



Consiglio di Stato



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

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

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Answers to questionnaire: Slovenia



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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.

- Does your legal system provide general rules for the interpretation of law?
- No
- Yes

There are standard methods of interpretation of the law, which are deemed to be the ones the courts have to apply when interpreting any provision of an act of parliament or secondary legislation. These methods are to be used and explained when giving reasons for a certain judgement, both regarding material and procedural law. These methods are: grammatical/literal, historic, systemic, logical and teleological (ratio legis). There are other rules for interpretation, which can be used in certain circumstances as well as in specific areas of administrative law. As methods in established case law one can also find the use of analogy, teleological reduction and others which are used to determine the correct interpretation and use of law in administrative jurisdiction.

- 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 above-mentioned general rules regarding the interpretation of law are deemed to be a part of the constitutional legal order and the rule of law (Article 2 of the Constitution of Republic of Slovenia). A judgement that cannot be founded on the established methods of the interpretation of the law can be found to be arbitrary and therefore in violation of the requirements of a fair legal process as one of the constitutional rights (Article 22 of the Constitution).

There is still an ongoing dogmatic debate, whether our legal system permits only one correct interpretation of the law or not, but in practice there are steps toward accepting different legal interpretations as valid (not false per se). In this case there is a general obligation to use the possible interpretation of the law that protects human rights and fundamental liberties to the constitutionally required extent and that is in conformity with EU law. If such an interpretation is not possible, the e.g. act of parliament is deemed to be contrary to the Constitution and/or EU law, with consequences that stem from this conflict and have to be resolved in a determined way (challenge of the act before Constitutional Court, direct effect of EU law etc.).

Some more specific rules can be found in the parliamentary acts, e.g. the requirement of proportionality of sanction, which are additional guidance to the judge when applying the law.

1.3 What are the criteria for interpretation of the law?

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

Explain, if necessary.

As mentioned above, in the interpretation of law it is also possible to refer to historical and logical interpretation.

According to Article 206 of the Civil Procedure Act the court of first instance in civil proceedings has possibility to apply directly to the Supreme Court with a proposal for the issuance of an advisory opinion, when it should apply a legal rule regarding which the case law of higher courts is not uniform and there is no case law of the Supreme Court. In such a case, judge proposes to the Supreme Court to issue an advisory opinion. If the Supreme Court does not reject the proposal for the issuance of an advisory opinion, it issues an advisory opinion by a decision, in which it gives an interpretation of the legal rule. Advisory opinions are not binding.

That option was established by Amendment E in March 2017. The case law of the (administrative department of) Supreme Court hasn't ruled on yet, whether the issuance of an advisory opinion can also be requested in an administrative dispute.

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.

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

- X No
- Yes

Please explain and give an example.

In practice not in general terms. Nevertheless, the Supreme Court can specify - regarding a specific case - how the law applicable to the case should be interpreted, which can be seen as further elaboration of the criteria themselves. This can also be found in jurisprudence of the Constitutional Court, albeit in more general terms.

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 often

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

never (not applicable) seldom sometimes often

- The impact of the decision;

never seldom sometimes often

Other

Please specify.

In administrative law there are areas where the jurisprudence of ECtHR is widely used (e.g. asylum cases), there are however those, where the scope is more limited because they fall to a large extent outside of the scope of ECHR (e. g. Taxation).

Regulatory impact analysis isn't applicable, but since May 2018 within "Case law monitoring department" of the Supreme Court special Analysis and research Service has been operating, which also provides comparative legal analyses of specific foreign case law.

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

As mentioned above, there is a special department of the Supreme Court "Case law monitoring department", composed of one judge and judicial advisors, that is responsible for drafting the abstracts for publication of judgments of the Supreme Court, the most important ones are also classified as such, but only by special notice on the website of the court and/or in internal publications of the judiciary. Similar is valid also for the courts of second instance and the Administrative Court. There is no general formal classification of judgements of the Supreme Court.

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.

As already mentioned, Analysis and research Service, organized within “Case law monitoring department” in Supreme Court, provides comparative legal analyses of specific foreign case law. Besides that, on its web page the department also provides information about preliminary rulings and decisions of CJEU, decisions of the European Court of Human Rights (ECtHR) and the highest courts of Members States of European Union. The department also provides organizational support and substantive coordination for a range of educational activities aimed at judges and court staff. Recently, special attention has been paid to the training of judges and court staff for the use of databases.

In the field of international activities, the department provides translations of the most important decisions of the ECtHR and the CJEU from the civil field, which have not been translated into Slovenian. In addition, the department provides information on the activities of both courts, as well as information on issues related to the application of international (European) procedural and substantive law.

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

- No
- Yes

Please explain.

Slovenian justice operates a free and open database, which includes the rulings of Supreme Court, courts of second instance and the Administrative Court.

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.

Slovenian administrative judges have access to a range of technical equipment (intranet, laptops) and free access to public databases and to some private databases. Databases related to national legal system and jurisprudence are used daily, as well as EU Law (Curia) database

and ECtHR (Hudoc) are in frequent use. There are several other databases, especially of German Administrative Law (Beck Online, Juris) that are used quite frequently.

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.)

Not applicable.

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

Although in Slovenian legal system, unlike common law jurisdictions, the principle of “stare decisis” is not traditionally established, the changes of the law, regulating access to the Supreme Court, as well as jurisprudence of the Constitutional Court and Supreme Court itself, have confirmed the obligation of lower courts (and administrative bodies) to follow the decisions of these courts as the “courts of precedent”, emphasising the binding effect of their judgements on the lower courts, which includes the Administrative Court.

The principle is that the Supreme Court, which chooses only the most important cases to be considered, through its constitutional position ensures the unification of the application of law and its correct interpretation. Therefore these select decisions of the Supreme Court have a binding effect on the Administrative Court (and other courts) in all substantially equal (future) cases. The binding effect is not absolute, since – contrary to common law systems - there is a possibility for the Administrative Court to depart from the interpretation of the law adopted by the Supreme Court, but only if there are valid legal arguments put forward – which therefore

can be examined (again) by the Supreme Court through legal remedies (revision). This does not however mean, that the Administrative Court is free to disregard the rulings of the Supreme Court (this could in itself represent a violation of the law), but that the binding effect is limited.

Following some arguments the binding effect of the judgements of the Supreme Court is based on the Constitution and enshrined principles of the rule of law (Article 2) and the position of the Supreme Court as the highest court in the State (Article 127). Some others base this effect also on the provisions of the Courts' Act based on which the final decisions of the judicial authority shall be binding on every natural and legal person in the Republic of Slovenia (Article 2) and the power of the courts of higher level to direct the legal reasoning of the lower courts (which still remain independent when applying the law, Article 11).

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%

No available data/Not applicable.

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.

The situation referred to in this question is not applicable in Slovenia.

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.

Supreme Court, when stating a principle of law or solving a conflict of interpretation, sits in Plenary session that consist of all the judges of the Supreme Court, and adopts its decisions provided that at least two thirds of the judges attend the session. Among other, according to Article 110 of Courts Act Plenary session of Supreme Court also adopts principled legal

opinions on issues important for the uniform application of Acts and legal opinions on issues arising from case law.

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

- No
- X Yes

There are specific procedural rules regarding the procedure for referring a question to the Plenary session and are provided by article 111 of Courts Act and by rules of procedure of Supreme Court which shall be validly adopted if voted for by at least two thirds of the judges of the Supreme Court.

The discussion and adoption of a principled legal opinion or a legal opinion may be proposed by the department of the Supreme Court whose field of work includes that matter and to which the principled legal opinion or the legal opinion refers (Administrative Law Department, Civil Law Department etc.). A proposal is adopted by the department by a majority vote of the judges of this department. A plenary session of the Supreme Court is then be convened by the President of the Supreme Court.

The parties to a judicial proceeding cannot appeal directly to the Plenary session or propose an opinion of the Plenary session. It has also to be noted that the Plenary session does not decide on legal remedies in cases, falling within the jurisdiction of the Supreme Court.

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

The legal opinions adopted by Plenary session are binding on the panels of the Supreme Court and may only be changed at a new plenary session.

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.

Besides already mentioned Plenary session of the Supreme Court, due to overcoming difficulties in harmonizing case law at the horizontal level of Supreme Court, there is also an informal professional college, which consist by the heads of departments (judges), its work is coordinated by the Vice-President of the Supreme Court. The scope of work of the professional college mostly includes discussion of open legal matters which are common to several departments and on which the judges took a different position, in an attempt to eliminate inconsistencies.

In established practice and tradition there are weekly meetings of judges of the Department of Administrative Law where open and important questions of law are discussed, as well as changes in judicial practice and possible inconsistencies of decision making of different judicial panels.

It is good practice to organize periodical meetings among judges and advisors of the Supreme Court and Administrative court 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. At least once a year is organized seminar or conference to stimulate debate on topics of common interest.

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*).

The Supreme Court is the only (common) highest court for all courts of general or specialized jurisdictions, so any potential conflicts of jurisdiction can be resolved within the Supreme Court itself. It therefore also adjudicates on disputes regarding any conflict of jurisdiction between an administrative and other court (Article 12 of Administrative Dispute Act).

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 principle of binding the public administration as a party of administrative dispute to the ruling of the court is based partially on the general provision of the Courts' Act. According to Article 2 of Courts' Act Article 2 final decisions of the judicial authority shall be binding on every natural and legal person in the Republic of Slovenia. The decisions of the judicial authority shall be binding on courts and all other state bodies of the Republic of Slovenia. Including the decision of Administrative Court.

Specifically the administration is bound to the final administrative judgement in accordance with the Article 64 of Administrative Dispute Act, which states that in the case of annulment of the decision of administration (administrative act) the competent administrative body has to issue a new administrative act within 30 days and is bound by the legal reasoning of the administrative judgement in relation to material and procedural law. This effect is extended to all bodies, deciding on legal remedies in the same administrative case, following the final judgement of the court.

The jurisprudence of the Supreme Court has elaborated these provisions and stressed that the administration is (absolutely) bound to both factual findings and legal reasoning of the administrative judgement. The violation of this obligation can result in the court deciding on the merits of the case itself instead of administration (in full jurisdiction).

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
- X Yes

As a general principle, the effects of an administrative judgment are limited to the parties involved in the trial. Nevertheless, 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 Administrative Court into account.

A decision of the Supreme Court in an administrative matter has according to the newer jurisprudence a precedential effect and obliges all administrative bodies to follow it as legally binding (see above).

**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.

The General Administrative Procedure Act does not provide a systemically regulated possibility for the administration to change final administrative decisions following a new interpretation of the law by the Administrative Court or Supreme Court (no specific extraordinary legal remedies). If an act has not been challenged by a party, it will remain final and will not be changed. There are some limited possibilities to apply to the higher administrative body to annul the administrative decision because the use of material law was manifestly false (as can also be established by an administrative judgement), but the time limits are relatively short (1 year), so it is not often in practice that this would happen.

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

Yes, also in the Slovenian legal system a specific procedure for the execution of judgments is foreseen (Article 102 and 103 of Administrative Dispute Act), albeit only in those cases, where the Administrative Court has decided on the merits of the case itself and resolved the administrative case with a final judgement with an obligation imposed on the administration (in full jurisdiction).

If an administrative judgement imposes an obligation on the State the private person (beneficiary) can enforce the implementation of the judgement through separate execution proceedings regulated by Claim Enforcement and Security Act. According to first paragraph of Article 103 of Administrative Dispute Act where execution is enforced against the state, local community or their authorities or organizations, the court competent for the execution under the Claim Enforcement and Security Act shall, prior to issuing the order of execution, inform the authority or organization of the intended execution with an invitation to avoid the execution

by a voluntary fulfilment of obligations. The time limit for the voluntary fulfilment of obligations shall not exceed three months.

Certain procedural decision issued, e. g. an interim injunction to temporarily regulate the situation in connection with the contentious legal relationship, are also executed under the provisions of the Claim Enforcement and Security Act.

The implementation of other judgements by administrative authorities (following annulment of the administrative act etc.) is regulated in the General Administrative Procedure Act. This is also the case if an obligation is imposed by the administrative judgement on a private person.

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

Practically none. If the administrative judgement (in full jurisdiction) does impose an obligation on the State, the judgement is executed by the administration without need to use enforcement proceedings. The judgements of this kind are however not many, since in a vast majority of cases the success in administrative dispute results in annulment of the administrative act and (generally) a referral back to the administration to issue a new decision.

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?

- No
- Yes

Please explain.

Only final judgements are binding on the administration.

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.

In case the administration does not issue a new administrative act in accordance with the administrative judgement, the Administrative Court can decide on the merits of the case (in full jurisdiction) if a party starts a new administrative dispute proceeding. The question is therefore not resolved through enforcement procedure but as a new case before the Administrative Court (in subjectively and objectively the same administrative subject-matter).

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

No

Yes

There is no special provision in the law regulating the liability for damages in these cases, but if the administration would act unlawfully the State would be liable for damages caused to a private or legal person based on the requirements of the Constitution (Article 26) and general civil law.

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.

If the party wants to act against the official in person or the state from the title of liability of the non-execution or incorrect execution of the judgment, the case must be brought through the civil courts. Only in case of a new administrative dispute in the same administrative case can the Administrative Court also decide on damages because its judgement was not followed, which in practice is rarely the case.

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

Please specify.

The situation referred to in this question is not applicable in Slovenia.

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)

The situation referred to in this question is not applicable in Slovenia.

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)

The situation referred to in this question is not applicable in Slovenia.

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

There is a possibility of secondment of judges to the Ministry of Justice for a limited period and also to participate in certain projects (preparation of legislation). A special decision of the Judicial Council is required to do so.

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