



Bundesverwaltungsgericht



**Seminar organized by the Federal Administrative Court of
Germany and ACA-Europe**

**Functions of and Access to Supreme Administrative
Courts**

Berlin, 13 May 2019

Answers to questionnaire: Italy



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ACA-Europe Seminar on Functions of and Access to Supreme Administrative Courts

12 - 14 May 2019

Oberverwaltungsgericht Berlin-Brandenburg
(Higher Administrative Court Berlin-Brandenburg)

Questionnaire

Introduction

One of the most important tasks of ACA- Europe is to foster mutual understanding of the jurisprudence of the member states. The recognition and evaluation of the jurisprudence of the Supreme Administrative Courts of other member states is a key prerequisite for the development of a European legal community. For this purpose it is not sufficient to be able to read the decisions of the other member courts. In order to really understand their jurisprudence it is also eminent to understand under what conditions and traditions our colleagues perform their duties.

The conditions Supreme Administrative Courts work under are among others strongly determined by the specific functions a Supreme Administrative Court has in its national legal order. The specific functions on their part might have strong influence on how the access to the Supreme Administrative Court is designed and what scope of assessment of a case is applied. This leads to a number of questions: Which “filters”, for example, does administrative procedural law incorporate into the procedure, if it does at all? Does the procedure require a special admission or can every case be brought to the Supreme Administrative Court by the parties? Are only legal questions or also facts to be discussed?

Dealing with these questions the seminar to be held in Berlin from 12th to 14th May 2019 hopes to contribute to a deeper mutual understanding of the decisions of the member states’ Supreme Administrative Courts. It shares this objective with the closely linked seminar taking place in Dublin on 25th and 26th March 2019, which will lay an emphasis on the internal mode of decision making, asking how our courts decide. Both seminars will deal with different aspects of the ways of our judicial conduct, deliberation and reasoning which are all important to understand the jurisprudence of the different member states.

These aspects cannot be studied efficiently from manuals, so ACA-Europe seminars are the right place to assess these important features of the judge’s daily work.

I. Functions of the Supreme Administrative Court (SAC)

1. a) How many **instances** are known in your (administrative) jurisdiction?

In the Italian administrative jurisdiction, there are two instances. The Constitution provided the creation of first instance administrative judges, on regional basis (art. 125 cost).

Administrative Courts of first instance are the Regional Administrative Courts (hereinafter TAR if one, TARs if more than one), which work in each Region. The judge of second and last instance is the Council of State.

The Supreme Court has competence in matters of jurisdiction and, only regarding such questions, may represent a third instance judge in litigation with the public administration.

- b) Does your SAC also serve as a first instance court?

No, the Council of State is only court of second and last instance, except in one case in which it can serve as an unique instance court (see answer c)

- c) If so, under what circumstances does your court serve as a first instance court?

- depending on the subject-matter?
- depending on the importance of the case?
- depending on a choice by the plaintiff (alone) or the parties (by agreement)?
- depending on other criteria?

Please explain.

In case of action of compliance, for enforcement of judgements (the so called "giudizio di ottemperanza"), only for the decisions of the Council of State except the case in which the first instance decision is upheld on appeal with motivation that have the same dispositional and conformative content of the provisions of first instance. (see 112 e 113 code of administrative trial).

- d) What is the percentage of first instance cases compared to the overall case load? Please give statistical data about the quantity of cases (not about the quality or the relative working load resp.)!

We do not have statistical data about this point, but we can say that the number of cases in which the Council of State serve as first instance judge is very small.

2.

- a) Looking at the **case load** of a single judge of your SAC, can you identify larger groups of cases which make up the overall case load (quantitative approach)? I.e. Provisional proceedings, proceedings of admitting an appeal, first instance proceedings, other. What is the percentage of these groups of cases in the overall case load?

The largest group of cases which makes up the overall case load of the Council of State (counting about 11.500 cases per year considering final judgment and provisional decisions) is that of provisional proceedings (about 2.500 cases per year). Indeed all the decisions on interim reliefs taken by the first instance judge (TAR) can be

appealed before the Council of State. Moreover, after the first instance judgement, the loser, while lodging the appeal, may ask the suspension of effects of the first instance decision to the Council of State.

Than we also can mention the cases about housing and urbanism (about 1.700 per year) and the special proceedings for public procurements (about 1.200 per year).

b) If you can identify larger groups of cases (question a), is it possible to weigh these cases as to their complexity and thus to the amount of time required in treating them (qualitative approach)?

We do not have any objective criteria to weigh the complexity of cases. Nevertheless, we can say that public procurement cases and cases regarding expropriations, urban plans, acts of Independent authorities, environmental authorizations, antitrust cases, etc. are generally all very difficult and they take more time than the other cases.

3. a) In appeals cases, does your SAC:

- review decisions of the lower courts with a view to the facts and to the law?
- review decisions of the lower courts with a view to the law only?
- solely answer a(n abstract) legal question?

The Council of State review the TAR's decisions with a view to the facts and to the law.

4. What are the **purposes** of the jurisdictional work of the SAC as a court of appeals?

- the standardisation/unification of the law?
- the deliverance of single case justice?
- (further) development of the law?
- care for adherence to procedural rules of lower courts?

Standardisation of the law, deliverance of single case justice, care for adherence to procedural rules of lower courts.

5. a) What are the purposes of the jurisdictional work of the SAC as a court of first instance?

See answer 1b) and 1c) and the next one.

b) What is the rationale of assigning certain proceedings to the SAC as a court of first instance?

As already said, the Council of State is a court of unique instance only in case of action of compliance, for its decisions. Instead, jurisdiction also lies with the Regional Administrative Court for its provisions upheld on appeal with motivation that have the same dispositional and conformative content of the provisions of first instance (see.112 e 113 code of administrative trial). The rationale is to give the competence in order to enforce a judgment of the same judge who has written the motivation of the judgment.

6. a) Is there a separate constitutional court in your country?

Yes. The Constitutional Court is empowered to settle disputes concerning a law's constitutionality and "conflicts of power" between the various State powers (legislative, jurisdictional, administrative), between the State and the Regions, and between the Regions. In this area, it may pass judgment regarding administrative decisions which generated the conflict.

b) Does the SAC in your country serve as a constitutional court?

No.

c) In how far does your SAC consider constitutional law, especially fundamental rights?

The violation of the constitutional law and fundamental rights might be also a defect of administrative acts, but if is an ordinary law which violates the constitutional law, the Council of State shall refer the case to the Constitutional Court.

d) If there is a separate constitutional court, is there a special/extraordinary remedy against (final) decisions of the SAC to the constitutional court claiming violations of constitutional law?

No. The competence of the Constitutional Court concerns only the constitutionality of laws.

e) If there is a separate constitutional court and your court considers constitutional law, too, how would your court handle a case, if your court deems a relevant law as unconstitutional?

If the Council of State deems a relevant law as unconstitutional, the question is referred to the Constitutional Court. Meanwhile, the proceeding must be suspended until the decision of the Constitutional Court, which is binding on the referring court.

f) If there is a separate constitutional court in your country, can plaintiffs challenge administrative acts also before the constitutional court (i.e. without bringing the case before the SAC first)? If so, how are actions before the constitutional court related to the proceedings before the SAC?

Administrative Judges are "Gatekeepers" of Constitutional Judgement. The question of the constitutionality of a law can be raised by either of the parties, or can simply be raised ex officio by the presiding judge, that is, without its being specifically requested by any party. If one of the parties requests that the question be referred to the Constitutional Court, the judge is not obliged to do so automatically.

II. Access to the SAC

1. a) Does a party have to be **represented by a legal professional** before the SAC?

Yes, for proceedings before the Council of State representation by a lawyer admitted to practise before the higher courts is required.

Anyhow, a party or the person who represents them, when they have the necessary qualities to exercise the office of defender with power of attorney before the court, may represent themselves without the assistance of any other defender. (see. 22 code of administrative trial).

Finally, the parties may represent themselves in court without the assistance of a defender in proceedings concerning administrative access and transparency and electoral matters (art. 23 code of administrative trial)

- b) If so, does the representative have to be an attorney at law/solicitor/barrister?

Yes

- c) Are there attorneys/solicitors/barristers specially authorized to act before the SAC?

No, they just have to be admitted to practise before the higher courts.

- d) Are other legal professionals admitted as representatives? I.e. legal scholars, representatives of NGOs...?

No

- e) Are there specific (different) rules for representatives of administrative authorities?

No. Nevertheless, the State authorities (for example the Ministers) are necessarily defended by the State lawyers.

2. a) What are the **formal requirements** for an appeal to the SAC (e.g. precise application, reasoning,...)?

The application must indicate:

- *the applicant(s);*
- *their defender(s);*
- *the parties against whom the appeal is proposed;*
- *the judgment which is being appealed;*
- *a brief statement of the facts;*
- *the specific complaints against the headings of the judgment in question;*
- *the conclusions;*
- *the signature of the applicant (if they have the necessary qualities to exercise the office of defender with power of attorney before the court) or their defender with, in this case, an indication of the special power of attorney released together with that for the judgment in the first instance. (see. 101 code of administrative trial).*

b) Is your SAC bound by (and limited to) review the case according to specific objections (on procedural law and/or on substantive law) of the appellant?

Yes, according to the principle of application of parties, the appeal shall contain “the specific complaints against the headings of the judgment in question”. (art. 101 code of administrative trial)

“Questions and pleas declared absorbed or not examined in the judgment of first instance are understood to be renounced, if they are not expressly proposed again in the appeal, or, for parties other than the appellant, with a brief submitted under penalty of forfeiture within the deadline for appearance in court.” (art. 101, paragraph 2).

In any cases, the court might declare, also ex officio, the appeal inadmissible if the deadlines for appeals are not respected, or there is a lack of interest or there are other reasons;

The appeal may be declared not pursuable when, during proceedings, parties loose their interest in the decision, or the adversary proceedings have not been completed within the prescribed period, or when other reasons impeding a decision supervene over the merit.

Also ex officio, the court declares the judgment extinguished if it does not continue or resume within a period fixed by law or assigned by the court; by preclusion; by renunciation.

The court, also ex officio, may order the unsuccessful party to pay a sum of money determined equitably, in favour of the counterparty, but no more than twice the costs incurred, in the presence of manifestly unfounded reasons.

The court orders the unsuccessful party ex officio to pay a financial penalty, of not less than twice and no more than five times the court fees, when the losing party has brought the legal action or resisted recklessly in the court.

Also the nullity of the acts can be raised ex officio.

c) If this is the case, how does your SAC deal with its duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU?

The SAC refers ex officio a preliminary ruling to the EU Court of Justice.

3. Concerning the function of the SAC in your country as a **court of appeals** (i.e. not as a court of first instance):

a) Does every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all kinds of decisions of the court of lower instance?

Yes, any unsuccessful party can appeal the first instance decision.

Can certain types of decisions of lower courts (e.g. provisional decisions, certain fields of law,...) not be brought before the SAC?

No. According to the Italian Constitution (art. 125 Cost), all the decisions of the first instance courts can be appealed before the Council of State. Thus, also the precautionary measures can be appealed.

4. As far as in general the parties of the proceedings of the lower instance can seize the decision of the SAC (as a court of appeals):

a) Is this right restricted by a legally established **filter** (quantitative, e.g. depending on a certain value in litigation, or qualitative, e.g. in certain fields of law, depending on a preliminary assessment)?

No, there are no filter at all.

b) If there is a preliminary assessment, please give details:

- Which court decides (lower court or SAC)?

- If the lower court admits a case to the SAC, does this decision have binding effect on the SAC?

- If the SAC decides, is there a specific procedure of admittance before the SAC? Please give details!

- If the lower court decides (in a negative way), can the SAC still admit a case?

- If the lower court decides, does it decide on the admission of an appeal ex officio or only on application?

Not applicable.

c) Are there special rules for filters for certain fields of law (e.g. asylum law,...)?

Not applicable.

d) If your jurisdiction knows a procedure of admittance, what are the general requirements under which a case can be admitted to the SAC?

Not applicable.

e) If there are more than two instances in your country, is it possible to appeal against decisions of the court of first instance to the SAC directly? Under what requirements?

The question is not applicable to the Italian legal system since there are only two administrative instances.

f) Are there specific requirements in certain fields of law?

Not applicable.

g) If your jurisdiction knows a procedure of admittance, what is the percentage of cases admitted?

Not applicable.

5. If there is no legally established filter (Q. II.4.), has your SAC established a jurisprudence on the (in-)admissibility of appeals or of specific objections (see also Q. II.2.b)) which has the effect of a factual filter, e.g. by rejecting them as abusive, or by dismissing petty cases?

No, there are no specific rules or jurisprudence on admissibility of appeals, except those dictated in accordance with the code of procedure.

6. Considering the functions of your SAC as a court of appeals (Q. I. 3.), how are these functions related to restrictions of the access to the SAC as discussed in Q. II.4.), as far as applicable?

Not applicable

7. a) Are there any constitutional provisions in your country with respect to having an appeal's instance?

For the administrative judge, the double degree of jurisdiction is provided for by Article 125 of the Constitution.

b) If so, does the constitution in your country provide for a full review of a first instance decision or for access to a procedure of admittance to the next instance?

The Italian Constitution provides only for the organisational aspect, imposing for administrative jurisdiction the appeal before the Council of State of the decisions of Regional Administrative Courts, but it does not directly concern the second instance procedure.

8. Is there a political or academic discussion concerning any kind of reform with regard to the access to the SAC (e.g. introducing filters, restricting the filter, loosening the filter)?

No, there is not any discussion about this issue.

III. Implementation / Procedural Aspects

1. As far as your SAC serves as a court of first instance: What is the **possible content of decisions** of your SAC:

- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- other?

2. As far as your SAC serves as a court of appeal:

a) What is the possible **content of decisions** of your SAC:

- cassation of the decision of the lower court and remitting the case back to the lower court?

According to art. 105 Code of administrative trial, "The Council of State refers the case to the court of first instance only if there were no adversary proceedings, or the right to defence of one of the parties was infringed, or it declares the nullity of the judgment, or reforms the judgment or order that declined jurisdiction or pronounced on competence or declared the termination or annulment of the judgment".

- cassation of the administrative act?

Yes, it is usually possible, when an action of annulment of an administrative act has been brought to the Court.

- obligation of the administrative authority to issue an administrative act?

Yes, it is possible.

For example, in the proceeding against the silence of the administration (art. 117 code of administrative trial), the judge may order the administration to issue an administrative act within the due time.

- obligation of the administrative authority to issue a new discretionary decision?

Yes, it is also possible, but the judge cannot give any advices about the content of the discretionary decisions. The Court can only order the administration to issue an administrative act.

- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?

Yes, it is possible. The administration may be condemned to pay a sum as damage compensation, or, in case of action of compliance, the administration may be ordered to pay a sum of money for each violation or subsequent non-compliance, or for any delay in the carrying out of the res judicata. (art. 112 code of administrative trial).

- issue an administrative act itself?

No, it is not possible, except in case of the action of compliance in which the administration may, in theory, issue an administrative act itself or appoint a Commissioner (Commissario ad acta), who acts in the place of the administration and takes any measures required to enforce the judicial decision.

- issue a discretionary decision out of its own authority?

No, it is not possible, except the case mentioned before

- remit to the constitutional court?

Yes, it is usually possible to refer ex officio a question of constitutionality to the Constitutional Court.

- issue a legal opinion/authoritative interpretation of the law without connection to a single case?

No, it is not possible.

- other?

b) To what extent can or must your SAC rely on the facts as they were investigated and determined by the lower court?

All facts may be re-examined, except those for which there is no contrast among parties. Only in certain specific cases, it is possible to admit new evidences.

3. a) When your SAC serves as a first instance court, does it apply the same rules of court procedure as the common first instance courts?

Yes. Except those regarding the admission of new pleas and new evidences and for notification of the act of appeal.

b) If not, what are the differences?

The main differences are the following:

According to art. 104, first paragraph: "1. New questions may not be raised in the appeal proceedings, without prejudice to Article 34, paragraph 3, nor new pleas that cannot be raised ex officio."

However, it may be possible to claim interest and accessories accrued after the judgment under appeal, as well as compensation for damages suffered after the judgment."

And according to art. 104, second paragraph: "2. New evidence and documents may not be admitted, unless the college considers them indispensable for the purposes of deciding the case, or the party shows that it could not present or produce them in the judgment of first instance for reasons not attributable to them"

According to art. 93 CAP: "The appeal has to be notified at the declared residence or the domicile chosen by the party in the act of notification of the judgment or, failing that, with their defender either or at the declared residence or domicile chosen for the judgment according to the ruling."

4. As far as there is a specific procedure of admittance of appeals before the SAC, are there different rules of procedure for these procedures of admittance than for admitted appeals' procedures?

Not applicable.

5. Are there (compulsory, facultative) public hearings in procedures of admittance and or the admitted appeals' procedure?

Not applicable.

6. Do the decisions of the SAC have an effect on other cases than the one decided?

They have direct effect only in the decided case. They can only take into consideration as a judicial precedent. Only the decisions of the Plenary meeting are binding for judges of the Council of State.

a) Are lower instance courts bound by law to follow decisions of the SAC in other (similar) cases?

There is no legal obligation. Nevertheless, this is considered a good practice.

b) If so, under which conditions can they deviate from a decision of the SAC?

c) Is the SAC bound by law to follow its own previous decisions?

There is no legal obligation to follow the precedent, even if it is considered a good practise.

A legal obligation exists only for decisions of the Plenary assembly that is composed of the President of the Council of State, who presides, and twelve judges of the Council of State, assigned to the judicial divisions.

d) If so, under which conditions can it deviate from its previous decision?

The deviation from its own previous decisions, even if it is always possible, should be well motivated, according a new perspective or interpretation of law or according to the "jus superveniens".

The deviation from the decisions of the Plenary meeting is not possible, except the Section decides to refer the question of law to the Plenary meeting again.

According to art. 99, paragraph 3, code of administrative trial, "If the section to which the application is assigned considers it does not share a principle of law enunciated by the plenary meeting, it sends the determination of the appeal back to the latter with a motivated order."

7. Are the judges of your SAC bound by the decisions of other sections within your SAC?

There is no legal obligation. Nevertheless, according to art. 99 code administrative trial, the section to which the appeal has been assigned may remit the application for examination by the plenary meeting of the Council of State, if it detects that the point of law submitted to it for examination has brought about, or might bring about conflicts with case law among sections of the Council of States.