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Right of Action in Estonian Administrative Procedure

Introduction

After constitutional order was restored in the territory of the Republic of Estonia, the administrative court system, liquidated under the Soviet occupation, restarted its activities in 1993.¹ The Administrative Court Procedure Code² was enacted at the same time. In order to remove deficiencies, which had mainly emerged in practice, the Riigikogu³ passed in February 1999 a new amended version of the Administrative Court Procedure Code (ACPC),⁴ which after its entry into force on 1 January 2000 will provide a multitude of facilities for more efficient protection of persons. The new Code will not only smooth out minor unwanted angularities but remarkably restructure the fundamental system of Estonian administrative procedure.⁵ On the other hand, the reformation of administrative adjective law in Estonia cannot be considered complete for a long time yet, as a range of questions need more in-depth analysis than could be afforded in removing urgent deficiencies⁶. The circle of persons entitled to bringing an action to administrative court, i.e. the question of the right of action, can, *inter alia*, provide a subject of deeper analysis. In this point, the process of acceding to the European Union is also one of the initiating factors.

1. Right of Action in Essence

The opportunity to contest administrative acts in court is an inseparable part of the constitutional order of Estonia as well as many other states. The judicial control is well characterised by the fact that courts do not begin to exercise control on their own initiative but rather in the event of an action.⁷ One of the key questions in the system⁸ of judicial control over administration is the decision on who has the right to initiate administrative control procedures in

court, i.e. the right of action, also known as the right of initiative. The right of action regulation determines the persons who are competent to challenge administrative acts in court. In Estonian legal literature, the right of action has also been regarded as "active legitimation" or title of interest. "Title of interest means a justification or right to initiate proceedings on the specific presumption of connection between the initiating party and the subject matter of dispute."⁹ These concepts overlap to a large extent but it must be taken into consideration that in principle, the right of action may also be vested in a person without a personal connection with the administrative act in dispute.¹⁰ The right of action must, however, be certainly distinguished from passive and active legal capacity in administrative procedure. Passive legal capacity in administrative procedure means the general capacity to be a party to the procedure while active legal capacity in administrative procedure means the right to independently act in the court on one's own behalf.¹¹

In every legal order, certain limits are established with regard to bringing actions against the executive but, as shown by comparative analysis, quite different solutions are possible in that aspect. The regulation of competence for action may also be differentiated on national level, e.g. on the basis of causes of action and the field of substantive law from which the action originates. In regarding possible models of the right of initiative in administrative procedure, four action categories can be distinguished abstractly: actions for protection of rights, actions based on interests, popular actions and association actions.¹² In the aspect of comparative analysis of major legal orders, mainly two solutions exist:

- (1) the system of subjective rights protection, in

which only actions for protection of rights are permitted;

(2) the system of objective control over administration, in which also actions based on interests are permitted¹³.

The first system sees the general objective of the administrative court procedure primarily in protecting individuals' rights and freedoms and, consequently, grants the right of action only for the purpose of protecting subjective rights. In wider terms, this is based on the understanding that although the executive has a general obligation to act in accordance with law, judicial enforcement of that obligation may be demanded only by competent persons.¹⁴ That solution is characteristic of particularly German and Austrian law of administrative procedure.¹⁵ In the administrative procedure in France¹⁶ and the United States¹⁷, however, provisions concerning competence for action are much more "generous", as the right of action is generally ensured also in the event of violation of justified interests, in addition to violation of rights. That "generosity" is accordant with other fundamentals underlying administrative procedure law in those legal orders and does not necessarily mean more extensive control over administration¹⁸. Furthermore, the objective of administrative procedure is much more seen in ensuring the legitimacy of the executive's activities in those countries. Judicial protection in the judicial bodies of the European Union has also been largely influenced by French law; in addition, opportunities by far wider than in the system of subjective rights protection must be ensured for contesting national administrative acts which are in conflict with EU legislation.¹⁹

2. Right of Action under the Reviewed Administrative Court Procedure Act

In Estonia, administrative courts may be addressed by submitting either an action or a protest (ACPC § 6(1)). By means of an action, administrative court procedures may be initiated by individuals (ACPC § 7(1)) or associations of individuals, and by means of protest, the procedures may be initiated by supervising agencies or officials (ACPC § 7(2)). The ACPC does not directly refer to categories of action but, dogmatically, actions for avoidance, actions for performance and actions for declaratory judgement, in which the conditions for addressing the administrative court, including the right of action, are different, can be distinguished on the basis of applications contained in actions. Under §§ 6(2) and (3) of the ACPC, actions may be brought to the administrative court for avoidance of an administrative act²⁰ or a part thereof (actions for avoidance), enforcement of an administrative act, conducting an act — to compel the performance of an administrative act or a factual measure — and compensation for damages caused by an administrative act or measure (actions for performance), and for ascertainment of unlawfulness of an administrative act and the existence or absence of a rela-

tionship under public law (actions for declaratory judgement). Supervising agencies or officials may have the right of protest only under a special Act in the exercise of supervision over the legitimacy of the activities of an administrative body in a specific field.²¹ By protest, the same applications as in the event of action may be presented to the administrative court, except the ascertainment of unlawfulness of an administrative act and the compensation for damages (ACPC § 6(2)). During the first years after the restoration of the administrative court procedure, state and local government agencies made several attempts to initiate administrative disputes by virtue of action. However, since state and local government agencies are not independent legal subjects in Estonia²² (unlike the former Soviet legal order), such actions were denied. An administrative body may challenge the activities of another administrative body in the administrative court only in the form of protest but therefor it must be specifically authorised to do so by law.²³

In preparing the new ACPC, the former solution for the right of action served as a basis — the drafters only attempted to make more specifications therein and adjust it to the new categories of action (actions for avoidance and actions for performance) in Estonian administrative procedure. Under the ACPC applicable at the time of writing this article as well as the new ACPC, actions for protection of rights are a rule — the rights of actions for avoidance and actions for performance as the main categories of action are, in general, vested only in such persons whose rights are violated by the contested administrative act.²⁴ An action may be brought on condition that subjective public rights have been violated by the administration.²⁵ Thus, in its principal part, Estonian administrative procedure is founded on the idea of subjective rights protection. As regards actions for declaratory judgement, the idea has been abandoned in the new ACPC, as in this aspect, justified interests are sufficient for creating the right of action (ACPC § 7(1), second sentence).²⁶ In contrast, the second sentence of the Administrative Court Procedure of 1919 vested the right of action in a significantly wider circle of persons: "actions may be presented by all persons, associations and local government agencies should their lawful or material interests be touched in an unlawful manner". A.-T. Kliimann concluded from the cited provision that, in addition to protection of private interests, popular actions — actions against violations of legal order and public interest — are also possible.²⁷

The ACPC defines the right of action as the condition for the admissibility of action.²⁸ Nevertheless, whether, in addition to objective unlawfulness of an administrative act, subjective rights of a person have been violated thereby or whether the interest of a person presenting an action for declaratory judgement is worth protection or not will become evident only in the course of the essential examination of the case. The competence for action is not a

requirement in respect of an action, on which the administrative court could adopt the final decision in preparing the examination of the case²⁹ but rather a question, which must be evaluated in the judgement after having conducted the essential examination at a hearing.³⁰ At the same time, it must be taken into consideration that the right of action as a precondition for the admissibility of action must be verified in each administrative case. The formal requirement is provided in clause 10(2) 4) of the ACPC, which imposes on the claimant the obligation to indicate, in addition to why the administrative act is unlawful, also the rights or freedoms violated by the administrative body. When the claimant fails to show the alleged violation of rights even after being additionally requested so by the court, the action may be dismissed without examination (ACPC § 11(3)). The provision is aimed at avoiding unjustified actions but it fails to imply that the administrative court verifies only the justifiedness of allegations made in the action. Estonian administrative procedure is based on the principle of investigation³¹ and thereunder, the court must check that the administration has also respected other rights of the claimant. If the administrative court establishes that the claimant's rights have not been violated, the court cannot grant the action because the requirements for admissibility of action are not satisfied.³² The reasons need not include the specific right or legal basis therefor but rather the factual circumstances underlying the claimant's consideration of his rights being violated by the administration's activities. For example, the reason that violation of auction rules impaired "the right to participate in an auction and the opportunity to win the auction" has been regarded by the Supreme Court as sufficient grounds for admissibility in preliminary procedure.³³ This does not mean, however, that such reasoning would actually be appropriate or true, which must be determined in the course of, rather than in preparing, the proceedings.

2.1. ACTIONS FOR AVOIDANCE AND IMPOSING AN OBLIGATION

Actions for avoidance and actions for performance are admissible only if the rights or freedoms of a person bringing the action are violated by an administrative act made by an administrative body or by its refusal to make an administrative act (ACPC § 7(1)). In that provision, "person" means individuals as well as legal entities,³⁴ including, in a limited number of cases, legal persons under public law, who are wishing to protect their rights or freedoms.³⁵ Under § 9(2) of the Constitution, fundamental rights and freedoms extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights and freedoms. The construction "rights or freedoms" originates from § 15(1) of the Constitution. In this aspect, "freedoms" however mean the freedoms protected under objective law, i.e. the so-called freedom rights, which do not form separate legal positions

besides subjective rights but are rather a category of the latter. R. Alexi concludes that "[...] it is evident that freedoms are, nonetheless, fundamental rights protecting special benefits. Therefore, one could cease regarding freedoms as an independent category and proceed with generally referring to fundamental rights, which protect the benefits of freedoms (and hence acts) or natural situations or legal positions".³⁶

2.1.1. Subjective Rights in General. The Protective Norm Theory

What should be regarded in Estonian administrative procedure as a right of the protected individual? In general legal theory, subjective rights mean the legal power (opportunity, competence), vested in a legal subject, to demand, from another, certain behaviour, inaction or tolerance in the first subject's interests.³⁷ Any subjective right logically derives from another person's legal obligation, while legal obligations can also exist without corresponding subjective rights.³⁸

Administrative courts are competent to settle only disputes under public law, and only subjective rights under public law can be protected in administrative courts. According to German judicial practice, property of local government entities and other legal persons under public law, unlike that of individuals, is not protected under the Constitution (in Germany, § 14 I GG) and therefore, in administrative courts, local government entities cannot have resort, as a subjective right under civil law, to violation of ownership.³⁹ From the viewpoint of individuals, a subjective public right is an opportunity, provided by public law, to demand from the state certain behaviour as regards the individual.⁴⁰ In private law, subjective rights primarily mean legal power vested in an individual for realisation of certain interests,⁴¹ or can also mean an interest protected by law.⁴² In private law, legal obligations are established usually for protecting interests of the other party and this is accompanied by the partner's right to performance. Public administration, however, mostly acts in the public interest rather than in that of an individual, and provisions regulating the administration's activities also realise public interests, to a large extent. Nevertheless, even in the field of public law a subjective right is constituted in the event of imposing on the administration an obligation to protect, besides public interests, also someone's private interests. According to the so-called protective norm theory (German *Schutznormtheorie*), which is prevalent in substantiating the concept of subjective rights in Germanic legal system, an allegedly violated provision of law must (besides at least public interests) also protect the claimant's private interests.⁴³ No subjective right is constituted when a person's interests are coincidentally aimed at the same result which would have been achieved by the administration's lawful behaviour as well.⁴⁴ On that basis, economic and political interests, geographic or infrastruc-

ture advantages as well as intangible interests such as the appeal of a city or good repute of a company, in so far as they are not protected under subjective rights, cannot be protected in administrative courts.⁴⁵

According to the so-called newer protective norm theory, the protection objective of a provision need not be entirely and primarily manifested from the will expressed by the legislator. In addition, the protection objective may appear in the surrounding provisions and its "institutional framework". And lastly, even fundamental rights may play a role of explanation and systematisation of values in the creation of a protection objective.⁴⁶ Hence the fundamental rights have the ability to so-to-say "subjectivate" provisions of ordinary laws.

Placing fundamental rights themselves directly as a category of subjective rights has been disputable. According to R. Wahl, fundamental rights are specific constitutional subjective rights, yet to be formed into subjective rights on the level of ordinary Acts.⁴⁷ At least one part of the fundamental rights, however, exist in the legal order as equal to subjective rights. According to K. Merusk, "it is important that the appropriate provision has the quality of realising itself, i.e. it is adequately accurate, clear and specific in order to be implemented."⁴⁸ R. Alexi concludes in his analysis that fundamental rights referred to in the Estonian Constitution exist, as a rule, in the form of subjective rights. "When in the Chapter of fundamental rights, an obligation is imposed on the state, that obligation is principally reflected in a subjective right of an individual. [...] A provision contained in the catalogue of fundamental rights is purely objective only when sufficient reasons can be given for that the state's obligation need not be reflected by a subjective right of a citizen. That is so when, if and in so far as that provision explicitly serves collective purposes rather than individual interests, as the wording of § 27(1) of the Constitution, or when the provision is exclusively of an organisational nature, as § 28(3) of the Constitution."⁴⁹

2.1.2. Vestedness of the Right in the Claimant

Any violated right must belong to the claimant itself: an action may not be filed on behalf of other persons,⁵⁰ least of all for protecting public interests, i.e. as a popular action. In other words, the claimant must belong to the circle of persons protected by the violated provision. According to the practice of the German Supreme Administrative Court, a subjective right may arise out of only such legal provisions the elements of which allow determination of the circle of persons which is distinguished from the public in general. However, such position of the court is problematic, given today's technologies of considerable influence (nuclear energy, genetic technology).⁵¹

The so-called association actions are not absolutely precluded in Estonian administrative procedure. An association of persons, including associations without the status

of a legal person, may turn to administrative courts for the purpose of protecting its members' or other persons' interests only in the events provided in a special Act (ACPC § 7(3)).⁵² In this aspect, § 7(3) of the ACPC is a special provision, leaving to the legislator a reservation to provide for availability of association actions in certain events. Such exceptional association actions may be presented in the interests of one's own members (egoistic association action) or other persons (altruistic association action)⁵³. However, protection of the association's rights by a member or shareholder thereof is precluded. Likewise, a resident of a rural municipality or town may not challenge state acts which are in violation of local government guarantees.

2.1.3. Connection between Violation of Rights and Administrative Activity

Proof of the existence of a right of action cannot be provided only by a successful demonstration by the claimant that the administrative body has committed a violation of law and that subjective rights are vested in the claimant, unless the claimant satisfies the court that the case of violation has resulted in consequences to the claimant's rights. In order that the right of action be created, the claimant's rights must have been violated namely by the challenged administrative act. In the case of administrative act, this requires the existence of an adequate causal relationship between the regulation of the administrative act and the changes in the claimant's personal sphere of rights. No right of action exists when the administrative act in question brings about only factual influence but is not legally binding on the claimant.⁵⁴ On the other hand, a violation of rights need not be reflected in the factual status of the subject: a violation or restriction need not result in factual consequences.⁵⁵ It is the deterioration of the legal status that is important. In disputing an administrative act, resort may be had only to such rights as were vested in the claimant at the moment of making such act; protection cannot be afforded to a right that has been created subsequently or that had been extinguished for other reasons before the moment of making the act.⁵⁶ However, if rights were not created for the very reason of an act, such act can be admitted as an adequate reason violating the sphere of the claimant's rights.

Direct relationships often lapse in the event of making preliminary rulings in multi-stage administrative procedures. Disputes concerning the ownership reform can be pointed out as an example in the situation of Estonia. Restitution of unlawfully expropriated property is practically carried out in a two-stage procedure: at the first stage, the fact of unlawful expropriation of property during the Soviet occupation is ascertained (the former owner or his or her successor is declared an entitled subject), and at the second stage, restitution of property is determined by an administrative act. The rights of the present user of the property (the right to privatise the property) can be violat-

ed by the final decision on restitution of the property but not by declaring somebody an entitled subject with regard to the property, as the question concerning restitution of the property is not yet decided thereby.⁵⁷

2.1.4. Exceptions

The following paragraphs address the suitability of solutions offered by foreign authors for settling some of the exceptional cases in Estonian administrative procedure.

2.1.4.1. *The Addressee Theory*

According to the so-called addressee theory offered by German authors, an illegitimate burdening administrative act can always be regarded as violating a subjective right of the addressee⁵⁸ because it touches at least the general freedom of activity, which is protected in Germany under Article 2(1) of the German Constitution.⁵⁹ The direct addressee of a burdening administrative act may always refer to the administrative court and the objective illegitimacy of the administrative act is, in essence, sufficient for granting an action for avoidance of the burdening administrative act.

In criticising the addressee theory, D. Ehlers finds that this theory is inapplicable to problematic cases, such as challenge of a building permit by a neighbour. In the opinion of Ehlers, the addressee of a burdening administrative act is not always entitled to action since not all such administrative acts interfere with the sphere of the addressee's rights.⁶⁰ Such criticism, however, remains doubtful as the neighbour of the developed immovable property is not the addressee of the administrative act but rather a third party whose rights may be influenced disadvantageously by the administrative act favourably addressed to the addressee.⁶¹

The task of the addressee theory is, however, not to provide an exhaustive answer in respect of all administrative acts but to save further checks on the competence for action in the event of a burdening administrative act. But on the other hand, the addressee theory cannot be overestimated from in particular its practical side: the question of when a person can be regarded as an addressee of a burdening administrative act and when that person can be regarded as a third party, i.e. towards whom the will of the issuer of the administrative act was directed, can be unanswerable by means of one single determination. In the event of doubt, the existence of the protection objective of the provision must nevertheless be rechecked under general criteria. The Administrative Council of the Supreme Court has recognised the existence of a right to action in disputing the restitution of property, previously given to a person, to the former owner thereof namely because of burdening character.⁶²

2.1.4.2. *Administrative Acts Refusing to Grant Preferences*

Besides the addressee theory, the application theory has been proposed, whereunder any person who has applied for a favourable administrative act from the admin-

istration but whose application has been denied is competent for action. Such vision cannot, however, be approved of. An administrative act whereby the issue of an administrative act favourable to a certain person is refused cannot be regarded as burdening although it does not accord with the addressee's interests. Such administrative acts are, in fact, directed towards leaving the addressee's rights and obligations unaltered. An application for preference may be submitted by anyone but the subjective right to preference is enjoyed only by a specified circle of persons.⁶³

When a person has been refused a certain preference, the appropriate category of action would be an action for performance rather than an action for avoidance. In the event of an action for performance, competence for action is vested only in the person who has a subjective right to demand the issue of an administrative act or the conduct of a factual measure. The ultimate goal of the person applying for preference is, after all, not to get rid of the refusing administrative act but to be granted the preference. That must also be the objective of the action brought to the administrative court; in the event of disputing a refusing act, the requirement of protection of rights is not met and hence no violation of rights can be referred to. The existence of such right must be ascertained on the basis of additional criteria, otherwise anyone would be entitled to demand favourable administrative acts.⁶⁴ In the case of actions for performance, the general law of freedoms is not applicable and in this point, one must demonstrate that the administration is legally bound to take active steps and that the obligation has been established in the claimant's interests. The foregoing assertion should, however, not be applied in such narrow manner to the so-called control permits,⁶⁵ which in formal terms are favourable administrative acts but virtually belong in the field of restrictive administration. The control permits only restore an initial former freedom that has been restricted by law rather than grant additional benefits (e.g. pension). In this point, the actual illegitimacy of an administrative act and a violation of subjective rights overlap. When, however, subjective rights have not been violated, i.e. there are no grounds for receiving a permit, no attention should either be paid to any procedural and formal errors occurred in making the decision of refusal. The same result is achieved also when an action for performance is preferred to an action for avoidance; in the case of an action for performance the court only checks whether the claimant has grounds for demanding an administrative act and not whether the refusal to make the administrative act has been legitimate. Nevertheless, an authentic burdening administrative act must, when disputed, be set aside also in the event of formal or procedural errors.

Among other formal requirements, significance can be attributed to the obligation to motivate (indicate reasons for) an administrative act — that obligation is related to the

right to judicial protection set out in § 15(1) of the Constitution. Judicial protection can be used efficiently only when the administrative act indicates reasons therefor. On that basis, the Supreme Court has considered the absence of reasons in an administrative act, even in the event of issuing a favourable administrative act, per se a violation of subjective rights: "In order that the legitimacy of an administrative act be disputable, a person must know the reasons for issuing that act. Otherwise the exercise of the constitutional right of action, which also encompasses challenge of the legitimacy of such reasons, would be rendered impossible. The order in question has been issued in violation of the right to know and dispute the essential basis of refusal." In addition, the Supreme Court concluded, in the same case, that the right to equal treatment had been violated: "As no reasons were indicated for not granting citizenship to the claimants while the refusal to grant citizenship to others was substantiated by reasons, this constitutes unequal treatment, which is in conflict with the equal treatment principle."⁶⁶

2.1.4.3. Administrative Acts with Collateral Effect

Administrative acts with collateral effect are those influencing one person favourably and another unfavourably at the same time, but the unfavourable effect is not yet burdening, as was the case with the addressee theory,⁶⁷ i.e. the unfavourable effect is not in conflict with general freedom. In such event, the claimant must demonstrate that a claimant's specific right has been violated — the claimant has the so-called right of defence. In this aspect, no general criteria exist, and environmental law⁶⁸ and building law are among particularly problematic fields, in which the collateral effect of permits under administrative law can reach both closer and more distant neighbours.

When a preference (activity licence, tax allowance, subvention, concession) granted to a competitor is disputed, the question will arise of whether this constitutes only a prejudice to economic interests or also violates subjective rights in the case of objective conflict with law. In Estonia, this could be regarded only in terms of restricting the freedom of enterprise, set out in § 31 of the Constitution, or ignoring the principle of equal treatment. The former usually cannot be used as an argument because § 31 of the Constitution affords protection to, not against, the enterprise. However,⁶⁹ § 31 of the Constitution may offer protection when activities in the given field are precluded or rendered meaningless by a preference granted to a competitor; but a mere decrease in income will not be sufficient for this purpose. As equal treatment of market players is one of the conditions for fair competition, a person can indeed have resort thereto in disputes concerning competition. However, this constitutes a basis for disputing not the preference granted to the competitor but rather the refusal to grant a preference to the claimant if no legitimate grounds for differentiated treatment exist. And indeed,

problematic cases have emerged in Estonia with regard to preferences granted to competitors. For example, the owner of a competing radio station disputed a Directive of the Minister of Culture, whereunder Eesti Raadio, an institution under public law, was allowed to use an additional radio frequency area. The Supreme Court, however, took the position that on the basis of the public-law status of Eesti Raadio, the equal treatment principle had not been violated.⁷⁰

2.2. ACTIONS FOR DECLARATORY JUDGEMENT

In Estonian law, the limitation of the circle of persons entitled to turn to the administrative court by the criterion of subjective rights protection extends only to actions for avoidance and actions for performance. In accordance with the second sentence of § 7(1) of the ACPC, a justified interest is sufficient for filing an action for declaratory judgement. In this aspect, the new Code has taken a remarkable step towards expanding the right of action — in the Code of 1993, actions may be filed only by a person who finds that his or her rights or freedoms have been violated by the activities of the administration (§ 5(1))⁷¹. Expansion of the right of action was not among the independent objectives of establishing the new Code. By § 6(3) 3) of the ACPC, the scope of application of actions for declaratory judgement was expanded by allowing submission of applications to administrative courts for ascertaining the existence or absence of relationships under public law. It would be erroneous to make that option available only for the purpose of protecting subjective rights. The wording of § 43(1) of the German VwGO, which served as one of the comparative models in drafting the new ACPC, also expressly provides for actions for declaratory judgement only in the event of justified interests but the subjective rights protection requirement is also applied thereto by analogy with actions for avoidance and actions for performance. In the event of actions for declaratory judgement in German administrative procedure, justified interests are only a precondition additional to violation of rights.⁷² Under the new Estonian ACPC, however, the subjective rights protection principle should not be applied to actions for declaratory judgement by analogy. If a person does have justified interests but that person's subjective rights have not been violated, that person cannot demand that the administrative act be set aside but may apply for declaring the administrative act unlawful, like for the ascertainment of any other fact in public law. In this aspect, German professional literature has noticed the danger that when the right of action is expanded, actions for declaratory judgement may become a shortcut with regard to avoiding actions for avoidance and actions for performance, which are regulated under more stringent admissibility requirements.⁷³ R. Wahl, on the other hand, sees no harmful consequences in this, as in his opinion, the legal consequences

of a successful action for avoidance or action for performance are sufficiently different from those resulting from an action for declaratory judgement. An action for declaratory judgement is a declaration which need not result in setting aside the administrative act or an obligation to issue an unissued administrative act. In settling an action for declaratory judgement, the administrative court will much less intervene in the executive's activities, and therefore, the less stringent restrictions on submission of actions for declaratory judgement are consistent with the system logic.⁷⁴

Actions for declaratory judgement with a wider availability of initiative cannot, however, be regarded as popular actions in Estonian administrative procedure. Actions for declaratory judgement are actions based on interests rather than popular actions. Although justified interest as a criterion for creation of the right of action expands the circle of persons having the right of initiative, it does not make it unlimited. The presentation of a popular action is not barred by any obstructions relating to the claimant but two aspects are still required for justified interests: first, certain personal relationship with the contested act, and second, the need for ascertainment, i.e. the presumed advantage of ascertaining a legal fact in protecting the claimant's interests.⁷⁵

2.2.1. Personal Connection

Estonian administrative courts are yet to open the meaning of the personal connection aspect of justified interests. On the basis of the experience gained by other countries, it can still be expected that the conception of justified interests will not include just any interests pointed out by the claimant but rather only those worth protection under legal order. Economic, personal, cultural or ideal interests may be taken into consideration.⁷⁶ In French administrative procedure, which is aimed at objectively controlling the legitimacy of the administration's activities, the existence of interest (*intérêt pour agir*) is the main criterion for the right of action. The interest must be direct and personal (*intérêt direct et personnel*).⁷⁷ In this field, the French regulation of the right of action has strongly influenced the law of the European Union.⁷⁸ Actions against legislation adopted by an institution of the European Union may be filed with the Court of Justice by the addressees but also by third parties who are directly and personally influenced by the piece of legislation in such comparable manner as is the addressee.⁷⁹ The direct nature of personal contiguity in European law must manifest itself in the direct effect of the piece of legislation, i.e. the creation of influence must not require adoption of additional legislation, except when the issuer of the implementing act has no independent space to decide.⁸⁰ In order to prove personal contiguity under French as well as European law, the claimant must demonstrate that the claimant belongs in the group of persons concerned, unless the claimant is a direct addressee of the administrative measure in dispute.⁸¹

Merely being a national of a state does not provide the right to challenge any act of the state, as this would lead to popular action.⁸²

2.2.2. Need for Ascertainment

In addition to personal contiguity, a grant of an action for declaratory judgement must provide the claimant by a real advantage. An admission that an administrative act is unlawful need not result in any consequences to even that person whose rights are violated by such act. For example, the person has no demand to set aside the unlawful administrative act which has come into effect.

This aspect is similar to the requirement of legitimate interest in § 43(1) of the VwGO as it is regarded as additional to the subjective rights violation requirement. In order to bring an action, a mere uncertainty in the claimant's sphere of interests is not sufficient: there must be a specific need to determine the circumstances, such as in a dispute between the claimant and an administrative body in a question which is of importance to the claimant. This may arise when, for example, the administrative body intends to begin the procedure of enforcing a void administrative act.⁸³ With regard to terminated legal relationships, justified interests may exist upon continuance of legal influence, e.g. upon the danger of recurrence of an unlawful act, upon a need for rehabilitation or in the event of claim for damages.⁸⁴

3. Criticism of the Right of Action Provisions

3.1. INFLUENCE OF THE LAW OF THE EUROPEAN UNION

In criticising the system of subjective rights protection, influences arising out of the law of the European Union have often been used as an argument. Owing to the accession negotiations, Estonian jurists cannot escape from determining these influences on Estonian administrative procedure. The influence forcing to consider expansion of the right of action has been caused by the organisation of enforcement of EU legislation. The law of the European Union is mostly implemented by bodies of the Member States themselves (indirect enforcement), and disputes arising in that regard are, to a large extent, also settled in national courts of the Member States.⁸⁵ In order to ensure legislative implementation by the Member States, many acts provide for the persons concerned the opportunity of having recourse to national courts. The criteria of the right of action are often prescribed as similar to the conditions for having recourse to judicial institutions of the EU — thus these criteria are wider than in the countries which apply the system of subjective rights protection. "Legal positions created by Community law may not be provided with less advantageous conditions in national adjective law regardless of what is regarded as such advantages [provided to individuals] by Community law."⁸⁶ Fields in which

such developments can be noted include granting of subventions (with regard to competitor actions), state procurements, environmental protection and agricultural law.⁸⁷ In many aspects, the confrontation between national and Community law can be removed by expanding the sphere of subjective rights on account of the positions protected under Community law.⁸⁸ Failing this, the body of EU provisions ensuring the right of action can also be treated as specific regulation which does not influence purely national competence for action. At the same time, regarding the increasing role of Community law, an implementation of two parallel competence for action models is of doubtful reasonableness.

On the other hand, in analysing the problem fields of German administrative procedure discussed by e.g. C. D. Classen, the conclusion can be reached that upon Estonia's accession to the European Union, the conflict of right of action provisions would maybe not be so serious as it was in the case of Germany. As mentioned above, the equal treatment requirement substantially subjectivates provisions concerning the grant of preferences by the state. Provisions of environmental law are subjectivated by § 28 and 53 in the fundamental rights Chapter of the Constitution.⁸⁹ In implementing the law of the European Union, the phrase "rights and freedoms" contained in § 7(1) of the ACPC should be interpreted as closely as possible in accordance with Community law, and not necessarily in accordance with the protection norm theory.⁹⁰ Moreover, the law of the European Union may not require that recourse to courts be necessarily permitted in the form of actions for avoidance; this is not required either by § 15(1) of the Constitution, concerning protection of subjective rights. Although the introduction of two models in parallel would be unreasonable, special regulation of the right of action may, however, be provided in certain fields, e.g. environmental law.

3.2. NEED TO RESTRICT RIGHTS OF ACTION

Regardless of the certain expansion of the competence for action with regard to actions for declaratory judgement, Estonian administrative procedure will still remain oriented towards the protection of the rights of individuals. Leaving out the above-discussed problems relating to European integration, a comparative analysis will nevertheless bring about the question of whether the system of subjective rights protection is the best solution for Estonia. Maybe the activities of Estonian administrative courts should be regarded in future as a security for the principle of legitimacy of administration, just as the opportunity to refer to national courts is regarded as a factor coercing into enforcement of the law of the European Union. After all, the general legitimacy of administration is aimed at ensuring the liberty of individuals. Likewise, popular actions should not be regarded undesirable. Despite that, opinions prevalent in scientific legal literature of the countries

applying the system of subjective rights protection are opposed to expanding the right of action.

The need to protect administrative courts from excessive amounts of actions is often used as an argument for the subjective right of action model. The effect that restricting the competence for action produces on the number of actions is, however, doubtful. Even inadmissible actions reach administrative courts and, instead of dealing with essential questions, disputes are held over competence for action. Even this can pass through more than one instances of court and waste the courts' time as much as or even more than settlement of problems under substantive law. Moreover, evaluation of additional admissibility requirements lays an additional burden on the courts — given, particularly, that violation of subjective rights fails to be a category of very clear definition and judges have to waste more of their energy on substantiation.⁹¹

The argument that limiting the competence for action to subjective rights protection is necessary for increasing the importance of subjective rights in comparison with other interests in legal order cannot be considered very seriously either.⁹² The advocates of that position are of the opinion that those enjoying a subjective right to demand certain action from the state cannot be placed in the same position with those who only want the state to adhere to the applicable law. The argument is inappropriate in that form, as expansion of the right of action would improve, not impair, an individual's position with regard to the state power.⁹³ On the other hand, it may be applicable in relationships involving protection of third persons' rights. In simplified terms, only the subordination relationship between the administration and a citizen is, as a rule, taken as a basis in administrative law. In real terms, however, the application of administrative law must additionally take into consideration the colliding interests of different individuals, which results in the involvement of third persons in administrative disputes. It is possible that a person turns to the court only out of interest, spite or a wish to attract political attention but the grant of such action would cause a deterioration in another's rights. In many events, they should be protected in Estonian legal circumstances regardless of the fact that the administrative act underlying such rights is unlawful (on the basis of lawful expectancy or protection of ownership). It is true, however, that, in this regard, the European Court of Justice has attributed more priority to efficient implementation of Community law.

3.3. SYSTEM ARGUMENTS

The conception proceeding from system decisions of the administrative court procedure and presented in comments by R. Wahl, seeks arguments for subjective rights⁹⁴ protection from the connection between the right of action and other fundamental decisions in the administrative process.

The minimum standard of the right of action is consti-

tuted by the fundamental right to judicial protection in case of violation of subjective rights. As mentioned above, the requirement of subjective rights protection does not preclude more generous opportunities of action. The problem with judicial control over administration is, however, that of separate and balanced powers. Under the separation of powers principle, one branch of power may not be provided with arbitrary competence with regard to another branch. The mutual control between branches of power must ensure the protection of individuals' rights and freedoms without breaking the balance between the branches of power. Interference with the activities of another branch must be minimal in order to ensure the protection of individuals. General control exercised by the courts (i.e. judges separated from the legislative and executive powers) over the activities of the administration is not an inherent part of the mutual control of powers principle nor a natural function of judicial power. The initial function of the courts was limited to general judicial functions (civil and criminal cases), protection from violation of subjective rights by the executive was added later, when the rule of law principle was rooted.⁹⁵ The system of objective control of administration, characteristic of France, originates from the very self-control of the administration — *Conseil d'État*, the highest instance of the administrative court system, is a control authority that has grown out of the executive.⁹⁶

Evaluation of the legitimacy of the administration's activities depends much upon considering different interests and values. When protection of individuals' rights is not necessary, public interests may be given more weight in making the evaluation decisions, the matter may be reduced more to political decisions. Under the separation of powers principle, pursuits should undoubtedly be directed towards the ideal, in which case political decisions are taken by the parliament. It is, however, impossible to reach the pure ideal model, as the administration will remain confined to the position to concretise general decisions of the parliament. When no restrictions of individuals' rights are involved, it would be wrong to entrust administrative courts with absolute control over using the space to decide. The administrative court system cannot be placed on the same level of specialisation as the administration. In addition, important role in the realisation of powers in considering the public interests is played by the political control exercised over the executive by ministers and, through them, the parliament. Political control over courts is, however, precluded under the Estonian model of separate powers. Thus, in expanding the competence for action, the scope of administrative judicial control or at least the arsenal of powers vested in administrative courts must be restricted.

One has to agree with K. Merusk that discretion can be exercised only under lawful authorisations and that discretion is a question of law, i.e. a question of abidance by

laws.⁹⁷ The fact that, in exercising discretion, the administration is tied to the discretion rules does not necessarily result in judicial control thereover. In Estonian constitutional order, the administration's activities are subjected to judicial control by the requirement of judicial protection of subjective rights (§ 15(1) of the Constitution). "This also applies [...] to cases when the administration, in exercising discretion or applying undefined legal concepts, violates persons' rights and freedoms."⁹⁸

It must be taken into account that judicial control always functions with a temporal delay after the administration's activities. By the moment of entry into force of the judgement, the objective reality may have already been significantly changed by the initial decision of the administration. Removal of an offence retroactively may in many cases be much more burdensome than sustaining the initial decision. Again, an example can be pointed out from the procedure of privatisation, reverse enforcement of which may result in substantially more serious consequences to the state than possible damage caused by the unlawfulness of privatisation.⁹⁹ Unless subjective rights have been violated, sustainment or retroactive removal of an unlawful decision should depend on the administration's discretion. Thus, in the case of actions for declaratory judgement, the expansion of right to initiative is accordant, because merely declaring an administrative act unlawful under the new ACPC does not put the administrative body under an obligation of annulment or reverse enforcement of the act. The action for avoidance, granting which would penetrate most deeply into the sphere of administrative power, is particularly characteristic of the system of subjective rights protection¹⁰⁰ without its existence being required *per se* by § 15(1) of the Constitution.¹⁰¹

Conclusion

In Estonia, the main elements of the reformed administrative procedure, including the body of provisions concerning the competence for action, are designed on the basis of the model of subjective rights protection. The right of action is the condition of admissibility of an action, verified in making the substantial adjudication after having discussed the case at a hearing. Under the principle of investigation, the court is not only bound by the claimant's allegations on violation of subjective rights but must also determine the possible violation under its official duties.

Actions for avoidance and actions for performance, as the major categories of action, are available in the event of violation of the claimant's subjective rights. In order to determine a violation of subjective rights, account must be taken of the protection norm theory by checking whether:

- (1) the violated provision creates a subjective right or simply a favourable position;
- (2) the subjective right in question is vested in the claimant;

(3) any connection exists between the administrative act and the violation of subjective rights.

The addressee theory is applicable to Estonian administrative procedure: the addressee of an administrative act that decreases rights or increases obligations may be regarded as competent for action even without considering the general criteria. Besides the specific rights of defence and claim, account must be taken of the equal treatment principle and the requirement to indicate reasons for an administrative act in the event of challenging administrative acts concerning refusal to grant preferences or having a collateral effect. In ascertaining the right of action, fundamental rights may usually be regarded as subjective public rights.

Actions for declaratory judgement are available in the event of justified interests — this expands the circle of persons competent for action but also requires them to be in an actual need for judicial statement in order that the action be granted.

In near future, it will not be directly necessary, in further development of the administrative court procedure, to amend the fundamental rules for the competence for action; accession to the European Union should not make it necessary either. Possible requirements more favourable with regard to the claimant can be met by means of provisions regulating the right of initiative in respect of actions for declaratory judgement.

The decision in favour of the subjective rights protection has been induced in Estonia by the fundamental right of recourse to courts when one's rights have been violated (§ 15(1) of the Constitution) and this applies in accordance with the principle of separate and balanced powers (§ 4 of the Constitution). However, this does not preclude an expansion of the competence for action in specific fields of activity.

Notes:

¹ An administrative court system related to courts of general jurisdiction but acting under separate rules of procedure was created in Estonia in 1919: the year when the Administrative Court Procedure (AKK - RT 1919, 10, 23) was also adopted. For further information about administrative procedure in pre-Soviet occupation Estonia, q.v.: A.-T. Kliimann. *Haldusprotsess (Administrative Procedure)*. Akadeemilise Kooperatiivi Kirjastus. Tartu, 1937.

² The Administrative Court Procedure Code - RT (Riigi Teataja = State Gazette) I 1993, 50, 694; 1994, 16, 290; 28, 425; 1995, 29, 358 and 359. For comments thereon q.v.: K. Merusk. *Halduskohtu mõiste, organisatsioon ja pädevus haldusvaidluste lahendamisel*. (The Concept, Organisation and Competence of Administrative Court in Settlement of Administrative Disputes.) *Juridica* No. 2 1994, p. 47.

³ Riigikogu = the parliament of Estonia.

⁴ The Administrative Court Procedure Code - RT I 1999, 31, 425.

⁵ About the changes, q.v.: I. Pilving. *Halduskohtute korraldus ja pädevus halduskohtumenetluse seadustiku eelnõus*. (Organisation and Competence of Administrative Courts in the Draft Administrative Court Procedure Code.) *Juridica* No. 10. 1998, p. 515; and K. Merusk. *Halduskohtumenetluse seadustiku eelnõu olulisematest muudatustest menetluses*. (About the More

Important Amendments to the Draft Administrative Court Procedure Code as Regards the Procedure.) *Juridica* No. 10. 1998, p. 523.

⁶ The Letter of Explanation for the Administrative Court Procedure Code. Ministry of Justice, 1998, p. 1. Q.v. <http://www.riigikogu.ee/ems/index.html>

⁷ K. Merusk. *Halduskohtu mõiste...*, the above-cited work, p. 47.

⁸ About system decisions (German *Systementscheidung*) in the administrative procedure generally and the right of action as one of the aspects of the system decision, q.v.: Fr. Schoch. *Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluß des Gemeinschaftsrechts*. *Neue Zeitschrift für Verwaltungsrecht*. 1995, 5, p. 457; Fr. Schoch, E. Schmidt-Abmann, R. Pietzner (Hrsg). *Verwaltungsgerichtsordnung. Kommentar*. Beck. Stand Mai, Munich, 1997. *Vorb § 42 Abs 2 Rn 4-6, 11 ff.*

⁹ A.-T. Kliimann, the above-cited work, p. 206.

F. Hufen recommends that the term "active legitimation" originating from the civil process not be used in the administrative procedure, as it is inaccurate in its meaning. — F. Hufen. *Verwaltungsprozeßrecht*. 3., überarb. Aufl. Beck, Munich, 1998, p. 452.

¹⁰ I. Koolmeister. *Protsessiosalised halduskohtumenetlused*. (Parties to Administrative Court Procedure.) *Juridica* No. 2. 1994, p. 51. A.-T. Kliimann, the above-cited work, p. 206.

¹¹ Fr. Schoch, E. Schmidt-Abmann, R. Pietzner (Hrsg.), the above-cited work, *Vorb § 42 Abs 2 Rn 10*.

¹² This classification is tentative because, as indicated above, the right of action may be regulated differently also on national level.

¹³ About the relationship between the legitimacy of administration principle and subjective rights, q.v.: H. Maurer. *Allgemeines Verwaltungsrecht*. 11, überarb. und erg. Aufl. Beck, Munich, 1997, pp. 149 and 150.

¹⁴ Cf.: § 42 II of *VwGO* (German Administrative Court Procedure). *Verwaltungsgerichtordnung vom 21.1.1960 (BGBI. I p. 17)*.

¹⁵ J. Koch. *Die Verfahrensarten im französischen Verwaltungsprozeß*. — *Verwaltungs-Archiv*, 1998, 4, p. 566.

¹⁶ D. Ehlers, *Die Klagebefugnis nach deutschem, europäischem Gemeinschafts- und U.S.-amerikanischem Recht*. *Verwaltungs-Archiv*, 1993, 2, pp. 168-169.

¹⁷ Fr. Schoch, E. Schmidt-Abmann, R. Pietzner (Hrsg.), the above-cited work, *Vorb § 42 Abs 2 Rn 36*.

¹⁸ In Germany, this has led to a situation in which the circle of persons competent to file actions must be regarded differently on the basis of whether a violation of national law or Community law is in question. D. Ehlers, the above-cited work, p. 156. J. Kokott. *Europäisierung des Verwaltungsprozessrechts*. *Die Verwaltung*, 1998, 31, p. 348.

¹⁹ An administrative act [...] is any order, directive, decision, prescription or other legal act given by an authority [...] of public administration for the regulation of any individual case in relationships under public law. (ACPC § 4(1).

²⁰ E.g. a county governor may file with an administrative court a protest against a legislative act of the local government when the latter itself has not abided by the county governor's proposal to align it with law (§ 85 (4) of the Government of the Republic Act. - The Government of the Republic Act, RT I 1995, 94, 1628; 1996, 49, 953; 88, 1560; 1997, 29, 447; 40, 622; 52, 833; 73, 1200; 81, 1361 and 1362; 87, 1468; 1998, 28, 356; 36/37, 552; 40, 614; 107, 1762; 111, 1833; 1999, 10, 155; 16, 271 and 274; 27, 391.

²¹ Legal persons are the state and local governments themselves.

²² Adjudication of the Supreme Court Administrative Council (RKHK) 3-3-1-19-97, RKHK 3-3-1-21-97, RKHK 3-3-1-28-97.

²³ An action may be filed with administrative courts by a person who finds that his or her rights or freedoms have been violated by an administrative act (first sentence of § 7(1) of the ACPC of 1993).

²⁴ K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest*. (About Estonian

Constitutional Law.) Õigusteabe AS Juura, Tallinn, 1998, p. 201.

²⁶ Q.v. paragraph 2.2 below.

²⁷ A.-T. Kliimann, the above-cited work, p. 214.

²⁸ In German administrative procedure, the existence of this condition is checked in two stages: the possibility of violation of the right in the event of admissibility of the action and the causal relationship between the administrative act and the violation if the action is justified. Q.v.: F. Hufen, the above-cited work, pp. 276 and 482.

²⁹ These requirements have been provided separately in § 10 of the ACPC. Fulfilment of the requirements is checked by the administrative court in preparing the judicial proceeding of the case (§ 11 (1) 1) of the ACPC). When an action fails to be in conformity with the requirements provided in § 10 of the ACPC, the court will give a time-limit for removing such deficiencies. When the deficiencies are not removed, the action will be dismissed under a court order without examination.

³⁰ RKHK 3-3-1-25-99. This may also be concluded from adjudications RKHK 3-3-1-10-95, RKHK 3-3-1-19-97, RKHK 3-3-1-24-98.

³¹ K. Merusk, Halduskohtu mõiste..., the above-cited work, p. 47.

³² RKHK 3-3-1-4-95. During the first years after the administrative court system was restored, courts of lower instance disregarded that rule in many cases. Courts declared administrative acts unlawful without verifying whether the admissibility requirements for actions were satisfied or not.

³³ RKHK 3-3-1-24-98.

³⁴ K. Merusk, R. Narits, the above-cited work, p. 201. Q.v. also: RKHK 3-3-1-12-94, RKHK 3-3-1-19-97, RKHK 3-3-1-28-97.

³⁵ Q.v. also: note 38.

³⁶ The position has been stated in the legal analysis of the Estonian Constitution. - R. Alexi. Põhiõigused Eesti põhiseaduses. (Fundamental Rights in the Estonian Constitution.) Kiel, 1997, p. 27.

³⁷ H. Maurer, the above-cited work, p. 149.

³⁸ Ibid. p. 152.

³⁹ D. Ehlers, the above-cited work, p. 145 (Fußn 25). H. D. Jarass. B. Pieroth. Grundgesetz für die Bundesrepublik Deutschland. Kommentar. 4. Aufl. Beck. Munich, 1997, p. 339.

⁴⁰ H. Maurer, the above-cited work, p. 149.

⁴¹ H. Köhler. Tsiviilseadustik. Üldosa. (Civil Code. General Part.) 23rd fully revised version. Õigusteabe AS Juure. Tallinn, 1995, p. 29.

⁴² According to R. Ihering. Q.v.: R. Narits. Õiguse entsüklopeedia. (Encyclopedia of Law.) Õigusteabe AS Juura. Tallinn, 1995, p. 60.

⁴³ C. D. Classen. Die Europäisierung der Verwaltungsgerichtsbarkeit: eine vergleichende untersuchung zum deutschen, französischen und europäischen Verwaltungsprozeht. Mohr. Tübingen, 1996, p. 40.

⁴⁴ In such event, this would constitute a so-called legal reflex (Rechtsreflex). A legal reflex is only factual burdening or favourable (not intended as normative) functioning of a legal provision. E. Eyermann. Verwaltungsgerichtsordnung. Kommentar. 10., völlig neu erarb Aufl. Beck. Munich, 1998, p. 268. H. Maurer, the above-cited work, p. 152.

⁴⁵ F. Hufen, the above-cited work, p. 280.

⁴⁶ H. Bauer. Altes und Neues zur Schutznormtheorie. Archiv des öffentlichen Rechts, 1986, 113, p. 590.

⁴⁷ Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 54.

⁴⁸ K. Merusk, I. Koolmeister. Haldusõigus. (Administrative Law.) Õigusteabe AS Juura. Tallinn, 1995, p. 54.

⁴⁹ R. Alexi, the above-cited work, p. 22.

⁵⁰ Except, of course, filing the action on behalf of the principal.

⁵¹ E. Eyermann, the above-cited work, pp. 268-269.

⁵² Until now, such opportunity has not been provided for in any Acts. The provisions of 1993 are much more generous in this regard; the opportunity to refer to protection of one's members may also be provided in the statute or Articles of Association, in addition to the law. However, general provisions of the statute will not suffice, e.g. "the objective of the apartment association is to represent common interests of its members". The Supreme Court has stated that "the right to turn to the court in the interests of one's members or other persons must be provided *expressis verbis*." — RKHK 3-3-1-40-96.

⁵³ F. Hufen, the above-cited work, p. 301.

⁵⁴ F. Eyerman, the above-cited work, p. 274.

⁵⁵ I. Koolmeister, the above-cited work, p. 52.

⁵⁶ RKHK 3-3-1-19-97, RKHK 3-3-1-21-97.

⁵⁷ RKHK 3-3-1-34-96, RKHK 3-3-1-32-97.

⁵⁸ In the Estonian context, a burdening administrative act is an administrative act that imposes on the addressee a legal obligation or interferes with the addressee's rights. About burdening administrative acts in German law, q.v.: H. Maurer, the above-cited work, p. 203.

⁵⁹ In Estonia, under § 19(1) of the Constitution, everyone has the right to free self-realisation.

⁶⁰ D. Ehlers, the above-cited work, p. 146.

⁶¹ The addressee of an administrative act means any persons about whose rights or obligations the administrative act has been issued. However, an administrative act can also influence third parties' rights but as the issuer of the administrative act has not intended to change the sphere of such persons' rights, such persons cannot be treated as addressees of the administrative act.

⁶² "Specific obligations are imposed on the said persons by that administrative act." — RKHK 3-3-1-27-96.

⁶³ D. Ehlers, the above-cited work, p. 147.

⁶⁴ F. Hufen, the above-cited work, p. 278.

⁶⁵ Permits issued in the course of supervision, whereunder a person is authorised to develop activities principally permitted under general freedoms or fundamental rights but restricted by law — e.g. building permits, activity licences. H. Maurer, the above-cited work, pp. 205-208.

⁶⁶ RKHK 3-3-1-5-97.

⁶⁷ H. Maurer, the above-cited work, p. 204.

⁶⁸ Q.v.: Fr. Schoch, the above-cited work, p. 458.

⁶⁹ C. D. Classen, the above-cited work, p. 44.

⁷⁰ RKHK 3-3-1-14-99.

⁷¹ The ACPC of 1993 indeed provides only for the opportunity to file actions for declaratory judgement, more specifically, the opportunity to demand that a legislative act be declared unlawful (§ 20(1) 1)). The administrative court is authorised only to declare the contested or protested legislative act unlawful, in full or in part.

⁷² In the event of German appeals for ascertainment under VwGO § 43 (1), q.v.: E. Eyermann, the above-cited work, p. 309. R. Wahl has taken a critical position (the above-cited work, § 42 Abs 2 Rn 23 ff.) H. Rupp. Kritische Bemerkungen zur Klagebefugnis im Verwaltungsprozeß. Deutsches Verwaltungsblatt, 1982, 1, p. 146. A similar position regarding the right of action under the applicable ACPC was taken in adjudication RKHK 3-3-1-28-99: " Under § 5(1) of the ACPC, anyone may file an action against an administrative act only when he or she has justified interests therefor."

⁷³ D. Ehlers, the above-cited work, p. 144.

⁷⁴ Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 25, 26.

⁷⁵ Principally, popular actions are also unavailable in e.g. France and the

European Court of Justice, where interest or personal connectedness are the criteria for the right of action.

⁷⁶ In the event of German actions for declaratory judgement under VwGO § 43(1), q.v.: E. Eyermann, the above-cited work, p. 309. About *recours pour excès de pouvoir* - the principal action category in France — q.v.: C. D. Classen, the above-cited work, p. 59.

⁷⁷ J. Koch, the above-cited work, p. 566. C. D. Classen, the above-cited work, p. 59. R. Wahl, the above-cited work, p.10.

⁷⁸ J. Kokott, the above-cited work, p. 348.

⁷⁹ C. D. Classen, the above-cited work, p. 66.

⁸⁰ *Ibid.* p. 67.

⁸¹ J. Koch, the above-cited work, p. 567. Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. *Vorb § 42 Abs 2 Rn 124*.

⁸² On the other hand, for example, any taxpayer may dispute an increase in the tax rate. - J. Koch, the above-cited work, p. 567.

⁸³ F. Hufen, the above-cited work, p. 373 ff.

⁸⁴ E. Eyermann, the above-cited work, p. 310-311.

⁸⁵ Fr. Schoch, the above-cited work, p. 459 ff.; J. Kokott, the above-cited work, p. 335.

⁸⁶ C. D. Classen, the above-cited work, p. 80.

⁸⁷ *Ibid.* pp. 73-76.

⁸⁸ J. Kokott, the above-cited work, p. 349.

⁸⁹ Section 28 of the Constitution establishes everyone's right to the protection of health. Section 53 imposes on everyone the obligation to preserve environment.

⁹⁰ For the same about § 42(2) of the VwGO, q.v.: C. D. Classen, the above-cited work, p. 80.

⁹¹ H. H. Rupp, the above-cited work, p. 145.

⁹² Although it can be agreed that the recognition of subjective public rights as such distinguishes a democratic rule of law from a rule of fear, absolutism, administrative state, etc.. About the importance of subjective public rights, q.v.: K. Merusk, I. Koolmeister, the above-cited work, pp. 51–52. H. Maurer, the above-cited work, pp. 150-151.

⁹³ C. D. Classen, the above-cited work, p. 85.

⁹⁴ Subsection 15(1) of the Estonian Constitution; § 19(4) of the Constitution of the Federal Republic of Germany (GG).

⁹⁵ Fr. Schoch. *Vorb § 42 Abs 2 Rn 2-3*. About transition from administrative self-control to judicial control, q.v.: F. Hufen, the above-cited work, p. 30.

⁹⁶ Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. *Vorb § 42 Abs 2 Rn 7*.

⁹⁷ K. Merusk. *Administratsiooni diskretsioon ja selle kohtulik kontroll. (Discretion of and Judicial Control Over the Administration.)* Õigusteabe AS Juura. Tallinn, 1997, p. 102.

⁹⁸ *Ibid.* pp. 102-103.

⁹⁹ *Adjudication of the Tallinn Circuit Court, 2-3-69-99*.

¹⁰⁰ Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. *Vorb § 42 Abs 2 Rn 8*.

¹⁰¹ For the same assertion about § 19(44) of the GG, q.v.: Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. *Vorb § 42 Abs 2 Fußn 12*.