



Consiglio di Stato



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

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

Fiesole (Firenze), Autumn 2021

Answers to questionnaire: Norway



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ITALIAN PRESIDENCY ACA - EUROPE

FIESOLE (FIRENZE), 19 OCTOBER 2020

"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

1.1 The seminar to be held in Fiesole, on the 19th and 20th October 2020 at the European University Institute, is the first meeting organised by the Italian presidency.

As explained during the initial presentation of the programme for the upcoming Italian presidency, its leitmotiv will be to enhance and foster the value and the experience of “horizontal dialogue” among the highest administrative national Courts, aiming to create and develop a common culture and shared standards in judicial review of the activity of the public authorities.

This “horizontal dialogue”, more than “vertical dialogue”, aims to focus on examining and comparing modes of judicial decision making and judicial conduct, and the impact of judgments on the activities of public authorities.

Horizontal dialogue between Courts of Member States is the best way to achieve an effective European citizenship, that is to say a common standard of legal protection for citizens and companies living in Europe and dealing with public powers.

1.2 The purpose of this questionnaire and of the subsequent seminar is to provide a greater understanding of similarities and differences among our legal systems, especially regarding:

- a) the interpretation of law by judges;
- b) the binding effect of judgments both so as to ensure the judges’ compliance with the nomophylactic statements of the Supreme Administrative Courts (SACs) and to act as an instrument to address the future action of public administrations in similar cases;
- c) the effect of the administrative judgments on the activity of public administration and their enforcement;
- d) the consultative role of the SAC, if existing.

1.3. The seminar will cover the following topics:

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- a) The method followed by administrative courts in the interpretation of the law, focusing on the criteria applied by judges (including reference to *ratio legis*, reference to preparatory work, reference to the advice of the SAC regarding the adoption of the law, if existing, etc.). A special focus will be placed on the tools for supporting judicial activity with regard to services for classifying and archiving judgments, e.g. databases and AI instruments.
- b) The application of the law by the Court, with specific reference to the nomophylactic pronouncements of the SAC. Jurisprudential stability and the predictability of decisions are important values related to the general principles affirmed by the European Court of Justice such as legal certainty, predictability for citizens and companies of the consequences of their behaviour and the protection of legitimate expectations. Therefore, there will be a special focus on the ways and the procedures, where they exist, through which SACs ensure compliance with the nomophylactic statements in the administrative system.
The “binding or steering effect” of the of Supreme Court judgments: this topic aims to foster mutual understanding of the capacity of administrative judgments to bind the public administration in the subsequent exercise of its power. It covers not only the binding effect on decided case, but it also aims to analyze judgments as instruments to orientate the future action of public administrations in similar cases (i.e. judgement as guidelines).
- c) The seminar will also examine the enforcement of the administrative judgment, in case the public administration fails to comply with it spontaneously and correctly, with special reference to judicial enforcement measures provided by each legal jurisdiction, if they exist.
- d) Finally, a brief session will be devoted to the consultative role of the SAC, if existing, and its impact on administrative action.

1.4 It is intended that the Seminar will provide each Supreme Administrative Court with a better understanding both of the decision making process underpinning the judgments of other SACs and of their impact on the activity of public authorities.

In a constitutional democracy, administrative courts are seen as performing a vital function in the interaction between law and administration.

The purpose, to reiterate, is to verify whether it is possible to find or develop a homogeneous method to scrutinize the way public administrations exercise their powers and to guarantee a common standard of legal protection for citizens and companies in all Member States.

The questionnaire which follows represents an initial information gathering exercise the purpose of which is to clarify the interaction of the administrative courts with the law, on the one hand, and the administration, on the other, so as to ensure certainty, legality and quality of justice for citizens and public institutions.

I SESSION

THE METHOD OF INTERPRETATION OF LAW AND ITS APPLICATION BY THE COURTS

Introduction: *Article 88 of the Norwegian Constitution provides that The Supreme Court pronounce judgments in the final instance. Accordingly, the Supreme Court is Norway's highest court, at the top of a pyramid consisting of courts on three levels: the local district courts, the regional courts of appeal and the national Supreme Court. Norway has only one Supreme Court, and the Supreme Court has jurisdiction on all areas of law. Thus, Norway does not have a separate supreme administrative court. The Supreme Court has ultimate appellate jurisdiction over the lower courts, and deals only with cases that are brought before it by way of appeal from the regional courts of appeal.*

Article 89 of the Norwegian Constitution states that in cases brought before the Courts, the Courts have the power and the duty to review whether applying a statutory provision is contrary to the Constitution, and whether applying other decisions under the exercise of public authority are contrary to the Constitution or the law. Hence, this article demonstrates the judicial branch's role in the separation of powers.

1. The role of the Supreme Administrative Courts in the interpretation of law.

1.1. Does your legal system provide general rules for the interpretation of law?

- No
- Yes

1.2. What is the level of general rules for interpreting the law?

- Law
- Public authority regulations
- Guidelines
- Supreme Court rulings
- Other

Please explain and give an example.

The general rules regarding the interpretation of law are mainly developed through Supreme Court case law, in interaction with legal science. As regards to criminal law, a central

Answers from Norway

interpretation criterion is found in the Constitution, namely the principle of legality. Other than that, there exists no written statutory law regarding rules of interpretation of law.

1.3 What are the criteria for interpretation of the law?

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

Explain, if necessary.

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

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

Explain, if necessary.

This is not possible in criminal matters and in cases regarding administrative sanctions because the principle of legality requires clear basis in statutory law, thus prohibiting analogic interpretation.

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

- X No
- Yes

Please explain and give an example.

Not in general terms. Nevertheless, the Supreme Court always specifies - regarding the specific case – how the law applicable in the case should be interpreted, and why such interpretation is correct. This provides precedence for the future interpretation of such law – which is also binding for the exercise of governmental authority.

Answers from Norway

1.6 In deciding the case, to what extent does the Court take the following into account and within which limits?

- EU law (Nice Charter, EU regulations, EU directives) and the judgments of the EU Courts;
 never seldom sometimes often
- The European Convention of Human Rights and the general principles elaborated by the ECHR;
 never seldom sometimes often
- The general clauses of proportionality and of reasonableness.
 never seldom sometimes often
- The statements (or case law) of the Courts of other countries in similar cases;
 never seldom sometimes often
- The general interests involved (i.e: order and public safety, environmental protection, consumer protection, the economic, financial and social effects on the labour market)
 never seldom sometimes often
- The results of regulatory impact analysis (AIR), if applicable;
 never seldom sometimes often
- The impact of the decision;
 never seldom sometimes often
- Other

Please specify.

2. Tools for supporting judicial activity.

2.1. Are there any services established in the Supreme Administrative Court responsible for classifying the judgments and drafting their abstracts?

- No
- Yes

The Legal Secretariat of the Supreme Court comprises 25 law clerks. Although the primary function of the Legal Secretariat is to assist the Appeals Selection Committee, it also performs duties for the justices serving in the Supreme Court's two divisions that deal with admitted appeals. The law clerks provide legal support in the assigned case until the case comes to an end.

Answers from Norway

2.2. What other activities do these Services perform?

- preparation of useful material for the most important judgments of the SAC ;
- comparative studies;
- information about new developments in the law and in the case law;
- training of judges
- other activities.

Please specify.

Each appeal to the Supreme Court is assigned to a designated law clerk. The law clerk will provide legal support in the assigned case until the case comes to an end. The law clerk puts forward a suggested decision for the Appeals Selection Committee, as to whether the appeal shall be granted or denied leave. These decisions do usually not include reasons, and are based on simplified and standardized wording. The workload in a particular case depends on the complexity of the case, whether the appeal is granted or denied leave, and to what extent the justices assign tasks to the law clerk. The justices do not have personal law clerks.

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

- No
- Yes

Please explain.

The judicial decisions of the Supreme Court and of the Appeals Selection Committee of the Supreme Court are published in the Lovdata Foundation digital legal information system. Decisions from the Supreme Court are also published on the Supreme Court's website.

See for example: <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2018-1720-a.pdf>

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

- public and free databases
- private databases, provided by their institution
- other

Please explain.

Answers from Norway

The Supreme Court judges has access to a full range of technical equipment (computers, laptops, mobile phones, etc.) and free access to public databases and the Court's internal databases.

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

- No
- Yes

2.6 If yes, explain the role of the AI systems in the decision-making process (e.g. drafting final decisions, supporting judges for some significant aspects of the case, such as for example the calculation of damages, etc.)

3. The application of law: the “nomophylactic” statements in the administrative judicial system.

3.1. Does the judgment of the SAC have binding effect on lower courts?

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

The main role of the Supreme Court is to ensure clarification and development of the law through its decisions and within the scope provided by the Constitution and by law. The Supreme Court's view of the law constitutes judicial precedent, and thereby ensures unification of the law.

3.2. If the answer to question 3.1. above is no, what percentage of lower court cases comply with SAC decisions?

- less than 25%
- from 25% to 50%
- from 50% to 75%
- from 75% to 100%

Answers from Norway

3.3. If the answer to question 3.1. above is no, how is the consistency and predictability of court decisions ensured?

Please explain and give an example.

3.4. When solving jurisprudential conflicts or stating principles of law, does the SAC work in a special composition (for example a Plenary Assembly or a larger panel)?

- No
- Yes

If the answer is yes, please explain.

When the Appeals Selection Committee has granted leave to an appeal, the Chief Justice may decide that the appeal shall be brought before the Grand Chamber with 11 justices or before all 20 justices in a plenary session. Grand Chamber or plenary session is applicable in

- *cases giving rise to questions concerning the setting aside of a legal interpretation that the Supreme Court has used as a basis in another case,*
- *cases giving rise to questions of conflict between statutory law or other decisions by the Norwegian Parliament, and the Constitution or provisions in conventions to which Norway is bound (e.g. the ECHR).*

After an oral hearing before the Supreme Court in an ordinary session with five justices, transfer to Grand Chamber or plenary session is still an option. The statutory requirement is that two out of the five justices demands the case shall be brought before Grand Chamber or plenary session, and the Chief Justice then decides which of the two alternatives shall apply for the case.

The above mentioned rules and procedures follows from statutory law, namely The Courts of Justice Act.

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

- No
- Yes

Please refer to the answer to question 3.4.

3.6. If the answer to question 3.5 above is yes, if a judge of the SAC does not agree with the principle affirmed, what can he or she do?

Answers from Norway

- it is not possible to disagree
- it is possible to take a different decision, giving reasons
- a new referral to the Court is necessary

The day after conclusion of the oral hearings, the justices meet for deliberation where each justice presents his or her views on the case. The chair justice begins with the deliberation by giving a thorough presentation of his or her view. The justice who has gone the longest time without writing an opinion is assigned to write the opinion representing the majority or unanimous vote. If this justice does not belong to the majority vote, the writing is assigned to the next in line. The dissenting justices (if any) decides among themselves who is to write the dissenting opinion.

3.7. In order to guarantee the consistency of jurisprudence among the various sections of the SAC or with another Supreme Court, if such exists, are there organizational mechanisms in place to promote this aim (for example, periodical meetings among judges or among presidents)?

- No
- Yes

If the answer is yes, please explain.

3.8. If your judicial system has administrative Courts separated from other Courts (civil ones), which body or Court is entitled to resolve conflicts of jurisdiction between administrative and ordinary courts? (e.g. *Tribunal des Conflits*).

Not applicable.

SESSION II.

THE IMPACT OF DECISIONS OF SUPREME ADMINISTRATIVE COURT ON THE FUTURE DEVELOPMENT OF ADMINISTRATIVE ACTIVITY

1. To what extent does the administrative judgment bind the public administration in the new exercise of its power?

Please explain.

Normally, the question for the Supreme Court is whether an administrative decision is legal – on procedural and/or material grounds - and if the court concludes negative, the

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administrative decision will be ruled void, with binding effect for the parties in the case. In its judgement, the Supreme Court will lay out its understanding of the relevant law, and the merits of the judgement will function as binding precedent pertaining to the interpretation and application of the law. Such precedent is binding to public administration for the future, based on the principle that Supreme Court judgements in general are a primary source of law.

2. Can the decision of an administrative judge influence the work of public administrations even beyond the objective and subjective context of the case decided?

- No
- Yes

Please explain.

Please refer to the answer in II 1.

3. According to regulatory rules or practices, may the effects of an administrative judgment be extended by the administration itself beyond the case decided?

- No
- Yes

Please explain.

The public administration will seek to act and govern in accordance with the relevant law as laid out and interpreted by the Supreme Court.

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS.

1. Is there a specific legal procedure in your system aimed at monitoring and pursuing the full and complete execution of the judgment?

- No
- Yes

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

Answers from Norway

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

The relevant public agency will comply with the ruling of the Supreme Court. This follows from The Constitution, and the principle of division of power, whereby the executive branch shall adhere to the judicial branch.

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

- No
- Yes

Please explain.

Not applicable.

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

- No
- Yes

Please specify.

Not applicable.

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

- No
- Yes

5.1. If the answer above is yes, is it within the jurisdiction of the administrative judge to decide on the action for damages?

Please explain and give an example.

Answers from Norway

No. However, the public agency's counterpart of the administrative decision may sue for damages in regular lawsuit. Simplified, the legal test is as follows: Has the government, with negligence or intent, exercised unlawful authority.

SESSION IV

THE CONSULTATIVE ROLE OF THE SAC (IF EXISTING) AND ITS IMPACT ON ADMINISTRATIVE ACTION.

1. Does the SAC play advisory functions for the government or for the public administration?

- No
- Yes

The Supreme Court may issue statements in connection with the preparatory work in legislation process as part of the normal hearing process, in which all relevant private and governmental parties may voice their opinion to the Parliament on a proposed statutory act.

In addition, it follows from The Constitution article 83 that the Parliament may obtain the opinion of the Supreme Court on points of law. However, the Parliament rarely takes such action - last time was in 1945, when the Parliament consulted the Supreme Court regarding the reopening of the Parliament following the liberation and the end of WW2.

1.1 Where the answer to the above question is yes, please specify the kind of acts to which the advisory functions apply.

(More options are possible)

- primary legislative acts (of parliament or of government)
- governmental and ministerial regulatory acts
- resolution of specific questions on request of a public administration, on the interpretation of a law or in the definition of a specific matter.
- Other

Please specify.

Please refer to the answer in IV 1.

2. The SAC's advice in its consultative role is:

- optional and non binding

Answers from Norway

- mandatory and binding
- mandatory but not binding
- optional and, once required, binding
- it depends on circumstances (please clarify)

3. In exercising its advisory functions, can the SAC consult experts in economics or statistics in order to assess the economic and social impact of regulations?

- No
- Yes
- In certain circumstances only (please specify)

4. Are there forms of collaboration of administrative judges in the activity of the Government or of public administrations? (for example, secondment of individual magistrates to head legislative boards of a Ministry or as members of an independent authority, participation in study commissions, etc.).

- No
- Yes

5. Can the advisory function of the SAC also consist in the resolution of a specific dispute working as an ADR (alternative dispute resolution)?

- No
- Yes