



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: Lithuania



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



Consiglio di Stato



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.

Some general rules regarding the interpretation of law are laid down in law, for example, in the Civil Code (law provides principles of justice, reasonableness and good faith, consistency within the legal system method etc.), some – in doctrine (here we find methods such as adequate interpretation - in Latin ad litteram or de lege ferenda, creative interpretation - in Latin interpretatio praeter legem etc.).

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.

Lithuanian courts often interpret the law with the help of general principles of law such as – justice, reasonableness and good faith.

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

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

Explain, if necessary.

According to Article 4(7) of the Law on Administrative Proceedings in case of the absence of a law regulating the matter of the dispute, the court shall apply the law regulating similar matters, while in case of the absence of such a law, the court shall conform to the common fundamentals of laws and their meaning, as well as to the criteria of justice and reasonableness.

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

- No

- Yes

Please explain and give an example.

In a general sense – no. Such a function is not assigned to the court, nevertheless, the Supreme Administrative Court of Lithuania 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

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

Please explain.

There is a special structural unit - Judicial Research Department - composed of highly qualified lawyers (half of them have doctoral degree in social sciences) – legal advisers. This Department is responsible for classifying the most important decisions of the SAC. For this purpose, a special classification has been developed in which a relevant rule of interpretation and application can be easily found. The Department prepares monthly reviews of key decisions of the SAC. Summaries of key decision of other international courts are made quarterly or semi-annually.

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.

Mentioned above Department covers wide range of activities, the most important of which are: rendering legal assistance; monitoring case law and ensuring its unification; preparation, publication and distributions of the SAC Bulletin, court's Annual Report; maintaining international relations of the court and relations with other courts of Lithuania, the academic community, state institutions.

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

- No
- Yes

Please explain.

There are several free and open databases, which include the decisions of both - first and second - instances.

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.

The judges of administrative courts hold access to a full range of databases: the public ones (various state registers); some private (the court itself or National Courts Administration bear the cost) and internal ones (provided by court).

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.)

There is, as yet, no project implementing AI systems for drafting the content of final decisions. Nevertheless, there are many software products available on the internet useful for supporting

judges in their judicial activity. For example, there are special calculation tools to calculate stamp duty, attorney's fees, to determine limitation period, procedural time limits 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

The judgment of the SAC has no “binding effect” because the principle of “stare decisis” is not fully accepted in the Lithuanian legal system, unlike common law jurisdictions. It must be acknowledged, that discussions are still taking place on the significance of court practice, its growth and adjustment.

Therefore, despite the fact that the doctrine of “stare decisis” of the common law countries is still not established in Lithuania, the recent tendency of unification of court practice shows that lower courts defer to the interpretation and application by higher courts whereas highest courts are especially careful about correction of court practice, changing it only on serious grounds and on the basis of detailed argumentation.

Furthermore, Article 15(3) of the Law on Administrative Proceedings provides that “the clarifications of the application of the laws and other legal acts provided in the decisions and rulings of the Supreme Administrative Court of Lithuania are considered by the state and other institutions and other persons in application of the same laws and other legal acts”.

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.

There are some legal instruments to maintain the consistency and predictability of court decisions. One of them – possibility to renew proceeding (a) where is clear evidence that a material violation of the norms of substantive law has been committed in its application which could have affected the adoption of an unlawful decision, ruling or order; (b) when it is necessary to ensure the formation of uniform practice of administrative courts.

Another instrument concerns the formation of the expanded chamber. For the hearing of complex cases (inter alia to ensure the nomophylactic statements), an expanded chamber of five or seven judges may be formed on the initiative of the president of the court or on the recommendation of the chamber or the case may be referred to the plenary session of the court.

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
- Yes

If the answer is yes, please explain.

In general, the cases in the Supreme Administrative Court of Lithuania are heard before a chamber of three judges. The other composition of court is optional: “for the hearing of complex cases, an expanded chamber of five or seven judges may be formed on the initiative of the president of the court or on the recommendation of the chamber or the case may be referred to the plenary session of the court” (Article 43(2) of the Law on Administrative Proceedings).

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

- No
- Yes

There are specific procedural rules provided for by Article 43 of the Law on Administrative Proceedings, regarding the procedure for referring a question to the expanded chamber.

The power of referring a question to the expanded chamber belongs to the president of the court, who may exercise it on his own initiative or on the request of the chamber. The case is reassigned to the expanded chamber by order of the president of the court.

It should be added, that there are some categories of cases, which are examined by the expanded chamber without any separate order. The hearing of those cases in a manner of expanded chamber is provided by the law. For example, petitions of the municipal council to present a conclusion whether the member of the municipal council has breached their oath and/or failed to exercise the powers assigned to them by the laws (Art. 17(13)), model cases (Art. 129), cases renewed on some particular bases (Art. 163(2) etc.

The parties cannot appeal directly to the expanded chamber under any circumstances, they can only request that a matter should be referred to it.

The administrative judges of first instance have no authority to refer questions to the expanded chamber.

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

The judge whose opinion of the case differs from that of the majority of the judges may write his dissenting opinion. The dissenting opinion shall not be announced publicly but shall be attached to the case file.

If one section or expanded chamber of the SAC does not agree with the principle stated by the other expanded chamber, it cannot judge in disagreement with it, but it must resubmit the matter to the plenary session to request a change in jurisprudence.

The important aspect is, that only the expanded chamber (plenary session) has the authority to reverse its own previous decision.

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.

In order to guarantee the consistency of jurisprudence among the various sections, the court has a well-functioning mechanism, regulated by an internal act, i.e. the Judicial Research Department (see answer to 2.1) prepares materials for meetings among judges and provides all the relevant information for problematic issues with some options for overcoming them.

In addition, one of judges, the vice-president of the court, is entrusted with discussing and promoting uniform case law.

In order to guarantee the consistency of jurisprudence with another Supreme Court or other courts, the SAC also has mechanism, but it is based on good practice and cooperation. This collaboration manifests itself as intense exchange of information, i.e. special notices containing extracts from the latest practice and information on extended chambers are sent to other courts monthly.

It is a good practice to organize periodical (one, twice per year) meetings among judges and president 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.

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*).

Lithuania has the specific body entitled to resolve conflicts of jurisdiction – special judicial panel of judges composed of the President of the Civil Cases Division of the Supreme Court of Lithuania, the Vice-President of the Supreme Administrative Court of Lithuania and other two judges - one assigned by the President of the Civil Cases Division of the Supreme Court and another by the President of the Supreme Administrative Court. The sessions of the special judicial panel is presided over by the President of a Civil Cases Division of the Supreme Court. Decisions are delivered by consensus or a majority of votes of the members of the judicial panel; in the event of a tie the presiding judge has the casting vote. An order on the jurisdiction of the case is final and conclusive.

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 extent to which the administrative judgment can bind the administration depends on the grounds for annulment of contested act (i.e. grounds on which the decision is based) and, accordingly, on the types of decision. 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, i.e. the court obligates the appropriate entity of administration to remedy the committed violation or carry out other orders of the court. If no room for discretionary evaluation is left, it may happen that the decision can bind the administration to adopt a favorable measure in order to comply with it.

If the contested act is annulled because it is illegal by reason of being adopted by an entity of administration acting outside the remit of his competence, such annulment shall signify restoration in a certain specific case of the status quo which existed before the making of the contested act (action), i.e. the claimant is granted restoration of the infringed rights or lawful interests.

If the court has found only procedural infringements, the further activity of administration is free except for the procedural matter.

In the cases relating to omission by an entity of public administration, i.e. failure to perform official duties or in the cases regarding delay in performing actions, the administrative court may adopt a decision obligating the appropriate entity of administration to make a relevant decision or comply with any other court order within the prescribed time limits.

Also, there may be cases where the court indirectly indicates in the decision how one or another issue should be dealt with, thus facilitating subsequent aspects for the public administration entity. This is usually based on goodwill and the active role of the court.

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.

Apparently, yes. The SAC, by forming the practice of administrative courts in the application of laws, not only influences the development of the case law, but also indirectly affects the activities of other subjects of administrative law.

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. These so-called “regulatory

cases” (petitions to investigate the lawfulness of regulatory administrative acts) are distinguished by the fact that they examine legislation which establish rules of conduct for a group of persons not characterised by individual features, and this in turn means that the decision taken by the court will have direct impact on a larger number of individuals than in ordinary cases.

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 generally takes into account previous decision of the SAC. As proof of this one can note the websites of public entities where they post relevant court decisions (despite the unfavorable outcome of the court decision) and share them with the public. Moreover, almost every complaint from public entity is based on case law, and this confirms that the decision of the administrative judge influences the work of public administrations and the case law is closely followed.

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.

Formally, the public administration does not have a discretionary power to extend the effects of an administrative judgment beyond the case decided. Nevertheless, this can happen due to improper enforcement of the court decision when public entity abuses its power and acts ultra vires.

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

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

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

Under the Law on Administrative Proceedings, after the court decision whereby the complaint/application/petition is met becomes effective, the approved copy (transcript) thereof shall be sent for enforcement by the entity of public administration or other persons the legal acts or actions (inaction) or delay to perform actions whereof were appealed, or to the entity of public administration representing the State (Government) in the case, as well as the

claimant (Article 99(1)). If the entity of public administration referred to in Paragraph 1 of this Article or any other person fails to perform the decision within fifteen calendar days or within the time-limit set by the court, at the request of the claimant, the administrative court which adopted the decision issues a letter of enforcement by also ordering the enforcement thereof by the bailiff according to the location of the seat of the respondent in accordance with the procedure laid down by the Code of Civil Procedure. Where the sums are recovered to the state budget or in case of recovery of damage resulting from illegal actions of entities of public administration, as well as in case of recovery of sums associated with office-related legal relations or payment of pensions, the court shall issue a letter of enforcement to the recovering entity without the request thereof (Article 99(2)).

Where the voluntary enforcement of the decision is not performed, the procedure of the compulsory enforcement begins. This procedure is initiated by the claimant himself through the Judicial Officers (bailiffs) system, one of the main activities of which is enforcement of the courts judgements.

It should be noted that there are cases where the enforcement of a judgement coincides with its pronouncement, so the full compliance of the judgement is carried out by the court itself. For example, the decision of the administrative court declaring a regulatory administrative act (or a part) illegal and annulling the regulation must be published in the Register of Legal Acts and this must be done by the court itself. Such a regulatory administrative act (or a part), as a rule, cannot be applicable from the day of official announcement of the effective decision of the administrative court on the recognition of the relevant regulatory administrative act (a part) as illegal.

3. If there is such a judicial remedy, does it require the judgment to become final?
- No
- Yes

Please explain. *Please refer to the previous answer.*

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

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.

No. All the conditions of Judicial Officer's civil liability (inter alia and the action for damages) are determined by the courts of general jurisdiction.

However, it should be noted that if the decision is not properly enforced because of the fault of the entity of public administration and the person claims damages, such a dispute would fall within the jurisdiction of the administrative court, which would decide on all conditions of liability (inter alia on the action for damages).

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

It should be noted, however, that some advisory activities are still performed by the SAC. For example, the SAC provides advisory opinions regarding the draft legislation of the Government or Parliament, but this formally does not fall into the competence of the SAC of Lithuania. In the vast majority of cases the SAC is asked to provide its opinion on the draft texts while exercising its administrative function, in other words, as the interested state institution. These references made to the court concern matters closely related to its functions, e.g. particular amendments to the Law on the Administrative Proceedings or the Law on Courts etc. This informal court's opinion on the draft text is by no means binding. The opinion is provided by exercising administrative powers. However, in practice it is regarded as a complementary information source and the legislator in most of the cases is willing to analyse it.

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.

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)

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)

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
- Yes

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