



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

Answers to questionnaire: Germany



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"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.

The rules for the interpretation of the law historically stem from academic writings and teachings. They have also found their way into the jurisprudence of the supreme courts and the constitutional court.

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.

In addition to the methods mentioned above, the law may also be interpreted in a systematic way taking into account the structure and systematic relation of norms within an act or in relation to other acts.

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

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

Explain, if necessary.

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

- X No
- Yes

Please explain and give an example.

It can only do so in the motivation of a judgment concerning a specific case.

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 X often
- The European Convention of Human Rights and the general principles elaborated by the ECHR;
 never seldom X sometimes often
- The general clauses of proportionality and of reasonableness.
 never seldom sometimes X often
- The statements (or case law) of the Courts of other countries in similar cases;
 never X 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 X 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

The general service which is in charge of classifying the judgments is provided by the Information Services of the Federal Administrative Court. Trained professionals with a legal background view all judgments of the SAC and select judgments according to formal and other established criteria for the national legal database juris.de. juris is a commercial firm, but the majority owner is still the German state. The professionals work for the court, but their work results are directly and electronically transferred to juris and can only be utilised by juris. Because of a long-standing contract between the state and juris (which started as a 100% state-owned firm), juris is a monopoly provider for legal information concerning judgments of German courts of all instances. Part of the indexing work of the professionals is classification of judgments; indicating key-words; providing head notes, if necessary; providing the most important legal norms of the judgment and citing related case law. However, drafting abstracts of judgments are not part of the indexing work. In the field of planning and environment, the Information Services have developed a non-proprietary tool which enables them to collect relevant information from different databases. This includes technical surveys, technical and legal literature, directives and jurisdiction.

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

X other activities. (for example: electronic provision of table of contents of legal journals with possibility to order the article in full text)

Please specify.

See answer to question 2.1.

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

No

X Yes

Please explain.

Since 2002 decisions of the Federal Administrative Court are published on its website ([https://www.bverwg.de/suche?lim=10&start=1&db=e&q=&dt=](https://www.bverwg.de/suche?lim=10&start=1&db=e&q=*&dt=)) and are accessible for free. Another free database is provided for by the Ministry of Justice in cooperation with juris: Rechtsprechung im Internet (<https://www.rechtsprechung-im-internet.de/jportal/portal/page/bsjrsprod.psml>). This database contains around 7000 judgments of the Federal Administrative Court since 2010. Both databases supply judgments with full text, but almost no metadata. Another useful free database is dejure.org (<https://dejure.org/gerichte>).*

Also, these decisions are made available to several commercial legal data bases which dispose of high quality search engines. These databases are not free of cost. Next to this the lead decisions are also published in paper in the official court bulletin.

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

X public and free databases

X private databases, provided by their institution

X other

Please explain.

Most judges consult the three major databases juris.de; beck-online.de and wolterskluwer-online.de. These data bases are public, but not free of cost. Databases on the European level, such as the ACA-Europe JuriFast and the Judicial Network of the European Union are less frequented.

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

- X 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.)

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?

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

The judgments of the Federal Administrative Court are binding only insofar as it concerns the specific case. Yet, there are factual nomophylactic effects; lower courts will usually follow the interpretation of the Federal Administrative Court. But they are not obliged to.

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%

There are no numbers available.

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.

See above, answer 3.1. Since recourse against lower courts' decisions to the Federal Administrative Court is open in cases of deviation the jurisdiction of the Federal Administrative Court has a factually nomophylactic effect.

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)?

X No

Yes

If the answer is yes, please explain.

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

X No

Yes

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

a new referral to the Court is necessary

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

X Yes

If the answer is yes, please explain.

In case a panel intends to deviate from the jurisdiction of another panel of the court or of the jurisdiction of another Supreme Court (there are five jurisdictions in Germany) an enlarged panel - either within the Federal Administrative Court or composed of representatives of every Supreme Court - will decide this question.

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*).

This question is regulated in Section 17a of the Courts Constitution Act:

(1) If a court has declared with final and binding effect that the recourse taken to it is admissible, other courts shall be bound by this decision.

(2) If the recourse taken is inadmissible, the court shall declare this proprio motu after hearing the parties and shall at the same time refer the legal dispute to the competent court of admissible recourse. If several courts are competent, the dispute shall be referred to the court to be selected by the plaintiff or applicant or, if no selection is made, to the court designated by the referring court. The decision shall be binding upon the court to which the dispute has been referred in respect of the admissibility of the recourse.

(3) If the recourse taken is admissible, the court may give a preliminary decision to this effect. It must give a preliminary decision if a party challenges the admissibility of the recourse.

(4) The decision pursuant to subsections (2) and (3) may be given without an oral hearing. Reasons must be given therefor. The immediate complaint (sofortige Beschwerde) shall be available against the decision pursuant to the provisions of the respective applicable code of procedure. The participants shall only be entitled to lodge a complaint against a decision of a higher regional court at the highest federal court if this has been admitted in the decision. The complaint must be admitted if the legal issue concerned is of fundamental importance or if the court deviates from a decision of one of the highest federal courts or from a decision of the Joint Panel of the Highest Federal Courts (Gemeinsamer Senat der obersten Gerichtshöfe des Bundes). The highest federal court shall be bound by the admission of the complaint.

(5) The court that rules on an appellate remedy against a decision by the court seized of the case shall not review whether the recourse taken was admissible.

(6) Subsections (1) to (5) shall apply mutatis mutandis to adjudicating bodies with jurisdiction over civil disputes, family matters and non-contentious matters in relation to each other.

In short: In a positive conflict of competence any court will be bound by the decision of another court which declares itself competent. In a negative conflict of competence any court may transfer the case to the court it considers competent. The latter is bound by the decision of the former. Any of such decisions can be challenged by the parties within the relevant jurisdiction. There is no central institution governing these conflicts.

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.

The decision of the administrative court only has a formally binding effect inter partes. Yet, the authority of the jurisdiction and the possibility to challenge any administrative decision before the administrative courts will in most cases produce a factual binding effect. Administrative authorities are obliged by the constitution to abide by the law - and usually they do. In rare cases (mostly in tax matters) the ministries produce orders of non-application of a certain jurisdiction. The administrative authorities are bound by these orders; the citizens would have to take recourse to the courts in every one of these cases.

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.

See answer to question 1.

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.

See answer to question 1. In fact, in most cases the administration will apply the interpretation of the law given by the administrative courts to all further cases.

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

The execution of judgments is provided for by the Code of Administrative Court Procedure. It depends upon a motion by a party.

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

It is used in very rare cases. German authorities observe court decisions as a general rule.

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

Not applicable.

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

X No

Yes

Please explain.

In most cases the decision will have to be final; yet, preliminary decisions may also be subject to execution.

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

X No

Yes

Please specify.

The means of execution against a public authority are limited to the determination and execution of a coercive fine.

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.

In case that a damage results from the non-execution of an administrative judgment damages would have to be made subject to separate legal proceedings. According to a constitutional provision, these would most likely fall within the jurisdiction of 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

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

Not applicable.

Please specify.

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
- it depends on circumstances (please clarify)

Not applicable.

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
- In certain circumstances only (please specify)

Not applicable.

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.).

- X No
- Yes

There are single cases of secondment to public authorities, usually ministries. These secondments are not institutionalized and depend on a voluntary decision of the ministry, the court and the magistrate to be seconded. This practice is used more often in the lower instances. At the Federal Administrative Court it happens rather seldomly.

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

Not applicable.