



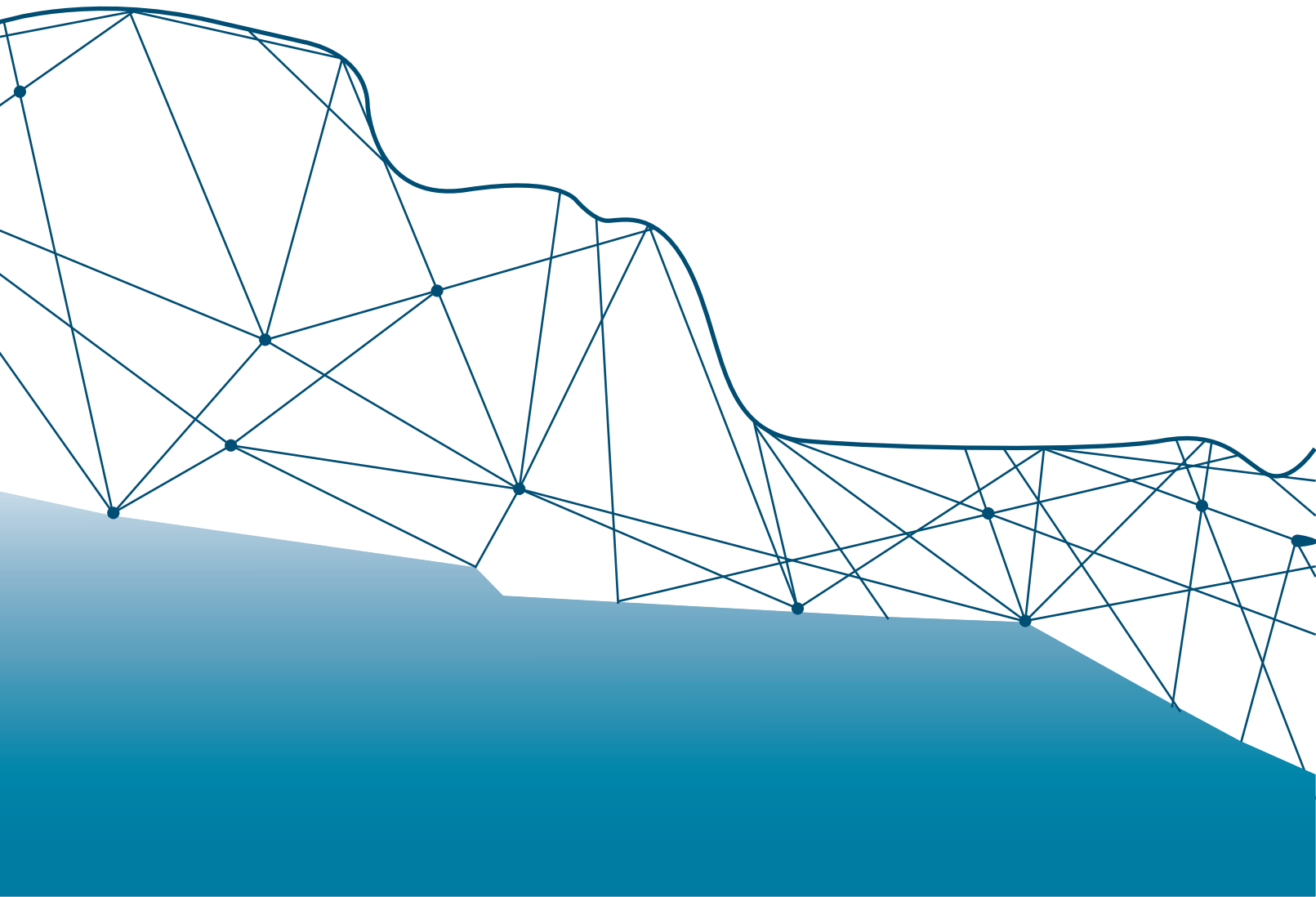
Nationaler
Normenkontrollrat

Opportunities for speeding up administrative court proceedings pertaining to projects for the construction of infrastructure facilities and industrial installations

Expert report prepared by

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commissioned by the National Regulatory Control Council



Key Messages

Proposals for Speeding up Administrative Court Proceedings

Protracted planning, approval and court procedures have become a major barrier to investment in infrastructure and industrial facilities, notwithstanding multiple modifications by legislators to the framework conditions for the approval of infrastructure measures and industrial installations since the early 1990s in order to speed up procedures. Where provisions of administrative procedural law have been adapted, these have mostly been limited to shortening the length of legal proceedings. However, there was no significant improvement in the overall situation.

Therefore, the National Regulatory Control Council commissioned an expert report to determine, on the basis of a systematic investigation and empirical data, whether and to what extent further changes to administrative court proceedings could lead to a reduction in the duration of proceedings.

The expert report includes detailed descriptions with specific proposals for legal changes (page numbers are given in brackets). In this context, many proposals for acceleration discussed by practitioners or in jurisprudence were examined. European environmental law, which raises considerable application problems and difficult questions, has been a key factor determining the length of time required for court disputes on major infrastructure projects and industrial plants. Therefore, substantial potential for speeding up proceedings must also be sought, above all, in this regulatory area at EU level. At the same time, the proposals indicate that a fairly significant potential for speeding up proceedings might also be realised by optimised national administrative court proceedings.

It is also recommended to actually aim for low-hanging fruit, thus realising quick wins. The recommendation to establish senates at a federal level is a case in point. With such specialised senates, the necessary expertise needed for such approval procedures can also be gained and synergy effects can be exploited, even for smaller higher administrative courts with less personnel.

1

Speed up Proceedings - Set an Early First Date

In many cases, pleadings are exchanged over a period of months after the action has been brought without any procedural indications from the court or an oral hearing.

The introduction of an obligatory early first discussion date would lead the rapporteur to discuss a procedural timetable with the parties at an early stage. This would focus the further presentation on the essential issues relevant to the decision. Doing so would avoid the current proliferation of exchanges of comprehensive pleadings between the parties. This would also enable the parties to clarify legal issues more quickly (pp. 79-86).

2

Make Interim Legal Protection More Effective

In practice, the order or restitution of the suspensory effect often takes the form of a yes-no decision. This is because estimating the potential effects of immediate enforcement is often complex and cannot be reliably predicted. The courts should be able to handle the decision determinants for balancing interests in interim relief more flexibly.

If reversible and repairable measures are associated with the project, then it should be possible to order immediate enforcement even if the prospects of success remain unclear. This should also apply to cases in which an error can clearly be remedied during a supplementary procedure. This would limit an order or restoration of suspensory effect to those situations where this is necessary to ensure effective relief in the main action.

Appropriate amendments to the Administrative Court Ordinance would ensure that measures for interim relief can be considered in a more differentiated manner and that the project can be started more quickly. For example, certain preliminary work could be carried out which would otherwise only be permitted again after the end of an entire vegetation cycle (see p. 119 et seq.).

3

Create Incentives for Bringing Procedures to an End After Error Correction

In the area of environmental and planning law, plans containing errors can be corrected even during a legal procedure. In the event of claims put forward by environmental organisations, this may result in the fact that the positive effect of their action will not become visible in the end. Although parts of the approval decision contained errors, the legal procedure would be terminated in favour of that decision after error correction.

It is quite understandable that environmental organisations see themselves as being deprived of the confirmation that their objections to a project were justified. This greatly increases the incentive for them to continue the procedure even after error correction. This could change if the environmental organisations had the possibility to bring a claim for declaratory judgment for the resumption of proceedings. With such a declaratory judgement in combination with an appropriate cost sharing, the environmental organisations could obtain confirmation from the court that their concerns were well founded. As a whole, this could shorten the subsequent proceedings (see p. 106 et seq.).

4

Speed up Proceedings by an Early Examination of the Right of Action

The question whether a claim is accepted by the court giving a ruling in that regard depends on the right of action. The highest courts have declared that those applying for judicial review must present an adequate set of facts before the factual investigation can even begin.

The same must apply to environmental organisations in the context of judicial review proceedings and explicitly be clarified in the Environmental Appeals Act. This could be a main factor in speeding up proceedings. An early clarification of this issue could limit the factual investigation to those proceedings which fulfil these admissibility criteria (see p. 95 et seq.).

5 *Provide Faster Legal Certainty - Review of Administrative Action to Be Limited to Parts Containing Errors*

If a court decision leads to an error correction in a subsequent administrative procedure as it is quite often the case in practice, this procedure can also be reviewed in full by an administrative court. There are no legal rules limiting the renewed judicial review to that part containing the error to be corrected, but up to now there exists only a self-limitation of the administrative courts.

In order to provide legal certainty for that part of the administrative procedure which does not involve any error, the final judgement would have to be conferred not only to the identified legal errors but also to the rest. This also avoids unnecessary duplication of efforts undertaken by the administrative courts. By means of an amendment to the Code of Administrative Court Procedure or, alternatively, the Administrative Procedural Law and the Environmental Appeals Act, a partial legal validity of the approval decision could be established (see p. 101 et seq.).

6 *Administrative Influence on Experts and Investigation Methods Accelerates Legal Proceedings*

Administrative courts provide the approval and planning authorities with a margin of discretion from the environmental point of view and verify the environmental basis for an administrative decision only to a limited extent. This substantially accelerates environmental proceedings.

To ensure that this administrative assessment prerogative stands up in court, this requires that the authority may exercise a decisive influence on the criteria for the selection of experts and their methodology.

It is therefore recommended that even in case of projects with private, non-public project developers approval and planning authorities be allowed to play an active role in and exert early influence on the expert selection criteria and the methods to be applied in accordance with the specific legislative standard (see p. 132 et seq.).

7 *Maintain the Judge-Rapporteur in Case of Change of Senate - Avoid Delays*

Large-scale legal proceedings often last several months or years. For this reason, it cannot be ruled out that the Judge-Rapporteur changes the senate during such a proceeding. This means that a loss of familiarisation time and acquired expertise goes along with it.

It is therefore suggested that the Code of Administrative Court Procedure be amended in such a way that the Judge-Rapporteur may continue to exercise his/her jurisdiction despite his/her change of senate (see p. 69 et seq.).

8 *Faster File Processing Requires Additional Special Experts and Research Assistants*

Environmental issues are often complex so that judges are obliged to spend a considerable amount of time to understand and master these issues. Special experts or additional research assistants of the courts may accelerate this process by carrying out plausibility checks and/or by offering advice and assistance to the respective judge.

In dealing with technically complex matters they can contribute to expediting the legal proceedings. Even though personnel resources are not a question of legislative changes, it is highly recommended to make more use of this possibility (see p. 78 et seq.).

9 *Speed up Proceedings - Digitise Files*

In major administrative court proceedings, the files of the authorities often fill a large number of folders. It takes many months to make these documents available to all parties to the proceedings, because paper documents cannot be read at the same time by all judges and parties involved. To work on these large quantities of paper documents without a simple keyword search is also cumbersome, time-consuming, expensive and inefficient.

The acceleration potential of digitisation must therefore be made use of also in administrative court proceedings. Authorities should be required to submit documents and files in a searchable electronic format by means of an amendment to the Code of Administrative Court Procedure (see p. 138 et seq.).

10 *Identify Further Potential for Accelerating Proceedings Through Improved Data Bases*

For this expert report it was not possible to provide empirical evidence for most of the suspected acceleration potentials and contributory factors to the delays. This is because there are no relevant data and statistics currently available which make it possible to draw conclusions about the progress of administrative proceedings or the time and duration of individual stages of proceedings. However, such information is vital to monitor the success of the acceleration measures.

In order to identify and evaluate further measures to speed up proceedings, it is therefore recommended to supplement the legal statistics and to systematically collect actual data from legal proceedings on an annual basis (see p. 141 et seq.).

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