



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**

CZCECH REPUBLIC

**Brussels
- 1 and 2 March 2012 -**

(simultaneous interpretation English/French)

Seminar organised with the support of the European Commission



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?

Answer: The Supreme Administrative Court (hereinafter referred to as “the Court”) has only power to annul the disputed decision or to dismiss the cassation complaint as inadmissible. The powers are arranged so due to the concept of cassation character of the Court.

There is only one situation when the Court can change the decision of the administrative body: if the court decides on a complaint against a decision whereby the administrative authority imposed a penalty on account of an administrative offence, the court may, if there are no causes for annulling the decision but the penalty imposed was apparently unreasonably large, either waive the penalty or decrease it within lawful limits, if such a decision can be made on the basis of the facts from which the administrative authority started and which the court may have supplemented through its own evidence in nonessential ways and if such a procedure was proposed by the complainant in his or her complaint (Section 78 para. 2 of the Code of Administrative Justice, “CAJ”)

Section 78 of the Code of Administrative Justice provides:

“The judgement

(1) If the complaint is justified, the court quashes the contested decision as unlawful or for procedural faults. The court also quashes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it.

(2) If the court decides on a complaint against a decision whereby the administrative authority imposed a penalty on account of an administrative offence, the court may, if there are no causes for the revocation of the decision in accordance with paragraph 1 but the penalty imposed was apparently unreasonably large, either waive the penalty or decrease it

within lawful limits, if such a decision can be made on the basis of the facts from which the administrative authority started and which the court may have supplemented through its own evidence in nonessential ways and if such a procedure was proposed by the complainant in his or her complaint.

(3) If the court quashes a decision, it may, depending on circumstances, also quash the decision of a lower-level administrative authority which preceded it.

(4) If the court quashes a decision, it simultaneously declares that it returns the matter to the defendant for further proceedings.

(5) The legal position adopted by the court in the vacating judgement or a judgement declaring nullity is binding on the administrative authority in subsequent proceedings.

(6) If the court quashes a decision of an administrative authority in a matter in which the court itself produced evidence, the administrative authority includes the evidence among the grounds for a new decision in the subsequent proceedings.

(7) The court shall dismiss a complaint if not justified.”

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.

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: No, the Court has no power to rectify a flawed decision by itself. It can just determine how the administrative court of first instance shall decide in its new decision and the administrative court of first instance shall follow the legal opinion of the Court.

Since 1st January 2011 the Court has power to quash all the decisions in the cassation proceedings at once – that of the administrative court of first instance and even the decisions of administrative authorities, if there were such grounds for annulment of these decisions in the proceedings before administrative court of first instance (Section 110 para. 2 of the CAJ)

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.

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: N/A, see the answer to question 1.

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

Answer: N/A, see the answer to 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?

Answer: N/A, see the answer to 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?

Answer: No, we are not familiar with such system. In the Czech Republic the compensation for maladministration is governed by the Act No. 82/1998 Coll., on Liability for Damage Caused during the Exercise of State Authority by a Decision or Maladministration. Nevertheless the Act does not cover the system of compensation as an alternative to annulment. The compensation for maladministration is awarded by civil courts.

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?

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?

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?

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?

Answer: No, it has no such power.

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?

Answer: In the Czech Republic the compensation for maladministration is governed by the Act No. 82/1998 Coll., on Liability for Damage Caused during the Exercise of State Authority by a Decision or Maladministration. The compensation for maladministration is awarded by civil courts. Neither the Supreme Administrative Court nor the regional administrative courts calculate the compensation.

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?

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: Administrative courts can in the course of proceedings impose some obligations not only to the participants of the proceedings, but also to the third persons. Nevertheless the enforcement of decisions is governed by the Code of Civil Procedure [Section 274 Letter b) of the Code] and entrusts the enforcement of the obligations to the general courts. Thus the administrative courts do not have their own special means to ensure the enforcement of their

rulings. In addition, the administrative courts rule mostly in a way that they just quash or uphold the contested decision.

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?

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

The Code of Administrative Justice stipulates that if a petition has been submitted for the commencement of proceedings and if it is necessary to take temporary measures to adjust the parties' circumstances liable to cause serious harm, the court may resolve to impose on the parties the obligation of having to do something, to restrain from doing something or to endure something by a provisional ruling. For the same reason the court may impose such an obligation on a third person, if he or she can be justly requested to do so.

It is obvious that this is not a situation of enforcing the ruling; the situation is more like issuing a provisional ruling which is to protect the participant(s) from serious harm, to deflect the harm. Roots of that harm are connected with the subject-matter of the proceedings. The court shall decide on the petition in short order.

The motion may be filed by any of the participants and may be filed whenever after filing the action.

Pursuant to the CAJ, the court may rescind or modify the decision on a provisional ruling if the circumstances change even without a petition. The provisional ruling terminates at the latest on the day when the decision of the court whereby the proceedings are concluded has become enforceable.

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?

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

Answer: Yes, every administrative court, be it regional or Supreme Administrative Court, has a right to issue a provisional ruling (injunction). This ruling may be issued even in the cassation proceedings. On this stage of proceedings the first instance administrative court has

no power to ensure the injunction since the proceedings before it had terminated by issuing the decision and the Supreme Administrative Court is now competent to issue provisional ruling.

There is one more institution that has to be mentioned: the suspensory effect of an action. The filing of an action in general does not have suspensory effect (unless otherwise provided for by the CAJ or a special law). At the plaintiff's motion after hearing the defendant's opinion the court shall award suspensory effect to the action if the enforcement of the decision or other legal consequences of the decision would result in irreparable damage to the complainant, the award of suspensory effect does not unreasonably affect the acquired rights of third persons and is not contrary to the public interest. The award of suspensory effect stays the legal effect of the contested decision until the termination of the proceedings before administrative court.

The Supreme Administrative Court has the power to grant the suspensory effect of the cassation complaint since the cassation complaint is always filed against effective judgement in legal force.

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?

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

Answer: No, they have no such right.

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?

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: Administrative courts quash or uphold the contested decisions, thus the complainant can not make an application for enforcement of the judgement.