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Contents:

FROM THE SECRETARY-GENERAL'S DESK.....	3
<i>By Mr Yves KREINS, Secretary-General of ACA-Europe</i>	
SEMINAR IN BRUSSELS ON 1 AND 2 MARCH 2012: 'Increasing the efficiency of the Supreme Administrative Courts' powers'	
INTRODUCTION	4
<i>By Mr Jean-Marc SAUVÉ, Vice President of the Council of State of France</i>	
THE ADMINISTRATIVE LOOP.....	6
<i>By Mr Pierre LEFRANC, Councillor of State at the Council of State of Belgium</i>	
POWER TO AWARD COMPENSATION AND ACTION FOR ANNULMENT	20
<i>By Mr Michel PÂQUES, Councillor of State at the Council of State of Belgium</i>	
EFFECTIVENESS OF THE ENFORCEMENT OF RULINGS BY ADMINISTRATIVE COURTS	29
<i>By Mrs Pascale VANDERNACHT, Councillor of State at the Council of State of Belgium</i>	

FROM THE SECRETARY-GENERAL'S DESK

On 1-2 March 2012, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) held a seminar in Brussels entitled 'Increasing the efficiency of the Supreme Administrative Courts' powers'. For the organisation of this event, it received the scientific support of the Council of State of Belgium, which had a particular interest in this subject due to the importance the relevant statement of the Belgian government – passed by the Belgian parliament in late 2011 – attaches to reforming the country's court system with a view to improving applicable proceedings before the Council of State of Belgium, in the interest of litigants and administrative authorities alike.

ACA-Europe also wanted to ensure the seminar was fully in line with efforts by the European Commission's Directorate-General for Justice to promote more accessible, more modern and faster justice.

The seminar brought together around 60 courts, and the European Commission responded positively to its invitation by assigning an adviser to take part in discussions.

The seminar, chaired by Mr Andersen, First President of the Council of State of Belgium, revolved around three topics, each introduced by one of three rapporteurs from the Council of State of Belgium. The topics were as follows:

- the power to rectify the legality of an administrative decision and, more specifically, the 'administrative loop' procedure;
- the power to award compensation and action for annulment;
- the effectiveness of enforcing the rulings of administrative courts.

Thus, the rapporteurs provided an overview of the practices in the legal systems of the represented courts, based on those courts' responses to a questionnaire sent to participating courts. The rapporteurs' speeches were followed by more detailed presentations of individual systems: first the Dutch system, then the Danish system, and finally the French system. Afterwards, an exchange of views involving a series of questions and answers helped to identify the main specific features of each participant's court system in more detail.

Through such exchanges, ACA-Europe is fulfilling one of its key roles, i.e. to serve as an ideal converging point for the various court systems within the European Union, enabling member supreme courts to compare their respective operating procedures with a view to implementing best practices, thereby stimulating and enhancing national discussion on what action can be taken to increase the efficiency of administrative justice. In this respect, the seminar will prove vitally important in the plans being devised by the government to enable it to achieve its objective, i.e. to reform the administrative proceedings brought before the Council of State.

This newsletter includes the three general reports and the introduction provided by Jean-Marc Sauvé, Vice President of the Council of State of France, who, for exceptional reasons and at short notice, was unable to open the seminar as initially planned. All contributions are available at www.aca-europe.eu under Colloquia/Seminars and Newsletter.

Yves Kreins
Secretary-general

INTRODUCTION

By Jean-Marc Sauvé, Vice President of the Council of State of France¹

1. I would like to begin this short introduction by telling you a tale, well known by French legal practitioners and written by Professor Jean Rivero some 50 years ago in 1962.² The story recounts a visit by a member of the Hurons, a clan of indigenous peoples in Canada, to the Council of State of France.

“He was a Huron and a legal practitioner. He sat at the foot of a copper beech tree whose leaves, blown free by the wind, would occasionally come to rest on his shoulder as though forming a red sash. He taught public law to the future warriors of his clan. The hearts of those young, honest and virtuous men would sing when he told them of the miraculous inventions by which the Wise Men on the other side of the vast Ocean had protected man from the misuse of powers.”

So began *Réflexions naïves sur le recours pour excès de pouvoir* (Naïve Reflections on the Appeal on Grounds of Misuse of Powers).

At first, the Huron was overcome with admiration for the appeal on grounds of misuse of powers, which he considered a supreme achievement of the Council of State of France. However, during his discussions with the professor accompanying him, many of the concrete notions he had formed began to crumble. The professor explained to him that appeals on grounds of misuse of powers were not suspensive, that the court did not possess the power to quash administrative decisions and that, if it did, it would have no means of enforcing its rulings. However, the professor insisted that the appeal on grounds of misuse of powers was a “great and glorious institution” and that, even where it did not bring full satisfaction to the appellant, and even where it could not stop the arm of the administration as it was about to descend, “it enshrines, above all contingencies, the principle that the Administration is subject to the Law”³.

The Huron, somewhat disconcerted, questioned the professor’s reasoning with pure common sense: “We outsiders, noble savages, are simple beings: we believe that justice is done for litigants and that their worth is measured in terms of day-to-day life. It is not the development of law that interests us: it is the effective protection afforded to the individual by that law”. He concluded: “I thought your great appeal gave them that protection. Have I travelled so far only to discover I was wrong?”⁴

2. Some 50 years have passed since those deceptively naïve remarks. During that time, the work of the administrative court has changed so much that, if the Huron were among us today, he would probably be unable to hide his surprise at such an extensive transformation. The administrative court lacked the necessary means to suspend the enforcement of manifestly illegal rulings, to cancel out the harmful effects of the illegality of administrative rulings, or to order the administration to act in a certain way.

¹ Written in collaboration with Olivier Fuchs, advisor to the Administrative Court and Administrative Court of Appeal, and special advisor to the Vice President of the Council of State

² J. Rivero, *Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir*, D., 1962, chron., p. 37.

³ *Ibid.*, p. 39.

⁴ *Ibid.*

Now, the court can rule on urgent cases and, taking into account the practical consequences of its ruling, ensure that it is enforced in line with the judgement handed down.

These changes have paved the way for the administrative court's new powers which, I believe, are shared across our specific national features. The first of these is the growing role of the litigant in the day-to-day work of our courts. The *a contrario* argument implied in that sentence may well ruffle a few feathers. In my eyes, administrative law has never been seen and applied by the administrative courts as an instrument for the benefit of the powerful, but rather as a right benefiting all litigants. However, in the absence of certain powers, especially injunction, the administrative court has occasionally lacked the power to tangibly influence the situation of the appellant. As such, the desire, in abstract terms, to restore a legal system misused through an illegal act has prevailed over any considerations relating to the actual restoration of the appellant's situation. This is a major transformation: in fact, recent changes have truly integrated the administrative court into society by giving it the means to take charge of such situations, wherever an illegality has been committed.

More generally, the effectiveness of the powers possessed by the administrative courts also depends on the balance those courts strike between the principle of legality and the requirements laid down by the principle of legal certainty. The annulment of administrative rulings is not necessarily the best course of action in a given case, or at least not the hasty annulment of such rulings. There is a wide range of mechanisms to help strike a better balance: some courts regulate the impact of their annulments over time; in other systems, courts are allowed to substitute their rulings for those of the administration; others employ the 'administrative loop' system. Compensation can also be seen as a substitute for the annulment of rulings. All these mechanisms and others reinforce the responsibilities of the administrative court. They help give rise to a more flexible view of legality that also takes into account the requirements inherent to the principle of legal certainty and the rights of litigants.

3. Therefore, the aims of this seminar are to better understand the powers possessed by European administrative courts, to compare them and to draw conclusions from this study as to the effectiveness of court rulings. In this regard, the comparative analysis becomes truly meaningful and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) entirely fulfils its role which, under Article 3 of its Articles of Association, is to promote the exchange of ideas and experiences on case law, and the organisation and operation of member courts.

“In my opinion, just as the tomahawk is made for war and the calumet for peace, the administration is made for citizens and the court for litigants”, said the Huron.⁵

Today, if the Huron were to visit our country, he would surely believe that the administrative court, through its new powers, could not only give better consideration to the situation of litigants, but also take into proper account the limitations of administrative action. But while the balance struck between those demands is better, it could certainly be improved – a goal we must now work towards. The best way to improve that balance is to share our achievements, experiences and projects. By comparing our practices in this way we can be most sure of progressing together. On that note, I hope to see productive exchanges during this seminar, which has been expertly prepared by the Council of State of Belgium and the General Secretariat of the Association, whose job it is to put the supreme administrative courts on the path to greater efficiency.

⁵ J. Rivero, *Nouveaux propos naïfs d'un Huron sur le contentieux administratif*, EDCE, Paris, 1979, p. 30.

THE ADMINISTRATIVE LOOP

By Pierre Lefranc, Councillor of State at the Council of State of Belgium

I. BELGIUM

Ultra vires proceedings and action for annulment

De lege lata

The primary role of the Litigation Division of the Council of State of Belgium⁶ is to protect parties against arbitrary administrative rulings. This general report will not address the fact that the Council of State is also a court of cassation with the authority to hear appeals against rulings by lower administrative courts.⁷

The main tasks of the Council of State in this context are *suspending and annulling* administrative decisions (both individual decisions and regulations⁸) which breach legislation in force. In principle, only actions for annulment and not absolute-jurisdiction actions fall within the Council of State's jurisdiction.⁹

The report submitted by Belgium confirms that the Council of State has no jurisdiction to *reverse* rulings in actions for annulment.¹⁰ Neither may it impose an *injunction* on the authorities.¹¹

Article 14(b) of the Coordinated Laws of the Council of State (LCCE) nevertheless permits the Council of State, where the latter deems it necessary, to stipulate by means of a general provision those effects of provisions of annulled administrative decisions which it believes should be considered as definitive or should be retained temporarily for a period determined by it. This authority of the

⁶ The Council of State of Belgium (www.conseildetat.be) is split into two divisions: the Litigation Division and the Legislative Division, the latter acting as an advisory body in legislative and regulatory matters. For details, see also the reports (available in French only) by Annemarie Ginthor (<http://www.aca-europe.eu/exchanges/2010/RapportGINTHOR.pdf>) and Alberto Augusto Andrade de Oliveira (<http://www.aca-europe.eu/exchanges/2011/RapportOliveira.pdf>) who completed his stage at the Council of State in October 2010 and September 2011 respectively.

⁷ See: E. Loncke and G. Pijcke, *Cassation administrative, théorie de la cause et moyen nouveau*, RCJB 2011, 65-87; P. Lejeune, *Les spécificités de la cassation administrative*, JT 2010, 185-191; report by P. Lewalle compiled in 2010, pages 4 and 34 (http://www.aca-europe.eu/colloquia/2010/Rapport_d%C3%A9finitif_colloque_Belgique_FR_7_juin_2010.pdf, available in French only); see also the report for Belgium compiled in 2009, pages 6 and 11 (http://www.aca-europe.eu/en/eurtour/i/countries/belgium/belgium_en.pdf).

⁸ See also the reports compiled respectively by M. Leroy in 1986 (<http://www.aca-europe.eu/colloquia/1986/belgium.pdf>, available in French only) and P. Maroy in 1978 (<http://www.aca-europe.eu/colloquia/1978/belgium.pdf>, available in French only).

⁹ See also the report compiled by P. Tapie in 1976 (<http://www.aca-europe.eu/colloquia/1976/belgium.pdf>, available in French only), the report for Belgium compiled in 2009, page 18 (http://www.aca-europe.eu/en/eurtour/i/countries/belgium/belgium_en.pdf) and the report compiled by P. Lewalle in 2010, page 2 (http://www.aca-europe.eu/colloquia/2010/Rapport_d%C3%A9finitif_colloque_Belgique_FR_7_juin_2010.pdf, available in French only).

¹⁰ See also the reports compiled respectively by G. Debersaques in 1998 (http://www.aca-europe.eu/colloquia/1998/belgium_nl.pdf, available in Dutch and French only), P. Lemmens in 2000 (<http://www.aca-europe.eu/colloquia/2000/belgium.pdf>), and S. Guffens in 2006, pages 45 and 67 (<http://www.aca-europe.eu/colloquia/2006/Belgium.pdf>, available in French only).

¹¹ See also the reports compiled respectively by P. Maroy in 1978 (<http://www.aca-europe.eu/colloquia/1978/belgium.pdf>, available in French only), G. Debersaques in 1998 (http://www.aca-europe.eu/colloquia/1998/belgium_nl.pdf, available in Dutch and French only), P. Lemmens in 2000 (<http://www.aca-europe.eu/colloquia/2000/belgium.pdf>), and S. Guffens in 2006, page 29 (<http://www.aca-europe.eu/colloquia/2006/Belgium.pdf>, available in French only).

Council of State to *retain or amend the timescale of effects of annulment rulings* does not extend to individual administrative decisions.¹² Derogating from the principle of the retroactive effect of an annulment ruling, the result of the aforementioned Article 14(b) is that the annulled regulation, the effects of which have been retained in whole or in part by the judgment handed down by the Council of State, is not removed from the legal system and thus remains a regulation.¹³

The Council of State also has the power to impose fines on authorities which fail to enforce an annulment ruling; this power entails requiring a defaulting authority to take measures to rectify legality (Article 36 LCCE). Plaintiffs may not take action seeking to have a decision or administrative regulation annulled whilst at the same time seeking to have the annulment accompanied by a fine. This option is only available to plaintiffs where an authority has failed to enforce an annulment ruling within a period of three months from the time the ruling was passed. A separate claim must be lodged to this effect, after the authority concerned has been issued a formal notice. Where the Council of State orders that a fine is payable, said fine is not paid to the plaintiff but to a budgetary fund, the Fine Administration Fund (*Fonds de gestion des astreintes*).

De lege ferenda

In a memorandum issued by the Council of State in July 2010, the *chefs de corps* expressed their desire for cases to be settled *quickly and definitively following a single set of proceedings* and called upon the legislature to grant the Council of State, inter alia, the power to issue *injunctions* ordering the author of an annulled decision either to take certain action or to refrain from taking certain action (failure to comply being punishable by a fine), as well as the authority to *reverse* decisions in some cases to ensure that annulment rulings are enforced efficiently and effectively.

It was no doubt against this backdrop that the government envisaged, in its agreement dated 1 December 2011, examining and adopting in partnership with the Council of State proposals designed to enhance proceedings before the Administrative Division of the latter in order to respond more appropriately to practical concerns in the interests of litigants and the administrative authorities.¹⁴

The Flemish parliament has, on several occasions, expressed the desire to see the Council of State granted an administrative-loop mechanism, making reference in doing so to the administrative courts of the Netherlands.¹⁵

Absolute jurisdiction

Nevertheless, the Belgian report states that Article 16 LCCE grants *absolute jurisdiction* in certain very specific cases and that when exercising this jurisdiction, the Council of State is acting in the place of the author of the appealed decision, with the result that the defects in the decision are addressed and

¹² See also the reports by G. Debersaques in 1998 (http://www.aca-europe.eu/colloquia/1998/belgium_nl.pdf, available in Dutch and French only) and for Belgium in 2009, pages 40-41 (http://www.aca-europe.eu/en/eurtour/i/countries/belgium/belgium_en.pdf); R. Andersen, *La modulation dans le temps des effets des arrêts d'annulation du Conseil d'Etat in X., Liège, Strasbourg, Brussels: Parcours des droits de l'homme*, Liber amicorum Michel Melchior, Limal, Anthemis, 2010, 381-395.

¹³ Constitutional Court, ruling no. 18/2012, 9 February 2012 (www.const-court.be).

¹⁴ Available at www.premier.be.

¹⁵ On 3 March 2010, the Flemish parliament adopted a resolution in which it recommended, inter alia, that the LCCE be adapted to include an administrative-loop mechanism (<http://docs.vlaamsparlement.be/docs/stukken/2009-2010/g395-2.pdf>, available in Dutch only) following an exchange of views at the parliament with Professor C.W. Backes of the University of Maastricht (<http://docs.vlaamsparlement.be/docs/stukken/2009-2010/g55-2.pdf>).

rectified by its ruling. Fields in which such jurisdiction applies are broad-ranging and include provincial and municipal elections, social assistance, disputes between newly established municipalities concerning distribution of goods between inhabitants of separated territories, election of members of 'police boards' (*conseils de police*) provided for in the Integrated Two-Tier Police Force Act of 7 December 1998, and restrictions on and monitoring of electoral expenditure in the context of elections to the federal Chambers, and transparency as regards the funding of and accounts kept by political parties.

Cassation

The Belgian report also notes that the Aliens Litigation Council¹⁶ is one of a number of administrative courts with special powers whose rulings may be appealed in cassation before the Council of State, and that it enjoys absolute jurisdiction in terms of review of matters pertaining to asylum¹⁷: Article 39(2)(1) of the Act of 15 December 1980 grants it jurisdiction to uphold or reverse a disputed decision passed by the General Commission for Refugees and Stateless Persons. The Aliens Litigation Council will only annul a disputed decision passed by the General Commission for Refugees and Stateless Persons either where said decision is vitiated by a substantive irregularity which cannot be rectified by the Council, or because the latter is lacking key elements which mean that it cannot determine whether to uphold or reverse the decision without additional investigation.

These lower administrative courts also include the Flanders Council for Challenges to Land Planning Permits (*Raad voor Vergunningsbetwistingen*)¹⁸ and the Environmental Enforcement Court of Flanders (MHHC).¹⁹ The Flanders Council for Challenges to Land Planning Permits has the power to annul an unlawful decision and may order the authority that passed it to adopt a fresh ruling within a time period stipulated by the Council. In this context, the Council may i) highlight certain irregular or manifestly unfair grounds which may not be factored in when adopting the fresh ruling, ii) stipulate legal rules or principles which must be observed when drafting the fresh ruling, and iii) detail the procedural steps which must be taken before the new decision is adopted.²⁰ The Environmental Enforcement Court of Flanders hears appeals against decisions imposing an administrative fine, where applicable accompanied by confiscation of unlawfully acquired gains, penalising an environmental offence or violation. It may annul the disputed decision in whole or in part, may determine itself the level of any fine and, where appropriate, may pass judgment on relinquishment of any advantage and rule that its decision on the matter replaces the annulled decision.

Compensation

A particular feature of the Belgian legal system is that in the absence of any other competent court, the Council of State may rule *on an equitable basis* – taking due account of all the relevant circumstances of public and private interest – on claims for compensation in respect of material or non-material damage caused by an administrative authority.²¹

¹⁶ Website: <http://www.rvv-ccce.be/>. See also the 2009 report on Belgium, pp. 43-44 (http://www.aca-europe.eu/en/eurtour/i/countries/belgium/belgium_en.pdf)

¹⁷ In respect of other appeals, the Council may annul decisions on account of breaches of procedures which are either substantial or mandatory, and of action ultra vires or misuse of powers (Article 39(2)(2) of the Act of 15 December 1980).

¹⁸ Website: <http://www.raadvoorvergunningsbetwistingen.be>.

¹⁹ Website: <http://www.mhhc.be/fr>.

²⁰ The extension of the competencies of the Flanders Council for Challenges to Land Planning Permits via, inter alia, the administrative loop is detailed in a draft decree submitted to the Flemish parliament on 29 February 2012 (<http://docs.vlaamsparlement.be/docs/stukken/2011-2012/g1509-1.pdf>, available in Dutch only).

²¹ See also the 2009 report for Belgium, p. 3 (http://www.aca-europe.eu/en/eurtour/i/countries/belgium/belgium_en.pdf)

Conclusion

It would be interesting to examine the administrative loop enjoyed by the administrative courts of the Netherlands and/or said courts' jurisdiction in general to rectify (or have rectified) the lawfulness of an administrative decision, and to compare this jurisdiction with that of administrative courts in other European countries.

II. THE NETHERLANDS²²

Certain powers being exercised more frequently²³

In recent years, the administrative courts (including the Council of State) have been called upon more frequently to settle disputes definitively²⁴.

This requirement explains why the Dutch Council of State is now exercising a number of powers more frequently, including:

- the power to *annul* a decision whilst *retaining its legal effects*²⁵: this is only possible where the legal situation created by the annulled decision is lawful and correct; this power applies both to regulations and individual administrative decisions;
- the power "*of the court itself to settle a matter*"²⁶ (substitution): where in law only one specific ruling is possible (e.g. where a permit can only be refused), the administrative court may adopt this decision itself; in such cases, it must always take into account the interests of interested third parties (including those who are not parties to the case in question). The administrative court is even required to rule itself in disputes surrounding administrative fines;
- the power to "*disregard*" defects in a decision where only certain formalities have been breached and the likelihood is that such breaches(s) will not prejudice the interested parties.²⁷

A new power

Since 1 January 2010, the Dutch Council of State has enjoyed a new instrument with which to provide definitive settlement of a dispute: the 'administrative-loop'²⁸. Under this system, the Council of State has the authority to order an administrative authority to rectify a defect identified in a decision before

²²See also the report compiled by E. Lancksweerd in 2010 (<http://www.aca-europe.eu/exchanges/2010/RapportLANCKSWEEERDT.pdf>, available in French only) and published in *Administration Publique* 2011, 73-82, the 2009 report for the Netherlands (http://www.aca-europe.eu/en/eurtour/i/countries/netherlands/netherlands_en.pdf), and the reports compiled respectively by T.G Drupsteen in 2006 (<http://www.aca-europe.eu/colloquia/2006/Netherlands.pdf>), M.J.H Blaauw in 1988 (<http://www.aca-europe.eu/colloquia/1988/netherlands.pdf>, available in French only) and P.J. Boukema in 1978 (<http://www.aca-europe.eu/colloquia/1978/netherlands.pdf>, available in French only)

²³ It should be noted that, in principle, no provision is made in the Netherlands for a specific appeal for annulment of regulations (see the report by P.J. Boukema in 1986: <http://www.aca-europe.eu/colloquia/1986/netherlands.pdf>, available in French only). However, appeals for annulment of zoning ordinances may be lodged before the Council of State.

²⁴ This trend comes in response to the desire expressed by *chefs de corps* within the Council of State of Belgium in the aforementioned memorandum.

²⁵ Article 8:72(3) of the General Administrative Law Act (AwB) of 4 June 1992

²⁶ Article 8:72(4) AwB

²⁷ Article 6.22 AwB

²⁸ Article 8:51 et seq. AwB and Article 8:80 et seq. AwB

annulling it; it also stipulates how the decision needs to be adopted in order for it to be lawful and the conditions which must be met. Wherever possible, this interim ruling constitutes settlement of the dispute, however, the administrative-loop mechanism must not prejudice the interests of third parties.

This new power was bestowed upon the administrative courts to avoid successive annulment proceedings occurring within the context of a single case.

The administrative courts may pass an interim judgment *giving an administrative authority the opportunity* (in the case of a district court) or instructing an administrative authority (in the case of the Administrative Jurisdiction Division of the Council of State and the Central Appeals Tribunal) to rectify a defect in a contested decision (or have it rectified) within a given period of time, except where such rectification would result in unfair treatment of interested parties who are not parties to the proceedings. The interim judgment should provide as much detail as possible as regards how the defect is to be rectified. In such cases, the administrative authority must notify the administrative court as quickly as possible whether it intends to make use of the opportunity to rectify the defect or have it rectified. If the administrative authority intends to rectify the defect, it must also provide written details as quickly as possible of how it intends to rectify the defect in question. The parties may, within a specified time period after written notification is sent, register their position as regards how the defect is to be rectified. A final ruling will then be passed on the original appeal against the defective decision (which may or may not have been rectified subsequently).

Where the administrative-loop mechanism fails (i.e. because the administrative authority refuses to rectify the defect), in addition to annulling the contested decision, the Council of State may:

- *order* the authority to adopt a fresh decision taking the ruling into account;
- *impose a deadline* on the authority by which it must adopt said fresh decision²⁹;
- impose a *fine* on the administrative authority in favour of a stated party where the authority fails to implement the ruling.

Conclusion

The call for the administrative courts to settle disputes definitively as quickly as possible has resulted on the one hand in the legislature granting the administrative courts powers – including the administrative-loop mechanism – in addition to the power to annul decisions, and on the other the administrative courts exercising those powers more frequently and more creatively. The previously 'passive' administrative courts are thus becoming increasingly proactive and their workloads are growing as a result.

III. POWER OF ANNULMENT ONLY

Cyprus

The Supreme Court³⁰, which has exclusive jurisdiction as regards review of the legality of administrative decisions, only hears appeals for *annulment* of an administrative decision in relation to

²⁹ Article 8:72(5) AwB

³⁰ See also the report for Cyprus compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf)

lack of jurisdiction, breach of a core procedural requirement, substantive breach of the law, breach of the Constitution and/or exceeding or misusing discretionary powers. The Supreme Court may only either a) uphold a decision, action or omission, in whole or in part, or b) declare a decision or action to be null and void, in whole or in part, or declare that such omission, in whole or in part, ought not to have occurred and that whatever has been omitted should have been performed.

Turkey

In general, all administrative cases governed by administrative law fall, in principle, under the jurisdiction of the administrative courts (the Litigation Division of the Council of State, the fiscal and administrative courts, and the regional administrative courts)³¹. As regards review of legality, appeals for annulment may result in the *annulment* (in whole or in part) by said administrative courts of unlawful individual administrative decisions taken or regulations passed by an authority. However, the courts may neither substitute their own assessment as regards suitability for that of the authority, nor rule on the nature of the administrative decision, nor rule in such a way as to restrict the exercise of administrative powers.

IV. ABSOLUTE JURISDICTION

France

French administrative law permits absolute-jurisdiction appeals and appeals in respect of action *ultra vires* to be brought before the administrative courts³².

Appeals in respect of action *ultra vires* may request that a unilateral administrative decision be annulled.

The report submitted by France states that the automatic nature of annulment of a decision on the grounds of external lawfulness was recently relaxed via a judgment handed down on 23 December 2011. In the latter, the Council of State set out a principle whereby in the event that administrative decisions need to be taken in accordance with practices and procedures laid down in legislation and regulations, a defect impacting on the progress of prior administrative proceedings shall only render the decision taken unlawful where the case file indicates that said defect was likely to have influenced the decision taken or deprived the persons concerned of a guarantee.³³ In such cases, therefore, the Council of State *disregards* the identified defect.

The report also states that the administrative court may play a role in rectifying the illegality where, having annulled a decision, it then opts to *amend the effects of that annulment*. Up until 2004, annulment of an administrative decision always had far-reaching effects and was necessarily applied retroactively. The annulled decision was erased both for the future, of course, and as regards the past. Annulment of an administrative decision still has the effect, in principle, of the decision in question being deemed never to have occurred. Nevertheless, the rigidity of this principle was relaxed somewhat in the light of a judgment handed down by the Council of State on 11 May 2004. Since this ruling, where it is clear that applying annulment retroactively is likely to have consequences which are

³¹ See also the report for Turkey compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/turkey/turkey_en.pdf)

³² See also the report for France compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/france/france_en.pdf)

³³ CE, ass., 23 décembre 2011, *Danthony*, n° 335033.

clearly excessive on account both of the effects to which the decision in question has already given rise and situations which have arisen, and of the general interest associated with maintaining its effects temporarily, it is the responsibility of the administrative court to take into account, on the one hand, the consequences of applying the annulment retroactively on the relevant public and private interests, and, on the other, the drawbacks posed by a limiting the effects of the annulment in time.³⁴ In making its assessment, the court takes into account the principle of lawfulness, the principle of legal certainty and the right of litigants to an effective remedy. Combining these considerations, the court assesses whether, as an exception, it is appropriate to derogate from the principle of the retroactive effect of annulments. Where such derogation is deemed permissible, the court may stipulate in its ruling that certain of the effects of the unlawful decision, pre-dating the annulment, shall become definitive or even that the annulment shall not take effect until a specified later date. Where the court opts to *defer the effects of annulment*, the authority is given the time required to rectify its unlawful decision to prevent legal voids from arising.

In the case of absolute-jurisdiction appeals before an administrative court based on special legislation or on case law (action in respect of quasi-delict, contracts, elections, fiscal matters, pensions, dangerous buildings, registered environmental protection centres, penalties imposed by the authority (with the exception of penalties imposed on public officials themselves) and certain criminal proceedings), the court has the power not only to annul the disputed administrative decision but to *reverse* it. The court thus acts in the place of the authority and makes a decision in the same way as the authority itself would have done.

Luxembourg

There are two categories of appeal before the administrative courts: appeals for *annulment* under ordinary law and appeals for *reversal*. Reversal requires special legislation which grants the administrative courts the authority to hear such appeals (administrative tribunal of first instance and higher administrative court³⁵). Appeals for reversal may only be brought against individual administrative decisions; where regulations are concerned, only an appeal for annulment may be lodged. Administrative court ruling in the capacity of courts with authority to reverse a decision thus *act in the place* of the authority and pass their own rulings. The administrative courts' power to reverse a decision is generally unrestricted and thus includes, to some degree, the power to rectify an illegality in a disputed decision by substituting their own – lawful – decision. Administrative courts may thus review in their entirety administrative decisions brought before them, where said decisions require reversal.

Administrative courts acting in the capacity of a court with authority to reverse a decision may also stipulate, via reversal of a decision, broad principles only whilst referring the case back to the competent administrative authority for the latter to determine the details as regards application, calculation or enforcement of the principles cited. This applies mainly in the case of technical matters or issues involving special requirements as regards enforcement.

³⁴ CE, Ass., 11 mai 2004, *Association AC ! et autres*.

³⁵ See also the report for Luxembourg compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/luxembourg/luxembourg_en.pdf)

Greece

The administrative courts (administrative courts of first instance, administrative courts of appeal and the Council of State)³⁶ hear two types of appeal: appeals for *annulment* (action *ultra vires*) and absolute-jurisdiction appeals. Appeals against regulations are always appeals for annulment, while appeals against an individual decision are either appeals for annulment or absolute-jurisdiction appeals. Appeals against an individual decision are, in principle, appeals for annulment, except where the law stipulates that an appeal against a specific category of case is deemed an absolute-jurisdiction appeal. Where the administrative decision is discretionary in nature, it may only be *annulled* by the administrative court. Where it entails circumscribed powers, it may also be *amended* by the administrative court. In the case of appeals for annulment, the administrative court may annul the decision once it has reviewed its lawfulness. In the case of absolute-jurisdiction appeals, the court may not only annul the disputed decision but may also reverse it. No court has the power to issue an injunction against an authority.

Where a litigant's application is implicitly refused, the administrative court refers the case to the authority in question for the latter to draw up a decision. A substantive ruling will only be passed after an explicit decision has been made by the authority. However, this system is not the same as an administrative-loop mechanism since a) the administrative court simultaneously annuls the unlawful implicit refusal, and b) the ruling passed is definitive rather than interim. Moreover, the administrative decision adopted to enforce such a ruling may only be challenged via a fresh appeal before the administrative court.

Slovakia

In addition to the power to *annul* decisions and to refer cases to the authority in question, in cases in which it enjoys absolute jurisdiction (financial penalties), the competent court³⁷ also has the power to *act in the place of* the authority and to adopt a fresh decision.

Portugal

The increase in reviews of administrative decisions by the administrative courts (administrative and fiscal tribunal, administrative courts of appeal and the Supreme Administrative Court)³⁸ is down to the introduction of the principle of effective legal protection.

Aside from *annulment*, said courts may also *rectify* defective decisions, despite the power of rectification being limited to administrative decisions within the scope of circumscribed powers. In the case of an unlawful refusal or omission, the administrative court has the power to restore legality, either by *amending* the refusal decision, or by detailing the legal parameters which must be observed and *ordering* the authority to effect the administrative decisions required by law. Where effecting the decision required falls within the scope of authority's discretionary powers, the administrative court may not impose the content of the decision to be effected but may simply stipulate the constraints to

³⁶ See also the report for Greece compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/greece/greece_en.pdf)

³⁷ See also the report for Slovakia compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/slovakia/slovakia_en.pdf)

³⁸ See also the report for Portugal compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/portugal/portugal_en.pdf) and the report by Fernanda Xavier, who completed an exchange with the Council of State of Italy in October 2011 (http://www.aca-europe.eu/exchanges/2011/ReportXavier_EN.pdf)

be observed by the authority in order to effect the decision. Where circumscribed powers are involved and the administrative court does not have sufficient facts at its disposal to be able stipulate the content of the decision to be effected, it invites the authority to submit a reasoned proposal with 20 days, following which the parties' claims are heard. Where a fresh decision is adopted (amendment or replacement), the appeal becomes, in principle, irrelevant. The plaintiff may nevertheless ask for proceedings to continue. This system of increased review of decisions is, to a very limited degree, similar to the administrative-loop mechanism.

Italy

In general, the administrative courts (regional administrative courts of first instance and the Council of State)³⁹ only have the power to *annul* an administrative decision. However, in matters in which said courts enjoy absolute jurisdiction, they may *act in the place of* the authority and either adopt a fresh decision or rectify a disputed decision. This arrangement applies to cases involving elections and administrative penalties.

V. AN ADDITIONAL POWER: INJUNCTION

Spain

The ordinary courts⁴⁰ may *annul* an administrative decision. In cases involving a regulation, they may also stipulate that "a specific legal situation exists and that appropriate measures be adopted to re-establish that situation fully, by means, inter alia, of damages". Where an appeal has been lodged against an authority's failure to act, the court may *order* the authority in question to fulfil its obligations under the terms laid down by law.

Austria

In principle, the Administrative Court⁴¹ only has the power to *annul* an administrative decision. As a general rule, it does not have the power to issue an injunction or amend a decision. Nevertheless, where an appeal is lodged against an omission on the part of an administrative authority, the Administrative Court may *order* said authority to issue a decision in the case within the specified time period (renewable) and to notify the Court, if not of the decision, then of the reasons why the failure to issue a decision is not unlawful. The proceedings are closed once the authority has notified the Court of the decision it has adopted to enforce the judgment. Compared with the administrative-loop mechanism, this system only makes provision for the authority to adopt a decision it had previously failed to adopt.

The Court of Asylum has the power to *amend* a decision. Only where the Court does not have sufficient facts at its disposal concerning a case will it agree to annul a disputed decision.

³⁹ See also the report dated 7 December 2011 by Valérie Michiels who completed an exchange with the Council of State of Italy (<http://www.aca-europe.eu/exchanges/2011/RapportVMichiels.pdf>, available in French only), the report for Italy compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/italy/italy_en.pdf) and the report by Fernanda Xavier, who completed an exchange with the Council of State of Italy in October 2011 (http://www.aca-europe.eu/exchanges/2011/ReportXavier_EN.pdf)

⁴⁰ See also the report for Spain compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/spain/spain_en.pdf)

⁴¹ See also the report for Austria compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/austria/austria_en.pdf)

United Kingdom

The competent courts⁴² have the power to *annul* an administrative decision and, where necessary, to *compel* the authority in question to adopt a fresh decision.

Estonia

The competent courts (administrative tribunals, appeal courts and the Supreme Court)⁴³ have the power to *annul*, in whole or in part, an administrative decision which is unlawful, and to issue an *injunction* requiring such a decision to be reversed; any such injunction must indicate how the decision is to be reversed.

In line with the recent case law of the Supreme Court, the administrative courts also *disregard* a defect in the legal basis for a decision where they deem that the same decision on a correct or different legal basis would be the same.

Poland

In addition to *annulling* a disputed decision, the administrative courts (provincial (voivodeship) administrative courts and the Supreme Administrative Court)⁴⁴ may submit *an assessment of lawfulness and mandatory recommendations* to the authority.

Germany

One of Germany's three public-law jurisdictions is the general administrative jurisdiction, which is divided into three levels (administrative courts of first instance, higher administrative courts of second instance at federal state (*Land*) level, and the Federal Administrative Court as the court of third and final instance).⁴⁵

In addition to being able to *annul* an administrative decision in whole or in part, the administrative courts may *compel the authority in question* to pass an individual administrative decision after it has refused or failed to do so, and may *issue it binding guidelines* on how the decision should be drafted. In the case of a review of lawfulness, it is not the responsibility of the administrative courts to review the suitability of the administrative decision in question or to replace the assessment made by the authority with its own assessment, even if, in the court's view, other decisions would be more suitable or more favourable to the plaintiff.

Nevertheless, in disciplinary cases, the administrative court has the power to *suggest* to the authority that it *amend the disputed decision during the course of proceedings* so as to shorten the duration of

⁴² See also the report for the United Kingdom compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/unitedkingdom/unitedkingdom_en.pdf)

⁴³ See also the report for Estonia compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/estonia/estonia_en.pdf)

⁴⁴ See also the report for Poland compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/poland/poland_en.pdf) and the report by Joanna Hottiaux, who completed an exchange with the Supreme Administrative Court in June 2011 (<http://www.aca-europe.eu/exchanges/2011/RapportJHottiaux.pdf>, available in French only)

⁴⁵ See also the report for Germany compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/germany/germany_en.pdf)

the latter. Where the decision is amended, the administrative court will reconsider the appeal. Where it is not, it will find in favour of the plaintiff.

Moreover, the majority of case law acknowledges that in less complex cases⁴⁶ and in a bid to shorten the duration of proceedings, the administrative courts may invite the parties to an informal hearing at which the court explains the legal situation to them and *suggests or recommends that the disputed decision be reviewed*. Where the decision is reviewed and provided that the parties are in agreement, the administrative court will then close proceedings and issue a ruling on costs. This could be viewed to some degree as a form of informal administrative-loop mechanism despite the court taking an amicable-or-judicial-settlement approach as laid down in the rules of procedure for administrative courts.

Lithuania

The administrative courts (regional administrative courts and the Supreme Administrative Court)⁴⁷ may review the lawfulness although not the suitability of administrative decisions and have the power not only to *annul* a disputed administrative decision (in whole or in part) but also to *compel* the relevant authority to remedy the breach committed or to implement the court's instructions and, in appeals against failure by an authority to take certain action, to compel that authority to adopt a decision or enforce the court's instructions within a specified time period.

In practice, contrary to legislation, the administrative courts may *reverse* a disputed administrative decision, for example commuting a harsher penalty to a milder one.

Romania

The competent courts (the Administrative and Fiscal Division of the High Court of Cassation and Justice, the administrative and fiscal divisions of the appeal courts and courts of tribunals of first instance)⁴⁸ have the power not only to *annul* a disputed administrative decision, in whole or in part, but also to *compel the authority in question* to adopt a decision (rectify a disputed decision). The principle of separation of powers precludes the administrative courts from acting in the place of the authority in question and passing its own administrative decision.

Sweden

Where they are asked to conduct a review of lawfulness, the administrative courts (county administrative courts, administrative appeal courts, the Supreme Administrative Court)⁴⁹, in addition to the power to *annul* a disputed decision passed by an authority, may also compel it to *amend* the decision in any way. In the case of ordering an authority to amend a decision, the authority is required to fulfil a precise set of instructions (injunction) rather than remedying the defect highlighted by the administrative court.

⁴⁶ E.g. refusal of social assistance, building permit, operating permit and so forth.

⁴⁷ See also the report for Lithuania compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/lithuania/lithuania_en.pdf)

⁴⁸ See also the report for Romania compiled in 2007 (http://www.aca-europe.eu/en/eurtour/i/countries/romania/romania_en.pdf)

⁴⁹ See also the report for Sweden compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/sweden/sweden_en.pdf)

The administrative courts may also *delay issuing a ruling and refer the case back to the authority* for the latter to pass a fresh decision. Where this is the case, an appeal for annulment may be lodged against the fresh decision. This kind of intervention on the part of the court bears a number of the hallmarks of an administrative-loop mechanism despite the ruling being definitive rather than interim.

VI. AND EVEN AN ADDITIONAL POWER: REVERSAL

Czech Republic

The competent courts (regional courts and the Supreme Administrative Court⁵⁰) have the power to *annul* disputed administrative decisions. They may also *commute an administrative penalty* where there is no reason to annul it and where it is clearly disproportionate.

Bulgaria

The administrative courts (administrative tribunals of first instance and the Supreme Administrative Court)⁵¹ have the power to *annul* an authority's decisions and, in cases concerning matters falling within their discretionary powers, to refer the case back to the authority in question giving mandatory *instructions*. In cases involving certain matters prescribed by law (financial penalties, aliens, etc.), the administrative courts have the power to act in the place of the authority and to reverse the disputed decision.

Denmark

The ordinary courts⁵² have the power not only to *annul* a disputed administrative decision but also to *compel* the authority to adopt a fresh decision. They may even order an authority to *amend* a disputed decision where they are in an equivalent position to that of the authority in question and are thus able to assess all aspects of the case. The power to reverse decisions is exercised primarily in cases involving financial matters.

Norway

In the case of decisions which have been adopted by an authority within the scope of its discretionary powers, the ordinary courts may only *annul* the decision in question. Where an authority adopts a decision within the context of its circumscribed powers, the court may not *act in the place of* the authority by adopting its own decision.

Switzerland

The administrative courts (administrative courts of first instance, federal courts) with the power to *annul* an unlawful administrative decision must, in principle, reverse that decision by acting in the

⁵⁰ See also the report for the Czech Republic compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/czech/czech_en.pdf)

⁵¹ See also the report for Bulgaria compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/bulgaria/bulgaria_en.pdf)

⁵² See also the report for Denmark compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/denmark/denmark_en.pdf)

place of the authority in question and adopting a fresh decision. They may deviate from this principle and *refer* the matter back to the authority where they are not privy to all the facts of the case, where the decision to be adopted falls within the authority's discretionary powers, and where they are of the opinion that the prior proceedings were affected by a serious and rectifiable procedural defect. This type of system differs from the administrative-loop mechanism in that, on the one hand, the administrative court refers the case back to the authority after the disputed decision has been annulled, and, on the other, the ruling is a definitive one. The fresh decision adopted by the authority may be appealed anew before the administrative courts.

Latvia

The administrative courts (district administrative courts, regional administrative courts and the Administrative Affairs Division of the Supreme Court Senate)⁵³ may *annul* an administrative decision. They may also, in cases involving certain matters prescribed by law, *amend* an administrative decision and determine the content of the latter where the defect is rectifiable. They may thus act in the place of the authority in question. The administrative courts may also *order* the authority to adopt a fresh decision where required. In such cases, the courts will specify what provisions any new decision should contain.

Hungary

The competent courts (regional courts, the Capital Court, the Court of Appeal, the Supreme Court)⁵⁴ may *annul* a disputed decision and, where necessary, *compel* the authority to stage fresh proceedings; in such cases, the courts will stipulate the mandatory requirements with which such proceedings must comply. In certain fields detailed in the Code of Civil Procedure (taxation, asylum, property, etc.), the courts may also *amend* an authority's decision.

Slovenia

During preliminary proceedings, the administrative courts⁵⁵ may *invite* an authority to rectify a defect in a disputed decision. In addition to being able to *annul* a decision and refer the case back to the authority in question, the administrative courts also have the power to *rectify* defects in the disputed decision, except where those defects are absolute (decision issued by an authority with no jurisdiction, core defects, etc.). In the majority of cases, the administrative courts may not act in the place of the authority in question.

Malta

The administrative courts⁵⁶ have the power not only to *annul* a disputed decision and to order a fresh decision to be adopted (on issues pertaining to permits, licensing, etc.) but also to *reverse* that decision (on issues pertaining to taxation, financial penalties, etc.).

⁵³ See also the report for Latvia compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/latvia/latvia_en.pdf)

⁵⁴ See also the report for Hungary compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/hungary/hungary_en.pdf)

⁵⁵ See also the report for Slovenia compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/slovenia/slovenia_en.pdf)

⁵⁶ See also the report for Malta compiled in 2009 (http://www.aca-europe.eu/en/eurtour/i/countries/malta/malta_en.pdf)

VII. CONCLUSION

In Belgium, there is no administrative-loop mechanism as such, the main reason for this according to the Belgian report being the separation of administrative and judicial powers. Nevertheless, the rapporteur acknowledges that the system has its advantages but fails to detail them (in response to the questionnaire) in his report. He sees some of these (unspecified) advantages in a situation in which an administrative authority whose decision has been challenged before the Council of State subsequently withdraws the decision in question once the auditor in charge of investigating the case has determined that it is unlawful. Via the legal principle of withdrawal of administrative decisions, any authority which has passed an unlawful decision being challenged before the Council of State may withdraw it at any time up to closing arguments.⁵⁷ A finding by a judge from the Auditor's Office that the decision is unlawful is sufficient, in some cases, to convince the authority to withdraw it.

Neither does the administrative-loop mechanism feature among the array of instruments used by other supreme administrative courts in Europe. It is evident that several (supreme) administrative courts in Europe enjoy powers over and above or different from annulment, such as amicable settlements, 'disregarding' defects in a decision, acting in the place of an authority, injunction, limited annulment and so forth and that these powers are rooted in a desire to settle disputes definitively and as quickly as possible, and to avoid proceedings and processes repeating themselves over and over again. However, it is also clear that these specific powers are, for the most part, only granted to the relevant courts in the context of cases involving specific issues.

⁵⁷ See also the report by S. Guffens in 2006, pages 45 and 67 (<http://www.aca-europe.eu/colloquia/2006/Belgium.pdf>, available in French only) and the report compiled in 2008, page 26 (<http://www.aca-europe.eu/colloquia/2008/Belgique.pdf>, available in French only).

POWER TO AWARD COMPENSATION AND ACTION FOR ANNULMENT

By Michel Pâques, Councillor of State at the Council of State of Belgium

INTRODUCTION

Appeals in respect of action *ultra vires* and of State liability are closely linked. This report will not examine the aspects of Belgian constitutional law which conventionally – albeit in a relatively limited manner – preclude cases pertaining to ordinary administrative liability being assigned to the administrative courts⁵⁸. Neither will it address the new channels opened up in this respect by the recent government agreement, which makes provision for a review of the Constitution which will help to make administrative justice more effective by granting the Council of State jurisdiction to determine compensation for victims of damage caused by the unlawful decisions it has the authority to quash⁵⁹. These considerations are certainly relevant to the seminar but will not be presented here since we are keen to focus primarily on hearing about experiences in other countries.

As regards compensation, we have decided to look at the power of the administrative courts in two different contexts. The starting point for both is the jurisdiction of such courts to annul administrative decisions. We will look firstly at whether applicable legislation allows a court hearing an application for annulment to opt to order the defaulting authority to pay compensation to a plaintiff who has been the victim of harm as a result of an unlawful decision rather than annulling the unlawful decision itself. Where this is an option, we will address the resulting issue of the status of a decision which is not annulled and which is retained within the legal system (I). We will then look at the impact of annulling a decision: once an administrative decision has been annulled, does the administrative court have jurisdiction to determine compensation in respect of the damage caused by the annulled decision and under what conditions (II)? Finally, three comments will be made by way of conclusion and as a point from which to launch discussion.

I. COMPENSATION RATHER THAN ANNULMENT?

The first question in relation to compensation concerns whether it is possible for the court to award compensation to a victim rather than annulling an administrative decision where there are specific reasons for retaining it, despite a claim for annulment having been lodged. The responses from ACA-Europe members broadly fall into three categories: in the majority of countries, there is no such option (A); in others, the option is available up to a point (B); some countries adopt an alternative, 'pragmatic' approach (C).

A. No option for compensation in place of annulment

Most member countries responded that no provision was made for such an option. Several reasons were put forward for this. The German rapporteur cited two: 1) The principle whereby the claimant

⁵⁸ To recap, the Council of State of Belgium has jurisdiction to hear, *on an equitable basis*, claims for damages in respect of exceptional harm caused by the administrative authorities.

⁵⁹ <http://premier.fgov.be/fr/accord-de-gouvernement-0> (available in French and Dutch only), pp. 40 and 139.

determines the subject of the litigation, and 2) even where the claimant were prepared to accept compensation despite it being possible for the unlawful decision in question to be annulled, the established legal convention in Germany and the principle of a rule-of-law State precludes a claimant from deriving pecuniary benefit from unlawful conduct on the part of the authorities rather than having the situation rectified in law. The report from Turkey states that the most effective remedy is annulment.

B. Option of awarding compensation instead of annulment permitted up to a point

Four countries – Denmark, Italy, Norway and Portugal – report that courts may adopt a different approach in dealing with an unlawful decision, at least under certain circumstances.

In Denmark, the general principle is to annul an unlawful decision. However, in some cases awarding compensation is preferable to annulment. Three main criteria are cited (although no doubt not all of them need to be met): (1) Where considerable value would be wasted were the decision to be annulled; (2) where the claimant has acted in good faith in accordance with the terms of a decision such as a permit; (3) where such considerations are significant for a third party. The report cites the example of a local authority granting permission to build a shopping centre and a neighbour criticising that decision to grant permission, after construction is completed, on the grounds that the centre is too close to it. Instead of annulling the decision and demolishing the centre, the court awards compensation to be paid by the municipality which gave permission for the centre to be built.

One particular point should be made here. In this specific case, annulling a decision would not be a beneficial solution since it would entail the permitted building being demolished, demolition being the mandatory response to the absence of permission, which would essentially be the situation were the decision to be annulled. Compliance with the rule of law is thus a highly valued principle in the Danish legal system. Indeed, it would appear that permission for legalisation is impossible despite it frequently being sought in other systems, in particular in Belgium. This reasoning is applied, in Belgium, in certain civil-law situations, in particular in the case of construction resulting in minor encroachment, where it is deemed that requiring a building to be demolished constitutes an abuse of process and that the victim ought to be compensated instead.

The Danish report also states that once an order for compensation has been issued, the decision is assumed to comply with the law with regards to the parties involved in the dispute. Thus, the situation in respect of third parties remains unresolved. There is no requirement under Danish law for resolution in respect of third parties, since rulings passed under the Danish legal system are relative in scope and apply only to the parties to a given dispute.

The underlying principle in Italy is that annulment and compensation are concurrent rather than alternative remedies, i.e. the court quashes the flawed decision and, where annulment does not provide full satisfaction, awards compensation in addition, provided that evidence of the harm suffered is supplied. Nevertheless, in Italy, too, compensation is sometimes deemed preferable to annulment. Four scenarios are cited: (1) Cases in which annulment is no longer possible or useful since in the interim the decision has already been enforced and has taken effect; (2) cases in the field of public contracts in which the court deems that the general public interest will not be served by the contract

being annulled⁶⁰; (3) cases in which specific legislation prohibits annulment and makes provision for compensation only (the report states that this option currently applies only in the field of public contracts in respect of strategic infrastructure), and finally (4) cases in which the plaintiff has requested compensation only and not annulment.

The final point above clearly differs from the approach in Germany, where we have seen that the underlying principle of a rule-of-law State explicitly rules out such an option for plaintiffs. The Italian report explains that the option for the plaintiff to request compensation rather than annulment was only introduced via legislation in 2010. Prior to this, the topic was highly controversial. Procedural differences have now emerged, with the legislature having made provision for a longer period within which to lodge an action for compensation than to lodge an action for annulment. Action for compensation will be dismissed if it is deemed that the plaintiff could have avoided the harm sustained, in particular by requesting annulment within the ad hoc time period. Finally, even if the decision is not annulled, the awarding of damages by an Italian court implies that the decision in question was flawed.

The compensation option is considered only reluctantly since, even where it is not possible to annul the decision, the latter is nevertheless declared unlawful by the Italian courts and the defaulting authority may rescind it. Authorities enjoy discretionary powers in this regard and there is also the possibility of the official behind the decision being held personally liable if s/he fails to rescind the flawed decision.

In Norway, too, compensation and flawed decisions are interlinked. Where the court is asked to try a claim for compensation only (i.e. no claim is made for annulment) it will still examine the lawfulness of the decision as a preliminary issue when considering whether there is a basis for the claim for compensation. In most cases, compensation is awarded in addition to annulment. However, under Norwegian law compensation may sometimes be seen as an alternative to annulment. The following practical examples are cited in the Norwegian report: (1) Cases in which several parties are affected by a decision; (2) cases in which other parties' interest weigh heavily against annulment. This may lead to a void decision being retained. However, these scenarios are presented as being of an exceptional nature on account of separation of powers, the decision to retain a void ruling generally being taken by the authority in question itself following reopened proceedings.

Finally, in Portugal claims for annulment are automatically accompanied by claims for compensation. However, compensation alone is possible where the court acknowledges that it is not possible to order

⁶⁰ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and works contracts currently states: "2. The consequences of a contract being considered ineffective shall be provided for by national law. National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2(e)(2). 3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2(e)(2), which shall be applied instead. Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract, and the costs of legal obligations resulting from the ineffectiveness."

certain material decisions or actions to be taken, i.e. where it sees that there is a legitimate reason for non-enforcement. In such situations, the court will ask the parties to agree on the amount of compensation to be awarded. If the parties are unable to reach an agreement, the court will award a lump sum.

C. Pragmatic approach

In addition to these strict analyses of national approaches, a third option is cited in the report submitted by Germany. As mentioned above, German legislation precludes, in principle, compensation as a substitute for annulment. However, it does make provision for a 'pragmatic' approach. The report states that in complex cases, the court may encourage an amicable settlement which may entail accepting compensation in preference to the difficulties engendered by annulment. Once again, an example taken from planning legislation is cited.

A pragmatic approach per se is only mentioned in the report submitted by Germany, but one wonders whether it is not implicitly accepted more broadly, as is touched upon in one of this report's concluding remarks.

We will now move on to look at the second – far more conventional – channel involving compensation, namely compensation in addition to annulment.

II. PAYMENT OF COMPENSATION FOLLOWING ANNULMENT

Compensation in the event of harm caused by a flawed decision is a concept recognised in all ACA-Europe member countries. Jurisdiction to hear actions for compensation falls to either the administrative or the civil courts and this distinction creates a fundamental difference in the dynamics of the relationship between annulment and compensation. We will address three issues: the distribution of authority to annul and to award compensation (A), the basis for liability, i.e. whether liability is fault-based or based directly on a finding of illegality (B), and the significance of the severity of the breach committed and the scope of compensation to be awarded (C). We will not examine the issue of causal linkage in any detail.

A. Distribution of authority to annul and to award compensation

The various countries' legal systems are split into three main categories: those which follow the principle of legal monism, dualist systems under which compensation may only be awarded by civil courts, and systems under which the administrative courts have the authority to annul decisions and award compensation.

Under legal-monism systems, claims for compensation may be heard without any prior application having been made for annulment; this is the case in Norway. In such situations, the court will examine the legality of the decision in question as a preliminary question in seeking to determine whether there is a basis for the claim for compensation. More often than not, however, compensation is awarded following annulment of a decision. In Romania, appeals challenging the legality of a decision must be examined first but both actions for annulment and actions for compensation may be lodged at the same time.

Under dualist systems where the administrative courts hear appeals for annulment while the civil courts have jurisdiction for claims for compensation, as is the case in Belgium, Luxembourg, the Czech Republic, Austria, Poland and Malta, actions for annulment and claims for compensation are thus conducted separately. However, a distinction should be drawn between legal systems which enable the civil court to settle itself the issue of the legality of an administrative decision in order to determine where liability lies (Belgium, Luxembourg), and those which require the civil courts to submit a preliminary question to the administrative courts for a response on the matter. It would appear that such a system is followed in Austria, where administrative courts which have been asked to rule on a preliminary question rule on the lawfulness of the administrative decision in a judgment, which, with regard to that matter specifically, is of a declaratory nature only. However, despite the fact that Luxembourg law permits the civil courts hearing an action in respect of liability to rule independently on the lawfulness of an administrative act, the report submitted by Luxembourg notes that claimants generally tend to seek annulment via the administrative courts first before bringing action before with civil courts.

Many countries which follow the dualist system empower the administrative courts to award compensation, although some limited exceptions are made, for example in France. Proceedings may be conducted separately and independently (as in Greece). Actions may be lodged separately or jointly in Italy, Turkey and Lithuania where the time limits within which an action for liability must be brought are much longer than those applicable to annulment. Claimants in France enjoy significant freedom as regards the procedure for taking legal action since they may either lodge actions for annulment and compensation at the same time, or first lodge an action for annulment and subsequently, during the annulment proceedings, lodge an action for compensation. Additionally, they also have the option of claiming compensation only without bringing any action for annulment. Even within the same administrative-court system, both claims will not necessarily be heard by the same court. Jurisdiction lies with either the administrative court or the Council of State. The claims will not necessarily always be connected and connection may depend on the point in time at which each is lodged. The choice available to plaintiffs as regards the procedure they follow is thus not without consequences.

In Italy and Estonia, action for annulment takes precedence and must be lodged – indeed dealt with – before any action for compensation (except, in Estonia, where the claim for annulment would be of no benefit). In Estonia, the courts will openly advise a claimant to lodge an action for annulment where such an action is likely to provide the most appropriate remedy. It would appear that a declaration of illegality is generally required before compensation may be considered; this approach is mentioned in the reports submitted by Romania, Bulgaria, Italy, the Netherlands and Latvia. This also seems to be the case in Switzerland, where liability proceedings do not authorise the court to 'review' the lawfulness of decisions. EU law governing public contracts permits this form of proceedings and allows Member States to "provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers"⁶¹. By contrast, in Greece it is not necessary for the issue of the unlawfulness of a decision to be settled first in the form of an annulment ruling. The court hearing a claim for compensation will not annul a decision but may merely declare it unlawful as an incidental consideration.

⁶¹ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and works contracts, Article 2(5).

Where action for annulment must be lodged ahead of any claim for compensation, claimants may await the outcome of such action before subsequently lodging a claim for compensation (this is the case in the Netherlands, Portugal and Lithuania). Respondents were asked whether the parties could first request a decision *in principle* as regards compensation before determining the amount thereof. No such separation of proceedings is permitted in Lithuania.

Once a decision has been annulled, the basis for any claim for compensation may be established in one of two ways.

B. Basis for liability in the event of annulment

The various countries' systems are split into two main categories when it comes to determining the basis for liability: the latter is either fault-based (as in Belgium, Denmark, France, Italy and Norway) or based directly on a finding of illegality (as in Bulgaria, Lithuania and Greece).

Fault-based-liability systems involve presumption of fault. In Belgium, the case law of the civil courts has established presumption of fault the scope of which remains controversial. The issue is whether this presumption applies only to breaches of *specific* legislation or to failure to observe *any* legislation. To the extent that it is permitted, presumption of fault requires only that proof of the decision's unlawfulness be provided and thus avoids categorising the conduct of the author of that decision as unlawful. Where a decision is annulled by the Council of State, illegality is established *erga omnes* and fault is thus presumed. Nevertheless, this presumption can be overturned by evidence of an irrefutable error or other reasons, which lends some weight to the fault requirement. The arguable nature of the presumption thus means that such liability cannot be classed as objective. In France, Italy and Denmark, liability is fault-based with a presumption of fault where a decision is found to be unlawful. The report submitted by Denmark notes a recent trend towards limiting the scope of excusable mistakes on the part of the authorities in a bid to shore up citizens' confidence in their decisions. An opposite tendency appears to be emerging in Belgium⁶².

No provision is made for fault-based liability at EU level in the field of legislation concerning public contracts. The European Court of Justice interpreted Council Directive 89/665/EEC in this way, ruling that the need to make provision for effective review required that the directive be interpreted as "precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable". Fault-based liability is not sufficient under EU law, even where the fault is presumed⁶³.

This analysis applies, more broadly, to State liability for breaches of EU law in all areas, not purely in the field of public procurement⁶⁴. The European Court of Justice recently ruled that Article 2(1)(c) of Council Directive 89/665/EEC "gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held

⁶² Court of Cassation, 8 February 2008, J.T., 2008, pp. 569 et seq. comments by D. Renders; On this aspect of authorities' liability, B. Dubuisson and S. van Drooghenbroeck, *Responsabilité de l'Etat législateur: la dernière pièce du puzzle?*, J.T., 2011, pp. 801 et seq., sp., no. 19.

⁶³ European Court of Justice, 30 September 2010, *Stadt Graz v Strabag AG et al*, case no. C-314/09 ("including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.").

⁶⁴ The European Court of Justice expressly ruled that a concept of fault going beyond that of a sufficiently serious breach of Community law could not be sanctioned (European Court of Justice, 5 March 1996, *Brasserie du Pêcheur and Factortame III*, point 79 of the judgment).

responsible." It went on: According to case-law developed since the adoption of Directive 89/665/EEC, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights upon them, the breach of that rule must be sufficiently serious, and there must be a direct causal link between the breach and the loss or damage sustained by the individuals."⁶⁵

C. Severity of the breach

It is not necessary to determine whether an act should be classed as a fault in order, in some cases, for the severity of a breach to be taken into consideration. The severity of the breach is a criterion which comes into play either when determining liability per se or when determining compensation.

Under EU law, not all breaches entail liability; a certain degree of severity is required. Liability will depend on whether or not legislation *has been sufficiently seriously breached*. If legislation allows the authorities considerable scope for discretion, the decisive criterion in determining whether the breach was sufficiently serious will be whether the authority in question manifestly and seriously disregarded the restrictions on its scope for discretion. Where there is no scope for discretion, the breach will virtually always be deemed serious by definition⁶⁶. When it comes to the manner in which liability is determined, other legal systems also draw a distinction between circumscribed powers and discretionary powers. Accordingly, the report submitted by Lithuania states that there is no link between the severity of an unlawful decision and liability, except where liability stems from the exercising of discretionary powers. In such cases, the courts apply the same criteria as those followed by the European Court of Justice and seek to determine whether the authorities have manifestly and seriously breached the restrictions on their discretionary powers.

The severity of an unlawful decision may also be linked with compensation itself. In Latvia, where an authority is held liable, fair satisfaction is determined in light of the severity of the unlawful decision in question. The legislature also stipulates a ceiling for compensation. The French legal system, meanwhile, makes provision for some lump-sum arrangements, although these appear to be the exception rather than the rule. Nevertheless, recent case law has established the return of an ordinary law system of fault-based compensation for all harm, although in certain cases a lump-sum system is still applied, which limits its effectiveness.

Under most legal systems, however, compensation is awarded in line with all the harm suffered, i.e. both damage suffered and earnings lost (*damnum emergens et lucrum cessans*) and it is the responsibility of the plaintiff to provide evidence of such (Belgium, Denmark, France, Italy and Lithuania).

⁶⁵ European Court of Justice, 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie, Van Spijker Infrabouw BV, De Jonge Konstruktie BV v Provincie Drenthe*, case no. C-568/08, point 87 of the judgment in which the European Court of Justice makes reference to the judgments of 19 November 1991, *Francovich et al*, case nos. C-6/90 and C-9/90, ECR p. I-5357 (point 35), of 5 March 1996, *Brasserie du Pêcheur and Factortame*, case nos. C-46/93 and C-48/93, ECR p. I-1029 (points 31 and 51), and of 24 March 2009, *Danske Slagterier*, case no. C-445/06, ECR p. I-2119 (points 19 and 20).

⁶⁶ M. Pâques, *De la responsabilité de l'Etat pour violation du droit communautaire*, in *Droit des citoyens et des associations dans le droit européen de l'environnement*, Brussels, Story-Scientia, 1998, pp. 95 to 142.

The Italian legal system contains a specific feature as regards the manner in which the amount of compensation is determined: the courts refer the issue to the authority in question. Where no agreement can be reached on the matter, fresh proceedings may be opened.

Financial compensation is the norm in Greece; provision *may* be made for compensation in kind although no specific provisions are in place in this regard.

THREE CONCLUDING REMARKS

We would make three concluding remarks.

The first concerns the actual distinction between the two main issues: compensation *instead of* annulment and compensation *in addition to* annulment.

Whilst awarding compensation in place of annulment appears unusual and is not an option entertained by the majority of countries in cases before a court of annulment, by contrast the option to lodge an action for compensation independent of an action for annulment is a possibility where a legal system grants jurisdiction to award compensation not to the court of annulment but to the civil courts or another administrative court. In such cases, lodging an application for damages before a court authorised to award compensation does not necessarily require the decision in question to have previously been annulled *erga omnes*. It is sufficient for the court determining liability to establish that the event giving rise to compensation actually occurred, liability having been determined as being fault-based or based directly on a finding of illegality, as applicable. Thus compensation can be awarded without a decision having been annulled. The principle of a rule-of-law State would not appear to be undermined in any way. However, some systems still require a decision to be annulled before any compensation can be awarded.

Where a claim is made for compensation and where the latter is awarded without the decision in question having been annulled, the authority of *res judicata* is relative as regards a finding of the decision in question being unlawful. A finding of unlawfulness will thus not apply automatically to third parties. The report submitted by France states this clearly.

The second concerns unlawful decisions the effects of which are retained by the court. In some cases, the court of annulment may retain all or part of the effects of a decision which has been annulled. This authority may be conferred by law, as in Belgium, or more flexibly via case law, as in France⁶⁷. What is the impact of retaining such effects on liability proceedings arising from the decision? Should events proceed as if the decision were lawful? Where the court hearing an action for liability is required to establish a defect in or the unlawfulness of the decision, is its assessment of that defect or unlawfulness influenced by the ruling of the court hearing an *ultra vires* action quashing the decision whilst opting to retain its effects⁶⁸ ?

⁶⁷ In France, the jurisdiction of the administrative courts to limit the temporal effects of annulment is established via Council-of-State case law. The Council of State has also determined that this jurisdiction should only be exercised in exceptional circumstances. It would appear that it may apply to annulment of both regulatory and individual decisions. By contrast, the Belgian legislature grants the Council of State no jurisdiction to retain the effects of an individual decision which has been annulled. The constitutionality of this distinction is currently being reviewed by the Constitutional Court.

⁶⁸ Under Belgian law, the Council of State, as the court hearing actions for annulment, may retain all or part of the effects of a regulation which it has annulled. It has been clear since the ruling by the Constitutional Court of 9 February 2012 (18/2012) that the Belgian Constitution does not preclude a decision which has been annulled but whose effects have been retained

The third and final remark is prompted by the previous two and echoes details cited in the report submitted by France. Moving on from the issues of compensation instead of annulment and whether the corresponding effects should be limited, it pertains, more radically, to what constitutes an unlawful decision. In order to avoid the risk of being faced with burdensome annulments or annulments which are difficult to resolve, should the instances of unlawfulness giving rise to annulment be limited? The Council of State of France reports that it recently decided that annulment on account of procedural defect should not be an automatic response. A similar comment was made by our colleagues from the Netherlands. This is a long-standing issue: over time, courts' review powers have gradually broadened to encompass lawfulness in all fields, a development which has often been presented as progress in the concept of a rule-of-law State; today, lawfulness has become so complex that the tendency is to acknowledge that some instances of unlawfulness need not result in annulment. The issue is one with which the courts are fully familiar and one which they have resolved in many different ways. It's not the core issue of our seminar but the result of such a situation is ultimately likely to be the demise of both annulment and compensation.

from being binding on a judicial court subsequently asked to rule on an application containing an incidental criticism of the regulatory decision in question. In terms of lawfulness, the matter is thus settled, but the impact on the assessment of liability of retaining these effects remains unresolved.

EFFECTIVENESS OF THE ENFORCEMENT OF RULINGS BY ADMINISTRATIVE COURTS

By Pascale Vandernacht, Councillor of State at the Council of State of Belgium

INTRODUCTION

The primary duty of judges is to pass a ruling, settle the dispute before them, quash unlawful decisions, suspend enforcement of rulings where necessary and dismiss appeals that are unfounded.

Every day, through their rulings, judges ensure that public powers are exercised within the remit open to them under their relevant legal systems, the aim being to maintain a fair balance between the interests of individual citizens and those of the wider public.

Does this mean, therefore, that once a ruling has been passed judges are relieved of responsibility for the case and can leave court safe in the knowledge that they have done their duty? Even in situations where a litigant has won their case before a judge and where the latter's rulings are generally enforceable, that judge knows that his/her role is far from over since, in many cases, the appellant will have to rely on the goodwill of the authorities to enforce the court's ruling, despite the fact that such authorities have an obligation, in a State based on the rule of law, to observe the authority of *res judicata* and comply with the judicial rulings issued against them.

Nevertheless, judges often find the same litigants appearing before them, some months later, challenging a fresh administrative ruling which is still clearly in breach of established case law, and history has a habit of repeating itself over time. Despite the fact that, overall, the public authorities generally enforce legal rulings correctly, there are, however, cases in which enforcement of such rulings is problematic for a number of reasons. These include, in particular, a lack of willingness on the part of the authority, i.e. the latter not accepting the way in which a particular dispute was settled or considering the settlement difficult to implement and thus preferring not to implement it. Failure to enforce rulings is also sometimes directly linked to the content of the rulings themselves, for example they may not be considered explicit enough as regards the consequences they entail for the authority, which may, at that point, legitimately hesitate as regards how to enforce them.

The issue of enforcement of judicial rulings is a longstanding one and has prompted recommendations by the Council of Europe, including that adopted by the Committee of Ministers on 9 September 2003 on enforcement of administrative decisions and judicial rulings in the context of administrative law⁶⁹. It emerged from this recommendation that in order for justice to be effective, rulings passed by courts in the field of administrative law must be enforced within a reasonable time, in particular where it is the public authorities which are required to enforce them. Accordingly, the Member States must ensure that where a judicial ruling is not enforced, provision is made for an appropriate procedure to be set in train, in particular by means of an injunction or a fine. The Member States must also ensure that the administrative authorities can be held liable where they fail to enforce judicial rulings (including disciplinary, criminal and civil liability on the part of officials responsible for enforcement). As regards enforcement of rulings ordering the administrative authorities to pay a sum of money, the Member States are also asked to put in place a system which makes provision for enforcement within

⁶⁹ See also the Recommendation of 9 September 2003 of the Committee of Ministers on enforcement of judicial rulings.

a reasonable period and factors in interest on late payment, whilst ensuring that the authorities have adequate budgetary resources and enabling individuals to seize certain goods belonging to the authorities concerned.

The European Court of Human Rights (ECHR) has reiterated in several judgments that enforcement of a ruling, by any court, must be considered as forming an integral part of a 'trial' within the meaning of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms⁷⁰. In *Hornsby v Greece* (judgment of 19 March 1997, no. 18357/91), the ECHR held that the right to a court would be illusory where the domestic legal system of a Member State allowed a definitive and mandatory judicial ruling to remain inoperative to the detriment of one of the parties. The ECHR stated: "It would make no sense for Article 6(1) of the Convention to describe in detail the procedural guarantees – fairness, a public hearing and speed – afforded parties, but for no provision then to be made for judicial rulings to be enforced." It continued: "These principles are of even greater importance in the context of administrative proceedings concerning a dispute the outcome of which is decisive for a litigant's civil rights. By lodging an application for judicial review before the State's highest administrative court, namely the Council of State, the litigant seeks not only annulment of the impugned decision but also and above all the removal of its effects. However, the effective protection of the litigant and the restoration of legality presuppose an obligation on the part of the administrative authorities to comply with a judgment by that court. The ECHR observes in this connection that the administrative authorities form one element of a State subject to the rule of law and that their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay in doing so, the guarantees under Article 6 enjoyed by the litigant during the judicial phase of the proceedings are rendered devoid of purpose."

Enforcement of judicial rulings is no longer simply an extension of the trial itself but is becoming a crucial indicator of how well justice is performing, as underscored by the Reports and Studies Division (*Section du Rapport et des Etudes*) of the Council of State of France in its 2009 guide to enforcement. The court process does not end once a ruling has been passed and many EU Member States have put in place mechanisms to ensure that judicial rulings are effectively enforced, either by granting the judge directly a decisive role or via civil-procedure instruments. The main purpose of this summary report is to highlight the features of these different systems, national procedural law being more difficult to harmonise throughout Europe than substantive law.

We will turn our attention first to those Member States which have no specific procedures in place to enforce rulings passed by their respective administrative courts (I). Of these Member States, some use civil-law instruments to enforce judicial rulings (A). Others have made provision for instruments designed to encourage the administrative authorities to enforce judicial rulings either by bringing an action for damages (B) or by imposing financial penalties (C). We will then move on to look at those Member States which have granted their administrative courts the authority to impose injunctions or issue penalties (II).

⁷⁰ See also the ruling by the European Court of Human Rights (application no. 455574/99) of 18 June 2002 in *Stella B. and the Fédération nationale des Familles de France v France* and the judgment handed down on 6 March 2003 in *Jasiuniene v Lithuania*.

I. MEMBER STATES WHICH HAVE NO SPECIFIC PROCEDURES IN PLACE TO ENFORCE RULINGS PASSED BY THEIR RESPECTIVE ADMINISTRATIVE COURTS

According to reports from some Member States, there is no mechanism for enforcing rulings passed by those States' administrative courts. This is the case in Cyprus, Norway, Sweden and Hungary, whose courts have no inherent power to enforce their rulings.

The report submitted by Cyprus states that Article 146(5) of the Constitution renders all rulings by the Supreme Court mandatory, in particular those passed vis-à-vis State bodies and authorities since said bodies and authorities are duty bound to adopt the measures cited in the ruling and must refrain from any action declared to be unlawful. Thus, the only outcome for the litigant is for them to wait for the administrative authority to enforce the ruling against it and, if the new decision is in breach of the authority of *res judicata*, they may succeed in having that decision quashed.

By contrast, the report from Sweden states that where a public authority refuses to apply a judicial ruling, the litigant may approach the parliamentary Ombudsman, who has the power to name and shame the authorities and the individuals responsible for failure to enforce the rulings and, in the case of serious failings, take legal action against them. It also appears that a financial penalty may be imposed where a local authority fails to enforce a judicial ruling within a reasonable time. Whether a special penalty such as this may be imposed is determined by the court of first instance in the jurisdiction in which the local authority in question is situated.

In Austria, the Ombudsman may make recommendations to defaulting authorities as regards how judicial rulings should be enforced.

A. Member States which use instruments put in place to enforce civil-law rulings to enforce rulings on administrative matters

Under such systems, either the ruling itself constitutes an instrument permitting enforcement and generally sets out how that ruling is to be enforced, indicating precisely what it entails (1), or the court is required to issue an order for enforcement detailing how the ruling is to be enforced (2). In the majority of cases, rulings are enforced via an enforcement official who is generally a court bailiff responsible for applying civil-procedure rules.

1. The report submitted by Denmark explains that there is no scenario in which an authority which is a party to a dispute may not to comply with a court's ruling since compliance is mandatory under the Danish Constitution. However, failure by an authority to comply with a judicial ruling would give rise to an action for damages of a disciplinary, criminal and civil nature against that authority. It would also appear from the report that the Danish courts include, among their staff, court bailiffs who are responsible for applying the rulings handed down by those courts.

The report submitted by Bulgaria reveals that the procedure for enforcing judicial rulings on administrative matters does not fall within the jurisdiction of the courts themselves and that the enforcement mechanism in place is similar to that which exists to enforce judicial rulings in civil matters. This enforcement process is the responsibility of a court bailiff having the status of a civil servant, and who has jurisdiction for the geographical area in which enforcement is to be effected. The ruling must be enforced in the manner stated in the judgment or ruling. Where enforcement in the

stated manner proves impracticable or where no instructions as regards enforcement are stipulated, the court bailiff must ensure that the ruling is enforced as efficiently as possible by adopting the most favourable measures for the litigant and ensuring that the ruling has full effectiveness. A ruling must be enforced within the time period stated therein; failure to enforce it within this period means that the bailiff risks incurring a fine. The provisions laid down in the context of enforcement of a judicial ruling may be appealed. The Code of Administrative Procedure also details provisions concerning compensation for any harm suffered as a result of unlawful enforcement of a ruling or where the ruling enforced has itself been quashed on appeal or set aside following an appeal in cassation.

In Belgium, judgments handed down by the Council of State are enforceable *ipso jure* pursuant to Article 37 of its General Rules of Procedure (*Règlement général de procédure*). The administrative authorities are duty bound to comply with these rules and to ensure that rulings are enforced; court bailiffs, who are classed as ministerial officials rather than civil servants, may be appointed for this purpose in line with ordinary-law channels. However, judgments handed down by the Council of State very rarely stipulate precisely how they are to be enforced.

2. According to the report submitted by Lithuania, Article 97 of the Administrative Actions Act stipulates that where a judicial ruling has become definitive, a copy of that ruling must be forwarded for enforcement to the administrative authority whose action or failure to act was challenged and to the plaintiff. Where the administrative authority fails to enforce the ruling within 15 days or within the time period stipulated by law, the competent administrative court shall, at the plaintiff's request, issue a writ of execution and, at the same time, instruct the appropriate bailiff's office as per the relevant provisions laid down in the Code of Civil Procedure. To ensure that the judicial ruling is enforced effectively, the writ must include all the relevant information, including the court's instructions to the administrative authority.

Writs of execution must be actioned within five years of the ruling to which they pertain entering into force; however, this period may be reduced where the judicial ruling needs to be applied as a matter of urgency. This is the case, for instance, where a civil servant needs to be re-appointed to a post.

Where the ruling in respect of which enforcement has been requested is quashed on appeal, the measures adopted to enforce it are also deemed unlawful and the parties must be returned to the position they were in prior to the quashed ruling having been passed. It is the responsibility of the competent court to settle the matter. Thus, an administrative authority found guilty in the first instance and ordered to pay a sum of money may have this amount reimbursed if the court finds in its favour on appeal. The only exception pertains to amounts paid as remuneration for an employee, except either where the latter has acted dishonestly or in the event of an accounting error.

Where the litigant believes that the judicial ruling has not been correctly enforced by the administrative authority, s/he may also ask the competent court to issue a writ of execution. If the court finds that the ruling has indeed been enforced correctly, it will dismiss the application and this dismissal may be appealed. It is also possible for the parties to the case to request that the means by which the judicial ruling is to be enforced be changed, or to ask that enforcement be deferred due to exceptional circumstances preventing enforcement in the normal manner. In such cases, the competent court will have to take into account the requirement for legal certainty, proportionality and equal treatment as well as the expectations of the parties to the case. Under no circumstances may any changes made as regards enforcement of the ruling either violate the interests of the party in whose favour the ruling was passed or alter the essence of the judicial ruling.

The report submitted by Latvia states that the right to enforcement of judicial rulings is enshrined in the Administrative Procedure Act (Division 9: "Enforcement of rulings") and other legislation (e.g. special rules on fiscal matters). Where an authority fails to enforce voluntarily a ruling passed against it by the administrative court or where it fails to enforce such a ruling correctly, the litigant may lodge a complaint before the administrative court and the latter may rule that judicial enforcement be effected. Although the court may remind the authority at this point that the ruling *must* be enforced, said court will not itself be responsible for enforcement.

The Administrative Procedure Act states that the government may appoint an institution to oversee judicial enforcement of rulings. Where no such institution is appointed, judicial enforcement is the responsibility of the ministry to which the author of the administrative act is attached. Where the author is not attached to any ministry, and where there is no ad hoc institution, judicial enforcement is the responsibility of a court bailiff who will apply the provisions of the Civil Procedure Act.

Under the terms of the Civil Procedure Act, where, up until the point at which judicial enforcement commences, the ruling has not been enforced voluntarily within three years of its coming into force, it may be implemented by means of a substitute enforcement procedure (another authority being tasked with enforcing it), or a financial penalty. Such a penalty may be imposed on the director or another official within the administrative authority where the ruling requires the latter to perform a specific action or prohibits an action, and where the administrative authority fails to comply.

The report submitted by Malta states that the provisions contained in the Maltese Code of Organisation and Civil Procedure apply to enforcement of rulings handed down in administrative matters. Said provisions stipulate that enforcement warrants be issued at the request of the party in whose favour the ruling has been issued. A warrant *in factum* authorises the individual against whom it has been issued to be held in custody until the court itself has been able to enforce the ruling in question. It appears that such a warrant may be issued against an individual vested with the judicial representation of a public authority. A warrant of seizure may be issued where an authority has been ordered to pay a sum of money.

In the Czech Republic, it is also the role of the civil courts to enforce rulings in line with the rules laid down in the Code of Civil Procedure.

The report submitted by Romania states that where a ruling is not sufficiently clear as regards how it is to be enforced and where the administrative authority is not in a position to be able to understand the precise scope of the ruling, the court concerned may be asked to clarify its instructions by providing more detailed information on the scope of the latter, in accordance with Article 281 of the Code of Civil Procedure. Such clarification is to be provided via a court order, issued as a matter of urgency and following a summons to parties to the case.

B. Member States which permit an action for damages to be brought where the public authorities fail to enforce a judicial ruling

1. Most of the reports received mention the possibility of a public authority incurring liability where it fails to enforce a judicial ruling issued against it. In certain cases, officials of the authority in question may be named directly in an action for damages, be it civil, criminal or disciplinary. This is the

situation Denmark, Spain, Great Britain, Greece, Lithuania, Romania, Portugal, Turkey and Belgium. In the Netherlands, by contrast, public authority officials cannot be held personally liable.

2. The report submitted by Austria points out that the administrative authorities are required to comply with rulings handed down by the Constitutional Court (*Verfassungsgerichtshof*) and the Supreme Administrative Court (*Verwaltungsgerichtshof*), and that where an administrative authority fails to fulfil its duties, the court itself must determine the court or administrative authority responsible for enforcing the ruling as per the provisions governing such institutions. In cases of non-fulfilment through fault on the part of administrative authorities, both they and individual public-authority officials responsible for fulfilling the duties in question may be held liable. Any legal action is brought before the civil courts. Finally, the Austrian Constitution makes provision for an Ombudsman tasked with monitoring all the federal authorities. Litigants may approach the Ombudsman directly and while it has no binding powers, it can formulate recommendations to the public authorities setting out the measures to be taken to correctly enforce a judicial ruling. It is then up to the authority concerned to comply with the recommendation within eight weeks and to draft a report for the Ombudsman stating what steps it has taken to enforce the judicial ruling or explaining the reasons preventing it from complying with the recommendation. Recommendations issued by the Ombudsman are usually followed since failure on the part of a public authority to comply with them generally attract publicity, which the authorities prefer to avoid.

3. In Lithuania, criminal action may be brought against civil servants who fail to comply with a definitive judgment; such a failure may be punishable by 45 days' imprisonment. In Romania, too, criminal action may be taken against civil servants who fail to enforce a judicial ruling and a penalty of between six months' and three years' imprisonment or a fine of between RON 2,500 and RON 10,000 may be imposed.

4. Under the Turkish Constitution and Turkish law, legislative, executive and administrative bodies must comply with judicial rulings and may not delay their enforcement. Rulings must be enforced within 30 days. In principle, the administrative courts are not responsible for ensuring that their rulings are enforced, however, where their rulings are not enforced, the litigant in a given case may submit a complaint to the competent administrative court. An action for damages (both financial and non-financial) may be brought in respect of failure by an authority to correctly enforce a judicial ruling. Where public-authority officials deliberately fail to fulfil the requirements laid down in judicial rulings, action for damages may also be brought against them personally; they may also be held liable in disciplinary and criminal proceedings.

5. The report submitted by Switzerland states that where an administrative authority is responsible for enforcing judicial rulings, the court may nevertheless stipulate in its ruling another body which is more appropriately placed to enforce that ruling, in particular where it believes that there is the risk that the competent authority will not enforce it correctly or will fail to enforce it altogether. A ruling generally details precisely how it is to be enforced and sets out the obligations of the administrative authorities in particular.

Under the Swiss Constitution, the Federal Council (the government) must ensure that rulings handed down by the federal judicial authorities are enforced. Where a judgment passed by a federal court is not enforced correctly or within the given time period, an appeal similar to an appeal against a miscarriage of justice may be lodged with the government. The ruling passed by the Federal Council is final and may not be further appealed.

Where an authority fails to enforce a judicial ruling and in so doing causes harm to a litigant, it may be held liable. It is then up to the competent court to order the authority in question to pay a sum of money.

C. Member States which have also opted for a system of financial penalties where the administrative authority fails to fulfil its responsibilities

Various reports reveal that while in some cases a financial penalty is imposed directly on the authority concerned, in others it is imposed on the individual official who failed to comply with the requirement to enforce a judicial ruling; in others still, the penalty may be imposed on both the authority and an individual official. It is generally the administrative court which has the authority to decide which path to follow.

1. Poland, Bulgaria, Lithuania, Romania, Slovakia and Turkey all stipulate that where an authority wilfully fails to enforce a judicial ruling, the litigant may submit a complaint and request that a financial penalty be issued. However, in Bulgaria and Romania, the financial benefit derived in such situations is not made over to the litigant in whose favour the ruling was passed but is instead paid into the State budget. In general, paying such a penalty does not absolve the authority of its responsibility to enforce the ruling.

In Poland, the law states that where an administrative authority fails to enforce a judicial ruling voluntarily, the litigant may submit a complaint and request that a fine be imposed. Bulgarian law also contains provisions permitting a civil servant to be ordered to pay a fine where s/he has failed to enforce an obligation arising from a judicial ruling. Such a penalty is imposed by an order issued by the President of the competent court or by an authorised civil servant. An official who has failed to enforce an obligation must be given the opportunity to explain his/her actions in writing within a period of 14 days of the order being issued. The order may be appealed before a panel of three judges from the same court. Their ruling is final and may not be appealed further. Lithuania also makes provision for the possibility of a fine being imposed on an official who fails to enforce a judicial ruling. As mentioned above, it is up to a court bailiff to ensure that the ruling is correctly enforced and to notify the competent court where the administrative authority has failed to apply a ruling correctly. Where this is the case, said court may impose a fine as per the provisions laid down in the Code of Civil Procedure.

The report submitted by Romania states that an administrative court which has been asked to rule on an action for quash may decide to require the administrative authority to enforce its ruling within a given time period, subject to financial penalties calculated on a daily basis per day of delay. Where no deadline is stipulated, the decision is to be enforced within 30 days of the date on which it became irrevocable.

Where the deadline cited in the ruling is not observed, a fine totalling 20% of minimum gross salary is imposed per day of delay on the director of the public authority in question or, where appropriate, on the responsible individual; the plaintiff is also entitled to compensation for the delay suffered. Both the penalty and any compensation are applied or determined by the enforcing court at the applicant's request. Nevertheless, any such fines imposed are not made over to the litigant, but are primarily a means of compelling the administrative authority in question to comply with the judicial ruling.

According to the report submitted by Slovakia, a system of financial penalties may be put in place where an administrative authority fails to take the required action. If the authority in question fails to take action within the time period stipulated in the judicial ruling, the competent court may decide, at the request of the parties to the case, to impose a fine of up to €3,280 (said fine may be imposed multiple times). However, the court must request the opinion of the superior body of the authority concerned before issuing a fine.

2. The report submitted by Belgium states that pursuant to Article 36 of its Coordinated Laws, the Council of State may impose a fine on an administrative authority where, in order to restore legality, an administrative act must be quashed and a fresh decision or rule adopted, and where a rescinding judgment results in a duty for the authority to refrain from taking certain decisions. The conditions under which a fine may be imposed are detailed in the Royal Decree of 2 April 1992. The aforementioned Article 36 of the Coordinated Laws establish a phased system according to which, on the one hand, the applicant is invited to formally notify the administrative authority in question to comply with the ruling passed and, on the other, a period of at least three months must elapse from the time at which the notification of the rescinding judgment in respect of which enforcement is sought is issued. Unlike the penalties issued by the judicial courts on the basis of Articles 1385(a) et seq of the Judicial Code, those issued by the Council of State are not made over directly to applicants; revenue generated from penalties is allocated to a special fund to be used to modernise the manner in which administrative case law is structured. By contrast, the Council of State may not impose fines on defaulting administrative authorities.

II. MEMBER STATES WHICH HAVE GRANTED THEIR ADMINISTRATIVE COURTS THE AUTHORITY TO IMPOSE INJUNCTIONS OR ISSUE PENALTIES

1. The majority of the reports studied highlight the fact that it is crucial for judges to state correct reasons for their rulings. It is no longer sufficient simply to outline the legal framework forming the basis for the settlement of the dispute but to state clearly the consequences of the ruling for the parties involved. Such information should enable judicial rulings to be enforced as effectively as possible. The report submitted by Germany makes the point that what is important is no longer simply handing down a judgment but instead actually convincing the parties involved that that ruling is a justified one.

Accordingly, some legal systems allow parties to ask courts to clarify their rulings in terms of the provisions laid down for enforcing them; this is mentioned in the reports submitted by Romania and France respectively, the latter stating that the administrative authorities may submit a request for clarification to the Reports and Studies Division of the Council of State where there is uncertainty as to the consequences of a ruling handed down or as to how it is to be enforced. France has therefore put in place a mechanism to assist with enforcement which is non-litigious and which involves the Reports and Studies Division as an intermediary to facilitate the process of enforcing the judicial ruling; this mechanism is also in place at administrative-court level. This non-litigious phase may precede a binding litigious one.

2. The term "injunction" in its general sense is understood to be an order by a judge issued against a party to a case requiring the latter to either take or refrain from taking a particular action.

By granting a court the power to issue injunctions, the State is making the choice to confer upon it the authority not only to rule on cases but also to ensure that its rulings are enforced; by contrast, under the systems described above, it is the administrative authority which takes the lead in the latter role,

the litigant being able to obtain assistance from enforcement officials, who are generally court bailiffs. Thus, under the Spanish Constitution and the Code of Procedure governing the administrative courts of Portugal, the administrative courts in those countries are given direct responsibility for ensuring that their respective rulings are enforced.

In its report entitled *Enforcement of judicial rulings (Exécution des décisions de justice)*, the European Commission for the Efficiency of Justice (CEPEJ) emphasises that where the court is responsible for enforcing its own rulings, such a system offers at least two advantages: "It ensures that a) enforcement is dealt with by a judge who is already familiar with the case, and b) that said judge will be able to initiate proceedings on the basis of a case which is "still fresh", i.e. a case in which the facts remain largely unaltered". Ultimately, this means that the court can ensure continuity in the way disputes are resolved.

3. As has been underscored in some other of the reports submitted, the issue of enforcement of judicial rulings is a far less sensitive one in countries with a common-law system since such countries have long observed the principle of 'contempt of court', which permits a court to punish in the form of a fine or even imprisonment any officer of the Crown who refuses to enforce ruling. By contrast, in countries in which tradition has always demanded that the court not be permitted to issue injunctions against administrative authorities under the principle of separation of powers, the issue has been much discussed but has ultimately never prevented legislators from establishing such a mechanism.

Although the power to issue an injunction is in itself an instrument by which to ensure effective enforcement of judicial rulings, it is first and foremost one designed to serve as a deterrent. Sometimes it is sufficient simply to threaten an administrative authority with the likelihood of an injunction in order to compel the latter to comply with a particular ruling. According to several reports submitted, this appears to be the case in a number of countries; in Germany and Great Britain, the power to issue an injunction is rarely exercised despite the courts in those countries having the means to enforce their own rulings. The same applies in Luxembourg, where, its report states, administrative authorities ultimately enforce judicial rulings themselves in 90% of cases.

Looking at the variety of systems in place, it is clear that the power to issue an injunction may be exercised at different stages of proceedings (A), that power varies in scope, and that the means via which a court may issue an injunction are also extremely diverse (B). Finally, it is not uncommon for the power to issue an injunction to be accompanied by that to issue a fine (C).

A. Under what circumstances may the authority to issue an injunction be exercised?

In general, the power to issue an injunction may only be exercised once a specified time period has elapsed; the administrative authority must be given time to enforce the judicial ruling first. Either the time period is laid down in legislation or in a regulation, as is the case in Spain and Luxembourg, or it is up to the court itself to stipulate the time period within which its ruling must be enforced, as is the case in Estonia, the Netherlands and Portugal (1).

In the vast majority of cases, the injunction procedure is only initiated once it has been established that the administrative authority has failed to enforce a ruling. An applicant in whose favour a judicial ruling has been issued must approach the court again to request that the ruling be enforced. This is the case in Greece and Luxembourg. However, the reports submitted by the Netherlands, France, Italy and Portugal (2) state that the administrative court may issue instructions to the administrative authority

from the point of the initial appeal and may impose a deadline by which those instructions must be enforced.

1. According to the report submitted by Spain, the judicial enforcement procedure may only be implemented after two months from the date on which the judicial ruling was issued. The reports submitted by Estonia, the Netherlands and Portugal state that it is up to the court itself to stipulate the deadline within which its ruling is to be enforced. In Greece, a committee comprising the President of the Council of State and two Councillors of State are responsible for ensuring that rulings issued by the administrative court are enforced by requesting the authority against which the ruling has been issued to comply with said ruling within a reasonable time period; this time period is set by the court and may not generally exceed three months. The report submitted by Luxembourg explains that pursuant to Article 84 of the amended Act of 7 November 1996 on the Organisation of the Administrative Courts, the interested party may only approach the competent court and ask it to appoint a special commissioner responsible for implementing unenforced rulings once a period of three months has elapsed from the date on which the judgment or ruling was issued.

The report submitted by Slovenia states that where the judicial ruling in question requires a fresh decision to be adopted, the authority has either 30 days or a time period stipulated in the ruling itself within which to enforce it and must comply with the legal provisions contained therein.

2. Under the French system, first and foremost the power to issue an injunction may be requested by the parties to a dispute in the context of the main proceedings. It is thus up to the court to stipulate in its ruling the level of preventive enforcement it advocates, which may be accompanied by a deadline for enforcement and a fine. Accordingly, there will be adversary proceedings from the outset in respect of both the substance of the dispute and the means of enforcing any potential decision to quash.

The party in whose favour the judicial ruling is issued or any person likely, with good reason, to rely on said ruling may also submit a request to the administrative court for assistance as regards enforcement once a period of three months from the date on which the ruling was issued has elapsed. As mentioned above, this process is not pursued via the courts but falls within the remit of the Reports and Studies Division of the Council of State; in particular, it is the latter's responsibility to exercise due diligence in ensuring that the authority enforces the judicial ruling.

Finally, where, despite provision being made for injunctions in rulings themselves and due diligence during the non-litigious phase, the administrative authority still fails to enforce the ruling, the judicial enforcement procedure may be initiated before the court, which may issue a fine. This procedure may be initiated directly, even where the applicant has not previously lodged a request for assistance as regards enforcement. Equally, the administrative court may, of its own motion, move from non-litigious proceedings to the more binding phase entailing the issuing of a fine where it considers this necessary.

Provision is also made for a special procedure – the forced-payment procedure – in respect of payment of the sums of money owed by the administrative in the wake of a judicial ruling. Within two months of the ruling being issued, the applicant may submit details directly to a public accountant of the amount owed to them; the accountant must then pay the amount automatically provided that the judicial ruling in question has become definitive and the amount due is stipulated therein. Only where this procedure is unsuccessful may a judge intervene.

B. Scope of the authority to impose an injunction and means of implementation

It emerges from the majority of reports that implementation of the authority to impose an injunction must generally be requested by one of the parties to the dispute since the court itself is not able to exercise such authority of its own motion. The scope of the authority will depend on the nature of the obligations incumbent upon the administrative authority in the wake of a judicial ruling.

1. Some administrative courts have been granted the power to act in the place of an administrative authority.

a) The report submitted by Spain draws a specific distinction between judicial rulings ordering the administrative authority in question to pay a sum of money, and those ordering it to take certain actions. In the case of the former, where the ruling remains unenforced, it is up to the court to order the competent body to ensure that the sum required is paid and that sufficient budgetary resources are made available. In the case of the latter, the court may itself take the actions in question and, in doing so, may either request the assistance of officials within the administrative authority concerned or may call upon the services of another administrative authority. Where the administrative authority takes a decision which is in breach of the ruling passed, the court is authorised to overturn the ruling and order the authority to pay damages in respect of the harm caused. Where the authority fails to enforce the ruling within the stipulated time period, the court has the power to impose a fine on both it and specific civil servants who have failed to enforce the ruling; in such scenarios, these civil servants may also be held criminally liable.

b) The systems applied in Italy and Luxembourg are somewhat similar insofar as the administrative courts do not merely order an administrative authority to comply with a ruling within a specified time period but may also appoint a special commissioner to act on behalf of the authority in question to ensure that the ruling is effectively enforced.

In Italy, enforcement measures may be issued either in the context of proceedings conducted separately from those giving rise to the ruling, it being possible to initiate such separate proceedings within a period of ten years from the day on which the ruling was issued, or in the context of an application for judicial review or compensation.

In Luxembourg, the court must stipulate the time period within which the commissioner is required to fulfil his/her task; once a commissioner has been appointed, s/he takes over responsibility for enforcement from the administrative authority which has failed to comply. In terms of selecting a special commissioner, the law states that where the decision has to be taken by a decentralised or devolved authority, the commissioner must be appointed from among the senior civil servants of the supervisory authority or the ministry of which the authority to which the case has been referred forms part. In all other cases, the commissioner is appointed from among the administrative-court judges. It is also possible for a litigant to lodge an application for judicial review against a decision adopted by a special commissioner. The latter is entitled to receive remuneration set by the court depending on the nature and complexity of the case in question.

c) In the Netherlands, the administrative courts also have the power to order an authority to adopt a fresh decision and to take certain action to comply with a judicial ruling within a specified time period. Where it is clear what the fresh decision should be once the original decision has been

quashed, the court may adopt the fresh decision directly on behalf of the administrative authority. The court thus has the power to reverse a decision; this is examined in the report on the 'administrative loop'. If the authority fails to comply, the litigant may once again approach the court appointed to prepare the case and authorised to order the authority to adopt a fresh decision within a period of two weeks from the date of the ruling. The court may also issue a temporary interim order where enforcement of a judicial ruling is required urgently.

d) The report submitted by Portugal also points out that the court may act on behalf of the administrative authority where the latter has acted within the framework of circumscribed powers. If the matter involves re-establishing a prior situation or eliminating a situation brought about as a result of a quashed act and where some of the substantive information required to settle the case is missing, the court may ask the administrative authority to supply this information and submit a proposed settlement, stating reasons, within a period of 20 days. The court will then hear the other parties to the case and will issue a ruling. Where the quashing of an administrative act entails a fresh decision being adopted in respect of which the administrative authority enjoys a degree of discretion, the court imposes a deadline by which the authority must adopt the decision and stipulates the criteria which must be borne in mind. If, once the stipulated time period has elapsed, the authority has failed to act, the applicant may ask the court to issue a fresh decision, which this time will have the same effects as those of the action the authority has failed to take. This is the case, for example, where an administrative authority is refusing to re-hire a civil servant who has been unlawfully laid off.

In all cases, it is up to the court to clarify how its rulings are to be enforced by stipulating the measures required to enforce them, specifying the administrative body or bodies responsible for following up the ruling, and setting a reasonable deadline for enforcement. If the purpose of enforcing a ruling is to obtain payment of a sum of money, the court stipulates a period of 30 days. Where the ruling remains unenforced, the procedure runs its course and a lump sum becomes payable. Finally, an individual may also ask the court to set compensation in respect of civil liability where a ruling unlawfully remains unenforced.

e) The report submitted by Slovenia explains that where an authority fails to enforce a judicial ruling correctly within either 30 days or the period stipulated by the court, the new administrative act may be appealed and the court may opt to withdraw it and substitute it with its own decision, if such a scenario is practical given the nature of the dispute. Where an authority fails to enforce a judicial ruling, the court may again ask the administrative authority to explain its reasons. If the authority's reasons are unsatisfactory or if it fails to respond, it is up to the court itself to rule and to do so as if in the case of a substantive dispute.

2. Other courts, although they enjoy the power to issue an injunction, are not authorised to act in the place of an authority which has failed to observe a judicial ruling.

a) The report submitted by Estonia states that injunctions issued by an administrative court are based on the discretion enjoyed by the latter. Thus, the court may, depending on the case in question, order a specific administrative act to be issued or require the authority to review the case in the light of information arising from the court's ruling. Although the authority is duty bound to adopt a prescribed measure, it is for the court to detail the precise scope of that measure. This applies in particular where compensation is to be paid or other financial claims are to be met. The court may choose to impose a lump sum or may order the competent authority to calculate the amount payable based on its instructions and to pay that amount. Where the judgment is to be enforced within a specific time

period, the court may make provision for temporary measures to ensure that the rights of the litigant initiating the enforcement procedure are upheld.

b) The report submitted by Greece states that in Greece, a panel comprising three judges, set up within both the Council of State and the administrative courts, is responsible for ensuring that judicial rulings on administrative matters are enforced. Where an authority delays in complying with a judicial ruling, fails to comply with it or does not comply with it correctly, it is asked to present its reasons to the panel with a period of one month. Where the panel deems the authority's attitude unjustified, it issues a final deadline of no longer than three months by which the authority must comply with the ruling. If, at the end of this period, the authority has still not implemented the ruling, the panel may impose a financial penalty payable to the party which has suffered harm as a result of the failure to comply. The amount of such a penalty will be determined in particular by the significance of the dispute, the conditions under which the ruling remained unenforced, the consequences for the injured party and the duration of the period during which the authority failed to comply. If, despite a financial penalty being imposed, the administrative authority still fails to act, the panel may impose another financial penalty. These penalties are enforceable via a payment order and payment may be obtained via judicial enforcement. To fund this type of expenditure, a special annual fund is set up for the treasury, local authorities and other legal persons governed by public law.

c) Although the Council of State of Belgium does not have the power to issue an injunction, Flemish legislation makes provisions for first-instance administrative courts with such authority. Thus, a decree issued on 19 March 2004 grants authority to hear academic disputes to a special court which, when quashing an unlawful decision, may order the authority in question to adopt a fresh decision under conditions laid down by it. Another Flemish decree dated 27 March 2009 establishes an administrative court responsible for monitoring the lawfulness of certain decisions around planning; when quashing such decisions, this court may order the authority to adopt a fresh decision within a specified time period whilst at the same time citing unlawful or manifestly unfair grounds which may not be taken into account when adopting the fresh decision and stipulating, by contrast, the legal rules and principles which must indeed be respected and the procedural formalities which must be effected before that decision is adopted.

d) In France, where the administrative authority is required to adopt a fresh decision, the administrative court may issue a deferred injunction, thereby allowing the authority time to rectify the disputed decision, in particular where it has been quashed on account of a procedural defect which can easily be remedied. In cases where the authority enjoys discretionary powers, the injunction may be limited to the court imposing a deadline on the authority by which it must re-examine the case. The court is free to determine this deadline based, in particular, on the how problematic it will be to re-examine the case. The court may also order the authority to adopt a specific measure where it is exercising circumscribed powers, the right of the applicant necessarily to be inferred from the original decision having been quashed. However, the court may not itself determine the content of the measure to be adopted.

C. Authority to issue a fine

As explained above, the financial penalty is an especially widespread tool in the various legal systems examined. Whether they are called fines or financial penalties, the objective sought is the same: to put pressure on the administrative authority so that it enforces the judicial ruling of which it is the subject. Most States which have implemented the authority to impose injunctions have accompanied it with a

fine, i.e. the 'strong arm'. Generally speaking, the penalty is imposed when, despite the injunction imposed against it, the authority fails to enforce the judicial ruling within a specific period of time. However, the Luxembourg report explains that administrative courts are not empowered to force a defaulting authority to pay a penalty or fine, since such a request would be considered as involving civil rights and would therefore be a matter for the courts of the judiciary. The same holds true for Slovenia, which does not have the fine mechanism.

The fine can be defined as a financial penalty, calculated per day of delay, which bolsters a principal sentence where the principal sentence is not enforced within the time period required by the court and which seeks to obtain from the debtor the performance of an obligation arising from the sentence. Accordingly, the fine is a coercive process, not an instrument of redress, the idea being that applicants may not enrich themselves within such a context.

a) The report submitted by Germany states that a fine of up to €10,000 may be imposed on an authority, even repeatedly. The report submitted by Estonia indicates that the Administrative Court may sentence a party to the case to pay a fine of up to €32,000 in the event of failure to enforce a judicial ruling, with the amount of the fine taking account of the time that has passed since the entry into force of the judicial ruling. The Estonia report specifies that the amount of the fine is not paid to the applicant but becomes revenue for the State. For Greece, we saw that the committee comprising three members of the Council of State can impose a financial penalty on the defaulting authority which will benefit the applicant, and it is possible to impose this penalty multiple times. The report from Italy stated that the fine is linked directly to the failure of an injunction and that it benefits the party that demanded it as compensation. The Spanish and Dutch systems also allow the use of penalties.

b) The report from Portugal mentions that the administrative courts can, of their own motion, set a deadline by which the administrative authority must comply with the judicial ruling and, where appropriate, may sentence it to pay a fine calculated per day of delay. The fine will be paid by the civil servants directly responsible for the failure to enforce the judicial ruling, ranging from 5 to 10% of the national minimum wage. If the body responsible for enforcing the judicial ruling is a collegial body, only the members of that body who voted against enforcement will be required to pay the fine. The fine will come to an end when the judicial ruling has been fully enforced. The court settles the fine every three months or at the request of the applicant. The amounts due to the applicant, whether via compensation or via a fine, are cumulative. But if the amount of the fine exceeds the amount of compensation, it is then revenue for the High Council of Administrative and Fiscal Courts.

c) In the French system, a sentence to pay a fine requires that the applicant bring the matter of enforcement before the court when the applicant notes that, six months after the initial ruling, it has not been enforced. The court can then issue an injunction for enforcement within a specified time period along with a fine. If, at the end of this time period, the judicial ruling has still not been enforced, a new judicial ruling is necessary in order to rule on the settlement of the fine starting from the new time period. Such settlement may be either final, which therefore implies payment of the fine upon completion of the time period, or provisional, in which case the payment of the sum to the applicant is not automatic and requires a new judicial ruling. The court may also decide that part of the fine will not be paid to the applicant but will go to the State budget if there is a risk of unjust enrichment. The purpose of the fine is therefore not to remedy the error made by the authority but to compel the latter to enforce the obligations arising under the judicial ruling.

III. CONCLUSIONS

Regardless of the mechanism selected, the important thing is primarily the effectiveness of enforcement which, as the European Court stated, is directly applicable to the right to a fair trial. While various studies have been carried out at European level and nationally to better define the scope of the judicial backlog, along with numerous recommendations to improve the working methods of judges and make them more efficient, few are devoted to the issue of a reasonable period for enforcing judicial rulings, specifically in the area of administrative disputes. However, such studies could be a key indicator of the effectiveness of justice in a State based on the rule of law. Each case is unique and the time period for enforcement of its judicial ruling depends on multiple factors, the main one being the willingness of the administrative authority in question as well as the degree of difficulty in remedying the unlawful act committed.

By entrusting the courts with the task of overseeing the enforcement of their rulings, certain States have clearly opted for a more modern approach to the principle of the separation of powers, albeit without denaturing the very essence of it. After all, surely the right to a hearing before the courts lacks a basis in reality if the court's ruling goes unheeded?

It is worth noting that all of the courts that have the power to impose injunctions and penalties emphasise that they use these tools in a very limited number of cases, but that it is probably the very existence of these tools that ensures that their rulings are enforced by the administrative authority.

Unlike civil justice, where trials are a matter for the parties involved, with the judicial ruling on the substance of the dispute brought before it by the parties, the administrative courts act more like administrators, with their rulings necessarily accompanied by measures to ensure they are effective. "By clearly explaining what the enforcement of their rulings entails, administrative courts are only helping and enlightening the administrative authority," as former French Justice Minister Pierre Méhaignerie rightly pointed out.

The authorisation thus given to the courts to indicate in their rulings the very process for enforcing them requires the courts to think about the effectiveness of their rulings, which in turn enhances their legitimacy and, undoubtedly, their understanding by the parties. This can only benefit legal certainty.

In its recent agreement, the Belgian government said it would adopt – in consultation with the Council of State – reforms to improve the procedure for handling administrative disputes. Most of the reports show a certain level of willingness to ensure more efficient and effective justice for litigants. The power to impose injunctions is one of the tools that can guarantee such effectiveness.

In the 21st century, it would make no sense at all to deprive our Council of State here in Belgium of such a power and not to allow the judges on the Council of State to wield this responsibility even though they are regularly told to dispense justice without getting involved in the consequences of their rulings. On the contrary, the aim will be to 1) ensure more complete protection for litigants, and 2) assess more concretely the impact of a ruling on the administrative authority in question and provide the latter with resources for remedying the unlawful act committed while providing it with additional guidance.