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AN EFFECTIVE REMEDY IN ADMINISTRATIVE CASES: "THE PRINCIPLE OF FINALITY"

Lo scritto rappresenta il contributo italiano alla conferenza sull'effettività della giustizia amministrativa in Europa, svoltasi il 24 maggio 2013 a Utrecht (Olanda) e organizzata dall'Alta Corte amministrativa dei Paesi Bassi, dalla locale Università e dall'Associazione dei giudici amministrativi europei (AEAJ). All'evento è dedicato anche il sito http://www.eventscrvb.eu/Evaluatie/Conference/index.html

This questionnaire has been sent separately to the members of the AEAJ by mr. Henrich Zens. Mrs. Annika Sandstrom and mr. Bernard Even will present the findings of the questionnaire to the members of the AEAJ and participants during the conference in the afternoon of Friday 24 May 2013.

Introduction

One of the questions a judge in administrative court proceedings has to answer, is whether the challenged administrative act is legal or not (or in some countries, whether the act has violated subjective rights of the appellant). If the judge is convinced that the administrative decision is illegal, the question may be asked how the case should be continued from a conflict resolution perspective when the administrative act has been annulled by the court. Can the court decide the case by replacing the administrative decision by a decision of its own design or should the case be left for reconsideration to the administrative body that took the challenged decision? That question is the subject of this questionnaire. To put it differently: What is to be considered final conflict resolution in administrative proceedings and what can administrative judges actually do to end the conflict between administration and parties(s) at hand?

We would like you not to elaborate on national rules of administrative procedure – we are predominantly interested in your professional attitude concerning final conflict resolution and what you professionally can do and cannot do to make it work.

The results of the questionnaire will be used as input for a debate at the AEAJ-conference in Utrecht, 24th May 2013.

Questions

1. Is aiming at conflict resolution a dominant value in your legal system?

   a) What is the role of the articles 6 and 13 ECHR in that respect?

According to the Code of administrative proceedings (hereafter, the Code), enacted by legislative decree nr. 104/2010, the principles of the European law (as laid down in the UE Treaty and in the European Convention for the Protection of

Human Rights and Fundamental Freedoms - hereinafter ECHR) are applied in the administrative trial.

In particular, the principle of a fair trial within a reasonable time, laid down in article 2, para. 2, of the Code ("*The judge and the parties cooperate to reach the goal of the reasonable duration of the trial*"), replicates the fundamental principle set by article 6 ECHR.

The principle of an "effective remedy before a national authority", as set by article 13 ECHR is pursued through the arrangement of a fairly wide set of actions, all giving rise to cognizance proceedings: an action for annulment of administrative decisions; an action for compensation for damages; an action against "the silence" (i.e. inactivity) of a public administration and, as from 2012, an action for the order to administration to issue a certain act (as a substitute for the annulled act).

The enforcement of the judgements is guaranteed through a special action, namely through the "giudizio di ottemperanza" (i.e. enforcement proceedings), as explained later.

We can say that the described legal context is aimed at conflict resolution as far as the judge's attention is focussed on the requests of the claimant, not only in view of a due tutelage of individual rights and legal interests, but, as far as possible, also keeping an eye on the settlement of the conflict.

b) What is the leading perspective on the relationship between the administration and the administrative judge (separation of powers, checks and balances?)

The leading perspective on the relationship between the administration and the administrative judge is based on the constitutional principle of separation of powers: on one hand, the Administrative Jurisdiction is independent and separated from the Government, on the other hand, the judiciary cannot usually perform administrative power and therefore issue or rectify administrative decisions.

In other words, apart from some definite cases of "substantive" jurisdiction, as a general rule the jurisdiction of the administrative judge is a jurisdiction of legality, implying a verification of the legitimacy of the administrative act and not of the decision's substance (possibility of a different administrative decision) so that the judge cannot interfere with the merit of the discretionary choice made in the act and take a decision in the place of the administrative authority ([1]).

However, as from 2012 the administrative judge - on the pattern of the German *Verpflichtungsklage* set out by the *Verwaltungsgerichtsordnung* (VwGO) – has been given the power to order the administration to issue a certain act (as a substitute for the annulled act).
Moreover in some cases of "substantive" jurisdiction an Administrative Judge can substitute the Authority and replace the annulled act; the most relevant ones are represented by the "enforcement judgement" and the administrative election

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1 As for the limits of the national judge's review of the acts of an administrative authority, it has been pointed out that the administrative judge can with a full cognition check the facts considered in the proceedings as well as the evaluation process through which the Authority has come to apply the very rule of law, undisputed being however that, where the legitimacy of the action and the correct use of the underlying technical rules have been ascertained, the jurisdictional review cannot go beyond so as to substitute the judge's evaluation to the one already effected by the Administration, who remains the sole subject in charge of the exercised powers (Ex multis: Cons. Stato, VI, 12.2.2007, n° 550; Cons. St., VI, 10.3.2006, n° 1271; TAR Lazio, Rome I, 24.8.2010, n° 31278; id., 29.12.2007, n° 14157; id., 30.3.2007, n° 2798; id., 13 March 2006, n° 1898.
In process of time, the national courts have definitely come to affirm the lawfulness of a stronger, more incisive review of the judge, even on acts of the national regulatory authorities (especially of antitrust authority, characterized by a high level of technical discretion as well as by the use of indeterminate juridical concepts having their roots in the economic science), oriented to a full and effective tutelage of the individual juridical situations deducted in litigation. This intrinsic review of the judge has lately been deemed as comprehensive of a re-examination of the technical evaluations made by the Authority as well as of the economic principles and the indeterminate juridical concepts applied (Cons. St., VI, 20.2.2008, n. 595; 8.2.2007, n° 515), and is to be conducted by the judge by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration, also with the aid of experts (Cons. St., VI, 23.4.2002, n° 2199).
Also in the field of electronic communications the judge of appeal has finally relinquished its previous reluctant attitude towards the cognizance of the material issues underlying the highly technical matter at hand (which in a recent past had brought to the annulment of first instance decisions more open to the instances of a "bottom up" review of the contested acts of AgCom: Cons. St., III, 15.5.2010, n. 2802, quashing Tar Lazio, Rome, III ter, 14.12.2011, n. 9739), and reconsidered his own role by enriching his practise with the jurisprudential attainments already registered in the contiguous antitrust sector (Cons. St., III, 2.4.2013, n. 1856; 28.3:2013, n. 1837), so resulting more consistent with the trends emerged in the forum for national judges organized by the European Commission in order to elaborate and disseminate an *acquis communautaire* for the sector (see, for instance: "Seminar on predictable market regulation and effective right of appeal", November 26, 2012; "Implementing the revised regulatory framework in electronic communications", November 29, 2011).

disputes, in these latter the administrative Courts having the power to rectify the result of the election.

2. Is the scope of review limited to the question whether the administrative act has violated subjective rights of the appellant?

In Italy the administrative judge currently protects individual rights and legal interests (i.e., legally protected interests in matters concerning the administration, called "interessi legittimi") and doesn't include a general oversight of the administration's proper functioning.

As a result, a recourse against an administrative decision is examined by the judge within the limits of the complainant's interest and in adherence with his/her request, in accordance with the "principle of the claim" which masters the administrative proceedings.

The judge shall then ascertain whether the exercise of public power was legal, and this not merely to verify the proper functioning of the defendant administration rather to establish whether the contested flaws of the administrative act possibly infringed on the claimant's rights so that his/her claim may be admitted.

3. In your legal system, does an administrative judge have the legal competence to decide the case in a conflict resolving manner? For example, by:

- upholding the legal consequences of an administrative act annulled by the judge;
- replacing the annulled administrative act by a court decision; or
- by giving a declaratory decision
- do also higher courts/the Supreme (Administrative) Court have this competence?

4. In your administrative legal system does a judge have the formal competence to instruct the administrative body (lower court) how to handle a case after its original decision was annulled by the (higher/Supreme) court?

a) If so, which are the limitations to the exercise of this competence?

b) Does it make a difference in how far the annulled decision is based on a discretionary competence? For example the administrative body:

- has a free choice to use its competence or not; or
- can make an assessment if the conditions for the exercise of the competence have been fulfilled or not.

c) Does it make a difference if the challenged decision is a punitive sanction?

5. If in your legal system the judge has the formal competence to either replace the annulled decision by its own, or to instruct the administrative body how to take the decision that is to replace the annulled decision, what then is the dominant view on actually using such competences?

a) Does the dominant view in your administrative legal system hold that such competences should be exercised?
b) In how far could an individual judge steer the use of such competences?
c) What instruments do the rules of administrative court procedure hold?
d) What is the role and attitude of the parties towards administrative judges exercising those competences?
e) How can the judge see to it that he is informed of what he should know concerning the applicable law, the facts and relevant policies concerning the decision challenged in court?
f) Is the judicial perspective focused on the actual situation (ex nunc) or the situation as it was when the challenged decision was taken (ex tunc)?

If question 5 is not applicable to your situation, please go to question 6.

6. If, according to the rules defining the competences of the administrative courts, the judge does not have the competence to settle the case by replacing the annulled decision by a decision of the court, what then is the dominant view in your country of what the judge should do?

a) After annulment of the challenged decision, in how far could a judge instruct the administrative body to limit its options in taking a new decision? For example:

- Just annul the decision and refer the case back to the responsible administrative body; or
- instruct the administrative body to the extent that the discretion of the administrative body in taking a new decision is reduced to almost none; or
- something in- between – if so, what?

b) What instruments do the rules of administrative court procedure hold for the court to steer the outcome of the conflict?
c) What is the role and attitude of the parties towards administrative judges exercising those competences?
d) How can the judge see to it that he is informed of what he should know concerning the applicable law, the facts and relevant policies concerning the decision challenged in court?
e) Is the judicial perspective focused on the actual situation (ex nunc) or the situation as it was when the challenged decision was taken (ex tunc)?

(questions 3, 4, 5 and 6)

The Code basically provides the action for annulment of administrative decisions, due to breach of law, misuse or abuse of power, lack of competence.
The judge shall verify whether the issued act of the administrative authority was in accordance with the law and whether the administrative discretion ([2]) was used in adherence with the spirit of the law (control involving "*détournement de povoir*" and "*excès de povoir*") ([3]).
As a result, the administrative courts basically have the power to annul the disputed decision but not to replace it.

The check for legality of the contested act is performed on the basis of the factual and legal situation existing at the time of its adoption [question 5.f].
The judge seeks and knows *ex officio* the applicable law ("*iura novit curia*").
He can give a diverse interpretation or application of the law but cannot change the legal basis of an administrative act.

As for the facts and relevant policies concerning the challenged decision the court is informed by the parties, namely by the claimant, who shall contest the flaws and mistakes of the decision.

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2 In case of "administrative discretion" the Public Administration aims at a public purpose attributed to its care by law, by means of an activity of selection, acquisition, comparison and evaluation of public and private interests implied in its action.

3 According to the traditional and consolidated opinion the judge can verify whether the discretion has been used by the authority in adherence with the spirit of the law or instead the exercise of power has been affected by "*détournement de povoir*" and "*excès de povoir*" (of ancient French derivation), as it may be revealed by some signs or "symptoms" of the contested act, such as illogicality, unreasonableness, manifest injustice, inconsistency with previous acts of the same Administration or of the same procedure, disparity in treatment (Cons. St., III, 15.4.2013, n. 2032; V, 19.11.2009, n. 7259; Tar Lazio, Rome, III-ter, 11.2.2011, n. 1336; 14.12.2011, n. 9739; 11.7.2012, n. 6321).
In process of time, on the spur of the European case law, the Italian judge has lately departed from the absorbing paradigm of the "*excés de pouvoir*" and elaborated a series of criteria - like as many principles of law - to be followed in the examination of the relationship existing between the exercise of the administrative power and the protection of fundamental rights; these criteria are encompassed and summarized by the principle of proportionality, which expresses the suitability, adequacy and necessity of the administrative act for achieving the desired end (Tar Puglia, III, 13.2.2012, n. 347; Tar Lazio, Rome, III-ter, 11.7.2012, n. 6321; id, 11.7.2012, n. 6323).

In collecting proofs (4) the judge does not follow the inquisitorial model but a mixed one (dispositive-inquisitorial method): the claimant draws the framework of the proof and, if he/she does not manage to completely produce the evidence (mostly documents), the judge can order the authority its exhibition [question 5.e] ([5]). The judge shall use his powers in the matter of proof within the scope of the claim and in the limits of the fact allegations of the parties, whereas he cannot investigate on facts not offered by the parties ([6]) .

The effect of annulment generally operates *ex tunc*.

In public procurement controversies, however, the Italian code and the implemented Directive 2007/66/EC (improving the effectiveness of review procedures concerning the award of public contracts) provide that the administrative judge – in spite of the annulment of the award of a public contract - can come to uphold the legal consequences of the award and keep the closed contract in force or reduce its duration, by declaring its ineffectiveness for the future.

This rule, taken as a principle, has been deemed by the Council of State to be applicable also in other cases exceeding the ambit of public procurements, any time the application of the fundamental rule that the admission of the claim determines the full elimination of the effects produced by the prejudicial act, may

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4 The proof of facts has a twofold profile, at the same time being a right of the party to demonstrate a favourable fact or situation and, in its procedural shadow, an onus incumbent on the interested party so that the failure to give the proof of the deducted facts brings the judge to disregard them.

5 The described powers of the judge cannot be seen as an absorbing faculty, apt to direct the proceedings apart from claims, grounds and facts deducted and uprooted from probation initiatives taken by the parties. Such an interpretation would recall a model of the proceedings, of inquisitorial nature, which is in contrast with the basic principles and the function of the administrative proceedings, whose nature is disposable and based on the claims of the parties.

6 The matter of proofs is of direct derivation from the basic principles of the administrative proceedings : the principle of the claim (the judge cannot investigate on facts not indicated by the parties), the principle of the debate (the judge cannot assume proofs without giving the parties the possibility of counteracting and giving proofs to the contrary), the limit to the use of private science of the judge (the judge cannot assume initiatives on the basis of his personal private knowledge).

turn out inadequate and manifestly unjust or contrary to the principle of effectiveness of the judicial tutelage [question 3] ([7]).

In the jurisdiction of legality, when annulling the administrative decision, in the reasons of the judgement the Court indicates the flaws ascertained as well as the corrections and adjustments to be brought to the act on the part of the administration; as far as possible, courts don't rectify themselves the flawed decisions [question 4.a].

Where the discretionary power of the administrative body in taking a new decision after the judgment is absent or is otherwise reduced to nil and no further investigation is needed, the judge can go so far as to order the administration to issue a certain act (as a substitute for the annulled act) [question 4.b].

In any case, the judge can establish the proper measures to ensure the execution of final or executing judgements, including the appointment of an auxiliary of his (the "commissario ad acta"; see infra), which can be effected even in the cognizance proceedings with effect as from the deadline established for the compliance with the judgment [question 4.a].

In the field of "substantive" jurisdiction the administrative Courts have the power to substitute public administrations, by issuing a new administrative decision or rectifying the contested decision [question 3].

For example, in administrative election litigations, the judge can rectify the result of the elections; in litigations concerning administrative penalties (e.g. pecuniary penalties inflicted by Antitrust Authority or other independent Authorities), the penalty may be rectified with the final judgment [question 4.c].

On the basis of the proofs given by the party, the judge can substitute his own evaluation to the one of the Administration and reduce the amount of the sanction, but not increase it since, according to the principles of the claim and of

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7 Cons. St., VI, 10.5.2011, n. 2755; 9 marzo 2011, n. 1488; Tar Abruzzo, Pescara, 3.7.2012, n. 336. in this prospective, it has been stated that the judge can generally modulate the duration of the effects of the annulled act, taking into account not only the principle of certainty in law and the position of the winner in court but also any other relevant circumstance of the controversy, and so defer the effects of the annulment or not dispose at all of them and provide just for conforming effects of the judgement aimed at the replacement of the illegitimate act.

the disposable nature of the proceedings, he cannot put the claimant in a worse position.

In all these cases the prohibition of reformation *in peius* of the challenged act is applicable and so the judge could not, on the basis of a different law or a different interpretation of the law applied by the Administration, determine a higher amount of the sanction due [question 3].

Moreover, administrative authority is compelled to enforce the judgements and therefore rectify the flawed administrative act in compliance with the reasons of the judgement of the Court.

If the administrative body does not comply with the judgement, the claimant can lodge an "enforcement action" before the competent administrative Court, to begin an "enforcement proceedings" (in Italian: "giudizio di ottemperanza") for the execution of the judgement, in which the judge operates with the powers of a "substantive" jurisdiction ([8]).

In the enforcement proceedings not only does the judge order the administration to comply within a deadline but also has he the power to substitute the administrative body (and adopt or rectify an administrative decision) or to appoint an auxiliary of his (the "commissario ad acta"), who shall act in compliance with the judicial instructions and in place of the administration, taking any measure required to enforce the judgement.

In the Italian judiciary praxis the second option (i.e. the appointment of an auxiliary) is more common than the first one (i.e. the direct substitution of the judge to the administration).

8 The enforcement judgement is considered compatible with the principle of separation of powers because the disobeying administration is compared to an authority that is not exercising any (real) public power.

The enforcement action can be lodged in relation to any judgement (rendered by a civil or an administrative Court) which ascertains that an administrative decision is flawed or which directly annuls an administrative decision ([9]).

These powers are conferred on the Regional Administrative Tribunal (TAR, at first instance) and on Council of State (at second and last instance) [question 3], while the Italian system does not consider the eventuality of a solo judge deciding a case.

A single judge can be delegated to collect some evidence or issue urgent interim measures *("ante causam"* measures) [question 5.b], provided that the case shall be decided by a panel of judges, made of 3 judges at first instance (TAR), of 5 judges at second instance (Council of State) and of 13 judges (the Grand Chamber of the Council of State, called "Adunanza plenaria").

7. What consequences do the answers to questions 5 or 6 have for internal case management and information exchange between the court and the parties, especially concerning:

a) the intake of the case. Is there any form of a priory assessment of the case in order to determine if it is fit for mediation?;

ADR in administrative cases is generally not provided for.

It is given only in some special fields and, among them, in relation to controversies concerning procurements and, even in this ambit, isn't actually often used.

As a matter of fact the judge always aims at resolving the conflict between administration and the other parties, but has no special suitable legal means to lead the parties to such a result; nevertheless, the judge sometimes suggests this kind of solution at the hearing, in an informal way.

For this reason there is no form of a priory assessment of the case in view of a mediation.

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9 Civil Courts can only ascertain that an administrative decision is flawed and declare it without effects ("*tamquam non esset*") but, as a general rule, cannot annul administrative decisions; on the contrary, administrative Courts can annul all kinds of administrative decisions, including regulations.

b) pre-trial communications between the court and the administrative body that took the challenged decision. (requesting the file, other requests for information by the court); requests to the administrative body to send a representative with a negotiation mandate?;

No, there are no positive alternatives to the contentious proceedings.

c) setting and enforcing time limits on the parties to deliver documents or announce witnesses?

The judge can order (even the authority) to exhibit proofs concerning the dispute within a deadline; if a party does not comply with the order, this behaviour may be evaluated by the judge as a ground to reject his/her arguments.