



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

**Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union
With the collaboration of the Council of State of Belgium**

**Increasing the efficiency of the
Supreme Administrative Courts' powers**

BULGARIA

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

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?

Answer to question 1: Within the framework of the Bulgarian legal system is not provided for a mechanism, that confers on an administrative court, in the course of proceedings, the power to invite or to enjoin an administrative body by means of an interlocutory judgement to rectify within a set period an infringement in the disputed decision (administrative act) or the power to rectify itself (court) a flawed decision in a pending case prior to the pass of its final judgement on the legality of the disputed decision.

According to the Administrative Procedure Code the administrative court shall exercise a judicial review of the legal conformity of the administrative acts, actions or omissions. Administrative acts may be contested on the following grounds: lack of competence; non-compliance with the established form; material breach of administrative procedure rules; conflict with provisions of substantive law; non-conformity with the purpose of the law. The court verifies the legal conformity of the contested administrative decision of all grounds covered under the law. If any of these grounds is ascertained, the court may declare the nullity of the contested administrative act, may revoke the said act in whole or in part, may modify the said act, or may reject the contestation if a ground of contest is not found. When applicable according to the law, in case of a non-legal conformity of the disputed act the court after annulling or revoking the administrative act shall adjudicate in the case on the merits as if “substituting” for the administrative body including by modifying the contested act. In other cases laid down in Administrative Procedure Code where the matter lies within the discretion of the administrative authority, as well as where the act is null by reason of lack of competence or if the nature of the said act precludes adjudication in the matter on the merits, after annulling or revoking the flawed decision the court shall transmit the case file to the relevant competent administrative authority to issue a new decision with mandatory instructions on the interpretation and application of the law. This is not an interlocutory judgement but represents the final judgement. Reconsidering the matter the administrative body shall eliminate (rectify) the infringement identified by the court. In this case the issued administrative decision shall be subject to contestation before the court in respect of the legal conformity according to the general rules. The national procedural regulation does not allow the

administrative court to rectify a flaw in a decision under contest in the course of proceedings as interlocutory judgement before the pass of the final judgement, identical to (such as) the ‘administrative loop’ mechanism, but a similar effect is provided by other legal means and instruments. The reasons for such a regulation could be explained by the nature, function and purpose of the judicial review of the legality of the administrative activity. (art. 172, art. 173, art. 174 of the Administrative Procedure Code).

With regard to the court’s power to exercise in a pending lawsuit interlocutory measures relevant to the parties rights protection against the effect of the contested administrative decision should be noted the following: In principle the contestation before court provokes a suspensive effect, i.e. the appeal shall stay the enforcement of the disputed administrative act. During any stage of the proceeding until the entry into effect of the judgment, acting on a motion by the contestant, the court may stay the anticipatory enforcement admitted by an effective direction of the authority or laid down in law if the said enforcement could inflict a significant or irreparable detriment on the contestant. Furthermore, the direction whereby anticipatory enforcement is admitted or refused shall be appealable before the court, regardless of whether the administrative act has been contested. This legal mechanism guarantees that the implementation of a flawed (legally non-conforming) administrative act should not be admitted until the final judgement of the court. The reverse hypothesis is also provided for in the Administrative Procedure Code. During any stage of the proceeding, the court may admit anticipatory enforcement of the administrative act under the terms whereunder the said enforcement can be admitted by the administrative authority. Where anticipatory enforcement could inflict a significant or irreparable detriment, the court may admit such enforcement subject to the condition of a payment of a security deposit at an amount set by the court. (art. 60, art. 166, art. 167 of the Administrative Procedure Code).

In addition, the law makes provisions of the legal instrument of the judicial settlement. A judicial settlement may be reached during any stage of the proceeding under the conditions whereunder a settlement may be reached in the proceeding before the administrative authority. By the ruling conforming the settlement, the court shall invalidate the administrative act and shall dismiss the case. A confirmed settlement shall have the significance of an effective judgment of court. Thus it doesn’t get to a quash of the decision by the court. (art. 178 of the Administrative Procedure Code).

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)?

Answer to question 2: As previously mentioned, according to the Administrative Procedure Code one of the powers of the administrative court in

the verification of the legal conformity of the administrative acts is to modify itself a legally non-conforming administrative act. This power of the court is general and applies to all cases, i.e. it shall be exercised in reference to every administrative decision in every lawsuit if the preconditions for its implementation are present. In essence, the modification of the flawed decision achieves an analogous to "the administrative loop" purpose – the act is modified instead of being quashed. Thus the infringements of the contested act are remedied (rectified) and the act is set in compliance with the law. The difference lies in that the court may modify the legally non-conforming administrative act by the final judgement on the merits, not by interlocutory judgement.

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.

Answer to question 3: As the national legal system does not know the mechanism of "the administrative loop", special regulation on subsequent development of the proceedings and contestation of the rectified by "the administrative loop" decision is not provided for. With regard to the judicial protection against the legally non-conforming administrative decisions the Bulgarian legislation lays down the following mechanism of the judicial review:

Court proceedings under the Administrative Procedure Code shall be conducted in two instances, save as otherwise established in the said Code or in another law. This means that the court judgements, including these modifying the flawed act, shall be subject of verification by the superior court. In principle the regional administrative courts function as first-instance courts and the Supreme Administrative Court - as a court of cassation of the first-instance court judgements. The regional administrative courts shall take cognizance of all administrative cases with the exception of such cognizable in the Supreme Administrative Court. The Supreme Administrative Court has a jurisdiction as a first-instance court in the explicitly and thoroughly defined by law cases referring to the administrative body having issued the contested administrative act, the category and the subject of the act. In these cases the Supreme Administrative Court sitting in a panel of three judges examines the appeals against the determined by law administrative decisions such as issued by the Council of Ministers, by the government ministers, regulator bodies and other specific authorities with as well as statutory instruments of secondary legislation (except such issued by the municipal councils). The first-instance judgment that has been rendered by a three-judge panel of the Supreme Administrative Court shall be subject to cassation contestation before a five-judge panel of the Supreme Administrative Court, which judgement shall be final (unappealable).

The court of cassation instance has the following powers: The Supreme Administrative Court shall leave in effect the judgment or shall reverse the judgment in the contested part thereof if the said judgment is incorrect. Where the judgment is inadmissible, the Supreme Administrative Court shall invalidate the said judgment in the contested part and thereupon shall dismiss the case, shall refer the case back for re-examination, or shall forward the case to the competent court or authority. Where the administrative authority, acting with the consent of the rest of the respondents, withdraws the administrative act or issues the act which the said authority has refused to issue, the Supreme Administrative Court shall invalidate the judgment of court rendered on the said act or refusal as inadmissible and shall dismiss the case. Where the judgment is null, the Supreme Administrative Court shall declare the nullity thereof in whole and if the case is not dismissible, shall refer the said case back to the court of first instance for rendition of a new judgment. Where settlement has been reached before the Supreme Administrative Court, the court shall confirm the said settlement by a ruling whereby the judgment of court shall be invalidated and the case shall be dismissed. Where the judgment of the court of first instance is reversed again, the Supreme Administrative Court shall not remand the case for a new review but shall adjudicate on the substance of the matter. When the reversal grounds require so, after reversing the judgement, the Supreme Administrative Court shall schedule a date for reviewing the case in a public hearing and, if necessary, shall also collect new evidence.

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

Answer to question 4: According to the Administrative Procedure Code the court has the power to modify the legally non-conforming administrative acts by its final judgement on the merits. As experience of the court along these lines should be given the following examples: rectification of the amount of the pecuniary sanction imposed by the administrative body under a special law; rectification of the fixed by the administrative body amount of the compensation for the proprietors in case of compulsory requisition of land; rectification of the ground on which a discrimination is ascertained by the specialised state body; substitution of the measures preventing (securing) the fulfillment of the compulsory administrative measures imposed by the administrative authorities to the foreigners in the Republic of Bulgaria etc.

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

Answer to question 5: The answer of this question contains into the above stated on previous questions (1-4). The first-instance judgement that modifies

the administrative act shall be appealed before the cassation instance, save as exception established in law the court proceedings shall be conducted in one instance.

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?

Answer to question 1: No.

According to the Bulgarian legislation there is not a system of compensation as an alternative to annulment. These relationships are regulated in this way:

Proceedings for compensation are regulated in the Administrative Procedure Code. This Code regulates procedural questions. Substantive rules of the liability are at the Act on the liability for damage incurred by the state and the municipalities, as well as at civil and labour legislation.

Only individuals and legal persons, not unregistered partnerships, may be plaintiffs in action for damages. The prosecutor may not bring an action for compensation because in these cases there is not an important State or public interest that requires him to initiate the proceedings.

The legal actions should be based on statements for detriment inflicted on individuals or legal persons by legally non-conforming acts, actions or omissions of administrative authorities and officials. The acts may be individual administrative acts, general administrative acts and statutory administrative acts.

A legal action may be brought after the revocation of the administrative act according to the relevant procedure. A legal action may alternatively be brought before court together with a contestation of the administrative act prior to the close of the first hearing of the case. Where detriment is caused by a null or withdrawn administrative act, the legal non-conformity of the act shall be established by the court before which the legal action for compensation has been brought. The judgement of nullity, respectively the nullity or the legal non-conformity of the withdrawn administrative act may be established preliminary. The legal non-conformity of an action or omission shall be established by the court before which the action for compensation has been brought.

The defendant is the appropriate administrative authority (when the last is a legal person), whose legally non-conforming act, action or omission has inflicted the detriment. When the appropriate administrative authority is not a legal person, a legal action for compensation shall be brought against the legal person, to which administrative structure the appropriate authority belongs.

On a motion by a party or at the discretion of the court, the legal action for compensation may be separated if the examination thereof would impede the proceeding for contestation of the administrative act. The examination of the separated legal action shall proceed in the same court after entry into effect of the judgment whereby the act is declared null or is revoked.

Should the proceeding for contestation of the administrative act be terminated, the proceeding on the legal action joined therewith shall be terminated as well. This rule doesn't apply where the said action is for compensation for detriment resulting from a null administrative act or where the proceeding for contestation has been terminated by reason of withdrawal of the administrative act. The proceeding on the legal action shall furthermore be terminated if the contestation of the administrative act is rejected. Upon reversal of the judgement of court, the proceeding shall be resumed.

According to the Administrative Procedure Code when the administrative act is contested before court and a legal action for compensation is brought together with it, the administrative authority no longer could amend or withdraw the issued act. The administrative authority may review the matter and withdraw on its own initiative the contested act, revoke or amend the said act, or issue the relevant act, if the said authority has refused to issue the said act only when the administrative act has not entered into force and before the act has been contested according to an administrative procedure to the immediately superior administrative authority.

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

Answer to question 2: The court awards a compensation if only the preconditions for the realization of the liability under the Act on the liability for damage incurred by the state and the municipalities have been established during the proceedings. The necessary condition for this is the cumulative availability of reversed administrative act, any damages and a causation between two preconditions.

The State and municipalities shall owe compensation for all damage to property or any other damage being the direct and immediate consequence of damaging behaviour and regardless of whether inflicted by the officer concerned in a culpable manner. This is an absolute liability. Direct consequence means direct impact on the injured's legal sphere. Direct damages are only these damages that are typical, normally occurring and necessary consequence from the injury resulting. All pecuniary damages including future earnings shall be compensated when the plaintiff proves their size before court. Compensation

for non-pecuniary damages shall be determined ex aequo et bono by the court under subsidiary application of the provision of the civil law.

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

Answer to question 3: Proceedings for compensation usually take place after the revocation of the legally non-conforming act. A legal action may alternatively be brought before court together with a contestation of the administrative act. The award of compensation is a result of revocation of a certain administrative act as legally non-conforming or of declaring it void. The final decision awarding compensation has no impact on the power of other courts to control the lawfulness of the certain administrative act, because this question has been already resolved with *res judicata*.

Question 4: Does your court have the power to settle the 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?

Answer to question 4:
(See answer to question 1)

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

Answer to question 5:
(See answer to question 2)

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?

Answer to question 1: Yes, although the courts are not given the power to issue orders to the administrative authorities to enforce their rulings and judgments (power of injunction).

The effectiveness of enforcement of the rulings of administrative courts is achieved by the means of Enforcement Procedure provided for in a separate title

of Bulgarian Administrative Procedure Code. Each one of the rulings and judgements of the administrative courts which is entered into effect or is subject to anticipatory enforcement is an enforcement title upon which an enforcement proceeding is conducted. By the completion of such an enforcement proceeding is performed the obligation arising from the respective ruling or judgment of the court.

The administrative courts according to Bulgarian procedural law are not part of the enforcement authorities that conduct the actual implementation of the rulings and judgments of the courts. These means of enforcement of the rulings of administrative courts as described above is part of the continental legal tradition, characteristic for Bulgarian law system recognized as effectively applicable for long terms. By same means the decisions of the civil courts have been enforced for decades. Such is the procedural regulation both in the Administrative Procedure Code, applicable since 2007 and in the new Civil Procedure Code, in force from 2010. The identical approach provided for enforcement of the civil and administrative courts decisions is logically explicable as a consequence from the similarity between the civil and administrative court proceedings and the principle of subsidiary application of the Civil Procedure Code to any matters unregulated in the Administrative Procedure Code as regards the proceeding before the court.

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

Answer to question 2: No.
(See answer to question 1)

Enforcement Authorities according to the Administrative Procedure Code are: in respect of enforcement against individuals and organizations: the administrative authority which issued or should have issued the administrative act, unless another authority is specified in the enforcement title or in the law; in respect of enforcement against an administrative authority: the enforcement agent (the same is the enforcement authority for the civil court decisions) within the geographical jurisdiction whereof the place of performance of the obligation is situated.

The enforcement authority is obligated to carry out the enforcement in the manner specified in the enforcement title (such are the rulings and judgments of the administrative courts). Where no such manner specified or where the manner specified is impracticable, the enforcement authority shall determine: manners and means of enforcement which, considering the peculiarities of the specific case, will ensure most effective performance of the obligation; the manners and means which are most favourable to the individuals or organizations in respect of whom or which or in favour of whom or which the

enforcement is carried out, where it is possible to carry out the said enforcement in several equally effective manners. The enforcement authority shall be obligated to carry out the enforcement within the time limit indicated in the enforcement title. Upon non-fulfilment of this obligation, a fine shall be imposed on the blameworthy officials.

Enforcement shall commence ex officio, on the initiative of the authority which issued or should have issued the administrative act. Enforcement may furthermore commence on the initiative of the superior authority, of the prosecutor or the Ombudsman, or at a written request of an individual or organization concerned.

The provisions of the enforcement procedure are additionally arranged in two detailed sections according to the execution debtor – individuals and organizations or administrative authority. Each section contains special rules for execution of substitutable obligations, non-substitutable obligations and execution of obligation to surrender things.

When the court ruling or judgement has to be enforced urgently the legal regulation provides for anticipatory enforcement of those court rulings or judgements.

The Administrative Procedure Code regulates the means of legal remedies in case of infringements occurring in the course of enforcement proceedings.

One of the remedies is a legal action for negative ascertainment brought by the execution debtor against the execution creditor whereas the enforceable obligation can be contested solely on the basis of facts which occurred after the issuance of the enforcement title. The other remedy provides for the right to appeal the enforcement authority's actions. The right to appeal is vested in the parties to the enforcement proceeding, as well as in the third parties whereof the rights, freedoms or legitimate interests are affected by the decrees, actions and omissions of the enforcement authorities.

The Administrative Procedure Code prescribes also rules for restoration and compensation of any detriment inflicted on individuals and organization as a result of wrongful coercive enforcement (including the case of completion of enforcement beyond the time limit indicated in the implemented court decision or when the decision in respect of which enforcement is sought is annulled on appeal or quashed following a cassation complaint). The legal action can be brought against the State or the municipality, each of which shall incur pecuniary liability for the detriment mentioned, if the administrative enforcement authority is a State body or a municipal authority correspondingly, regardless of whether the detriment has been inflicted culpably.

The Administrative Procedure Code stipulates that where an administrative act is revoked after commencement of the enforcement thereof, the administrative authority shall restore the violated right within one month or, should this be impossible, shall satisfy the injured party in another legal manner; upon failing this, the injured party shall be entitled to compensation.

* The Administrative Procedure Code provides for one more legal means in case of non-compliance with the *res judicata* of an effective court decision by the administrative authority. Namely, any acts and actions performed by the administrative authority in contravention with an effective judgment of court shall be null and each party concerned may always invoke the nullity or motion the court to declare it.

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

Answer to question 3: No.
(See the answers to question 1 and 2).

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

Answer to question 4: Yes.

The administrative penalty provisions of the Administrative Procedure Code state that any official, who fails to perform an obligation arising from an effective judicial act, outside the cases referred to in the chapter regarding the enforcement proceedings, shall be liable to a fine of BGN 200 or exceeding this amount but not exceeding BGN 2,000. Any repeated above mentioned violation shall be punishable by a fine of BGN 500 for each week of non-performance, unless this is due to objective impossibility.

As regards the procedural rules, it is provided that written statement on the ascertainment of the said violations shall not be drawn up. The sanctions shall be imposed by an order of the president of the competent court or by an official empowered thereby; a transcript of the order shall be served on the offender. Prior to imposition of the penalty, the offender shall be afforded an opportunity to submit written explanations within fourteen days after communication and to adduce evidence. The sanctioning authority may collect other evidence as well. The order can be appealed before a three-judge panel of the same court within seven days after service. The court shall adjudicate in the case on the merits. The judgment of the said court is unappealable.

The penalty (fine) does not benefit the litigant who has won the case. The amount of money of the sanction imposed is revenue to the State budget.

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*?

Answer to question 5:

In line with the above described legal means of enforcement of the decisions of the administrative courts such problem are not likely to arise. This is so, because the whole enforcement proceeding has to be duly commenced and completed within the court decision, the latter being the only enforcement title for its own implementation.