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CONSIDERATIONS REGARDING THE STRUCTURE AND LIMITS OF EFFICIENCY IN THE ADMINISTRATIVE PROCEDURE

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Abstract:
The paper deals to the valid relation of efficiency, in its potential - though limited - application, with other competing principles in Administrative Law. It is focused on finding arguments for removing of the prior restraint from subordinating the economic efficiency in legal significance, as well. As a result, it was necessary to analyse the dogmatic subordination of the meta-legal efficiency and to establish the limits of the efficiency in the administrative procedure.

Keywords: public interest, administrative law**,** theoretical and methodological horizon to public law.

JEL Classification: K23, K39

Administrative measures are efficient when the goals they serve for the public interest are so important, as to justify the consumption of time, human effort and social resources and these goals could not be achieved through a lower disposal of resources.[2] Scarcity of resources should be distributed in competing possibilities of absorption/consumption in such a

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[2] BAER, *Schlusselbegriffe, Typen und Leitbilder als Erkenntnismittel und ihr Verhaltnis zur Rechtsdogmatik,* in SCHMlDT-AfiMANN/HOFFMANN-RlEM, Methoden der Verwaltungsrechts-wissenschaft, Baden-Baden 2004, 223 et. seq.

way that the maximum profit possible is produced. To what extent, however, by the application of provisions of administrative law are we allowed to weigh up, under inclusion of the economic principle of efficiency, as to what primarily constitutes a platform for a joint confrontation of principles of economy (minimal principle), use (maximal principle) and expediency (effectiveness)? What is the valid relation of efficiency, in its potential - though limited - application, with other competing principles in Administrative Law?

Furthermore, treating efficiency as a general principle regarding the whole spectrum of application of public law provisions, beyond its simpler version as merely a saving of resources, would equal - to a certain degree - juxtaposition with the thematic referring to the possibilities and the limits of the economic analysis of law[1].

Besides, it would be excess to requirements in the administration to process, in the critical way imposed by such a complex "instrumentalized" system as the economic example and to manage it by incorporating in its practice the possibilities and the restrictions of its methods.

It should be pointed out that decisions in favour of efficiency can easily lose their advantage because of the probably high cost to write and draw its content.

Reports about administrative economy and, thus, efficiency are concluded by the Constitutional provisions with regard to the competence of State Audit Council, in the principle of rational organisation of state operations and services, in the principle of viability, as well as in individual, mainly budgetary statutes. [2]

[This lecture will take the form of a thesis.]

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[1] For instance KIRCHNER, *Okonomische Theorie des Rechts,* Berlin / New York 1997; regarding Public Law Engel/Morlok, *Offentliches Recht als ein Gegenstand okonomischer For-schung,* Tubingen 1998.

[2] GROPL, *Haushaltsrecht und Reform, Haushaltsrecht und Reform. Dogmatik und Moglichkeiten der Fortentwicklung der Haushaltswirtschaft durch Flexibilisierung, Dezentralisierung, Budgetie-rung, Okonomisierung und Fremdfinanzierung,* Tubingen 2001, 329 et seq;. ORTMANN, *Die Fi-nanzwirksamkeit verfassungsgerichtlicher Entscheidungen im Spiegel der Rechtsprechung des Bun-desverfassungsgerichts,* Baden-Baden 2007, 564 et seq..

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A. The Environment of the Efficiency Reception

I. The Expansion of the Theoretical and Methodological Horizon to Public Law

Administrative law has considerable effects on resource allocations and can cause substantial transaction and information costs due to the distribution of rights and obligations. Different areas of public law attracted the attention of economic sciences, for instance by the introduction of the New Public Management theory into the public administration[1] or the use of cost-benefit analysis,[2] in particular in Environmental Law.[3]

Economics as a comprehensive term nowadays is used for a multiplicity of approaches aiming at analysing social institutions and consequently law and politics as phenomena of rational behaviour of individuals. Economic models could induce a better theoretical understanding of the multilayered problem areas of the public legal order. A normative requirement of economics, especially the New Institutional Economics, has emerged to develop instructions regarding the legal order by analyzing whether law and the jurisdiction achieve the politically given goals with the available means[4], so that they aim at pursuing the change of legal rules that are not efficient.

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[1] See DAHM, Das neue Steuerungsmodell auf Bundes- und Landerebene sowie die Neuordnung der offentlichen Finanzkontrolle in der Bundesrepublik Deutschland, Berlin
2004.

[2] GROPL, *Okonomisierung von Verwaltung und Verwaltungsrecht,* Verwaltungsarchiv 93 (2002), 459 et seq. FEHLING, Michael, *Kosten-Nutzen-Analysen als Mafistab fur Verwaltungsent-scheidungen,* Verwaltungsarchiv 95 (2004), 443 ff.

[3] ACKERMANN/HEINZERLING, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,* 150 University of Pennsylvania Law Review (2001/2002), 1553 et seq.; ADLER, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law,* 31 Boston College Environmental Affairs Law Review (2004), 591 et seq. This concerns the question, which qualitative and quantitative risks for humans and environment are we willing to accept for which economic use.

[4] So for instance LADEUR, *Die rechtswissenschaftliche Methodendiskussion und die Bewalti-gung des gesellschaftlichen Wandels. Zugleich ein Beitrag zur Bedeutung der*

Public Law makes references to the empirical sciences, commonly used in the legal system of the U.S.A.; its structural openness for social science approaches, is compatible with the theory and methodology of Public Law in European countries.[1] That favours the opinion that some contents of certain economic principles could be compatible with the methodological perception of Public Law.

II. Methodological Preparatory Work

Consequently, a structuring of a realization process which is in demand could unite the above mentioned different perspectives and disciplines. Andreas Vosskuhle suggests the following seven-level-model:

- analysis of motives for the inclusion of Economics as an empirical method;[2]
- determination of the real data for the analysis;[3]
- analysis of the political discussions and the conclusions and proposals from empirical sciences, as well as of the theoretical grounds and the relevant solutions for the crucial questions from the point of view of Economics[4] *(comp. certificates of pollution[1]);*

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okonomischen Analyse des Rechts, Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht 64 (2000), 60/93.

[1] See KIRCHNER, *The Difficult Reception of Law and Economics in Germany,* 11 International Review of Law and Economics (1991), 277 et seq.; also Susan ROSE-ACKERMANN, *The Economic Analysis of Public Law,* 1 European Journal of Law and Economics (1994), 53 et. seq..

[2] VOSSKUHLE, *Methode und Pragmatik im Offentlichen Recht. Voruberlegungen zu einem diffe-renziert-integrativen Methodenverstandnis am Beispiel des Umweltrechts,* in Bau-er/Czybulka/Kahl/Vosskuhle, Umwelt, Wirtschaft und Recht. Wissenschaftliches Symposium aus Anlafi des 65. Geburtstages von Reiner Schmidt, Tubingen 2002, 171/189.

[3] VOSSKUHLE op cit supra, 190

[4] *VOfiKUHLE,* Das Kompensationsprinzip. Grundlagen einer prospektiven Ausgleichsordnung fur die Folgen privater Freiheitsbetatigung - Zur Flexibilisierung des Verwaltungsrechts am Beispiel des Umwelt- und

- analysis of the compatibility of the above mentioned solutions based on the principles of public law[2];
- analysis of the criteria set as the basis of the solution; *whoever proposes the import of certificates of pollution by referring to the model of Economics, should recognize the basic admissions of the so-called Economic Example (homo oeconomicus, scarcity of resources and methodological individualism), compare the solution of certificates with other economic tools and be capable of counter argumentation;*
- analysis of the practical consequences of the solution chosen for the application of laws, the theory and the exercise of administrative discretion[3] (see further sub).

III. Formulation of Terms in an Interdisciplinary Approach

This means that law and economics maintain their independence concerning particular working methods and any justification and legalization requirements. At the same time a comparison between them can be ascertained; as it is:

Planungsrechts, *Tubingen 1999; STUER/SPREEN,* Emmissionszertifikate. Ein Pladoyer zur Einfuhrung marktwirtschaftlicher Instrumente in die Umweltpolitik, *Umwelt- und Pla-nungsrecht 1999, 161 et seq..*

[1] ACKERMANN/HEINZERLING, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,* 150 University of Pennsylvania Law Review (2001/2002), 1553 et seq.; ADLER, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law,* 31 Boston College Environmental Affairs Law Review (2004), 591 et seq..

[2] VOSSKUHLE op cit 9 supra, 192; SCHMIDT-JORTZIG, *Der Grundsatz der Wirtschaftlichkeit - Verfassungsrechtliche Determinanten*, in Butzer, Wirtschaftlichkeit durch Organisations-und Verfahrensrecht, Vortrage beim Symposium anlasslich des 65. Geburtstags von Prof. Dr. Friedrich E. Schnapp in Bochum, Berlin 2004, 17 et seq.; GAENTZSCH, *Gesetzmafiigkeit und Wirtschaftlichkeit der Verwaltung: Beifit oder vertragt sich das?,* Die offentliche Verwaltung 1998, 952 et seq.

[3] VOSSKUHLE op cit 9 supra, 193; comp. PETERS, Die Ausfullung von Spielraumen der Verwaltung durch Wirtschaftlichkeitserwagungen, Die offentliche Verwaltung 2001, 749 et seq..

1. analytical - empirical

as it is demonstrated by:

- the expansion of the economic analysis into areas of Budgetary[1], Public Service[2] and Administrative Procedural Law;[3]
- the constitutional consolidation of the economy principle;[4]
- the need to achieve the goals of the social state;
- the application in writing of the proportionality principle to restrictions of individual rights by legislative and administrative measures. The proportionality test and principle of equal treatment are applied primarily in order to treat questions referring to weighing up interest[5] by forming administrative decisions; that has led to surveys about the theoretical connection of proportionality to economic analysis.[6]

2. normative

A comparison between Constitutional Law and economic evaluations could be only presumed, if the economic view was at the same time constitutionally justified. Such estimation could probably result from

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[1] RISCHER, *Finanzkontrolle staatlichen Handelns. Wirtschaftlichkeit und Sparsamkeit als Pru-fungsmafistabe,* Heidelberg 1995.

[2] BATTIS, *Hergebrachte Grundsatze versus Okonomismus: Das deutsche Beamtenrecht in der Modernisierungsgefalle?*, Die Offentiche Verwaltung 2001, 309 et seq.

[3] WEISE, *Genehmigungsverfahren. Zwischen Markt und Norm* and GROSSEKETTLER, *Flexibili-sierung von Genehmigungsverfahren, Transaktionskosten und Koordinationseffizienz in dynamischer Sicht,* in Schmidtchen/Schmidt-Trenz, Vom Hoheitsstaat zum Konsensualstaat. Okonomische Analyse der Flexibilisierung von Genehmigungsverfahren, Baden-Baden 1999, 31 et seq. and 47 et seq.

[4] CHRISTONAKIS, *Das verwaltungsprozessuale Rechtsschutzinteresse,* Berlin 2004, 141 et seq.

[5] Comp. HALLER, *Die Verrechnung von Vor- und Nachteilen im Rahmen von Art. 3 Abs. 1 GG. Eine Untersuchung zur Kompensation von Grundrechtseingriffen,* Berlin 2007, 264 et seq.

[6] See FUHR, *Okonomische Effizienz und juristische Rationalitat. Ein Beitrag zu den Grundla-gen interdisziplinarer Verstandigung,* in: Gawel, Effizienz im Umweltrecht, 2001, 157/201 et seq..

an examination of the appropriateness of restrictive measures for the individual liberties.

Examining this parallelism would often prove to be inappropriate, since the mesh of applicable rules contains complex evaluations of the legislator and specialisations of certain constitutional principles.

In most fields of Public Law, except for - mainly - Public Procurement Law, the processes of evaluating competing interests cannot be replaced (or even supplemented) by numerical formulas, indicators, etc since, this way, the problem of promoting rationality would be simply removed, as well as the transformation of criteria into numerical data should be based on concrete assessments.[1]

Furthermore, particularly the regulating fields of individual rights appear to be susceptible to subordination by economic categories only under severe restrictions. *Thus, the fact that considerable social sources invested in public health are likely to be saved if obligatory genetic diagnostics were applied, cannot lead to weighing a claim of economic thought against human dignity.*[2]

IV. Favourable Circumstances for the Reception of Efficiency

Conflicts of evaluative judgments considering natural sciences and technology, for whose subordination in the legal order, no criteria have been developed.

The public legal order produces ever more rules of a programmatic nature, and final - non conditional - juridical structure.[3]

The Economic Theory of Constitution, having as an object the human rational behaviour from the point of view of Economics, gives the

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[1] HOFMANN, *Abwagung im Recht. Chancen und Grenzen numerischer Verfahren im Offentli-chen Recht,* Tubingen 2007.

[2] LINDNER, Franz Josef, *Rahmenbedingungen einer okonomischen Theorie des Offentlichen Rechts,* Juristenzeitung 2008, 957 et seq..

[3] SCHMIDTCHEN, *Effizienz als Rechtsprinzip,* Jahrbuch fur Nationalokonomie und Statistik 217/II (1998), 251/261.

possibility to control the actual achievements by the efforts of the executive to determine and promote the public interest by means of public law.[1]

B. Arguments for Removing the Prior Restraint from Subordinating the Economic Efficiency in Legal Significance

Lawyers react sensitively to the demand on economic rationality.[2] On the other hand, for some theoreticians, Economics takes a role as a reference science for Public Law.[3] On this basis, the following aspects in common can be primarily defined:

- the reference of efficiency regarding the relation of means to the goal is comparable to the structure of the proportionality test (see II 1 c, d);
- its method to evaluate legal interests is comparable;[4]
- there is a need to make the administrative control of expediency juridical;
- augmentative tendency to rationalize the legal order[5] common historical roots in the thought of Enlightenment with the require-

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[1] KIRCHGASSNER, *Okonomische Theorie der Verfassung,* in Mastronardi/Taubert, Staats-und Verfassungstheorie im Spannungsfeld der Disziplinen, Archiv fur Rechts- und Sozial-philosophie [ARSP], Beiheft 105, Stuttgart 2006, 75 et seq.

[2] For instance FEZER, *Aspekte einer Kritik an der economic analysis of law und am property rights approach,* Juristenzeitung 1986, 819 et seq. and *Nochmals: Kritik an der okonomischen Analyse des Rechts,* Juristenzeitung 1988, 223 et seq..

[3] LEPSIUS, *Die Okonomik als neue Referenzwissenschaft fur die Staatsrechtslehre?*, Die Verwaltung 32 (1999), 429 et seq..

[4] Comp. LACHMAYER, *Effizienz als Verfassungsprinzip: eine Maxime fur staatliches Handeln in Osterreich?,* in Recht und Okonomik, 44. Assistententagung Offentliches Recht in Jena 2004, Munchen 2004, 135/144.

[5] MORLOK, *Vom Reiz und vom Nutzen, von den Schwierigkeiten und den Gefahren der Okonomischen Theorie fur das Offentliche Recht,* in: Engel/Morlok, Tubingen 1998, 1/9; DENKHAUS, *Die neue Institutionenokonomik und das Governancekonzept - Zum Wandel der okonomischen Theorie und ihren Implikationen fur die Verwaltungsrechtswissenschaft,* in Recht und Okonomik. 44. Assistententagung Offentliches Recht, Jena 2004, Munchen 2004, 33/36.

ment to provide rational criteria for law and its application[1] legal nature of individual rights and goals determined by the public interest as *principles* (to be optimized);[2]

- advantages of Economics in favour of rationality as a decision forming method.[3]

C. Dogmatic Subordination of a Meta-legal Efficiency Term *I. Normative*

1. Equality

The compatibility test of a norm with the equality principle results in the evaluation of this norm questioning its objectivity.[4] Arguments within the frame of objectivity can refer to the aspect of efficiency. However, this does not involve a restriction on the basic possibility of the legislator to develop in each special case an objective criterion of differentiation that is not necessarily the most economic one. This consequence is also reasonable, since in the opposite case, the criterion of differentiation and its control of application would be mixed up.

2. Protection of Individual Property Rights

When the state is in danger of imposing additional taxes in order to face the consequences of omitting saving resources, it is not to be examined if a public obligation for protection of individual rights, such as property

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[1] WIEACKER, *Geschichtliche Wurzeln des Prinzips der verhaltnismafiigen Rechtsanwendung,* in Festschrift fur Robert Fischer, 1979, 867/878.

[2] ALEXY, *Theorie der Grundrechte,* Frankfurt a.M. 1985, 79 et seq., 143 et seq..

[3] VAN AAKEN, "*Public Choice*" *in der Rechtswissenschaft. Zum Stellenwert der okonomischen Theorie im Recht,* Baden-Baden 2003.

[4] MARTINI, *Der Markt als Instrument hoheitlicher Verteilungslenkung, Moglichkeiten und Grenzen einer marktgesteuerten staatlichen Verwaltung des Mangels,* Tubingen 2008, 210 et seq.

and the free development of personality are contravened, since the threat of infringements does not emanate from a third person.[1]

However, wasting resources could be potentially considered as insufficienty concerning the procedural dimension of the above property rights that has as content the prevention of their restriction, so that it constitutes an infringement.

II. Analytical

1. Possibility of Structural Equivalence to Proportionality Principle

a) Terminology of Proportionality and Efficiency

In accordance to the expanded perception of the proportionality principle are measures that may be an extra burden on the citizen's interests or rights; however, they have caused a much more important economic advantage in comparison to the limitations of the enjoyment of the corresponding subjective interest or right. That means practically that *an improvement of the position of underprivileged groups (= avoidance of infringements) should not* result in the deterioration of the goal-reaching level or the degree of burden on the position of others.[2] *An obviously high administrative cost can be the reason for the authorities to deny access to administrative information (German Freedom of Information Law/ Informationsfrei-heitsgesetz)*[3]

Efficiency and proportionality require rational evaluation in relations of means to goal. This is valid, because their application, on the one hand, is based on empirical estimation (is in effect for stages of suitability and necessity of the proportionality test), on the other hand, they

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[1] GERSDORF, *Offentliche Unternehmen im Spannungsfeld zwischen Demokratie und Wirtschaftlichkeitsprinzip. Eine Studie zur verfassungsrechtlichen Legitimation der wirtschaftlichen Beta-tigung der offentlichen Hand,* Berlin 2000, 460 et seq..

[2] Comp. MEfiERSCHMlDT, *Okonomische Effizienz und juristische Verhaltnismafiigkeit - Ge-meinsames und Trennendes,* in Gawel, Effizienz im Umweltrecht, Baden Baden 2001, 215; BIZER, *Die Okonomik der Verhaltnismafiigkeitsprufung*, Sofia-Diskussionsbeitrage zur Institutionenanalyse, Nr. 99-1, 2000, http.//www.sofia-darmstadt.de/Downloads_Diskussionbeitraege/ 1999/1-99.pdf

[3] Section 1 paragraph 2 sentence 3 of the German Freedom of information Law / in-formationsfreiheitsgesetz.

take place in relation of intense interaction (stage c of the proportionality test), provided that fulfilling one principle is not possible without the fulfilment of the other.

Efficiency and proportionality suggest methods of resolution of conflicts between objectives of administrative measures and decisions and allocated resources. Efficiency, as much as proportionality are terms without a core, they constitute methods to resolve the collision of justifying reasons to normative regulations with one another; methods to delimit an optimal distribution of resources among alternative ways of disposal.

They require an optimisation of the relation between expenses and goals. Hence they are turned to serve the rational action of a state in favour of individual rights being exercised.

Nevertheless, regarding their structure, they differ from each other. The proportionality presupposes the delimitation of competing goals in relation to the means that are to be chosen for seeking the goals; this it does not produce the goals in itself. The economic efficiency constitutes a goal to which the other goals are referred.

b) Suitability

An inadequate means is simultaneously not efficient, when the required resources do not bring profit, while they could be used for other, more profit promising alternatives.

c) Necessity

The proportionality, as much as the efficiency, seeks given objectives with the least possible disposal of resources and restriction of legal interests. A medium is characterized not necessarily, when it involves the same profit with higher cost in disposal of resources. If there are choices to be made, by using softer means, the objective in such a satisfactory way, that is to say they improve the position of somebody without their deteriorating the situation of another, then this means it is necessary and Pareto - efficient. *That is to say, in the new situation, there is increase of prosperity of a social unit without eliminating the prosperity of others.*

d) Proportionality stricto sensu

If the interests promoted by the legislative or administrative measure can be realised to weigh less than the legal interests that are limited, the cost of measure exceeds the profit by its application. The evaluative more important interest cannot be sacrificed for one less important. Consequently, the cost cannot be exaggerated above the benefit. The criterion Kaldor-Hicks[1] imposes the choice of this decision that it affixes the better relation between means of (cost, resources) and result of (profit, goal).[2]

2. The Examination of Including the Administrative Cost in Taking Administrative Decisions

Beyond the goals that are directly sought by a legislative or administrative measure, there are also inherent goals that are not obviously sought.[3] A legislative or administrative measure is characterized as necessarily, even if it is a burden on subjective interests or rights, however, the final result, the assessment of putting a strain on the public with regards to the disposal of resources, is lower than in other cases of such measures.[4]

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[1] According to this criterion, institutions or measures can be evaluated positively even if they do not treat preferentially all population groups; under the condition, the compensation of the damaged by the preferentially treated is possible.

[2] EIDENMULLER, *Okonomische Konzepte in der Rechtsanwendung,* in: Rechtsfortbildung jen-seits klassischer Methodik. Privatautonomie zwischen Status und Kontrakt, Privatrecht und Europa, Jahrbuch Junger Zivilrechtswissenschaftler 1992, 11 et seq.; criticism by HUSTER, Stefan, *Rechte und Ziele. Zur Dogmatik des allgemeinen Gleichheitssatzes,* Berlin, 1993, 433 et seq.; KUBLER, *Vergleichende Uberlegungen zur rechtspraktischen Bedeutung der okonomischen Analyse,* in: Ott/Schafer, Allokationseffizienz in der Rechtsordnung. Travemunder Symposium zur Okonomischen Analyse des Rechts, 23.-26. Marz 1988, Berlin / Heidelberg 1989, 293/299 et seq..

[3] Comp. DECHSLING, *Das Verhaltnismafiigkeitsgebot. Eine Bestandsaufnahme der Literatur zur Verhaltnismafiigkeit staatlichen Handelns,* Munchen 1989, 64 et seq..

[4] Comp. DECHSLING op cit supra, 74.

In accordance with the principle of proportionality, it is a measure that is defined as an extra burden on single citizen(s), however for the total it can have an important economic advantage concerning the use of the corresponding right (as this is limited by the particular measure) by more holders of the interest, that is to say, by the total of society.[1]

Compensation means in this context nothing more than deciding among possibilities on the basis of balancing their respective pros and cons. This represents the modified Kaldor-Hicks criterion.

Contrary to the attitude above, a measure could be excluded as not necessary under application (of the conservative parameter) of the **Pareto** criterion, if an alternative measure existed so that it could offer some advantage only to which it might concern.[2]

The legislator fixes rules of priority for the evaluation of public and private interests that are the basic objects of regulations and also of the acceleration and simplification of the process[3] *in relation to juridical protection and the democratic principle in order to economise costs for investment work and serve principles established by investment laws on the ground of an explicit constitutional*

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[1] CLERICO, *Die Struktur der Verhaltnismafiigkeit,* Baden-Baden 2001, 136 et seq..

[2] DAMMANN, *Materielles Recht und Beweisrecht im System der Grundfreiheiten,* Tubingen 2007, 316 et seq. CLERICO, op cit 40 supra, 132 et seq., proposes following rules of choosing the most efficient administrative means:
- priority of the normative provision;
- dependence of achievement of goals on the extent of reduction of the administrative cost;
- unimportant differences in the extent of an individual right infringement by the most efficient means in comparison to other means;
On the contrary, the efficiency of administrative measure is not crucial if:
- differences in the disposal of administrative resources are unimportant;
- the subjective right affected is important of for the development of the personality and potential civil rights and in general attendance and participation that refer to that right.

[42] In order to study the cost categories in the administrative proceedings for an approval for an investment project, see VOfiKUHLE, *„Okonomisierung" des Verwaltungsverfahrens,* Die Ver-waltung 34 (2001), 349/356. See table 1.

command.[1] *From the relative provisions, it can be concluded that the administration is authorised to establish restitutive regulations by weighing up the conflicting principles. For instance, a violation of the procedural and formal requirements due to a default of an environmental check performance that is contained in the German Federal Building Code and concerns the development of a legally binding land-use plan in the expedite proceedings, shall not be regarded as seriously affecting the validity of the plan, if a preliminary environmental check is accomplished*[2] *and its result can be considered as comprehensible; in this case it is not crucial that every individual public agency affected should have participated.*[3] *The aim in this respect is achieved with a restriction of access to Justice and moderation of sanctions because of the cancellation of rights of attendance.*

D. Limits of Application of Efficiency in the Administrative Procedure

I. The Necessity to Create a Reception Platform

In the area of Public Law that is working on the basis of a pluralistic system of goals and principles, only a *formal* criterion of economic efficiency can be pre-summed.[4] The essential economic criteria (Pareto, Kaldor-Hicks) can be used in this context for further individual analyses.

From the other point of view, the economic theory is supposed to make use of the theoretical broadness in order to include the principles of Public Law in its analysis. In this respect, the economic theories on efficiency should have at least a secondary, "serving" function in the administrative decision-making or measure-taking process.[5]

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[1] See article 109 paragraph 2 of the German Basic Law, clearly defined in the Law to Support and Stabilize the Economic Growth (Gesetz zur Forderung der Stabilitat und des Wachstums der Wirtschaft) in 1967.
[2] Section 13a paragraph 2 sentence 2 Nr. 2 of the German Federal Building Code.
[3] Section 214 paragraph 3 of the German Federal Building Code [Baugesetzbuch, BauGB].
[4] VAN AAKEN, op cit 31 supra, 315 et seq.
[5] Convincing analysis by VAN AAKEN, op cit 31 supra, 288 et seq..

The equivalent with the legal values system, the formal criterion of efficiency, should be capable of referring to constitutional principles as value determinations of the contents of regulations.

In this case, the content of the - solely formal - efficiency rule in Public Law will be consumed in the formulation of the decision-making theory with rules for real consequences of the applicable regulations to be calculated, based on the evaluation of all the alternative regulations and practical solutions in connection with the corresponding legislative aims.

II. Restrictions Resulting from the Fundamental Operation of Efficiency as a Tool of the Legislator

The legislator has the competence to decide if and in which context he would recognize the efficiency and in which relation he would delimit it, as opposed to his actual pursuits, also because of his know-how and the administrative resources allocated to him.

Efficiency is a *local* principle, as it namely refers to Budgetary Law; consequently, it does not have a comprehensive importance for the legal order and does not have a claim to be achieved in the optimal degree, but only with the content to prevent the wasting of public resources as a total consequence of the individual regulations from which it is to be concluded.

In this case, efficiency operates as an indicator that is being used by the judge in order to search for the consequences that are connected with alternative contents of an administrative decision.

Due to its character as a local principle, efficiency is unable to influence the judge in choosing the most efficient alternative solution.[1]

With the above mentioned point, the following issue is also relevant; to what extent the theory of Public Law as much as the science have suitable passage points for the economic thought in their working method.

As the science of Public Law does not influence its practical application so directly, it is limited to make suggestions of a juridical-civic

[1] EIDENMULLER, *Effizienz als Rechtsprinzip. Moglichkeiten und Grenzen der okonomischen Analyse des Rechts,* Tubingen 1995.

nature to the legislator after evaluating the usability of conclusions of economics within the Public Law system and the consequences of the possibility of adopting them.

Taking advantage of the preparatory work by the Public Law *science,* the *theory* could clarify the usability of the dogmatic tools of economics by processing their technical assimilation in Administrative Law, and, more concretely, in puncto exercise of administrative discretion. In this respect, there is here a correspondence to the above mentioned possibility for economic tools to contribute to the rationalization of each stage of the proportionality test.

III. The need to delimitate the efficiency in favour of distributive justice...

1. ...with the Principle of Social State

A distributive legal order that is based on the free market model and on the principle of the autonomy of preferences does not ensure a distribution of resources that corresponds to the principle of social state (= of fair distribution).[1] Rational balancing that is committed to purely economic goals should be replaced by a balancing act based on evaluative judgements.

Decisions concerning global economic categories should consequently be based on non-individual cost-benefit comparisons; therefore, on a wider base of information than Paretianian economy.

Thus, a system of mixture of elements of efficiency and distributive justice can be proposed: the legislator depends on market mechanisms for the fundamental distribution of resources and regulates the configuration of undesirable developments by Public Law systems of distribution (tax and social insurance), that are not, anyhow, neutral to economic efficiency.

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[1] TONTRUP, *Okonomik in der dogmatischen Jurisprudenz,* in ENGEL, Methodische Zugange zu einem Recht der Gemeinschaftsguter, Baden-Baden 1998, 41 et seq..

2.... with Individual Rights

Utilitarianism and efficiency do not set limits on the priority of preference autonomy, which is, in turn, based on the free development of personality, risk-taking, thus, its grounds itself.[1] The individual rights that are classified as belonging to the status negativus (life and physical integrity, freedom of expression, caution, which define a sphere of freedom, the content of which is to be found in their value itself that is determined without any (cross-)correlation with any economic profit), when they are secured with law under protest or without even such a protest, can be practically limited only by single efficiency aspects as an element of differentiation when making choices of social resources distribution (guarantee of health protection, basic life benefits).

If such decisions refer to the right of participation in economic life, competition etc., the distribution of resources on the basis of efficiency criteria contradicts the occupational freedom/right less, as less limited the danger for the individual sphere appears to be (as less, that is to say, the danger can concern the distribution of possibilities of developing the personality and some guarantee of equality of opportunities). *For instance, the catering of population with drinkable water cannot be solved by the price mechanism.*

IV. Because of Restrictions Resulting from the Principle of Legality in View of a Subordination of Efficiency in Administrative Law

Criteria of efficiency that can be consented to their given application can be useful as evaluation methods by the choice among several alternative contents of an administrative decision (that seem to be permissible in view of the legislative program), provided that any commitment of the administration as an expression of the legality principle is not violated.[2]

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[1] MARTINI op cit 32 supra , 252 et seq.
[2] NIEDOBITEK, *Rechtsbindung der Verwaltung und Effizienz des Verwaltungsverfahrens,* Die offentliche Verwaltung 2000, 762/767 et seq.

Such administrative obligations can be, depending on the characteristics of the applicable rule, material or formal.

In the last case, points of reference for the determination are *the internal configuration of process, abstract and technical terms, the administrative discretion, the hypothetical or final character of the legal program and the regulated mechanisms of conformity.*[1]

After redressing an infringement of a regulation governing procedure, the position of the citizen should not be worse than the position he would have had if the process had reached its opportune stage without defect. In other words, *the disadvantages by the application of the provision should be restored. For this purpose, the administration should be considered as compelled, on the occasion of an posteriori redressing of the procedural provision that had not been observed, at least to re-examine its initial decision.*

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Table 1: Cost categories in the administrative proceedings for an approval for an investment project,

	Costs of investor	Costs of the Administration	Costs of third persons	Costs of the Social total
costs because of passing time	delay (likely profits from the fast entry in the market, interests, rise of material prices)	- reduction in the degree of administration - acceptance	due to damages (for example: the issuing of authorisation of waste storage denied)	damages
procedural costs	- preparatory work for investment - preparation of application (consultations, charges/dues) - participation in the procedure	- realisation of process - personnel, material resources	- information/ briefing - participation - judicial protection	- information/ briefing - participation - mobilisations and administrative objections
Costs	Adaptation	- interventions - control	- damages - interventions - control	social cost