ACA-Europe Seminar
Law, Courts and guidelines for the public administration

Fiesole, Italy

General Report

by the Italian Presidency of ACA-Europe

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ITALIAN PRESIDENCY OF ACA-EUROPE

GENERAL REPORT
FIESOLE

INTRODUCTION

Dear Colleagues,

It is a pleasure and an honour for me to present this General Report as an introduction to the first seminar of the Italian Presidency of ACA, which, if the health emergency had not occurred, would have taken place last autumn.

Let me briefly recall what I said at the General Assembly held in Berlin in May 2019 when I presented our programme for the upcoming two-year period 2020/2022.

Our intention is to continue along the path undertaken during the German Presidency and to reinforce the potentiality of horizontal dialogue among the Supreme Administrative Courts, a theme perfectly in line with the DNA of ACA, that is to say, of promoting the exchange of mutual knowledge and continuing constructive dialogue.

In particular, the goal we have set ourselves, and which we aim to achieve, is to use horizontal dialogue to render the protection of the rights and interests of individuals and companies as homogeneous as possible, while continuing to respect the individual specifics of each internal system, with a particular focus on those sectors which are not directly subject to European legislation.

The ultimate aim of horizontal dialogue is to achieve the maximum standardisation of the means by which the rights of individuals and companies are protected when dealing with public authorities and this is a fundamental element for the construction of true European citizenship. This serves to avoid that by merely activating legal safeguards in one Member State as opposed to another could result in a diversity of protection levels of the same legal situations.

The pandemic gave us the opportunity to intensify comparisons with what was happening across all European countries, whose judges had to deal with new cases dictated by the emergency laws and the need to reorganise working methods in order to be able to continue

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their activities and to ensure the protection of rights, precisely at a moment when the health emergency had given the administrative authorities powers that would affect fundamental rights and freedoms, such as freedom of movement, freedom of association and freedom of economic initiatives.

The health emergency has shown how crisis factors tend to be transnational and how they must be dealt with by means of multilateral collaboration at all levels, without reserve.

The intense dialogue developed over the months of the health crisis among the European Administrative Courts has also shown that the administrative court, in its role as the authority competent to fully understand the legitimacy of the acts adopted by the Government and by the different territorial authorities to deal with the health emergency, has taken on the role of guarantor in this difficult balance between the requirements of safety and health protection and the relevant limitations and subsequent limitation of fundamental individual rights.

Clear evidence of the intensification of dialogue and confrontation among the Courts has been the creation on Jurifast of a special section dedicated to Covid-related cases which allows all judges to find out, in real time, how their European colleagues and counterparts have dealt with similar situations, and the creation of a questionnaire "The Supreme Administrative Courts in times of COVID-19 crisis - a lesson learned", whose declared purpose is to understand how the different administrative Courts have organized themselves in order to facilitate the continuance of jurisdictional activity even during the emergency phase in compliance with the fundamental principles of administrative trial, such as public hearings and the full contradictory hearing between the parties, and to share the "best practice" previously adopted to deal with the difficulties and solve the problems encountered.

I believe, therefore, that this General Report and the seminar that will follow constitute yet another important contribution towards guaranteeing the continuity of the experience of horizontal dialogue, a topic that has taken on even more significance during the global health crisis.

Thanks to the replies you all provided in the questionnaire, in fact, it has been possible:

a) to outline what the rules governing the interpretation and the enforcement of the law in each State are, with particular emphasis on the tools available to the judge;

b) to investigate which existing institutes in the different States are in place to ensure the uniformity and homogeneity of jurisprudence together with an in-depth examination of the conforming effect of the decisions of the Supreme Courts, in relation to the decided case and to the elaboration of principles and/or guidelines which will serve to direct the future actions of the public administration;
c) to identify the procedural institutes through which it is possible to effectively enforce the decisions, by analysing the different forms of protection provided by each individual legal system;
d) to analyse in-depth the issue of the advisory functions of the Supreme Courts, where they exist, for the Government public administrations in general.

According to authoritative doctrine, the law as a technique and style of regulation of the inter-subjective relations of a given group (the State) represents one of the strongest and most characteristic identifying elements in the process of integration of the State as part of a superior entity, which is undoubtedly the European Union.

Faced with the changing historical and political frameworks of reference, legal institutions inherently have a long-term stability that allows them to represent a strong identifying element of the human pool within which they operate.

If the judges of the different Member States were able to consult, one with the other, the Courts will therefore be able to make a valid contribution to an ever closer union among European countries, which is the objective of the Treaties of Rome, and make the European judicial and legal area the most effective instrument for the construction of a common constitutional patrimony, a multiple and identifiable common heritage which will allow us to transition "From judge-made law to judge-made Europe".

In conclusion, I can assure you that this Report would not have seen the light of day without the extraordinary and diligent work coordinated by the Professor of Administrative Law in the Faculty of Law at the Sapienza University of Rome, Avv. Marcello Clarich, and his collaborators, Prof. Giuliano Fonderico, Prof. Alfredo Moliterni and Avv. Gianlorenzo Ioannides.

They contributed to the first draft of the General Report with great enthusiasm and competence. My warmest thanks go to them and to the magistrates who collaborate on a daily basis within

the International Sector of the Council of State and who have also provided invaluable help in the organisation of this first Seminar of the Italian Presidency of Aca-Europe.

Finally, I would like to thank the ACA-Europe Secretariat which has constantly and consistently provided timely, efficient assistance in the various organizational tasks throughout the preparatory phase preceding our Presidency, together with the President of the German Federal Administrative Court, Klaus Rennert, for the extraordinary work accomplished by and under the German presidency. This presidency was extended by one year, and amply demonstrated his exceptionally high standards of dialogue and equilibrium that I have come to appreciate over the years.

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FIRST SESSION:

THE METHOD OF INTERPRETATION OF THE LAW AND ITS APPLICATION BY THE COURTS

1. The role of the Supreme Administrative Courts in the interpretation of the law

A first profile that is of central importance for reconstructing the interpretative function of the Supreme Administrative Courts (SACs) is that of the potential presence and efficiency of the general rules on interpretation within the individual legal systems. There are general rules for the interpretation of the law in all countries which were invited to complete the questionnaire. One of the few exceptions is The Netherlands, whose legal system, beyond the provisions of European law, does not have a clear hierarchy in interpretative criteria, nor an explicit prohibition to use certain interpretative methods.[1]

As for the legal source that regulates these interpretative criteria, in most cases it is ordinary law (Bulgaria, Latvia, Norway and Serbia) and, especially, the Civil Code (the Czech Republic, Estonia, France, Hungary, Italy, Romania, Spain and Switzerland), the Criminal Code (Belgium and France), or the Code of Administrative Justice itself (Lithuania, Portugal and Slovakia).

In some countries, however, the interpretation criteria are based on the text of the Constitution (Belgium, Finland, Hungary, Ireland, Romania and Slovenia). Only in limited cases may these criteria be provided for by regulatory acts (as in the case of Portugal, where administrations may intervene with secondary acts in order to further clarify and specify the law) or by soft law acts (as in the case of Croatia where the criteria are regulated by guidelines).

On the contrary, there are very few cases in which the rules of interpretation are based only on jurisprudence and not on positive law: this is the case, for example, of Germany (where the

[1] 1 With the exception of the provisions contained in the master plan for which the intention of the regulatory body - the city council - can only be used if the written provisions or the overall planning system cannot provide a clear answer [«In the Dutch national legal system, apart from EU law, there are no general rules on how to interpret laws. There is no hierarchy of interpretation methods and no general prohibition on the use of certain interpretation methods. There is one exception, namely regulations in a zoning plan. According to case law of the Administrative Judicial Division of the Council of State (AJD), the intention of the regulator (usually the council of a municipality) can only be used in the interpretation of a regulation if the text of the regulation or the system of the zoning plan do not provide a clear answer»].

Constitutional Court and the higher courts play a decisive role), but it is also the case of the European Union, Greece and Luxembourg.

Generally speaking, however, the Supreme Courts contribute, together with the law, to the definition and clarification of the general rules of interpretation (Belgium, Ireland, Norway, Poland, Portugal, Serbia and Switzerland), sometimes also by means of drawing-up interpretative guidelines (Estonia).

Finally, in several countries, doctrine also plays a key role in the definition of interpretation criteria (the Czech Republic, Finland, Germany, Latvia, Lithuania, Poland and Switzerland).

As for the individual interpretative reference criteria, in almost all countries the literal criterion and the *ratio legis* are applied. Several countries also refer to the criterion of the consistency of the legal system (Belgium, Bulgaria, Croatia, Estonia, Finland, Ireland and Italy).

It is also very frequently possible to refer to the preparatory work of the same normative texts to be interpreted (Belgium, Bulgaria, Croatia, Estonia, EU, Finland, Italy, Latvia, Luxembourg, The Netherlands, Norway, Poland, Romania, Serbia, Spain and Switzerland). Finally, in some countries. it is also possible to refer, by interpretation, to the same opinions issued by the SAC in the context of the process of adoption of the law (Belgium, Bulgaria, Croatia, Finland, Italy and Portugal).

Where gaps in the regulatory text emerge, the analogical criterion is taken into account in almost all countries. Sometimes this criterion is the only one that can fill the gaps in positive law - such as in Germany - while in many cases it can also refer to the general principles of the legal system (Belgium, Bulgaria, Croatia, Estonia, Finland, Italy, Latvia, The Netherlands and Norway).

In the Swiss legal system, for example, gaps can also be filled by the Federal Court by referring to constitutional rules and principles (as was the case of the general principle of equality, which made it possible, before the passing of a federal law, to introduce, by interpretation, the rule of equal pay for both women and men).

Moreover, in some countries, the SAC itself may intervene to fill legislative gaps by applying the general principles of the legal system, including, in particular, that of the coherence of the legal system (Luxembourg). Sometimes, as has been the case with France, gaps in the

legislative text can also be filled by referring back to European law; while, in other cases, it is also possible to refer to professional practice and customs (Romania). Finally, it is uniquely the case of the Estonian legal system that it is possible to declare as unconstitutional the omission for which the legislator is ultimately responsible.

As for the specific role played by the SAC, in most cases it contributes to the creation of criteria and methods of interpretation, although, generally, this role is jointly covered by the highest jurisdictions, such as the Constitutional Court or the Court of Cassation (Belgium and Bulgaria).

Indeed, it is a rare occurrence that only the SAC provides the general criteria of interpretation, as is the case of Finland or France (where the Council of State determines the general rules and methods of interpretation of the law based, among others, on the principles set out in Articles 4 and 5 of the Civil Code and Article 111-4 of the Criminal Code).

A final consideration, countries where the SAC is not directly involved in the process of the creation of the interpretation criteria are in a minority (as is the case of Greece, Italy, Norway, Spain, Slovenia and Portugal, where, however, the Administrative Justice Code provides the relative SAC with a series of instruments to ensure overall uniformity of interpretation).

In the decision of individual cases, there is frequent reference to European Union law (Bulgaria, Croatia, Estonia, Finland, France, Germany, Greece, Ireland and Italy), although there are also countries where this reference operates in a more restricted way (Belgium, Hungary, Norway and Serbia). However, the extent of the reference to European law depends entirely on the individual subject matter: as highlighted by The Netherlands, for example, the openness is greater when dealing with topics such as immigration or the environment.

Moreover, in most of the countries under consideration, the reference to the European Convention on Human Rights is less frequent, on an interpretative level, than the reference to European Union law, (although there are cases in which the references to such supranational systems are substantially equivalent, such as for Croatia, Finland, France, Greece, Norway and Switzerland).

Conversely, the reference to the general clauses of proportionality and rationality is absolutely predominant, except in isolated cases where these clauses operate in a more limited way (Hungary and Slovakia). Equally frequent is the importance attributed - within the interpretative process - to the relevance and weight of the interests concretely at stake (Belgium, Bulgaria,

Estonia, EU, Finland, France, Germany, Italy and Poland); only in a few cases does this reference operate in a more restricted way (Croatia, Greece, Ireland, Latvia and Lithuania).

One of the most consistent trends is the limited predisposition to make reference, in an interpretative way, to the jurisprudence of foreign courts in similar cases (Belgium, Bulgaria, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Norway, Romania and Serbia*)*. Cases of greater openness to the law of other Countries are reported - beyond the case of the Court of Justice of the European Union - with regard to Luxembourg, Portugal and The Netherlands, where, in particular, there have been open attitudes to German case law on religious beliefs, or to British case law on the sexual orientation of refugees.

Another prevailing trend is the infrequent reference to regulatory impact analysis, which is completely absent in many countries (Croatia, Finland, Hungary, The Netherlands, Portugal, Slovenia and Switzerland). The exception is Italy, where sometimes reference is made to this instrument, especially in the consultative session.

In some countries, attention to the possible impact and effects of the decision is more frequent (as in the case of Luxembourg, Norway or The Netherlands, where, for example, the financial impact of the decision is taken into consideration, especially with regard to the interpretation of laws). At times, consideration of the overall impact of the decision can even be significant (Estonia, France, Germany, Ireland, Italy and Switzerland).

Finally, among the additional and specific benchmarks, France highlights how the Council of State takes highly into consideration the Constitution and the other elements of the "*bloc de constitutionnalité*" (Declaration of the Rights of Man and the Citizen of 1789, Preamble of the Constitution of 27 October 1946, 2004 Environment Charter, objectives of constitutional value), as well as the interpretative reservations with which the *Conseil constitutionnel* accompanied the declaration of constitutionality of a legislative provision.[2]

[2] 2 Council of State , 5th July 2018, n. 401157, Langer. [«Le Conseil d'Etat prend également souvent en compte la Constitution et les autres composantes du bloc de constitutionnalité (Déclaration des droits de l'homme et du citoyen de 1789, Préambule de la Constitution du 27 octobre 1946, Charte de l'environnement de 2004, objectifs de valeur constitutionnelle), ainsi que les réserves d'interprétation dont le Conseil constitutionnel a assorti la déclaration de constitutionnalité d'une disposition législative (CE, 5 juillet 2018, n°401157, M. Langer)»].

2. Tools supporting judicial activity

As for the instruments used to support the interpretation process by the SAC, some countries do not have specific bodies for the classification of judgments and the elaboration of the abstracts of jurisprudence (Bulgaria, Croatia, Finland and Slovakia). Sometimes, although there is no specific office within the SAC, this function is performed by the same sections responsible for issuing opinions on proposed legislation (Belgium), or by the judges themselves (as in the case of Luxembourg, where each judge prepares a summary of the judgment).

Most countries, however, have specific support bodies for the classification and collection of the main judgements, which are periodically sent to judges, (the Czech Republic, Estonia, European Union, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovenia and Switzerland).

Sometimes, these bodies consist of members of the different jurisdictions present in the legal system (as in the case of Ireland); on the contrary, however, in a few cases, they also are made up of university professors (Spain).

In addition to the collection and classification of rulings, in most cases these bodies - or other specific bodies responsible for study and research activities (Ireland and Portugal) - provide the Courts with expert and informative support, also by means of the provision of comparative law studies (as recently occurred in France in reference to the measures adopted in European countries for dealing with the pandemic crisis), the drafting of reports on international courts (especially European courts), periodic updates on the existence of new legal guidelines or new regulatory interventions.

In some countries, these support bodies not only draw up the abstracts of rulings and enter them in special databases, but they also update *ad hoc* operating manuals in different areas of interest which are made available to judges (Ireland and The Netherlands). In other cases, these bodies may be called upon to prepare statistical analyses of the activities of the SAC (Estonia).

Tasks relating to the training of judges are more infrequently assigned to the same bodies **(**as is the case in Estonia, Hungary, Ireland, Italy, Lithuania, Poland, Serbia, and Slovenia); in some cases, these training tasks are assigned to specific bodies within the SAC (Belgium and France).

Sometimes, these bodies - or rather, specific professionals appointed within the Courts (Belgium) - can also offer support in the preparation and study of individual cases (Italy), sometimes directly at

the request of the judges (Ireland).

Moreover, such bodies may also offer support for the preliminary assessment of the case, while the assessment generally remains at an abstract level which does not go into the details of the specific dispute (Norway). Finally, at times, such support bodies may decide to submit the most important cases to informal groups within the Court and may provide support to the Advocate General (The Netherlands).

In most countries there are freely accessible databases available for the retrieval of previous rulings by the administrative courts (Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, EU, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Switzerland), although sometimes rulings on manifestly inadmissible or unfounded cases (The Netherlands) or on specific areas of interest (such as immigration for The Netherlands or legislation on foreigners for Belgium) are not published. Furthermore, in some countries, restrictions are placed on the publication of minor disputes (Finland).

As for the tools available to judges, the latter often consult the aforementioned public databases in the execution of their activities, as well as private databases developed by other bodies (Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, EU, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain and Switzerland). There are very few cases of judges who consult public databases only (Lithuania and Romania).

In almost all countries, there are currently no projects entailing the use of artificial intelligence systems for the elaboration or preparation of jurisprudential decisions (Belgium, Bulgaria, Estonia, EU, Finland, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Switzerland). At times, support to judges is limited simply to the processing of damages or expenses for witnesses and lawyers (Croatia and Italy).

In a few countries, projects have been set up to test machine learning and natural language in order to facilitate rendering judgements anonymous (The Netherlands). Finally, in France, where there is an explicit legal prohibition to take jurisdictional decisions on the basis of automated systems – unless it is to support the reasoning of the judge – there is, however, a project underway that uses artificial intelligence to identify cases with similarities with a view to dealing with them as a priority within a type of "pilot jurisdiction".

3. The application of law: the *νομοφυλακία* (nomophilachia) function in the system of administrative jurisdiction

The binding effect of SAC rulings on the lower courts is recognised only in certain countries (Belgium, the Czech Republic, EU, Hungary, Ireland, Latvia, Norway, Portugal, Romania, Serbia, Slovenia and Switzerland).

Sometimes, this binding effect operates only when the SAC pronounces when reunited in a certain specific panel (Bulgaria and Poland), or when it pronounces on matters of jurisdiction or on certain specific issues (The Netherlands). In other countries - even though the decision is not formally binding outside the parties of the same judgement - the law identifies a series of cases in which, due to hierarchical superiority or specific competence, the decision may still remain binding (Estonia).

In many other countries, on the other hand, the SAC's pronouncement is not, in itself, binding although it may be relevant in terms of interpretation and its power of persuasion (Croatia, Finland, France, Germany, Greece and Italy). In cases where the decision is not binding, the consistency and uniformity of the case law are guaranteed by the history of precedent, through the possibility of raising preliminary questions (Greece), through the possibility of calling informal meetings among the SAC judges before the case is actually discussed (Luxembourg) and, above all, through the authority of the role played by the SAC (France and Italy).

Moreover, in some countries, in the event of differences in interpretation, the SAC may decide on the format of an extended panel (Finland, Italy and Poland), or it may convene panels with a greater number of members (Latvia and Slovakia) or even special administrative sections within the Supreme Court (Spain).

There are also some countries (The Netherlands) where uniformity of interpretation is ensured through a variety of instruments (including the Commission for the Unity of the Law in Administrative Law, the mechanisms for appointing administrative judges as substitutes in other Administrative Courts, the creation of panels with more members in each Administrative Court of last resort). Finally, in other countries (Romania) uniformity of interpretation is ensured by the possibility of activating the instruments of appeal in the interest of the law and preliminary rulings for the determination of a matter of law**.**

Thanks to all these instruments, even in countries where the SAC decision is not binding, the consistency and predictability of decisions is very high : in some countries this percentage is between 50% and 75% (Italy, Lithuania, Romania and Slovakia); while in the majority of countries the percentage is between 75% and 100% (Croatia, the Czech Republic, Estonia, Finland, France, Greece, Latvia, Luxembourg, The Netherlands, Portugal, Serbia and Spain).

Generally speaking, SACs that intervene to resolve certain interpretative conflicts operate as a special panel which can be plenary or simply have more members (Belgium, Bulgaria, the Czech Republic EU, France, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, The Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Switzerland). In other cases, the special panel of the SAC operates in the limited cases provided for by the law (Estonia).

In Romania the special panel operates in an administrative section set up within the High Court of Cassation. However, in some countries there is no special panel for the resolution of conflicts of interpretation in the SAC (Germany, Luxembourg and Serbia).

In most cases, special rules are in place to promote the involvement of the SAC operating in special panels (Belgium, Bulgaria, Estonia, EU, Finland, France, Greece, Italy, Latvia, Lithuania, Norway, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia, Spain and Switzerland).

With regard to the possibility for the individual SAC judge to disagree with the orientation of the SAC in a special panel, it must be borne in mind that in many countries the individual SAC judge has the right to not adhere to a principle affirmed by the SAC in a special panel, by formally expressing his dissenting opinion (Bulgaria, Estonia, Finland, Latvia, Norway, Portugal and Romania).

In Italy and in the EU Court of Justice, however, it is not possible to express a single dissenting opinion. In Lithuania, any dissenting position may be attached to the file, but may not be made public. Furthermore, in Norway, Portugal and Italy, the dissenting judge is exempted from drafting the judgement.

Finally, in some countries special provision has been made, the result of which, is that the administrative judge may not disagree with the principle established by a special panel (France and The Netherlands).

With regard to the possibility for a Chamber of the SAC to disagree with the orientation of the SAC in special panel , in some countries, if a Chamber of the SAC decides not to follow the orientation of the SAC in a special panel, it is obliged to refer the matter once more to the same authority in a special panel (Belgium, the Czech Republic, Estonia, Finland, Greece, Italy, Latvia, Lithuania, Poland, and Slovakia).

In Italy, in particular, a Chamber of the SAC cannot adopt a decision contrary to a decision of the Plenary Meeting without making a preliminary referral, with the exception of application of EU law. In this case, the Chamber may directly refer the matter to the EU Court of Justice (see the Puligenica case).

The choices of the SAC as a collegial panel are binding and can only be modified by the SAC as a special panel, by means of a jurisprudential *revirement* (EU, Slovenia and Switzerland).

In Spain, having established the independence of the individual Chambers as being separate from the Assembly in Plenary Meeting, it is possible that the individual Chamber may deviate from the orientation of the Plenary Assembly, but by giving reasons for so doing.

In order to ensure uniformity and consistency of case law within the SAC - but also among the top bodies of the various higher magistracies - there are often regular meetings or seminars within the SAC (Belgium, EU, Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain); in some cases there are special regulatory mechanisms in place to ensure uniformity of jurisprudence among the different Chambers (Lithuania, Slovakia and Germany).

In consideration of the relationship among the different jurisdictions, the formation of working groups among the representatives of the various Courts (France) occurs fairly frequently or,

sometimes, there are informal mechanisms in place for regular consultation among the judges from different jurisdictions (Croatia, Estonia, Hungary, Italy, Latvia, Poland, Serbia and Switzerland); at times, such meetings are primarily aimed at sharing good practices (Lithuania).

In other cases, in contrast, consistency in the interpretative guidelines among the different jurisdictions is ensured by means of implementing specific interpretative measures which are adopted jointly by the judges of the General Assembly and the judges of the Court of Cassation and the SAC, as in the case of Bulgaria.

Finally, in some countries, consistency and uniformity are ensured by the possibility of referring the matter to an extended panel, consisting of representatives of the various jurisdictions (Germany), or through the possibility of an appeal, or an appeal at Cassation level in the interest of the law (Greece), or a special appeal as a preventive measure (Portugal).

Conversely, countries in which such coordination mechanisms among the various jurisdictions are not guaranteed, are completely in the minority (the Czech Republic and Luxembourg).

Finally, with regard to conflicts of jurisdiction in countries with a different administrative jurisdiction to the ordinary one, in many cases the resolution of such conflicts is allocated to a special jurisdictional body consisting of the representatives of the various different jurisdictions (Bulgaria, the Czech Republic, Estonia, France, Greece, Lithuania, Portugal and Spain); but special meetings among the representatives of the different jurisdictions (Latvia) may also be appointed for this purpose.

In some cases, however, the resolution of conflicts is allocated to the ordinary Supreme Court (Belgium, Croatia, Italy, Luxembourg, Serbia, Slovenia and Switzerland).

In other cases, cooperative mechanisms have only recently been made available, while the question of jurisdiction continues to be formally resolved autonomously by each individual court (Finland). Finally, in some countries the matter is resolved on a case-by-case basis by each court (Germany, The Netherlands and Poland), without the provisions of centralised coordination competencies.

SECOND SESSION

THE IMPACT OF THE DECISIONS OF THE SUPREME ADMINISTRATIVE COURT ON FUTURE DEVELOPMENTS OF ADMINISTRATIVE ACTIVITY

1. The effects of the administrative judge's ruling on the subsequent activity of the public administration (the so-called conforming effect)

The ruling of the administrative judge annulling an administrative act binds the public administration in the subsequent exercise of power in all countries under investigation. CJEU decisions are also binding, both for the European institutions and for the public administrations of the Member States. A minor exception to this principle exists in Estonia, where the binding effect of a court decision may be nullified if it is based on factual circumstances that change after it has been issued. In Germany, in some rare cases, mainly in fiscal matters, ministers may order the administration not to apply a particular judgement. However, such an order would most likely result in an immediate appeal.

The extent of the obligation changes considerably across the different countries, as are the differing consequences of not respecting a SAC pronunciation. A first distinction, in practice in many countries (Croatia, Finland, Greece, Italy, Lithuania, Luxembourg and Spain), derives from the defect identified by the administrative court: in the case of a purely formal defect, the administration may again adopt the annulled act, with the formal defect highlighted by the court having been amended.

Where the defect found is significant, the administration shall once again exercise its power within the limits indicated by the judge and within the margins of discretion that will persist following the ruling. In European law, the administrations of the Member States are obliged to apply European legislation, as interpreted by the Court of Justice, even if this entails non-application of any potentially conflicting national legislation. If the Court finds that a national law conflicts with European law, the Member State is obliged to take all necessary measures to ensure that it is amended and the conflict identified by the CJEU, subsequently eliminated.

The judgment annulling an administrative act can provide the administration with indications on how power should once again be exercised (Bulgaria, Croatia, France, Greece, Hungary and

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Italy); indications and clarifications on how to correctly enforce a judgment can also be requested later, by initiating the appropriate procedure (France and Italy).

The administrative judge may replace the public administration subsequent to the annulment of an act, in some cases indicated by law, (Belgium, Bulgaria, Estonia, Hungary, Italy, Luxembourg and The Netherlands), or in the event that the administration does not execute the sentence within the prescribed terms (Italy and Slovenia). This may occur in the judgement annulling the act or in the enforcement phase.

The consequences that may arise from failure to comply with a ruling of the administrative judge, or from the incorrect or untimely execution of the same, are similarly varied. In Portugal and Italy, failure to comply with a judgement, in addition to determining the nullity of any act adopted in violation of the same, may be a source of civil, criminal and disciplinary responsability for the official and of compensation for damages for the administration (Italy). In the Slovak Republic, if the administrative judge annuls an administrative act a second time for the same reasons for which it was previously annulled, the administration may be obliged to pay a penalty.

2. The effects of the decision of the administrative judge *ultra partes* and in similar cases

As a rule, the court decision has only *inter partes* effects. However, it may, in some cases, affect the activity of the administration even beyond the objective and subjective perimeter of the case decided. This may depend, in the first instance, on the nature of the contested act: in the case of the annulment of regulatory acts, town planning plans, indivisible administrative acts, the judge's decision will produce *erga omnes* effects in Bulgaria, Estonia, Lithuania, Hungary, Italy, the Netherlands, Poland, Romania and Spain.

It is also possible that the SAC, when pronouncing on a specific case, may express general principles which serve to guide the activity of the administration (Ireland and Italy). In France, jurisprudential rulings not only interpret laws and regulations, but also fill any potential regulatory gaps, establishing rules and principles to which all administrative activity must adapt. The administration is required to apply the principles expressed in a decision in all subsequent similar cases it may have to deal with, in application of the principle of fairness and impartiality.

The guidelines expressed by the administrative judge, and in particular by the SAC, are generally implemented by public administrations, even in the absence of a specific regulatory obligation, in application of the principles of legal certainty and fairness and this is to avoid acts which potentially may not conform to jurisprudence and become the object of numerous disputes and subsequent annulments. (Belgium, the Czech Republic, Croatia, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Portugal, Romania, Slovak Republic, Slovenia and Switzerland). To further facilitate compliance with case law, in some cases the SAC prepares reports on its own decisions which are to serve as guidelines for administrations on the topic of the correct application of the law (Latvia).

To guarantee legal certainty and to comply with the principle of fairness, the administration may orientate its future activity by changing its practices to conform with case law and, in some cases, even extend the effects of a judgment to similar cases.

Modification of administrative practices to align them with the principles expressed by case law in decisions on similar cases is frequent in Belgium, Estonia, Finland, France, Greece, Hungary,Luxembourg, the Netherlands, Norway, Serbia, Spain and Switzerland.

The effects of a judgement can be extended to similar cases in Bulgaria - although this does not occur frequently - Croatia, Estonia, Latvia and Portugal. In Italy, this decision is left to the discretion of the public administration, with the exception of civil service litigation, where the extension of the effects of judgements favourable to third parties is excluded for reasons of public expenditure restraints.

In some countries, the interested party may request that the administration review its decision if the administrative judge has declared similar measures illegitimate (this is always possible in Greece, and, only in some cases, in Spain).

However, it is not possible to extend the effects of the court's decision beyond the case decided in the Czech Republic, Ireland, Lithuania, Poland, Romania and Slovenia.

THIRD SESSION

ENFORCEMENT OF DECISIONS

1. The measures to ensure the enforcement of decisions with regard to the public administration

The principle of effectiveness of protection requires that court decisions are effectively and promptly enforced by the administration. To this end, most of the countries surveyed (Croatia, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Luxembourg, Poland, Portugal, the Slovak Republic, Serbia, Slovenia, Spain and Switzerland) provide for judicial proceedings to monitor and ensure the full and complete enforcement of court decisions.

In addition to these, there are also countries in which, in order to enforce decisions made by the administrative judge, or in any event made with regard to the public administration, the same ways and methods which are applied in the process of the execution of the sentences of ordinary judges , are implemented.

This is the case, in particular, of Lithuania, where, if the administration or the person obliged to enforce a decision of the administrative judge does not execute it within fifteen days, or within the different time limit set by the Court, the latter shall issue a letter of execution at the request of the claimant or, in some cases, even *ex officio*.

With this letter, the claimant can initiate the executive procedure, conducted by judicial officers, provided for by the Code of Civil Procedure. Even in Romania, where there is no separate administrative jurisdiction from the ordinary one, sentences handed down to the administration are enforced through the procedure provided for by the Civil Procedure Code for the enforcement of all jurisdictional measures.

In Italy, with regard to convictions in which the public administration is ordered to pay sums of money, it is possible to apply both the specific remedy for the enforcement of sentences before the administrative court (compliance judgement) and the executive procedures before the ordinary court.

Even among countries that do not provide for judicial proceedings, alternative procedures and/or sanctions are frequently provided for to ensure the correct enforcement of decisions.

Finland is an emblematic case from the point of view of the first aspect, where any measures necessary to ensure the enforcement by the administrative authority of the judge's decisions can be taken, *ex officio* or on request, within the ordinary system of checking the legality of administrative action (the Parliamentary Ombudsman and the Chancellor of Justice).

Sanctions, which indirectly guarantee the full, timely and correct enforcement of court decisions, are provided for in the legislation of The Netherlands and Estonia. In the first case, the administration which does not execute the judge's decision within the prescribed terms is automatically required to pay a penalty for each day of delay. In Estonia and in Italy, on the contrary, the application of penalties for the indirect enforcement of sentences (*astreintes*) is the remit of the administrative judge.

In order to encourage the spontaneous enforcement of the decision by the administration, thus avoiding litigation, French law stipulates that the jurisdictional procedure for enforcement be preceded by an administrative phase, overseen by the President of the competent court. This administrative phase, in 2019, made having to resort to the jurisdictional phase for the majority of legal proceedings possible.

Conversely, there is no provision for any type of procedure aimed at monitoring and ensuring the full and complete execution of the judge's decisions in Bulgaria, the Czech Republic and Norway.

The percentage of decisions whose implementation is incorrect or incomplete and which therefore requires the activation of the procedure for enforcement, is very low, less than 2%, or is defined as "extremely rare" in Croatia, Estonia, France, Germany, Greece, Hungary, Ireland, Luxembourg, Portugal and Slovenia. In Italy, the percentage of recourse to enforcement proceedings is around 15%. The other countries that do provide for enforcement proceedings have no quantitative data available.

In order to initiate the procedure required to ensure the full and complete enforcement of the judgement, it is necessary for it to become *res judicata* in Croatia, Estonia, Hungary, Latvia, Luxembourg, Poland, Romani, Serbia, the Slovak Republic, Slovenia and Spain. A few countries allow the enforcement procedure to be activated even before the decision becomes final, in the event of typified situations, and this is generally directly linked to the risk that the

delay in enforcement may render enforcement impossible or cause serious damage. (Estonia, Italy, Latvia and Spain).

In Italy, in particular, initiating proceedings is generally allowed before the first instance enforceable judgement becomes *res judicata*, unless the judgement is temporarily suspended by the Council of State.

The transition of the decision into *res judicata* is also required for the activation of the substitute mechanisms provided for in Finland.

2. The exercise of substitute powers by the administrative court

One of the ways of ensuring the correct execution of the judge's decisions is the option that, in the event of inertia on the part of the administration, or incorrect execution, the Court may take the place of the administration, either directly or by appointing an *ad acta* commissioner.

The Court may directly replace the administration, and thus take the measures necessary for the proper enforcement of its decisions, in Belgium, Croatia, Italy, Portugal, Serbia, Slovenia and Spain. A similar power of direct replacement, but limited to specific cases expressly indicated by law, is provided for in The Netherlands and Poland. In Luxembourg and in Italy, the authority to replace may be exerted by appointing an *ad acta* commissioner.

A few countries provide for forms of guaranteed enforcement which are different to the mere recognition of a substitute power by the Court. In Greece, a judge may be appointed to instruct the administration on the correct way to enforce judgements.

In Hungary, in addition to the option of imposing a financial penalty on the administration which does not enforce the decision, the administrative judge may order that the judgement be enforced by another administration, different to the one that has been obligated, while still retaining the same powers, or be enforced by the supervisory body responsible for the non-complying administration.

Only if both solutions are impossible, can the judge adopt temporary executive measures which lose effectiveness when the administration executes the judgement. Indirect methods of ensuring enforcement, by imposing sanctions, are provided for in Estonia, Italy and Latvia.

The judge cannot replace the administration in order to enforce judgements, nor are alternative mechanisms available in Bulgaria, EU, Finland, France, Germany, Hungary, Ireland, Lithuania, Romania, the Slovak Republic and Switzerland.

3. The responsibility of the public administration and public officials in the event of non-execution or incorrect execution of decisions.

The public administration and the official who acted are responsible for the damage caused by the inaccurate or non-execution of the judge's decisions in all the countries under investigation, with the sole exception of the Slovak Republic. However, this responsibility comes in different forms in different countries. In Estonia, the responsibility for damage lies only with the public administration, while in Greece the responsibility of the official arises only if disciplinary responsibility has been previously ascertained. In Portugal, in addition to the civil responsibility of the official, there are also certain kinds of criminal responsabilities, as well as financial penalties.

Jurisdiction over legal actions seeking damages is attributed in some cases to the administrative court, in others to the ordinary judge, and the solutions can be extremely varied. Specifically, the administrative judge has jurisdiction over actions seeking damages in Bulgaria, France, Hungary and Spain. In Hungary, the administrative court can order the administration to pay a penalty in addition to compensation for damages, although this occurs very rarely.

The ordinary judge is competent in Croatia, Germany, Greece, Ireland, Lithuania, Luxembourg, Norway, Poland and Romania. A particular case of subdivision of jurisdiction is that provided for in The Netherlands where jurisdiction over actions regarding sentencing is determined and based on the extent of the claim: the administrative judge deals with claims for an amount lower than € 25,000, while the civil judge with claims for a higher amount.

In Slovenia, the administrative court has jurisdiction if the action for damage compensation is proposed at the same time as the proceedings for enforcement of the decision, whereas the ordinary court has jurisdiction when it is brought independently. In Belgium, the administrative court may order the payment of compensation, but actions for damages are dealt with by the ordinary judge.

In Italy, the administrative judge is competent for actions seeking damages caused by the administration in the exercise of public office while the ordinary judge deals with the civil liability of the public administration in all other cases and the liability of individual officials towards third parties.

Damages resulting from the non-execution or incorrect execution of judgements sent down from the Court of Justice, on the part of an individual Member State, may be sought in the ordinary courts of the Member States themselves. If a Member State fails to comply with the decisions of the CJEU, the European Commission, by taking the necessary measures, may refer the non-compliant State to the Court of Justice pursuant to Article 258 TFEU.

FOURTH SESSION

THE ADVISORY FUNCTION OF THE SUPREME ADMINISTRATIVE COURT AND SUBSEQUENT IMPACT ON ADMINISTRATIVE ACTIVITY

1. The advisory functions of SACs

The SAC has an ordinary advisory role towards the administration only in some of the countries surveyed (Belgium, EU, Finland, France, Greece, Italy, The Netherlands and Norway). This role varies extensively from one country to another.

In Belgium, the Council of State includes a consultative section which expresses an opinion on all significant legislative acts and government regulations.

In Finland, the SAC may be asked to give its opinion on draft rules of primary rank or regulations, and may propose amendments to existing legislation.

In France, the opinion of the Council of State is mandatory for all bills and draft ordinances drawn up by the Government while it remains optional for bills submitted by parliamentarians.

In addition, government regulations schemes and certain individual administrative decisions of particular importance (for example, the declaration of public utility, revocation of citizenship) must be submitted to the Council of State for prior opinion and the Government may consult the Council on administrative matters, or to identify the correct interpretation of a rule, or on matters of subdivision of competence between the State and certain overseas communities. At the request of the Government, or on its own initiative, the Council of State may carry out studies on the management of public policies and prepare an annual report on the reforms which it deems necessary.

In Greece, the Council of State issues an opinion on the legitimacy of regulations adopted by presidential decree, as well as on issues of general interest and organisational matters relating to the Council itself and the proper administration of justice.

In Italy, the advisory function of the Council of State may deal with primary and secondary sources, governmental and ministerial regulations, codification projects and consolidated texts. The opinion of the Council of State may also be requested by the President of the Council of

Ministers on bills, especially those regarding the implementation of EU law. Finally, the Council of State may be consulted by the Regions or Independent Authorities.

In Norway, the SAC may participate in the preparation of bills in normal hearing procedures in which any interested party whatsoever may submit their opinion to Parliament. In addition to this, there is a distinctive role provided for in the Constitution, according to which Parliament may request an opinion on a point of law (this right, however, has not been exercised since 1945).

In The Netherlands, the advisory division of the Council of State expresses opinions on many acts of Parliament and Government indicated by law (acts of approval of treaties or withdrawal from treaties; government regulations; the annual budget of the Government, even those dealing with European constraints; expropriation decisions), as well as on various other issues (compliance with the European Stability and Growth Pact and climate policy; some conflicts between the Dutch Government and the governments of The Dutch Antilles).The Government and Parliament can then request opinions on legislation and public administration even outwith the cases expressly provided for by law, and the Council of State can advise the Government *ex officio*.

The Court of Justice of the European Union also has an advisory role. The European Parliament, the Council, the Commission and a Member State may request an opinion on the compatibility with the Treaties of an international agreement which would be binding for the European Union before it enters into force.

The SACs of Bulgaria, Croatia, the Czech Republic, Estonia, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Serbia, the Slovak Republic, Slovenia, Spain and Switzerland, ordinarily, do not perform advisory functions. In Spain, the SAC only performs jurisdictional functions and there is a Council of State which only performs advisory functions. In some of these countries, however, the SAC may perform advisory functions exclusively in specific matters, or on an occasional basis and as a matter of practice.

This is the case of Poland, where the SAC may be consulted by Parliament, like any other public body, in the context of the law-making process and may express its opinion in relation to bills regarding the status and organisation of the magistracy and of procedure.

Similarly, in Estonia, the SAC may be only consulted on the compatibility between provisions of the Constitution and European law.

In Switzerland, the SAC submits suggestions to Parliament annually to resolve any critical issues which have come up in cases decided on during the year.

In Lithuania, it is possible that the Government or Parliament may ask for the opinion of the SAC on bills, especially when they relate to issues concerning the administration of justice; this opinion is informal and non-binding.

In the Czech Republic, the SAC must give a mandatory, but non-binding, opinion on bills or regulations relating to jurisdiction.

Finally, in Ireland, the SAC expresses a preventive constitutionality judgement on bills.

2. The nature of the opinions given by the SAC (mandatory or optional, binding or not).

The nature of the opinion given by the SACs, which ordinarily perform advisory functions, differs widely among the various countries. The opinion of the Council of State in Belgium is mandatory for all draft legislative acts, or their amendments, which are proposed by governments; for all draft legislative acts, or their amendments, when required by a minimum number of members of the Legislative Assembly required to approve them; for draft regulations drawn up by the governments of the various components of the country.

Similarly, in France, the opinion is mandatory but only for certain types of acts, indicated by law, and is not binding, although it is generally observed. On the other hand, it is binding for certain individual decisions (for example declarations of public utility).

In Greece, the SAC opinion on presidential decrees is mandatory but not binding, although, as a rule, the President of the Republic does not issue decrees that would conflict with this opinion.

In Italy, the opinion of the Council of State is mandatory but not binding on Government or Ministerial regulations, on acts of Parliament, if it is required by law.

In The Netherlands, as mentioned previously, the law requires the acquisition of an opinion of the Council of State in relation to numerous acts and issues. This opinion is not binding.

In Finland and Norway, the opinion of the SAC is optional and non-binding.

Finally, the opinion requested from the CJEU on the compatibility of an international treaty which is about to be signed with the European Treaties is optional, however, where the opinion is negative, the treaty cannot come into force unless it has been amended in line with the Court's observations.

In some cases, the SAC, when performing advisory functions, may seek the opinion of experts. This is the case of Belgium, where the Council of State may ask experts for an opinion on the legitimacy of major regulatory reform projects of entire sectors of the law, or on reform projects regarding highly technical matters. In Italy, this occurs when drafting consolidated texts. Also in France, the Council of State frequently convenes hearings of experts before giving its opinions, or for conducting its own research. In The Netherlands, there are members of the advisory division of the Council of State who have specialist experience in economic and financial matters.

The option of seeking the advice of experts is not available in Finland, Norway and the CJEU.

3. The forms of collaboration between administrative judges and the Government or public administration.

The framework for the creation of forms of collaboration between administrative judges and the government or public administration varies greatly among the different countries.

In Belgium it is possible that magistrates of the Council of State, or more frequently in the case of hearing officers – for example the section of the Council responsible for the preparation of cases to be dealt with – may be seconded to the administration.

In France, the magistrates of the Council of State may be appointed, at the request of the Government, to carry out inspections, or to assist in the elaboration of a bill; they may also be seconded to public institutions, public companies or public administrations and participate in competition and administrative boards.

In Italy, administrative judges may take leave in order to take up top positions in the cabinets and legislative offices of ministries or independent authorities, for a maximum limit of 10 years. They may also hold university teaching positions, participate in study groups, competition

panels, or work as magistrates in the Constitutional Court, as researchers, while continuing to remain in service.

In Ireland, magistrates may preside over public enquiries on matters of public interest or over *ad hoc* courts established for a limited period of time to decide on specific compensation claims. Magistrates may also be appointed to publish reports on matters of public interest and may preside over referendum commissions, i.e. independent bodies whose main role is to explain to the public the subject matter of the referendum to validate amendments to the Constitution, and to encourage the electorate to vote.

In Slovenia, judges may be seconded to the Ministry of Justice for a limited period, or be involved in the preparation of bills. In both cases, a decision of the Judicial Council is required.

In Estonia, where the SAC does not have advisory functions, and in Luxembourg, magistrates may be called upon to take over administrative or university teaching positions but they cannot perform the functions of a judge during this time.

Finnish law and CJEU law do not provide for forms of cooperation. This is also the case in The Netherlands where, however, it is possible that a member of the Council of State may be called upon to cover a role for which particular professionalism and expertise is required, on condition that this does not adversely affect the independence and impartiality of the judicial function.

In Greece, magistrates cannot perform governmental or administrative functions. However, the law provides for the presence of members of the judicial order on committees that prepare bills, monitor the financial situation of parliamentarians and magistrates, in study commissions, and to evaluate the quality of regulation.

4. The recourse to the advisory function of the SAC as an alternative dispute resolution tool

The advisory function cannot serve as an alternative dispute resolution mechanism in any of the countries under investigation, with the exception of Italy, in the terms that will be detailed below, and of the European Union.

Member States may in fact refer the resolution of conflicts arising among them regarding matters regulated by the Treaties, to the CJEU. So far, this has happened only once.

In Italy, there is an alternative remedy to the jurisdictional appeal, called "extraordinary recourse to the Head of State", in which the Council of State is required to give a mandatory and binding "opinion", which is then implemented in a decree issued by the Head of State. This "opinion" is binding because it essentially puts an end to the dispute. It is promoted by a private party for the annulment of an administrative measure.

In Luxembourg, although an alternative dispute resolution function is not provided for, the administrative judge may act as mediator in certain conflicts between the administration and another party, provided that the subject-matter is not in the category of those issues which, if they were to result in a dispute, would come under the remit of the administrative jurisdiction.