



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:

In the UK there is no Supreme Administrative Court as such. To provide a useful answer to the question it may be necessary to consider three different jurisdictions:

- (i) In relation to subject-matter within the jurisdiction of the tribunals (which includes social security, tax, immigration, mental health etc), the Upper Tribunal which has appellate jurisdiction from the First-tier Tribunal (“FTT”) on issues of law;*
- (ii) The Administrative Division of the High Court (or “Administrative Court”), which has general judicial review jurisdiction in respect of all decisions of public authorities or of inferior courts and tribunals;*
- (iii) The Supreme Court, which is the final appellate court for decisions from all lower courts or tribunals, civil, criminal or administrative (normally via the Court of Appeal or, in Scotland, Court of Sessions).*

In none of these courts is there any equivalent to the “administrative loop” procedure. In the tribunal system, if the Upper Tribunal holds that the FTT decision is erroneous in law, it has power either to remit the case to the FTT, or to remake the decision itself, and to hear evidence for that purpose.

The Administrative Court has no such power. It can only quash the decision to enable it to be remade by the original decision-maker. The same applies in the Court of Appeal and Supreme Court.

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:

Apart from the special powers of the Upper Tribunal (see above), the courts have no power to rectify a flawed administrative decision. In practice a court will either quash the authority’s decision or declare it to be invalid. It may, if necessary, make a mandatory order compelling the authority to remake the decision, but this is not normally needed.

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:

This issue does not arise. Once the court has quashed a decision, those proceedings are normally at an end. This does not preclude a legal challenge to a new decision, once made, but this will normally require a fresh appeal or application to quash.

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

Answer:

In the Upper Tribunal (see above) the power to remake the decision is very useful in practice and works well, generally where all or most of the relevant evidence is available in written form, and the matter can be decided without the need to adjourn for further evidence. In such cases, the UT it avoids the delay and expense of remitting the case to the First-tier. Where further oral evidence is needed, it is usually more efficient to remit the matter to the FTT.

The issue does not arise in other courts which have no such power.

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:

Onward appeals in such cases are dealt with in the same way as other appeals, save that the Court of Appeal may be more ready to grant permission to appeal in a case where the Upper

Tribunal is in effect the primary decision-maker, than in “second appeals”, that is where the Upper Tribunal has been reviewing the legality of a FTT decision..

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:

The administrative courts have no general power to award compensation as an alternative to annulment.

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?

Not applicable (see above)

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?

Not applicable

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?

Not applicable

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?

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?

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:

Orders of the administrative courts and tribunals can be enforced in the same way as civil orders, including punishment for “contempt” of an order of court (which may result in imprisonment or a fine) or sequestration of assets. In practice it is rare for such powers to be required, since public authorities in the UK have a strong tradition of compliance with court orders.

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:

The courts have wide powers of enforcement but they are not normally required. The order may be applied for by any party with a sufficient interest in the order. The timing of any such order in a particular case will depend on the circumstances,

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:

The same powers are available to the administrative courts, Court of Appeal and Supreme Court. Orders of administrative tribunals may if necessary be enforced by the courts in the same way.

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:

Under the contempt procedure, a fine may be imposed as a penalty for breach of an order of courts.

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:

If a decision is remade in a form which is not consistent with the court's judgment, there is no principle (of res judicata or otherwise) to prevent a new application being made to court to quash it.