



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**

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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.

ANSWER TO QUESTION 1: There are instances under Maltese Law when the Administrative Review Tribunal (the Tribunal competent to review administrative acts) can rectify a flaw in a disputed decision. These instances are for example issues concerning payment of income tax or payment of duty on documents and relative penalties. The Administrative Review Tribunal can, after considering the case, substitute its discretion to that of the Commissioner for Revenue by revoking and annulling *in toto* or reducing the amount if tax (including penalties and interest) due by the tax payers. In cases involving payment of taxes there is this substitution of discretion but in cases involving the issue of licences, permits, authorisations etc., the Administrative Review Tribunal can only annul the flawed decision and order the relative competent authority to either repeat the administrative process leading up to the decision or to issue a licence, permit or authorisation on the basis of findings resulting from the hearing held before the Tribunal.

The power of the Courts to review administrative acts has been in existence under Maltese Law for a number of years – this process is known as judicial review of administrative acts by the Court – but it entails only the power to annul and not rectify, and review is limited to a number of specific instances, for example when the administrative act is *ultra vires* or contrary to the Constitution. With the introduction of the Administrative Justice Act, a Tribunal, known as the Administrative Review Tribunal, has been set up with the specific competence of reviewing administrative act, and this also a means to have a number of administrative tribunals absorbed into one Tribunal. The judicial review of administrative acts by the Courts has not been revoked by the two options (i.e. an action before the Administrative Review Tribunal or an action before the Civil Court, First Hall) exist in parallel. As per the Administrative Justice Act, the Administrative Review Tribunal is competent to review administrative acts both on points of fact as well as on points of law and as per certain specific Regulations the Tribunal can also substitute its discretion for that of the public authority concerned. With the introduction of the Administrative Justice Act and the setting up of the Administrative Review Tribunal all decision of public authorities, provided that the decision is not aimed at internal administration within the authority, can be reviewed by the Tribunal on the basis of fact and law.

Generally, the Administrative Review Tribunal can exercise its power to rectify only upon final judgement. The law does not provide for interim relief and case law has established the principle that a decision by a public authority which is *prima facie* valid must stand and be adhered to until final judgement. Interlocutory decrees can and are given in order to settle procedural disputes, for example: (i) establishing that the Commissioner for Revenue cannot refuse to give evidence in proceedings regarding income tax; or (ii) the suspension or otherwise of interest on tax due pending the outcome of proceedings. Naturally there are issues, for examples claims by the Commissioner for Revenue being time-barred or the review proceedings themselves being time-barred, which by agreement between the parties or by an order by the Tribunal, are decided by means of a preliminary judgement prior to the hearing of the case on the merits. The qualification for the prior consent of the parties or an order by the Tribunal for the delivery of a preliminary judgement prior to the hearing of the case on the merits is required in view of a provision of the Administrative Justice Act which provides that: *the time within which an administrative tribunal shall take its decision shall be reasonable in the light of the circumstances of each case. The decision shall be delivered as soon as possible and for this purpose the tribunal shall deliver one decision about all matters involved in the cause whether they are of a preliminary, procedural or of a substantive nature.* It is not always possible and practical to give one judgement on all matters involved in the cause and the delay in determining certain issues could even be detrimental and prejudicial to the parties, particularly to the applicant.

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.

ANSWER TO QUESTION 2: As already explained in the answer to Question 1, there are instances when the Administrative Tribunal can exercise its power to rectify a flawed

decision, for example in income tax cases. In the main however, the law is silent and therefore it would essentially depend on the particular issues involved. The Administrative Tribunal can annul a flawed decision and order the authority in question to act fairly and in terms of law towards the individual concerned. As already explained the Arbitration Review Tribunal is a novel set up under Maltese Law however, in cases of judicial review of administrative acts by the Court the public authority generally obeys orders given by the Court in its judgements when flawed decisions are quashed.

Even though these are still early days, there are other mechanisms in place within our legal system which could aid and ensure the adherence of the public authority to the judgement delivered by the Court or Administrative Tribunal, as the case may be. Amongst these there are proceedings for contempt of Court or of the Administrative Tribunal. Possible actions for damages against the public authority could also act as a deterrent towards the public authority in question not observing the 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: The answer to this question depends on the meaning of the question, in the sense that if it refers to the effect on the proceedings should the decision be rectified by the public authority itself during the course of the proceedings, then the answer is that the applicant generally withdraws the proceedings since he has attained the remedy he was seeking. The issue which could remain pending is one concerning costs which issue would generally in any case be settled prior to the withdrawal of the proceedings. If the question on the other hand refers to the decision being rectified by the Administrative Review Tribunal, as already explained above, interim relief or interim rectification is not provided for under our law and in the main rectification, if any, of the flawed decision takes effect upon final judgement.

Once the Administrative Review Tribunal delivers judgement, even in cases where it rectifies or annuls the decision and orders the public authority to act fairly and in terms of the law or to issue the requested licence, permit or authorisation, there is a right of appeal before the Court of Appeal. In other words, all judgements given by the Administrative Review Tribunal are subject to appeal, which right is afforded both to the applicant as well as the public authority.

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

ANSWER TO QUESTION 4: As already explained in the answer to Question 2, the Arbitration Review Tribunal is a novel set up under Maltese Law however, in cases of judicial review of administrative acts by the Court the public authority generally obeys orders given by the Court in its judgements when flawed decisions are quashed.

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: A person who feels aggrieved by an administrative act can appeal from such act before the Administrative Review Tribunal and judgements by the

Tribunal are then subject to appeal before the Court of Appeal. The law does not state anything regarding appeals from administrative acts which are rectified following a judgement by the Administrative Review Tribunal of the Court of Appeal, but presumably such an act too, if not carried out fairly and in terms of law, can be appealed from again.

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?

ANSWER TO QUESTION 1: Our legal system does not provide for compensation in lieu of annulment. Essentially it is the applicant/complainant who decides what course of action he wants to take and which remedy he seeks to obtain: (i) judicial review of administrative acts by the Court, where he can obtain annulment of the decision and damages, but is then limited as to the grounds on which he can apply for such remedies and can be availed of only where a specific remedy is not already provided for by the law; (ii) a civil action of damages; or (iii) an action for violation of fundamental rights and freedoms where the remedy sought is one of compensation.

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?

ANSWER TO QUESTION 2: As already stated in the answer to Question 1, our system does not provide for compensation in lieu of annulment but for damages together with annulment and this only in cases of judicial review of administrative acts by the Court. The Administrative Review Tribunal is not empowered to award damages and the complainant would therefore have to institute separate judicial proceedings in order to claim damages suffered.

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

ANSWER TO QUESTION 3: As already explained above, our system is different: it provides for review of the administrative act together with damages in cases of judicial review of administrative acts by the Court or review of the administrative act before the Administrative Review Tribunal and separate civil proceedings for damages suffered.

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?

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?

ANSWER TO QUESTION 4: No.

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?

ANSWER TO QUESTION 5: Not applicable.

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?

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?

ANSWER TO QUESTION 1: The Administrative Justice Act does not confer on the Administrative Review Tribunal specific means how to ensure the actual implementation of its judgements. However, the provisions of the Maltese Code of Organisation and Civil Procedure regarding the execution of judgements are made applicable to judgements delivered by the Administrative Tribunal. The provisions allow for the issue of a number of executive

warrants, upon a request by the applicant, amongst which: (i) the warrant *in factum* which shall contain the order that the party against whom the warrant is issued is to be conveyed to prison, in order to be therein kept at his own expense, until the performance of the act ordered by a judgment or until such time as the court may deem necessary to ensure such performance. The law does not provide that such a warrant cannot be obtained against the person vested with the judicial representation of a public authority; or (ii) garnishee orders or warrants of seizure which can be obtained in issues pertaining to refunds due following the quashing of a flawed administrative act.

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?

ANSWER TO QUESTION 2: Saving for the above-mentioned executive warrants, the Civil Court, First Hall and the Administrative Review Tribunal are not vested with any other form of power to order the authority to enforce their rulings or judgements.

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?

ANSWER TO QUESTION 3: Not applicable.

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?

ANSWER TO QUESTION 4: I am not aware of any provision under Maltese Law which empowers the Administrative Review Tribunal or the Civil Court, First Hall in cases regarding judicial review of administrative acts, to impose a penalty or fine on the offending authority. The Administrative Review Tribunal however can impose legal interest on the authority who delays in the payment of any refunds ordered, for example in cases of excess tax having been paid.

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?

ANSWER TO QUESTION 5: In this case I would imagine that proceedings for contempt could be instituted by the complainant or he could ask for the issue of a warrant *in factum* against the judicial representative of the authority.