



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.

Response: In Romania the administrative jurisdiction is part of the judiciary system, meaning that at the level of tribunals, courts of appeal and of the High Court of Cassation and Justice administrative divisions are functioning together with the civil and criminal ones. The procedural rules governing the administrative litigations are provided for and specified in the Law no 554/2004, *regarding the administrative contentious* (“Law no. 554”) as further amended in 2005, 2006 and more significantly in 2007 (Law no. 262/2007), as well as in the Civil Procedural Code, governing all civil litigations. In fact, the Law no 554 contains quite limited procedural rules and as a mater of principle does not confer in favour of the administrative courts “special jurisdictional powers” compared to the other courts. We do not have in Romania special nor separate administrative courts.

The mechanism described above, the so called “administrative loop” that exists in the Netherlands, as we do understand it, does not exist in the Romanian legal system, nor we are aware of any jurisprudence precedent that may be similar to that one. In other words, the administrative judge, in the course of the court proceedings initiated for the annulment of an administrative act, prior to the pronouncement of its decision, does not have, *ex officio*, the competence to interfere in the manner described.

According to the Romanian civil procedural rules applicable, as mentioned, we believe that such interlocutory injunction would be interpreted as an *ante-pronunciation* in connection with the merits of the case which is expressly forbidden and may trigger the request for the removal of the judge from the respective case.

According to Law no. 554 (article 18 combined with article 8) the administrative judge, following the object of the complaint, may pronounce one of the following decisions, (i) the annulment, in total or just partially of the contested administrative act , (ii) to oblige the administrative authority to issue a certain administrative act (meaning rectification of the infringements identified in the court decision) , or (iii) to oblige the administrative authority to deliver another documentation or to perform a certain administrative operation . The court is fully competent to decide upon the legality of the administrative act as well as upon the preliminary operations that were taken prior to the issuance of respective administrative act and shall also decide upon material and moral damages , but only if requested as such by the injured party.

In other word the administrative court had the competence, to pronounce decisions in which measures to insure recognition of the full recovery of the injured party’s rights, including as mentioned, adjustment of an administrative decision and such actions shall not be considered as an intrusion within the competences of the public administration

Possibly, the reasons for which under the Romanian administrative legal system the power of the court is solely limited to the annulment of the contested administrative act resides in the fact that according to Law no. 554, prior to file a contestation with the court, the injured party has the *obligation* to file an administrative preliminary complaint with the administrative body that issued the contested act/decision. The purpose of such *mandatory preliminary procedure* is in detail regulated in Law no 554 (article 7) and its main purpose is to offer to the administration authorities the opportunity to either revoke respective act or rectify it. That would avoid further litigation, if all parties involved are satisfied with the offered administrative solution.

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.

Response: As mentioned in the response under Question 1, the authority is obliged to rectified an infringement only such has been determined and decided upon through a final and irrevocable court decision, not following other mechanisms.

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.

Response: Not applicable as the described mechanism does not exist as such.

However, analyzing the question based on Romanian procedural proceedings applicable, and assuming that in the course of the *mandatory preliminary proceedings* the administrative authority would give full satisfaction to the injured party but in the meantime a court claim has been filed, the judge, solving the recourse in annulment will observe, in principle that such has no longer object.

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

Response: Not applicable as the described mechanism does not exist as such

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

Response: Not applicable as the described mechanism does not exist as such

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?

Response: As mentioned in the response under Issue 1- Question 1, the Romanian administrative judge through its ruling (decision), together with the annulment of the contested administrative act may also decide upon material and moral

compensation, but only if the claimant specifically requests for such damages. Law no. 554 does not provide for the possibility of compensation as an alternative to annulment.

In short, the response is no, we do not have the system of compensation as an alternative to annulment.

As we understand, such system would imply that in spite of the irregularities and even of the illegal aspects identified with regard to a certain administrative act /decision, the court shall decide to preserve the act but to indemnify the claimant. What about if respective act would continue to produce legal effects? The reason for such a possible solution reside in preservation of the state interest?

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?

Response: Not applicable as the described mechanism does not exist as such

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?

Response: Not applicable as the described mechanism does not exist as such

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?

Response: the Romanian administrative judge through its ruling (decision), simultaneously with the annulment of the contested administrative has the power to

decide upon material and moral compensation, if the claimant specifically requested for such damages, as already mentioned.

The plaintiff may submit the application for compensation at the same time as the annulment request, or that can be made subsequently, as well, after annulment, but within a delay that cannot exceed 1 (one) year since the damage was determined or could have been determined.

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?

Response: The compensation that may be granted includes material and moral damages and is fault based. The fault of the administrative authority, as a condition of the administrative – material liability can be established only in the due course of an annulment action when the illegal character of an administrative act or of the express refusal of the administration, as the case may be, is determined. The subsequent request for damages has to be filed with the administrative competent court (article 19 in Law 554).

The possibility that such request is filed with a civil court cannot be excluded, but in such case the burden of proof for the plaintiff is much higher as the legal ground should be different, namely not the provision in Law no. 554 but the general civil rules governing the liability *ex delicto*.

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?

Response: The mechanism through which we consider that the administrative courts in our country have the means to ensure actual implementation of their rulings and judgments by the authorities is provided for in articles 18 and 24 in Law no. 554.

According to article 18 *par. 5* and 6 in Law no. 544 when ruling upon the request for the annulment of an unlawful administrative act as well as upon the requested damages, the court may also decide to impose to the administration to execute the pronounced order *within a certain period of time*, under the sanction of pecuniary penalties calculated for each day of delay of respective term in implementation of the final court order.

According to article 24 in Law no. 554, in case the judge does not specify within its court decision the delay for the execution of the ordered measures, such execution has to take place *within no more than 30 days* upon the date when the court decision became irrevocable.

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?

Response: Apart the provisions described above, no injunctions are provide by the Law no. 554. The described mechanism is not applicable under the provision of our special administrative law.

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?

Response: Not applicable. See responses above

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

Response: The administrative court has the competence, according to article 24 mentioned above, in Law 554, upon the request of the injured party, to penalize the head officer of the administrative authority refusing to execute the court decision within the delay provided for, to a fine amounting to 20% of the lowest salary (as established by statistics) per each day of delay. The plaintiff is also legally entitled to ask for damages for the delay occurred.

The imposed fines which does not really benefit to the litigant, in the sense that he is not cashing their amounts, are conceived as to constitute an effective constraining mechanism to ensure enforcement of the irrevocable court orders.

The court orders that provide only for the payment of damages are submitted, in connection with their execution proceedings to the general civil procedural rules.

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?

Response: The Romanian special regulations on the contentious administrative proceedings does not provide for a certain solution in such situation. Thus, we would presume that in case the authority deliberately refuses to perform the enforcement of the court order in line with the decisions of the judge (not in line with the *res judicata*), the mechanism described above regarding the penalty impose to the head of authority for non-execution should be applicable.

Nevertheless, in case the content of the court orders are not clear enough and the administrative authority can reasonably invoke their imprecision, according to the Civil procedural code it is possible to ask the court to further interpret and clarify its orders, indicating also the extent of each of the dispositions. That shall be done through a separate court order, pronounced with emergency by summoning the parties (art. 281/1 Civil procedural code).

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