



Consiglio di Stato



**Seminar organized by the Council of State of Italy and ACA-
Europe**

**“Law, Courts and guidelines for the public
administration”**

Fiesole (Firenze), Autumn 2021

Questionnaire



Seminar co-funded by the «Justice » program of the European Union



ITALIAN PRESIDENCY ACA - EUROPE
FIESOLE (FIRENZE), 19 OCTOBER 2020

"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

1.1 The seminar to be held in Fiesole, on the 19th and 20th October 2020 at the European University Institute, is the first meeting organised by the Italian presidency.

As explained during the initial presentation of the programme for the upcoming Italian presidency, its leitmotiv will be to enhance and foster the value and the experience of “horizontal dialogue” among the highest administrative national Courts, aiming to create and develop a common culture and shared standards in judicial review of the activity of the public authorities.

This “horizontal dialogue”, more than “vertical dialogue”, aims to focus on examining and comparing modes of judicial decision making and judicial conduct, and the impact of judgments on the activities of public authorities.

Horizontal dialogue between Courts of Member States is the best way to achieve an effective European citizenship, that is to say a common standard of legal protection for citizens and companies living in Europe and dealing with public powers.

1.2 The purpose of this questionnaire and of the subsequent seminar is to provide a greater understanding of similarities and differences among our legal systems, especially regarding:

- a) the interpretation of law by judges;
- b) the binding effect of judgments both so as to ensure the judges’ compliance with the nomophylactic statements of the Supreme Administrative Courts (SACs) and to act as an instrument to address the future action of public administrations in similar cases;
- c) the effect of the administrative judgments on the activity of public administration and their enforcement;
- d) the consultative role of the SAC, if existing.

1.3. The seminar will cover the following topics:

- a) The method followed by administrative courts in the interpretation of the law, focusing on the criteria applied by judges (including reference to *ratio legis*, reference to preparatory work, reference to the advice of the SAC regarding the adoption of the law, if existing, etc.). A special focus will be placed on the tools for supporting judicial activity with regard to services for classifying and archiving judgments, e.g. databases and AI instruments.
- b) The application of the law by the Court, with specific reference to the nomophylactic pronouncements of the SAC. Jurisprudential stability and the predictability of decisions are important values related to the general principles affirmed by the European Court of Justice such as legal certainty, predictability for citizens and companies of the consequences of their behaviour and the protection of legitimate expectations. Therefore, there will be a special focus on the ways and the procedures, where they exist, through which SACs ensure compliance with the nomophylactic statements in the administrative system.
The “binding or steering effect” of the of Supreme Court judgments: this topic aims to foster mutual understanding of the capacity of administrative judgments to bind the public administration in the subsequent exercise of its power. It covers not only the binding effect on decided case, but it also aims to analyze judgments as instruments to orientate the future action of public administrations in similar cases (i.e. judgement as guidelines).
- c) The seminar will also examine the enforcement of the administrative judgment, in case the public administration fails to comply with it spontaneously and correctly, with special reference to judicial enforcement measures provided by each legal jurisdiction, if they exist.
- d) Finally, a brief session will be devoted to the consultative role of the SAC, if existing, and its impact on administrative action.

1.4 It is intended that the Seminar will provide each Supreme Administrative Court with a better understanding both of the decision making process underpinning the judgments of other SACs and of their impact on the activity of public authorities.

In a constitutional democracy, administrative courts are seen as performing a vital function in the interaction between law and administration.

The purpose, to reiterate, is to verify whether it is possible to find or develop a homogeneous method to scrutinize the way public administrations exercise their powers and to guarantee a common standard of legal protection for citizens and companies in all Member States.

The questionnaire which follows represents an initial information gathering exercise the purpose of which is to clarify the interaction of the administrative courts with the law, on the one hand, and the administration, on the other, so as to ensure certainty, legality and quality of justice for citizens and public institutions.

I SESSION

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

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

1.1. Does your legal system provide general rules for the interpretation of law?

- No
- Yes

1.2. What is the level of general rules for interpreting the law?

- Law
- Public authority regulations
- Guidelines
- Supreme Court rulings
- Other

Please explain and give an example.

Italian answer: general rules regarding the interpretation of law are found in the provisions preceding the Civil Code, at level of law. As regards criminal law, interpretation criteria are provided for by the Constitution.

1.3 What are the criteria for interpretation of the law?

- literal interpretation
- reference to purpose of law (so-called *ratio legis*)
- consistency within the legal system
- reference to preparatory work
- reference to the advice of the SAC regarding the adoption of the law, if existing
- Other

Explain, if necessary.

Italian answer: according to art. 12 of the provisions preceding the Civil Code (Interpretation of the law): “In applying law, no other meaning can be attributed to it than that made clear by the proper meaning of the words, according to their connection and to the intention of legislator.”

Thus, in the interpretation of law, it is possible to refer to preparatory work of the legislative procedure (in order to clarify the intention of legislator) or to the advice of the SAC regarding the adoption of the law, if existing.

Of course, any rules are to be interpreted according to the principle of consistency within the legal system.

1.4. What criteria do judges apply when there are gaps in the law?

- X Analogy (reference to similar *ratio* of other rules)
- X General principles of the legal system
- Other

Explain, if necessary.

Italian answer: According to art. 12 of the provisions preceding the Civil Code (Interpretation of the law): “If a dispute cannot be decided by applying a specific provision, it shall be decided in accordance with the provisions governing similar cases or similar matters; if the case is still in doubt, it shall be decided in accordance with the general principles of the State's legal system.” This is not possible in criminal matters and in cases regarding administrative sanctions, in which respectively the Constitution (art. 25), the penal code and the law (l. 689/11981) prohibits the analogic interpretation.

1.5. Does the SAC elaborate general interpretative *criteria*?

- X No
- Yes

Please explain and give an example.

Not in general terms. Nevertheless, the SAC can specify - regarding a specific case - how the law applicable to the case should be interpreted.

1.6 In deciding the case, to what extent does the Court take the following into account and within which limits?

- EU law (Nice Charter, EU regulations, EU directives) and the judgments of the EU Courts;

never seldom sometimes often

- The European Convention of Human Rights and the general principles elaborated by the ECHR;

never seldom sometimes often

- The general clauses of proportionality and of reasonableness.

never seldom sometimes often

- The statements (or case law) of the Courts of other countries in similar cases;

never seldom sometimes often

- The general interests involved (i.e: order and public safety, environmental protection, consumer protection, the economic, financial and social effects on the labour market)

never seldom sometimes often

- The results of regulatory impact analysis (AIR), if applicable;

never seldom sometimes often

- The impact of the decision;

never seldom sometimes often

Other

Please specify.

2. Tools for supporting judicial activity.

2.1. Are there any services established in the Supreme Administrative Court responsible for classifying the judgments and drafting their abstracts?

No

Yes

Italian Answer: There is a special "department for training and studies of administrative justice" , composed of judges both from the lower administrative courts and from the SAC, selected by the Judicial Council of administrative jurisdiction (selection based on CVs and previous experience). It is responsible for classifying the most important judgments of the SAC and of other Supreme Courts (Constitutional Court, the Court of Cassation, etc.) and drafting their abstracts.

2.2. What other activities do these Services perform?

- preparation of useful material for the most important judgments of the SAC ;
- comparative studies;
- information about new developments in the law and in the case law;
- training of judges
- other activities.

Please specify.

2.3. Are administrative Court judgments stored on a searchable and free database?

- No
- Yes

Please explain.

Italian answer: Italian administrative justice operates a free and open database, which includes the rulings of the Italian administrative judges, at both first and second instance.

2.4. What kind of database do the administrative judges consult in their daily work?

- public and free databases
- private databases, provided by their institution
- other

Please explain.

Italian answer: Italian administrative judges access to a full range of technical equipment (computers, laptops, mobile phones, etc.) and free access to public databases and to some private databases, provided by the Institution, which bears the cost.

2.5. Are there projects implementing advanced artificial intelligence systems operating in the decision making process and/or for the preparation of decisions?

- No
- Yes

2.6 If yes, explain the role of the AI systems in the decision-making process (e.g. drafting final decisions, supporting judges for some significant aspects of the case, such as for example the calculation of damages, etc.)

Italian answer: There is, as yet, no project implementing AI systems for drafting the content of final decisions. Nevertheless, there are many free software products available on the internet useful for supporting judges in their judicial activity (for example in the calculation of damages or of the amount of remuneration to be paid to expert witnesses or lawyers etc.)

3. The application of law: the “nomophylactic” statements in the administrative judicial system.

3.1. Does the judgment of the SAC have binding effect on lower courts?

- No
- Yes
- Only if the SAC decides in special composition

Italian Answer: No. The judgment of the SAC has no “binding effect” because the principle of “stare decisis” is unknown to the Italian legal system, unlike common law jurisdictions. Therefore, the judgment of the SAC might only have a persuasive effect, since it provides guidelines for the interpretation activity of lower courts.

3.2. If the answer to question 3.1. above is no, what percentage of lower court cases comply with SAC decisions?

- less than 25%
- from 25% to 50%
- from 50% to 75%
- from 75% to 100%

3.3. If the answer to question 3.1. above is no, how is the consistency and predictability of court decisions ensured?

Please explain and give an example.

Italian answer: The Plenary Assembly of the Council of State is the body which ensures the nomophylactic statements.

3.4. When solving jurisprudential conflicts or stating principles of law, does the SAC work in a special composition (for example a Plenary Assembly or a larger panel)?

- No

X Yes

If the answer is yes, please explain.

Italian answer: The SAC, when stating a principle of law or solving a conflict of interpretation, sits in Plenary Assembly formed of 12 judges plus the President of Council of State who presides; while the normal composition for ordinary matters is four judges plus the President of the Section.

3.5. Is there a specific procedure for referring a question to the SAC working in special composition?

No

X Yes

Italian Answer: There are specific procedural rules, provided for by art. 99 CAP, regarding the procedure for referring a question to the Plenary Assembly.

The power of referring a question to the Plenary Assembly belongs to a Section or to the President of the Council of State. The parties cannot appeal directly to the Plenary Assembly under any circumstances: they can only request that a matter be referred by the President or by the Section.

The administrative judges of first instance have no authority to refer questions to the Plenary Assembly.

3.6. If the answer to question 3.5 above is yes, if a judge of the SAC does not agree with the principle affirmed, what can he or she do?

it is not possible to disagree

it is possible to take a different decision, giving reasons

X a new referral to the Court is necessary

Italian Answer: If one Section of the SAC does not agree with the principle stated by the Plenary Assembly, it cannot judge in disagreement with it, but it must resubmit the matter to the Plenary Assembly to request a change in jurisprudence. In this case, the referral is mandatory (art. 99, paragraph 3, c.p.a.). In other words, only the Plenary Assembly has the authority to reverse its own previous decision. The only exception to this rule regards matters concerning European law: in this case the Section may refer the matter directly to the European Court of justice for a preliminary ruling (see the Puligenica case).

However, judges at first instance can disagree with a judgment of the Plenary Assembly, providing reasons for it.

3.7. In order to guarantee the consistency of jurisprudence among the various sections of the SAC or with another Supreme Court, if such exists, are there organizational mechanisms in place to promote this aim (for example, periodical meetings among judges or among presidents)?

- No
- Yes

If the answer is yes, please explain.

Italian Answer: It is good practice to organize periodical meetings among judges and Presidents of the SAC or of any administrative court of first instance to promote discussion on questions of common interest. Nevertheless, this is done on a merely voluntary basis and it is not provided for by any specific regulations. Regarding the relationship with the Court of Cassation (the Supreme Court of the civil and penal judicial system), seminars or conferences are occasionally organized to stimulate debate on topics of common interest. The important joint contribution of the Studies and Training Departments of the administrative and civil justice (see questions n. 2.1 and 2.2.), in supporting the respective Courts, with specific research, when deciding questions of common interest, should also be mentioned.

3.8. If your judicial system has administrative Courts separated from other Courts (civil ones), which body or Court is entitled to resolve conflicts of jurisdiction between administrative and ordinary courts? (e.g. *Tribunal des Conflits*).

Italian answer: the body entitled to solve conflicts between administrative and ordinary courts is the Court of Cassation, which sits in enlarged composition (United civil sections).

SESSION II.

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

1. To what extent does the administrative judgment bind the public administration in the new exercise of its power?

Please explain.

Italian answer: In case of annulment of an administrative measure, the judgment generally provides, also indirectly, the administration some instructions regarding the new exercise of its power. This is called the “complying effect” of the judgment (so called “effetto conformativo”).

The extent to which the administrative judgment can bind the administration depends on the grounds on which the judgement is based. If the judgement has found only procedural infringements, the further activity of Public administration is free except for the procedural matter. If the Court has detected a substantial violation of law, the administration, in the specific case, is bound by the judgment not to repeat the same violation and to act accordingly. If no room for discretionary evaluation is left, it may happen that the judgment can bind the administration to adopt a favorable measure in order to comply with it.

2. Can the decision of an administrative judge influence the work of public administrations even beyond the objective and subjective context of the case decided?

- No
- Yes

Please explain.

Italian answer: As a general principle, the effects of an administrative judgment are limited to the parties involved in the trial. Nevertheless, in some exceptional cases, the annulment of an administrative measure may produce effects also ultra partes. This happens when a regulation is quashed, or when the annulled administrative measure has an indivisible effect, involving many people.

An administrative judgment can have a persuasive effect on the work of public administrations even beyond the objective and subjective context of the case decided, when applied to similar cases. The administration must take the previous judgments of the SAC into account.

3. According to regulatory rules or practices, may the effects of an administrative judgment be extended by the administration itself beyond the case decided?

- No
- Yes

Please explain.

Italian Answer: in principle, the public administration has a discretionary power to extend the effects of an administrative judgment beyond the case decided. Nevertheless, this possibility

has been excluded by law since 2004 for questions regarding public personnel due to considerations of public expenditure.

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS.

1. Is there a specific legal procedure in your system aimed at monitoring and pursuing the full and complete execution of the judgment?

- No
- Yes

Italian answer: yes, in the Italian legal system a specific procedure for the execution of judgments is foreseen (art. 112-114 c.a.p.). Moreover, so-called “astraintes” for the indirect execution are also provided for.

1.1 If the answer to question 1 above is yes, in what percentage of cases are such remedies used?

Italian answer: The enforcement remedy is used in about 15% of SAC judgments.

2. If there is no specific procedure, how does your system ensure the full compliance of the judgment?

Italian answer: Not applicable.

3. If there is such a judicial remedy, does it require the judgment to become final?

- No
- Yes

Please explain.

Italian answer: No. The remedy does not require the judgment to be final.

Nevertheless, the powers of the judges to ensure execution are different depending on whether the judgment to be enforced is final or not. In the first case, judges can only indicate to the administration how to give execution to the judgment, considering without effect the possible administrative acts adopted in conflict with the judgment itself. Instead, if the decision to be

enforced is final, the judge can annul any administrative acts adopted in conflict with the judgment itself and can completely substitute the administration in the execution of the judgment.

4. Do judges have the power of substitution, directly or through Commissioners *ad acta*, in the case of *inertia* or incorrect execution of judgments?

- No
- Yes

Please specify.

Italian answer: in case of inertia or incorrect execution of a (civil or administrative) judgement, the judge has the power to act in place of the administration, substituting it, or, alternatively, can appoint an ad-hoc representative (Commissario ad acta), selected by the judge itself from among civil servants. This second option is generally more commonly used.

5. Is the administration (and/or the official) liable for damages due to non-execution or incorrect execution of the judgment?

- No
- Yes

5.1. If the answer above is yes, is it within the jurisdiction of the administrative judge to decide on the action for damages?

Please explain and give an example.

Italian answer: The administrative judge is only entitled to decide about an action for compensation against the administration itself. According to art. 112, par. 3, of the c.a.p., it is possible to request the same judge to issue an order for payment of sums by way of appreciation and interest accrued after the res judicata court judgment, as well as compensation stemming from the inability or failure to execute the res judicata in a specific form, in whole or in part, or its violation or circumvention”.

In contrast, if the party wants to act against the official in person, the case must be brought through the civil courts.

SESSION IV

THE CONSULTATIVE ROLE OF THE SAC (IF EXISTING) AND ITS IMPACT ON ADMINISTRATIVE ACTION.

1. Does the SAC play advisory functions for the government or for the public administration?

- No
- Yes

Italian Answer: Yes, the Italian Council of State has a consultative section (the first one) and a special section giving advice on regulatory acts.

1.1 Where the answer to the above question is yes, please specify the kind of acts to which the advisory functions apply.

(More options are possible)

- primary legislative acts (of parliament or of government)
- governmental and ministerial regulatory acts
- resolution of specific questions on request of a public administration, on the interpretation of a law or in the definition of a specific matter.
- Other

Please specify.

Italian Answer: The advisory function performed by the Council of State concerns primary and all the secondary legislation; governmental and ministerial regulations, projects of codification and consolidation.

The President of the Council of Ministers can also submit to the Council of State drafts of laws and regulatory acts, especially in relation to the implementation of EU legislation.

Finally, the advice of the SAC can also be requested by the regions or by independent agencies.

2. The SAC's advice in its consultative role is:

- optional and non binding
- mandatory and binding

- mandatory but not binding
- optional and, once required, binding
- X it depends on circumstances (please clarify)

Italian answer: the following acts are subject to the mandatory, but non-binding, advice of the Council of State:

-governmental and ministerial regulations;

-drafts of codification or consolidation of the legislative and regulatory norms;

-acts of Parliament, if advice is required by law, also in general terms.

-The SAC can give advice on the interpretation of a law if requested by the administration concerned.

Additionally, there is a particular remedy, alternative to the judicial remedy (namely, extraordinary appeal to the President of the Republic), which is substantially decided by a mandatory and binding “advice” of the Council of State.

3. In exercising its advisory functions, can the SAC consult experts in economics or statistics in order to assess the economic and social impact of regulations?

- No
- Yes
- X In certain circumstances only (please specify)

Italian Answer: Normally no. However, in the event that the Council of State is directly responsible for drawing up consolidated texts of legislation and regulation it is allowed to consult experts in non-legal disciplines.

4. Are there forms of collaboration of administrative judges in the activity of the Government or of public administrations? (for example, secondment of individual magistrates to head legislative boards of a Ministry or as members of an independent authority, participation in study commissions, etc.).

- No
- X Yes

Italian Answer: Administrative judges can be allowed, to hold, for no longer than 10 years in their career, senior positions in Ministries including the legislative boards, or in independent

authorities. They can also participate in study commissions while continuing to carry out their own judicial functions, or work in the staff supporting a judge of the Constitutional Court.

5. Can the advisory function of the SAC also consist in the resolution of a specific dispute working as an ADR (alternative dispute resolution)?

No

Yes

Italian Answer: In Italy the so called "extraordinary appeal to the President of the Republic", mentioned above, is a particular extra ordinem remedy, alternative to the judicial remedy, which takes the form of mandatory and binding advice of the Council of State, implemented in a decree of the Head of the State. It is promoted at request of a private party for the annulment of an administrative decision.