Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Council of State of Belgium

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Increasing the efficiency of the Supreme Administrative Courts'powers

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ISSUE 1: The 'administrative loop', or the power to rectify the legality of an administrative decision

What is meant by 'administrative loop', or the power to rectify?
In the Netherlands, an administrative court can invite (court) an administrative body by means of an interlocutory judgment or enjoin it (Litigation Division of the Council of State and Central Council of Appeal) to rectify or have rectified, within a set period, an infringement in the disputed decision unless such rectification would result in unfair treatment of the parties concerned who are not party to the case. The interlocutory judgment indicates insofar as possible how to rectify the infringement. In this case, the administrative body must inform the administrative court as soon as possible whether it intends to take up the option, offered by the court, of rectifying the infringement or having it rectified. Where the administrative body accedes to the request to rectify the infringement, it shall indicate in writing as soon as possible how it is going to rectify it. The parties may, within a set period following said written notification being sent, indicate their attitude to rectification of the infringement. A final judgment shall be handed down upon the first appeal against the flawed decision that has been (or has not been) rectified.

Question 1: In your country's legal system do you know of a mechanism laid down in the constitution, in law or in regulations, or borne out of established case-law, that confers on an administrative court, in the course of proceedings, the power to *rectify* a flaw in a disputed decision rather than have that decision quashed and proceedings reopened? If so, what does this power consist of? How is it organised?

If not, what are the reasons that, in your country's law, lead to the power of the court to be limited to solely annulling the disputed decision or to denying the court the power to rectify an infringement that has been established or have it rectified?
If so, what specific powers does the administrative court have to rectify an infringement that has been established or have it rectified? Explain your answer.
Do these specific powers of the court apply to any infringement that has been applied and to all decisions of the authority? Explain your answer.
At what stage of the proceedings and under what conditions can the administrative court exercise its power to rectify a flawed decision? Explain your answer.

In Austria's legal system such a mechanism which would confer on the Administrative Court the power to rectify or modify an administrative decision does not exist. Generally, the Administrative Court either annuls the contested decision or dismisses the complaint.

In 2008 a federal court, the Asylum Court (*Asylgerichtshof*), has been introduced in the Austrian system of administrative justice. This Court is competent to review the decisions of federal authorities in asylum matters. Rulings of this court are under review of the Constitutional Court only (and not under review of the Administrative Court).

Merely so called decisions-in-principle issued by the Asylum Court (fundamental decisions on generally relevant points of law) have to be submitted to the Administrative Court ex officio and are therefore subject to automatic review.

The Asylum Court (other as the Administrative Court) decides on the merits of the case and is competent to modify the contested administrative decision. Nevertheless the Asylum

Court has no power to give an interlocutory judgment in order to give the possibility to the responding authority to rectify the legality of the contested decision. A procedure as described above in question 1 is not foreseen. The Asylum Court normally decides directly on the merits of the case. It may according to article 66, para 2, General Administrative Procedure Act exceptionally annul the contested decision issued by the Federal Asylum Office and remand the case to the Federal Asylum Office for issue of a new decision, if the facts of the case are incomplete to an extent that an oral hearing or a repetition of an oral hearing is deemed unavoidable. In a procedure relating to a complaint against a rejection decision and the expulsion order issued in conjunction therewith, article 66, para 2, of the General Administrative Procedure Act, however does not apply (article 41, para 3, of the Federal Asylum Act 2005).

In Austria there are up to today no administrative courts of first instance. Thus in many administrative matters the Administrative Court is not only the first but also the final judicial authority which hears complaints against administrative decisions (provided that all stages of administrative appeals have been exhausted). Recently, after two decades of on-going discussions, the Federal Government has put forward a concrete proposal (government bill of 13th December 2011[1]) which would completely change this system and lead to the introduction of a real two-level administrative judicial review. According to this proposal which lays down a decisive reform of the Austrian system of administrative justice, administrative courts of first instance shall be established. These administrative courts of first instance would generally be competent to give ruling on the merits of the case and could therefore also modify the contested decision. The jurisdiction of the Administrative Court would (besides cases concerning failure on the part of the administrative courts of first instance to issue a ruling) as a rule remain limited to either annul the contested ruling of the administrative court of first instance or to dismiss the complaint.

These courts of first instance have not yet been set up, but under the Austrian Federal Constitution Independent Administrative Tribunals (*Unabhaengige Verwaltungssenate in den Laendern*) have been introduced and therefore in several cases the Administrative Court already functions as a kind of second judicial level above the so called Independent Administrative Tribunals. The interplay between the Independent Administrative Tribunals and the Administrative Court comes closest to a two-level judicial review of administrative acts as far as this is possible under the Austrian Federal Constitution. These tribunals have been established in 1991 in order to respond to the European Convention for the Protection of Human Rights, especially to its Art. 6. They are qualified as independent tribunals by the European Court of Human Rights, whereas they are not courts in terms of the Austrian Federal Constitution. Even though the members of these tribunals are not professional judges (but public servants), their legal status is similar to that of professional judges. Decisions of these "tribunals" are qualified under the Federal Constitution as administrative decisions and are under review of the Administrative Court. The Independent Administrative Tribunals are competent to decide on the merits of the case and have a quasi-judicial function.

Besides the Independent Administrative Tribunals a number of other independent quasi-judicial administrative authorities (Article 133, point 4 of the Austrian Federal Constitution) have been set up to deal with issues such as private broadcasting, data protection and

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1 http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=RegV&Dokumentnummer=REGV_COO_2026_100_2_718338 (in German only)

telecommunications. Their decisions are not subject to internal administrative appeal and may only be reviewed by the Administrative Court if the law so provides.

Furthermore there are several administrative bodies whose members are not bound by any instructions in the exercise of their quasi-judicial function. These bodies hear cases concerning issues such as environment (Independent Environment Tribunal, *Unabhaengiger Umweltsenat*), taxes and customs (Independent Financial Tribunal, *Unabhaengiger Finanzsenat*) and awards of public contracts (Federal Procurement Authority, *Bundesvergabeamt*). Although these institutions whose members have guarantees of independence and irremovability are formally part of the administrative organisation they are comparable to jurisdictions. Their decisions can be reviewed by the Administrative Court.

None of the above mentioned bodies have the power to issue an interlocutory ruling/decision in the sense of an "administrative loop" as described under issue I of the questionnaire. They decide on the merits of the case without issuing an interlocutory decision beforehand.

Besides dismissal of a complaint on formal grounds (due to the lack of procedural requirements) or closure of proceedings (e.g. because the complaint has become void of purpose or because the complainant has not duly followed instructions to remedy formal deficiencies of his complaint) or refusal to hear a complaint (under certain circumstances if the contested decision has been issued by an Independent Administrative Tribunal or the Federal Procurement Authority), there are generally two ways for the Administrative Court to give ruling:

dismissal of an appeal/complaint as unfounded or
annulment of the contested decision.

The Administrative Court is not empowered to modify the contested decision anyhow.

The appeal is to be dismissed as unfounded if, based on the relevant facts as ascertained by the administrative authority, the alleged violation of rights has not taken place.

Annulment of a decision may come in one of the following three ways:

a) annulment because of a material error of law affecting the contested decision (including misuse of discretionary powers)
b) annulment because the responding administrative authority has not duly respected its field of competence (lack of competence)
c) annulment due to the non-respect of procedural rules whenever strict adherence to these rules by the responding administrative authority could have led to a decision which would have been more favourable to the petitioner.

There is one exception. Under the Federal Constitution the Administrative Court also hears complaints about failure on the part of an authority to issue a decision. Such appeals may be filed if the highest competent administrative authority already addressed by a party has remained inactive for a certain period of time as prescribed by law, usually for at least six months. If such a complaint is successful, the Administrative Court, exceptionally, decides the case on the merits.

In proceedings concerning complaints about failure on the part of an authority to issue a decision, the responding authority is instructed by the Administrative Court to issue the ruling within a maximum term of three months and to submit a copy of the decision to the Administrative Court, or to inform the Court why it is not a case of a violation of the duty to reach a decision. This term may be extended one more time if the administrative authority is in a position to submit evidence for reasons which made it impossible to issue the decision in due time. If the decision is issued or has been issued before preliminary proceedings have been opened, the proceedings on the complaint about failure on the part of an authority to issue a decision within due time will be closed.

When deciding on complaints about failure on the part of an authority to issue a decision the Administrative Court may also at first restrict its decision to resolving a number of single relevant legal issues and instruct the authority to issue the administrative decision not rendered in due time on basis of the legal view thus established within a determined period of time not exceeding eight weeks. In case the Administrative Court does not make use of this possibility or the responding authority does not comply with the order, the Court will decide on the complaint about failure on the part of an authority to issue a timely decision by deciding on the merits of the case, using in this case also the discretion at the disposal of the administrative authority.

Question 2: Can the administrative court itself exercise its power to rectify a flawed decision and itself rectify the infringement that has been identified (power to reverse decisions)?

If so, explain in brief how this mechanism works. If not, is the authority required (obligation) – in the context of the exercise of this specific power to rectify a flawed decision– to rectify the infringement determined by the court? Explain your answer.

See above question 1.

Question 3: How is the action to quash affected if the decision involving an infringement is rectified? Is the appeal still valid? Must or can the rectified decision be disputed in another appeal? How do the proceedings continue once the court decides to exercise or has exercised its power to rectify a flawed decision? Explain your answer.

See above question 1.

Anyhow, there are situations where the administrative authority (without any interference of the Administrative Court) may modify or repeal its own decision (or the decision of a lower instance) either on its own initiative or during proceedings initiated by means of other legal remedies (e.g. motion introduced by a party asking for the reopening of proceedings). In such cases, if the authority modifies or repeals its decision, this naturally has an impact on pending proceedings before the Administrative Court. Thus there are different possibilities which have to be taken into account: If the contested decision is repealed or modified (as it has been asked by the complainant) during pending proceedings before the Administrative Court, proceedings before the Administrative Court will be closed either because the complaint has become void of purpose or because the complainant has been granted relief. Of course, a complaint against the newly issued administrative decision may be filed with the Administrative Court.

The ex officio rectification of administrative decisions containing typing or calculating errors or inaccuracies obviously due to an oversight or exclusively to technically inadequate operation of electronic data processing equipment falls under a specific category. Such a decision rectifying another decision affected by typing or calculating errors retroactively modifies the rectified decision. If proceedings before the Administrative Court concerning the rectified decision are pending the rectified decision has to be reviewed in the version as of its rectification. The rectifying decision itself may of course be subject to review if it negatively affects the complainant's rights.

Question 4: What are your experiences of the administrative court having such a power to rectify? Is it implemented successfully?

Such a power does not exist. See above question 1.

Question 5: Does your court hear appeals against decisions that are rectified in this way and, if so, how are such appeals dealt with?

See above question 1.

ISSUE 2: Power to award compensation and action for annulment

Question 1: Are you familiar with the system of compensation as an alternative to annulment?

If so, is this system applied to the exclusion of annulment? Does the system only work for certain illegalities or only the most serious ones? Is it available in appeals on any grounds or is it limited to appeals on only the most serious grounds? Is it applied to regulations and individual decisions? Is a choice between annulment and compensation available and if so, based on what criteria and who makes this choice (the legislator through the effect of the law, one of the parties, the court?) and when (at the time the appeal is lodged, during proceedings (how does this impact on adversarial proceedings))? Does the administrative body itself still have the option to annul its decision when compensation is asked or granted in Court?

No, such a mechanism does not exist in the Austrian system of administrative justice. If the Administrative Court finds that the contested decision has infringed the complainant's rights, it has to annul the administrative decision. Compensation as an alternative to annulment does not exist.

In the proceedings before the Administrative Court only reimbursement (lump sum) of the proceeding expenses incurred by the prevailing party is foreseen. Anyhow, this is not an indemnity for the damages caused by the annulled administrative decision, but only a reimbursement of proceeding costs for the party who has won the case.

Question 2: What is the extent of the compensation and how is it calculated?

Does it cover all the damage sustained or is a lump sum awarded, e.g. in the case of a fair satisfaction? In the latter case, does the award of the lump sum preclude action for further compensation to cover all the damage caused or may such action still be taken, where appropriate before another court? Can the plaintiff or the defendant initially request a decision *in principle* as regards compensation and only move to proceedings concerning the actual amount thereof once the principle has been acknowledged by the court?

See above question 1.

Question 3: What is the impact of penalising an unlawful decision by awarding compensation on the decision itself?

Is an unlawful decision which has been penalised in the form of the award of compensation subsequently assumed to comply with the law? What is the extent of this assumption? To what extent does a final decision awarding compensation impact on the power of other courts to control the lawfulness of that decision?

See above question 1.

Question 4: Does your court have the power to settle compensation for the damage caused by the unlawful decision it has previously annulled? If so, is this an exclusive power or is that power also granted to other courts?

Does the plaintiff have to submit the application for compensation at the same time as the annulment request or can it be made subsequently, after annulment?

An application for compensation due to the damage caused by an unlawful administrative decision may under certain circumstances be filed with civil courts according to the Liability of Public Bodies' Act ("*Amtshaftungsgesetz*"[2]). The Administrative Court itself is not competent to grant compensation for such damages.

The Liability of Public Bodies' Act provides for a special mechanism according to which civil courts in a kind of "preliminary procedure" may file a claim with the Administrative Court to give a ruling on the lawfulness or unlawfulness of the administrative decision.

Article 11 para. 1 of the Liability of Public Bodies' Act provides that if the civil court's ruling in the proceedings for compensation depends on whether the decision of any administrative authority, on which there has not yet been issued any ruling of the Constitutional Court or of the Administrative Court, is contrary to law, and if the civil court deems such decision to be contrary to the law, the civil court shall, unless the action is to be rejected, suspend the respective proceedings and file a claim with the Administrative Court

[2] http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1949_20/ERV_1949_20.pdf.

for a ruling on the unlawfulness of such an administrative decision. After having obtained the ruling of the Administrative Court, the civil court shall decide in accordance with the legal opinion of the Administrative Court (concerning the unlawfulness/lawfulness of the administrative decision). In these cases the decision of the Administrative Court has only declaratory character.

In particular cases, claims may be filed with the Constitutional Court under Article 137 of the Austrian Federal Constitution[3]. According to this provision the Constitutional Court pronounces on pecuniary claims against the Federation, the Laender, the municipalities and municipal associations which cannot be settled by ordinary legal process nor be liquidated by the decision of an administrative authority (e.g. refund claim for the amount of money paid due to a fine which has lost its legal bases after an annulment ruling of the Administrative Court or restitution claims concerning objects which have been confiscated). This provision is also relevant in cases of State liability due to a breach of EU law whenever legislative acts or rulings of Austria's supreme courts are at stake.

Question 5: What is the extent of the compensation and how is it calculated?

Does this compensation have to be fault-based? Does it have to remedy all the damage? Is a lump sum involved and if so, can an action for compensation to cover all damage incurred subsequently be brought before another court?

The Federation, the Laender, districts, municipalities, other bodies of public law and the institutions of social insurance are liable under the provisions of civil law for any damage to any person or any property caused by unlawful acts of persons at fault when implementing the law on behalf of such legal entities.

Indemnity shall be paid only in terms of money and will be calculated according to general provisions of civil law. Such a compensation can only be granted by civil courts (see above). The exclusive jurisdiction for decision on the claim for compensation against the legal entity in first instance rests with the regional court in charge of civil matters in whose jurisdiction the infringement of the law occurred.

Rules and conditions for State liability (due to non-compliance with EU law) are determined by provisions of EU law which don't foresee a fault-based system but set out conditions requiring a sufficiently serious breach of EU law which gives rise to State liability.

In the light of recent jurisprudence of the Court of Justice regarding actions for damages in the field of procurement law (see Judgements of the Court, *Strabag*, 30.9.2010, Case C-314/09, and *Combinatie Spijker*, 09.12.2010, Case C-568/08) actions for damages concerning implementation of EU law have to be qualified as a subcategory of State liability and may therefore not be fault-based.

ISSUE 3: The effectiveness of enforcement of the rulings of administrative courts

Question 1: Do the administrative courts in your country have the means to ensure actual implementation of their rulings and judgments by the authorities?

[3] http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf

If so, describe in brief these means and how exactly they are implemented. If not, what are the reasons for the absence of such means?

No, the Administrative Court does not have such means.

If the Administrative Court has granted a complaint, the administrative authorities are obliged to immediately establish the legal situation according to the legal opinion of the Administrative Court. If the Administrative Court exceptionally decides on the merits of the case (in case of complaints about failure on the part of the authority to issue a decision within due time; see above issue I, question 1), it shall also name the court or the administrative authority which will have to execute the Administrative Court's ruling.

The Court itself, however, has no means to ensure actual implementation of its rulings.

Normally, this does not cause any problems, because the Administrative Court's rulings are strictly limited to either dismiss the complaint (and so the administrative authority does not have to do anything anymore) or to annul the contested decision (and in this case the annulment of the contested decision takes place automatically at the time of the notification of the Administrative Court's ruling).

If the Administrative Court annuls the contested decision, this takes effect retroactively. As soon as the ruling of the Administrative Court is handed out the case returns to the situation in which it was before the contested decision had been issued. Proceedings before the administrative authority will ex lege be pending again. The administrative authority as well as the parties to its proceedings will find themselves in the same position they have been before the contested decision has been issued (the so called ex tunc effect of the Administrative Court's rulings). Generally, the administrative authority will have to issue a new decision according to the Administrative Court's opinion.

After having given its ruling, the Administrative Court closes the files of the proceedings. It does not monitor the proceedings before the competent authority any longer. This means the Administrative Court does not observe ex officio whether the administrative authority fulfils the obligations deriving from an annulment ruling (i.e. whether it immediately establishes the legal state of affairs according to the Administrative Court's legal opinion). If there is no further complaint (i.e. against the new administrative decision issued after the annulment ruling) the Administrative Court will usually not even get to know whether the administrative authority established the legal state of affairs according to its ruling. Although this may seem a little disappointing, one has to bear in mind that this is a consequence of the strictly cassational powers of the Administrative Court.

As the Asylum Court (other than the Administrative Court) is competent to decide on the merits of the case, the effects of the Asylum Court's rulings are different. If the Asylum Court grants asylum or subsidiary protection, its ruling in a constitutive way establishes a status from which certain rights (sojourn, access to labour market) derive. This status has to be respected by all authorities. In case of a negative decision, in particular the expulsion can be subject to execution, taking into account that during proceedings concerning measures

terminating a sojourn it can be claimed that an expulsion decision does not exist or that such a decision is not being duly respected (e.g. expulsion to the wrong country).

The Austrian system calls for the prevailing party (or any other party affected by an annulment ruling) to pursue its own legal interests. This usually means it is up to the prevailing petitioner to verify himself whether the respective administrative authority establishes the legal state of affairs according to the Administrative Court's ruling. In order to do so, the prevailing complainant during the course of the administrative proceedings (following the annulment ruling) may make use of one of the following remedies: 1. file a new complaint which alleges illegality of the administrative decision issued after the annulment ruling of the Administrative Court or 2. file a complaint about the failure on the part of the authority to issue a decision whenever the administrative authority fails to issue the outstanding decision in time.

Apart from a new complaint which may be filed with the Administrative Court, there are other remedies which the prevailing party may use in order to urge the respective administrative authority to establish the legal state of affairs according to the Administrative Court's legal opinion:

As mentioned above, according to the Austrian Constitution the Federation, the States (and also the autonomous communities) are liable under civil law for damages caused on behalf of these legal entities (Liability of Public Bodies' Act; see above issue 2). The legal action is to be brought before the civil courts. Legal action because of alleged liability of public bodies is to be considered a rather effective instrument whenever, after a previous annulment, the respective administrative authority should fail to issue its outstanding new decision in time or in a new decision again neglects the legal opinion expressed by the Administrative Court in its annulment ruling.

In case of a payment of compensation by the Federation/State/Community the latter may have recourse against the organ which caused the damage by intent or gross negligence. This liability, too, urges any organ to act in accordance not only with the legal opinion expressed in the Administrative Court's ruling in a particular case but also with the Court's established case-law.

As an additional and more general mechanism of control, the Office of the Ombudsman has been set forth by the Austrian Constitution. This Office consists of three members who are elected by the Federal Parliament. The Office of the Ombudsman is to control the entire Federal administration. It reviews alleged deficiencies in the field of federal administration. Everyone who is concerned by deficiencies of federal administration and has no other legal means at hand can address the Office of the Ombudsman. The Ombudsman can also review presumed deficiencies ex officio. It has access to the files and to information on demand. However, it cannot issue binding decisions but only submit recommendations to the highest administrative authorities concerning measures to be taken in a particular case. If an administrative authority fails to comply with the legal opinion expressed by the Administrative Court this would doubtlessly be considered as a "deficiency". The respective administrative authority has to comply with the recommendation within eight weeks and report on it to the Office of the Ombudsman or submit a justification explaining why it does not intend to comply with the recommendation. Although the recommendation is not legally binding it is not insignificant in so far as the case and the deficiencies stated by the Office of

the Ombudsman may attract public attention that is not welcome to the administrative authorities.

Thus, although the Administrative Court is not empowered to supervise the implementation of its rulings, the competent administrative authorities as a rule comply promptly with the legal opinion expressed in these rulings. This is not only due to the high reputation the Administrative Court enjoys. Non-compliance with the Administrative Court's decisions involves considerable risks for the administrative organs on all levels of administration, including the highest administrative authorities. These risks are usually avoided by the administrative authorities.

Finally one has to bear in mind that Austria is a small country with a comparatively small staff of legally trained civil servants. Since the members of this small group usually have a strong motive to foster their professional career there is simply no alternative to compliance with the rulings of one of the three supreme courts.

Question 2: Do the administrative courts have the power to order the authority to enforce their rulings and judgments (power of injunction)?

If so, at what stage of the action can this power of injunction be asserted?
Where the court can decide to issue such an injunction at the time of handing down its ruling, who may apply for such an injunction and by what means, and what will its scope be (can the court indicate to the authority how it can rectify the illegality?)? Can a deadline be imposed in respect of such an injunction and what happens if the authority fails to adhere to the stipulated deadline?
Where the injunction can be implemented at the stage of enforcement of the ruling or of the judgment, who can request it, by what means and at what time? What scope will it have? Does the authority have a certain period to enforce it? What happens if it has to be enforced urgently?
Is this power of injunction also applied when the authority in question is ordered to pay a sum of money (e.g. damages) and if not, how does this recovery work?

No. See above, question 1.

Note that in cases when the Administrative Court exceptionally decides on the merits of the case (complaints about failure on the part of the authority to issue a decision within due time; see above issue I, question 1), it will also name the court or the administrative authority which will have to execute the Administrative Court’s ruling.

Question 3: Have all your country’s administrative courts been granted this power of injunction?

Can an injunction be enforced even in case of appeal or cassation complaint? In other words, in the case of an appeal or cassation complaint does the administrative court of first instance retain the power to ensure that its ruling is enforced or does the higher court become competent? Where the court of first instance court retains this power, what happens if the decision in respect of which it is seeking enforcement is annulled on appeal or quashed following a cassation complaint?

The Austrian Administrative Court does not have such powers. See above, question 1.

Question 4: Can your country's administrative courts sentence the offending authority to pay a penalty or a fine?

If so, is this penalty or fine independent of the court's power of injunction? Explain the mechanism that has been put in place and the conditions under which the penalty or fine will be imposed. If this penalty is combined with implementation of a power of injunction, explain how the two mechanisms interact. Does this penalty or fine benefit solely the litigant who has won the case?

No. See above, question 1.

Question 5: What happens where the authority has enforced the ruling or judgment but this enforcement is not in line with the authority of *res judicata*?

Can the litigant in the case in question make an application for enforcement of the judgment or ruling to the competent court? Furthermore, if the administrative court considers that it cannot implement the power of injunction because the judgment or ruling has been enforced, can the litigant lodge an appeal against this decision? And to conclude, are there circumstances in which an authority can refuse to enforce a judgment or ruling despite an injunction to enforce having been issued?

See above, question 1, and remarks concerning the Asylum Court, issue I,1 and issue III, 1.