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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With the collaboration of the Council of State of Belgium

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

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 born 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?
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)?
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.

(1) General rule

The doctrine of separation of powers is the bedrock of the judicial independence in German constitutional law. No state authority is entitled to influence jurisdiction. As a consequence, however, the administrative courts are restricted to their role as a supervisory authority judging on the lawfulness of administrative behaviour: The administrative courts have to evaluate the administration, not to replace it. Therefore, the courts will not issue a rectified decision themselves but will have to leave it to the competent administrative authority to do so. Furthermore, the rectification generally has to be carried out as a result of the trial, the court having issued its judgment. Hence the possible contents of court orders regarding administrative decisions are generally limited to

- Quashing unlawful administrative decisions (rescissory action / cassation),
- Ordering a decision to be issued according to the relevant law (action for mandatory injunction), or to
- Giving binding guidelines for the exercise of discretion by the administrative authority (within an action for mandatory injunction) .

If none of the afore-mentioned kinds of actions is admissible, a declaratory action may be considered which is designed to seek a declaration of the existence or non-existence of a legal relationship (rights and obligations) or to establish the nullity of an administrative act.

Rectifying an administrative decision in the course of court's proceedings might raise the issue of procedural fairness as well. Even though article 114 sentence 2 of the Administrative Court Act (*Verwaltungsgerichtsordnung*) allows the administrative authority to rectify an unlawful discretionary decision during court's proceedings by additional reasoning, it is a matter of controversial discussion to what extent this can be accepted without reducing the

claimant's rights (e.g. to a fair hearing) in an unfair way. According to German procedural law, the administrative authority cannot change, for instance, the character of a challenged administrative act during court's procedure from a discretionary decision to a bound decision by "rectifying" it - the administration is strictly restraint to not more than add some reasons to those already given prior to the lawsuit.

(2) Exception

However, there is an exception to the general rule: In disciplinary procedures the administrative court can suggest an administrative decision to be rectified in the course of proceedings in order to shorten the disciplinary procedure (article 55 para. 3 Federal Disciplinary Code - *Bundesdisziplinargesetz*). The administrative authority then will have to decide, within a set period of time, whether or not to rectify the decision. After having done so, the authority will either deliver the rectified decision to the court or inform the court that no modification of the administrative decision is considered necessary. The court will go on to review the merits of the case. If the authority fails to react within the set period of time, the court has to close the case in favour of the claimant, the administrative authority not being allowed to reopen it.

(3) The pragmatic approach

Even if the administrative courts cannot, in general, formally rectify an unlawful administrative act or have it rectified by the administrative authorities in the course of proceedings, there is a more pragmatic approach to the idea of shortening courts' proceedings which is widely accepted:

It is common practise that the court, as soon after the commencement of proceedings as possible, gives to the parties in a less formal way a piece of advice about the legal situation. This can be combined, if appropriate, with the proposal (or recommendation) to revise the administrative act subject to the judicial review. The court will usually give the reasons for its evaluation of the administrative act as lawful or illegal and explain the relevant legal guidelines. The administrative authority may then rectify the challenged act and replace it in order to avoid a quashing order issued by judgment of the court. If it does so and if the other parties agree the court will close the case by delivering a decision on the costs of the proceedings, taking into account that the administration has withdrawn its former act. In this way it is possible to terminate less complicated cases within a short lapse of time and without rendering a judgment.

Independently, in German administrative law – procedural law as well as substantial law – has been established the principle of preservation of certain instruments of delegated legislation such as legally binding land-use plans ("*Grundsatz der Planerhaltung*"). If the court in a judgment points out that a challenged planning instrument is unlawful the administration may,

under certain circumstances, repeat the law-making procedure from the point the mistake has been committed and re-enact the instrument retroactively (article 214 para. 4 Federal Building Code – *Baugesetzbuch* -; this can be done outside of a lawsuit as well). Even if the newly issued plan might be unlawful as well as its predecessor – obviously, it can be challenged in court again – the principle of preservation dispenses with the need for a judicial instrument of rectification such as discussed in this paper to a certain extent.

Similarly, the court may, within 6 months after the commencement of proceedings, annul an administrative act without judging the case on the merits if it holds that the administrative authority has not properly looked into the facts of the case (article 113 para. 3 Administrative Court Act). The administrative authority will have to clarify the facts before issuing another decision which can, of course, be subject to judicial review as well.

Question 4: What are your experiences of the administrative court having such a power to rectify? Is it implemented successfully?
Question 5: Does your court hear appeals against decisions that are rectified in this way and, if so, how are such appeals dealt with?

The power to order the rectification of an administrative decision in disciplinary proceedings is widely accepted in practise. The courts as well as the administrative authorities are interested in shortening the duration of the procedure; moreover, they are under constitutional obligation to do so. In addition to that, the administration is practically obliged to take up the option offered by the court in order to avoid its decision being quashed and the proceedings being closed without further consideration. Thus many procedural flaws in disciplinary decisions are being corrected before judicial review can be exercised. Nevertheless, the courts are not restricted in reviewing the full range of legal aspects even if the challenged decision is the result of a court's proposal following article 55 para. 3 Federal Disciplinary Code.

Apart from that, German administrative law does not authorise the courts to rectify wrongful administrative acts so that both questions (4 and 5) do not need to be answered.

The afore-mentioned informal instruments to quickly reach a lawful administrative decision instead of waiting for a quashing order of the court followed by another lawsuit against the follow-up decision issued by the administration, are by now natural elements of the judicial way of working.

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?
Question 2: What is the extent of the compensation and how is it calculated?
Question 3: What is the impact of penalising an unlawful decision by awarding compensation on the decision itself?
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?
Question 5: What is the extent of the compensation and how is it calculated?

(1) General rule

German administrative courts do not have the power to adjudicate compensation for the effects of illegal administrative behaviour instead of judging on the challenged decision and rendering a judgment according to procedural and substantive law. Doing so against the will of the claimant would be inconsistent with the procedural rule that the claimant determines the subject of the litigation (article 88 Administrative Court Act). Constitutional law guarantees the right to legal protection as well (article 19 para. 4 Basic Law – *Grundgesetz* -) – this includes the right to a judicial opinion on the matter submitted to the court.

Even if a claimant would prefer compensation to the annulment of an act infringing his rights there is no legal rule in German administrative law which allows the choice between accepting an illegal act in order to obtain a compensation and challenging the illegal act in court in order to have it quashed. The idea that a claimant may draw pecuniary advantage from an unlawful behaviour of the public administration instead of having it rectified in his favour is unfamiliar to the concept of the rule of law in our understanding.

Thus, neither have the parties the right to choose compensation instead of repelling unlawful administrative behaviour nor is the court entitled to do so against the parties' will.

(2) Pragmatic approach

Nevertheless, a similar result can be the outcome of a settlement (article 106 Administrative Court Act) or an in-court-mediation. The court is even entitled to suggest such settlement if it holds it appropriate to pacify the situation between the parties. It is not always easy to decide if such a proposal will get into conflict with the above-mentioned priority of the rule of law and the impartiality of the court. The court will refrain from suggesting a settlement if the challenged administrative behaviour is clearly illegal or easily reversed. It will, on the other hand, try to reach a settlement if the legal situation is complicated, if the proceedings might be very costly to the detriment of the losing party or if the challenged act is, in general, reasona-

ble. E.g., if a building permission brings along a negative side-effect to the disfavour of the claimant and therefore unlawfully violates his neighbour rights while being reasonable as for the rest, it is a commonly used option to propose negotiations between the parties to settle the dispute in terms of financial compensation. The extent of compensation is a matter of negotiations and depends on the specific circumstances of the individual case; no relevant legal rules have been issued insofar.

It might be added that since December 2011 the courts are entitled to award compensation for the damage caused by an unreasonable length of court proceedings, the non-pecuniary damage being fixed to 1.200 € per anno (article 198 German Judicature Act – *Gerichtsverfassungsgesetz* -).

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?
Question 2: Do the administrative courts have the power to order the authority to enforce their rulings and judgments (power of injunction)?
Question 3: Have all your country's administrative courts been granted this power of injunction?
Question 4: Can your country's administrative courts sentence the offending authority to pay a penalty or a fine?

(1) The rules

Administrative courts have the means to enforce their rulings. Based on dogmatic principles of German procedural law, however, it might be more precise to say that it is the parties of a lawsuit who have the means to enforce the judgments: No enforcement measure will take place without an action for enforcement brought forward by a party of the proceedings (natural or legal personality, administrative body) claiming the implementation of the judgment being wrongful. The first instance court is competent to issue an enforcement order, either in favour or against the public administration (depending on the outcome of the judgment). It is possible to impose a penalty payment up to 10.000 € against an administrative authority, even repeatedly.

Whether enforcement is needed – quashing orders are self-executing, so that there is no need to enforce them – and in which way it should be executed depends on the contents of the court order. The details are laid down in articles 167 to 172 Administrative Court Act and articles 704 to 945 Code of Civil Procedure (*Zivilprozessordnung*).

(2) The legal practise

The afore-mentioned rules ensure that court decisions will be implemented according to the relevant judgment. However, in legal practise these means are being used only very rarely. Most administrative court judges would admit to be rather unfamiliar with enforcement procedures because usually administrative authorities fully comply with court orders; almost the same goes for individual and legal personalities being claimant or defendant in a lawsuit. There might be different reasons for such willingness to implement judicial decisions. As to the administrative authority, a strong feeling to be part of a system which is based on the rule of law plays an essential part in this context. Even more important is the fact that, traditionally, the reasoning of administrative court judgments is rather detailed and thoroughly elaborated, first instance court decisions being no exception from this rule. Thus the courts generally intend to convince the parties of the proceedings by explaining the relevant law and discussing the points of view brought forward esp. by the litigant not being successful. Furthermore, it is the intention of the courts to offer all parties the opportunity to defend their position orally and in writing during the course of proceedings. This, too, may contribute to the impression that administrative courts try to rather convince than merely hand down a sentence.

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*?

Those whose rights have been infringed by the wrongful implementation are, of course, entitled so seek legal protection. If the administrative authority has wrongfully implemented a judgment without prior enforcement by the court, the correct remedy would be an action to enforce the judgment (in a lawful way). If the administration has failed to fulfil the orders of the court issued as a result of an action for enforcement, the administrative acts issued as means of implementation are unlawful and can be subject to judicial review as well.

Again it has to be underlined, however, that actions for enforcement are most uncommon in German legal practise. It does happen, though, that the administration correctly fulfils the obligations emanating from the judgment as to the case decided (res judicata) but refuses to change its general practise in the relevant field of work according to the reasoning of the judgment. In such cases other individuals concerned have to file additional actions against the administration because generally the legal effect of the judgment is limited to the case decided.