, this has gone so far that there is reason to question its compatibility with EU procedural law, and in particular the principle of effective implementation. This appears to justify a closer look at German law as an exemplary case.

German administrative law first of all accepts the notion that a procedural failure makes the decision (procedurally) unlawful so that the decision must be quashed in principle.<sup>147</sup>

Not less than four mechanisms have been introduced allowing the prevention of a procedural failure leading to the annulment of the decision. They are:

- (1) the substantive rights effect,
- (2) the curing of infringement until taking of court decision (Heilung),
- (3) the relevance test (Erheblichkeit),
- (4) the curing of a mistake upon court order

#### (1) Substantive rights effect

According to German administrative law, the admissibility of a complaint and its consideration by the court presupposes that the administrative act or omission allegedly violated an individual right of the plaintiff.<sup>148</sup> One could suppose that procedural rights are rights in the sense of this requirement. German doctrine, however, construes participation in procedures as a

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<sup>146</sup> *Walton v The Scottish Ministers* ([2012] UKSC 44, 17 October 2012) See further Macrory National Report in this book.

<sup>147</sup> Should the mistake be obvious and grave (for instance because the agency was not competent to decide) the decision is *per se* null and void. A court if, called to decide on the matter, will in this case only formally declare that the decision is null and void. In the case of normal unlawfulness, the act nevertheless exists and must be quashed by “constitutive” court decision.

<sup>148</sup> § 42 (2) VwGO.

means of the protection of substantive rights. The implication is that holders of substantive rights shall be given a possibility of defence of their rights as early as at the stage of administrative decision-making.<sup>149</sup> Those who participate in a proceeding not in defence of their individual interests but in view of the public interest are excluded from legal protection. This narrow conception of admitting allegations of procedural failure mirrors the fact that participation is not regarded as a component of democratic government. In terms of political theory, the citizen may be welcome to participate in administrative proceedings but is not given legal protection for this; rather, only the bourgeois, whose substantive interest is at stake, has legally protected participation. This restriction entails the risk that individual interests (of the developer and of third persons) may be the major concern of the competent authority, and the public interest, which is said to be more than the sum of individual interests, which remain of secondary importance.

## (2) Curing of infringement until taking of court decision

A procedural failure which is admissible for court review does not necessarily require the quashing of the decision. It may be cured if certain preconditions are fulfilled. In that regard, § 45 of the German Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG) provides the following:

(1) An infringement of the rules governing procedure or form which does not render the administrative act null and void under section 44 shall be ignored when:

1. the application necessary for the issuing of the administrative act is subsequently made;
2. the necessary statement of grounds is subsequently provided;
3. the necessary hearing of a participant is subsequently held;

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<sup>149</sup> BVerfGE 53, 30 (Mülheim-Kärlich) is often cited as the core decision establishing this doctrine. However, things are a bit more difficult. This decision was a step forward because the court rejected the earlier doctrine, which held that there is no subjective right to allege procedural failure because procedure is a device exclusively serving the public interest in the quality of administrative decisions. The court's argument that procedure allows holders of substantive rights to make their rights heard early in the procedure was thus able to discard the older conception. *Mülheim-Kärlich* however did not at all posit that procedural rights must in any case have a substantive dimension. It is not excluded that the legislator established "pure" procedural rights. If it does so, these rights must as any other public rights be enforceable in the courts.

4. the decision of a committee whose collaboration is required in the issuing of the administrative act is subsequently taken;

5. the necessary collaboration of another authority is subsequently obtained.

(2) Actions referred to in paragraph 1 may be made good up to the conclusion of the last administrative court proceedings checking the merits of the case.

(3) [...] <sup>150</sup>

This means that a procedural mistake can be rectified by subsequent action. The action can be performed until the decision of the last court instance which is tasked to check the facts of the case. This is normally the second instance administrative court; in certain cases concerning large infrastructure projects, the single responsible court is the Bundesverwaltungsgericht (BVerwG). If, for instance, the adversely affected party was not heard before the administrative decision, the mistake can be corrected until the date of the judgment of the court of last factual instance. Some scholars even suggest that the application for administrative or court review already represents the opportunity to be heard.<sup>151</sup> It is submitted that, in this way, the right to be heard is made toothless.

§ 45 VwVfG does not expressly extend its scope to public participation proceedings. There is a widespread opinion that such extension is acceptable, at least in relation to the public hearing.<sup>152</sup>

### (3) Relevance test

If the rectification of the procedural failure has not taken place or was not accepted by the court, the relevance test intervenes. This test is by § 46 VwVfG formulated as follows:

The quashing of an administrative act, which is not null and void under section 44, cannot be demanded for the sole reason of failure of procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the substance.<sup>153</sup>

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<sup>150</sup> Author's translation.

<sup>151</sup> For a case concerning the legally prescribed hearing of a conscientious objector see BVerwGE 44, 17 (21)

<sup>152</sup> Ferdinand Kopp, Ulrich Ramsauer, *Verwaltungsverfahrensgesetz*, München: Beck Verlag 9th ed. 2005 § 75 n. 24.

In other words, a procedural mistake does not trigger the quashing of the decision if it has obviously not influenced the decision. This means that in the normal case procedural failure does not trigger the quashing of the decision. Only if it is obvious that the mistake did not have a substantial influence the decision can stand. The administrative authority has the burden of proving the evidence of no influence. In an attempt to make the rather complicated formulation of the provision better understandable, the BVerwG has rephrased the provision into the formula that the decision must be quashed if there is a concrete possibility that the procedural mistake has influenced it.<sup>154</sup> The relevant passage is the following:

“Concerning the identification of the here relevant causal connection [i.e. between the mistake and the decision, GW] it would be excessive at the one end to let the ‘abstract possibility’ suffice and at the other end to ask for a positive proof that because of the procedural failure the decision was taken with exactly this and no other content. Rather, the causal connection is to be accepted if under the circumstances of the case there was a concrete possibility that without the procedural mistake another decision would have been taken”.<sup>155</sup>

Although this formulation sounds practicable, an analysis of the case law of the BVerwG reveals that in hardly any case has the court found that such a concrete possibility had existed.<sup>156</sup> The administrative decision could therefore in almost all cases be upheld as far as administrative procedure was concerned. This practice has been explained by the fact that German administrative courts operate under the so-called investigation principle, i.e. they are obliged to promote the finding of the truth rather than watching and assessing the interactions of parties.<sup>157</sup> This means that they form their own judgment of the facts including those the plaintiff alleged during the administrative proceedings. They will then either quash or uphold the decision on

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<sup>153</sup> Author’s translation.

<sup>154</sup> BVerwGE 69, 256; BVerwGE 75, 214, 228.

<sup>155</sup> BVerwGE 69, 256, 270.

<sup>156</sup> As an exemplary case see BVerwGE 75, 214, 229. The case concerned the construction permit for the Munich airport. The competent authority was supervised by a Minister who was at the same time head of the supervisory board of the airport company. This was not regarded to bias the decision of the competent authority because the Minister had not exerted any visible influence on the decision. In the view of the author this is very unlikely because the airport was a firm political priority of the Bavarian government of the time.

<sup>157</sup> Bülow, op. cit. p.

substantive grounds. In this view procedural mistakes are of no avail either because the decision was lawful – then the mistake was without effect – or because it was unlawful – then the mistake is not “needed” for the quashing of the decision. In a critical perspective it appears that this devaluation of procedure disregards the fact that procedures have a genuine function, especially if the law is imprecise, concerns complex facts, or provides discretionary margins. The court will in such cases come to the conclusion that the decision taken was lawful, but it will not be able to exclude that the administrative authority, in using its discretion, may have come to another and equally lawful decision.

#### (4) Curing of a mistake upon court order

In the rare cases in which the procedural mistake was not cured until the court judgement the mistake was found to be relevant, there is one more possibility to save the decision from quashing: the court may declare the decision unlawful and unenforceable but allow the administrative authority to rectify the mistake. This means, for instance, if during a public hearing a certain issue was unlawfully excluded from discussion, the authority can reopen the hearing, discuss the relevant issue and approve or modify the decision on that basis.<sup>158</sup> In these cases, the courts usually emphasise that the authority must conduct the subsequent procedure with an open mind (“ergebnisoffen”).<sup>159</sup> But that is hardly a realistic advice. An administrative body which has defended its decision through internal and external reviews will not easily take an unbiased position.

#### b) EU law and jurisprudence

We will now confront the German concept of treating procedural failure with the EU principles stated above. Before doing so, the rules developed by the European courts for EU administrative procedures will be consulted for heuristic purposes.

#### aa) EU standards for EU procedural infringements – a heuristic look

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<sup>158</sup> § 75 (1a) VwVfG. For an example see BVerwGE 100, 358.

<sup>159</sup> BVerwGE 102, 351, 365.

There is no direct logical link between direct EU administration and MS administration that implements EU law. Concerning the construction of standing, the ECJ has even construed access to EU courts more narrowly than access to MS courts. This does however not mean that the Court of the European Union would repeat this contradiction in relation to the assessment of administrative procedures. After all, standing is something directly affecting the workload of a court. It is therefore understandable that a court construes it narrowly if its own workload is concerned. Things may be different when it comes to assessing the merits of a case, both in terms of substantive and procedural law.

The General Court and Court of Justice check administrative decisions on the basis of Art. 263 (4) TFEU. The catalogue of possible illegality of decisions - lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers – was drafted after the model of French administrative law. In particular, the test of “essential procedural requirement” resounds the French distinction between “formalités substantielles” and “formalités accessoires”. However, the European Courts have refused to elaborate on the distinction between essential and non-essential procedural requirements.

As for the curing of a mistake this was accepted as a possibility, but the regularisation has to be made by the end of the administrative proceeding. It is not admitted at the stage of the court proceedings. The Court of First Instance stated the reasons for this view as follows<sup>160</sup>:

Moreover, any infringement of the rights of the defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. If during the administrative procedure the applicant had been able to rely on documents which might exculpate it, it might have been able to influence the assessment of the

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<sup>160</sup>See cases concerning refused access of the plaintiff to files CFI Case 36/91 (ICI v Commission), ECR 1995 II-1847, n. 108 and ECJ C-199/99 (Corus UK v Commission), ECR 2003, I-11177, n. 128. For an analysis of the case law see Elena Bülow, *Die Relativierung von Verfahrensfehlern im Europäischen Verwaltungsverfahren und nach §§ 45, 46 VwVfG*, Baden-Baden: Nomos 2007, 245 et seq.

college of Commissioners, at least with regard to the conclusiveness of the evidence of its alleged passive and parallel conduct as regards the beginning and therefore the duration of the infringement. The Court cannot therefore rule out the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount.

The citation shows that the core argument for rejecting a regularisation of infringements pending court proceedings is related to the separation of powers: the court sees itself to be confined to legal review which disallows it to reopen the full scope of arguments considered before the administrative body.

Concerning the relevance test, the EU courts apply this test in cases of absence of an alternative decision. If the decision was the only possibility in legal terms, the court is prevented from annulling it. Procedural infringements are considered to be irrelevant in such cases.<sup>161</sup> In *Distillers* the plaintiff alleged as a procedural infringement that the competent advisory board was not adequately heard before the Commission decision. This decision stated that price terms adopted by distillers were in breach of the cartel prohibition according to Art. 85 EEC-Treaty. The plaintiff had not notified the terms to the Commission which was required to obtain authorisation for an exception. The court stated:<sup>162</sup>

In view of what is said above it is unnecessary to consider the procedural irregularities alleged by the applicant. The position would be different only if in the absence of those irregularities the administrative proceedings could have led to a different result. Subject to what the applicant says with regard to the product Pimm's the action is in effect confined to challenging the legality of the Commission's refusal, to grant exemption to the price terms under Article 85 (3) from the prohibition in Article 85 (1). The applicant does not deny that the price terms infringe Article 85 (1). Since however it omitted to notify the said terms to the Commission the applicant has deprived itself by its own act of any possibility of obtaining in the proceedings to

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<sup>161</sup>ECJ Case 30/78 (*Distillers v Commission*), ECR 1980, 2229.

<sup>162</sup>ECJ Case 30/78 (*Distillers v Commission*), ECR 1980, 2229 n. 26.

which the present application relates a decision granting exemption under Article 85 (3). Even in the absence of the procedural irregularities alleged by the applicant the Commission Decision based on the absence of notification could therefore not have been different.

This decision has been understood to prove that the ECJ also does accept a relevance test in cases where the administrative authority has discretion to decide.<sup>163</sup> Bülow argues on the basis of closer analysis of court practice that the European Courts apply such test only in cases of non-essential rules. Without building a systematic doctrinal concept, they implicitly reject a relevance test if the procedural rule is essential.<sup>164</sup> In contrast, a different reading suggests that the European Courts do apply a relevance test notwithstanding whether the infringed rule is essential or not. In particular, *Aalborg Portland* can be understood to mean that any procedural mistake is subject to a relevance test.<sup>165</sup> The plaintiffs, a group of cement producers, appealed a Commission Statement of Objections according to Art. 85 EEC-Treaty, alleging, among other issues, that the Commission had failed to disclose documents with exculpatory content to them. The court said:

On the other hand, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission (see *Solvay v Commission*, paragraph 68).

It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence (see *Hercules Chemicals v Commission*, paragraph 81, and *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 318), in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment

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<sup>163</sup>See for an analysis of the case law Bülow, op. cit. p. 327 et seq.

<sup>164</sup>Bülow, op. cit. p. 329.

<sup>165</sup>ECJ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (*Aalborg Portland v Commission*), ECR 2004 I 401.

in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine (see, to that effect, *Solvay v Commission*, paragraph 98).<sup>166</sup>

If the court is to be understood as applying the relevance test to essential procedural rules as well, the test is in any case not very demanding. It suffices that the applicant establishes that the mistake “was able to influence [...] the course of the proceedings and the content of the decision”. The formula appears to be somewhat less burdensome than the “concrete possibility” of the *BVerwG*. Be this as it may, there is certainly a significant difference in its application, the European courts laying less burden on the applicant than the German courts.

Taking my own position on the different readings, I believe that *Bülow* is right. I cannot imagine the Court of Justice of the EU applying a relevance test if a core procedural requirement was breached, such as, for example, where, against clear legal provisions, the application for a project was not published, comments were not accepted, or a hearing omitted. According to German law even in such cases the relevance test applies.

Concerning the possibility of a court to allow for a regularisation of procedural infringement, even after the court judgment was issued, no decision of the European courts have even considered this. Arguing a *maius ad minus*, it can be concluded that if a mistake cannot be made good after initiation of a court proceeding, this is even less possible after its ending.

Finally, concerning the question of whether standing to allege procedural mistakes presupposes a substantive right, no such requirement has been stated by the European Courts when checking standing under Art. 263 (4) TFEU (or the former Art. 230 (4) EC and Art. 173 (4) EEC). On the contrary, according to the *Plaumann* formula, a procedural right (if specifically provided to the applicant) even constitutes standing.<sup>167</sup> Since the entering into force of the Lis-

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<sup>166</sup>ECJ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (*Aalborg Portland v Commission*), ECR 2004 I 401, n. 74 and 75.

<sup>167</sup>ECJ Case 25/62 (*Plaumann v Kommission*) ECR 1963, 213; ECJ Case C-78/03 P (*Kommission v Aktionsgemeinschaft Recht und Eigentum*) ECR 2005, I-10737, paragraph 33; ECJ Case C-487/06 P (*British Aggregates v Kommission*) ECR 2008, I-10505, paragraph 26.

bon treaties, standing must be interpreted in the light of the right to an effective remedy according to Art. 47 ChFR. This right is provided to all persons whose rights are guaranteed by EU law. There is no doubt that these rights can also be procedural.

In conclusion, the jurisprudence of the European Courts on effects of procedural failures can be summarized as follows:

- the rectification of a procedural infringement is not accepted if made at the stage of court proceedings;
- a procedural infringement is not relevant (in the sense of not leading to the annulment of the decision) (a) if the decision was, in legal terms, the only one which could have been taken, or (b) if although the administrative authority had a discretionary margin, the failure was able to influence the decision; however, if the procedural requirement is of essential importance no relevance test is applied;
- there is standing to allege procedural infringements if the plaintiff was provided a right to participate, notwithstanding whether he/she is also materially concerned.

It is submitted that these standards which are aimed at EU administrative procedures can also serve as suggestions for EU requirements addressing MS procedures.

#### bb) EU standards for MS procedural infringements

Are precise procedural rules established by EU legal acts to be regarded as absolute, i.e. that their violation unavoidably leads to the annulment of the decision? This has sometimes been argued<sup>168</sup> but is hardly realistic. Procedural law would cause unnecessary waste of time and costs if the whole procedure must be reiterated although it is certain that without the failure the same decision would have resulted. Procedural fairness does not require completely superfluous administrative action. The same applies to procedural rules established by international law, such as the Aarhus Convention.

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<sup>168</sup> Anna-Maria Schlecht, *Die Unbeachtlichkeit von Verfahrensfehlern im deutschen Umweltrecht*, Berlin: Duncker & Humblot 2010, p. 206; Wolfgang Kahl, *Grundrechtsschutz durch Verfahren in Deutschland und in der EU*, *VerwArch* 95 /2004) S. 1 (25).

On the other hand, the fact that EU law and international law have established rather precise procedural requirements, particularly on public participation, and cannot be left unattended. While the “no alternative” situation may be conceded, it is submitted that those requirements do not allow disregarding the structural components of participation in cases of administrative discretion or complex risk assessment. The structural components would seem to include the information of the public at large of the project application, the information of the public concerned about environmental effects of the project, the acceptance of comments of the public concerned, and the conducting of an oral hearing if so required. If no information was provided on the core elements of the application and environmental effects, or comments alleging important issues not invited or accepted, or a hearing omitted, this must lead to the nullification of the decision without a test of relevance. Infringements of minor importance which would be subject to such test would include cases where the EIA was incomplete, the notice not published at all required places, an individual comment not accepted, or an issue of minor relevance refused to be discussed at a hearing. It is submitted that the formula of “concrete possibility that without the infringement another decision would have resulted” is appropriate but should be practiced fairly and without a bias in favour of preserving the administrative decision.

Concerning the rectification of infringements at later stages, the relevant EU legal acts and Art. 6 Aarhus Convention should be understood to allow this until the end of the administrative proceedings, but not anymore at the court stage. After all, they prescribe participation as a means to influence the administrative decision, and they even require this at an early stage when the options are still open.<sup>169</sup> It is submitted that this also holds true for systems like the German where the proceedings before administrative law courts are more investigative than in other legal systems, because even the German legal concept does not mean that the court proceeding, especially if related to discretionary administrative decisions, can substitute an administrative proceeding. This is all the more so because since the mid 1980s, the German administrative courts have developed a practice of judicial self-restraint and reduced density of review of administrative fact finding and assessment. This particularly concerned the risk assessment of complex technologies and infrastructure projects which are precisely those undertakings

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<sup>169</sup>See Art. 6 (4) Aarhus Convention; Art. 24 IPPC Directive; Art. 6 (4) EIA Directive.

which are subject to public participation.<sup>170</sup> Therefore, even in the German system of somewhat higher density of court review, no rectification should be allowed at the court stage and – even more so - at a later stage subsequent to the court judgment.

Another question is whether a procedural failure at the first instance administrative proceeding can be rectified at the second instance, which is called to decide on appeal from the first instance. The ECJ ruled on this question in *Križan*.<sup>171</sup> It held that rectification is in principle compatible with EU law but that the details are to be decided by the MS provided the principle of equivalence and effectiveness is respected. The relevant paragraph reads as follows:

Consequently, the principle of effectiveness does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned the urban planning decision at issue in the main proceedings during the administrative procedure at first instance, provided that all options and solutions remain possible and that rectification at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine.<sup>172</sup>

In more general terms the principle of effectiveness is interpreted to demand two preconditions for rectification at a second instance administrative level: all options and solutions must remain possible, and the public must still be effectively able to influence the decision. This implies that rectification is not possible at the second instance if the competent authority is confined to a legality check, or if the project has already been constructed.

Concerning locus standi, it was already said that Art. 47 of the Charter of Fundamental Rights must be interpreted to provide legal protection also for procedural rights, even if the right holder is not affected in his/her substantive rights. Although this provision is mainly addressed to the EU courts, it is also applicable to MS courts when the MS implement EU law.

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<sup>170</sup>The landmark decision signalling this new practice is BVerwGE 72, 300 (Nuclear Power Installation Wyhl).

<sup>171</sup>ECJ Case C-416/10 (*Križan v Slovenská inšpekcia životného prostredia*).

<sup>172</sup>ECJ Case C-416/10 (*Križan v Slovenská inšpekcia životného prostredia*), paragraph 90.

The best legal protection of participatory rights would certainly be granted if persons who were excluded from participation could apply for rectification while the administrative procedure is still pending. In the practical case, an interim measure would be necessary for the excluded person in order to come in before the end of the proceeding. However, some MS legal orders exclude applications for court review including interim measures while the administrative proceedings are pending, the reason being that the proceedings shall not be disturbed by court interference.<sup>173</sup> If this reasoning is accepted and the excluded person thus stripped of his/her procedural rights pending the administrative proceedings, it is imperative that he/she must, as compensation, be entitled to challenge the final decision as being procedurally unlawful. This conclusion can also be supported by Art. 9 (2) Aarhus Convention which demands that court review must be possible based on an infringement of the right to participation.

### **III. Conclusion**

The chapter has elaborated that the autonomy of the MS concerning administrative procedures and judicial review of said procedures is, in various ways, framed by EU law. There is a layer of general principles of EU law which must be respected, including the supremacy of EU law establishing procedural requirements, international law binding the EU such as the Aarhus Convention, the EU constitutional right to be heard, of access to files and of reasoned decisions, the principle of effective and equivalent implementation, and the right to effective judicial protection. These general principles are specified by sectoral legal acts, including acts establishing public participation procedures which were the focus of the present chapter. It was argued that in view of the principle of effectiveness and the Aarhus Convention, the scope of application of public participation should be extended to all activities having significant adverse effects on human health or the environment. Moreover, it was suggested in the same line that the preclusion of objections from administrative and judicial review should be abandoned. Concerning procedural infringements, it appears that their rectification should be possible but not anymore at the stage of court review. Even more so, rectification should not be possible after

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<sup>173</sup>In Germany see § 44a VwGO and the reasons for the draft provision in BT-Drucks 7/910 p. 97 ; for Spain see judgment of the Supreme Court of 17 November 1998, cited in the chapter by Garcia-Uretra/ Moreno Molina, section 4, in this volume.

the court judgment has been rendered. While a test of relevance of procedural infringement should, in principle, be accepted, this should be excluded in case of essential components of procedures. The test could be guided by asking whether there was a concrete possibility that, without the infringement, another decision might have resulted. However, this test must be practiced with caution bearing in mind that fair procedure is a value in itself. Concerning locus standi, applying for court review procedural rights should be considered as rights in the sense of the guarantee of effective judicial protection. MS law may exclude legal remedies pending administrative proceedings, but they must fully be granted after the decision has been taken.