Consiglio di Stato

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"Techniques for the protection of private subjects in contrast with public authorities: actions and remedies – liability and compliance"

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Answers to questionnaire: Cyprus

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"TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE".

INTRODUCTION

The seminar will analyse the types of actions that can be brought before the administrative judge: action of annulment, action of declaration and action of condemnation. With particular reference to the latter, the seminar will focus on compensatory measures, including damages for loss of opportunity and damages as a result of delay.

The seminar also intends to examine the possibility of any and eventual special or fast-track procedure, for introductory terms and methods which pertain to certain subjects under consideration, for example, for their economic or political relevance, such as those to be found in the sphere of public contracts (see also transversal analysis).

The aim of this questionnaire and of the subsequent seminar is to provide a wider comprehension of the similarities and differences that exist among the various legal systems of the member States insofar as they apply to the situations to be dealt with by the administrative court, paying particular attention to the content and subject matter of the relative rulings.

SESSION I

LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

1. **In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?**
   - An ordinary judge
   - An administrative judge
   - A judge who deals with special areas
   - Others

By virtue of Article 146.1 of the Constitution, jurisdiction to review administrative action is vested exclusively in the Administrative Court at first instance and on appeal in the Supreme Court. No other court can assume directly or indirectly jurisdiction to review acts, decisions or omissions of public authorities.

In this context both the first instance as well as the last instance court have jurisdiction to review, acts, decisions and omissions of public authorities, emanating solely, from the exercise of powers in the public domain. The test to determine whether an act or decision is justiciable under Article 146 revolves around the primary object of the act or decision. Hence, if the decision is primarily aimed at promoting a public purpose, it falls in the domain of public law. Acts of public authorities that emanate from the exercise of the powers in the private domain, are not amenable to judicial review before the aforementioned courts.

2. **Which actions can be brought before the administrative court in view of the exercise of administrative powers?**
   - Annulment of administrative acts
   - action of condemnation
   - Other actions

If you have replied 'other actions', please clarify which.

The following actions can be lodged before an administrative judge:

- Recourse for the Court to declare, either in whole or in part, that the decision or act to be null and void and of no effect whatsoever (Article 146.4. of the Constitution) (annulment of an act);
- Recourse for the Court to declare that the omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed (Article 146.4. of the Constitution) (renunciation of an omission);
- Recourse under Article 146 of the Constitution against the administration's omission to respond to a complaint made pursuant to Article 29 of the Constitution (renunciation of an omission). In this context, the omission can only be contested if the subject of the complaint falls within the jurisdiction of the Administrative Court, pursuant to Article 146.1 (for non-justiciable acts please see response to Question 4 below);
- Recourse for the Court to amend, either in whole or in part, the decision or act, subject to the provisions of the law, and provided that the decision or act concerns tax matters or international asylum procedures under European Union law (Article 146.4. of the Constitution);

- Application for an interim order for stay of execution (to suspend the enforcement/effects of the administrative act or decision) after the recourse has been lodged before the Administrative Court;
- Application for an interim order for stay of execution (to suspend the enforcement of the appealed first instance judgment).

Judgments of the first instance courts (Administrative Court and Administrative Court of International Protection) can be challenged before the Supreme Court on points of law, only.

3. **From which sources can actions be ~~proposed~~ brought before the administrative court?**
   - Law
   - Public authority regulations
   - Guidelines
   - Supreme Court rulings
   - Other

All aforementioned legal actions brought before the Courts of administrative jurisdiction, derive from the Constitution, the Administrative Court Law of 2015 L. 131(I)/2015, Administrative Court of International Protection Law of 2018 L. 73(I)/2018 and Rules of Court such as the Supreme Constitutional Court Rules of Court (Rules of Procedure) of 1962 (Rule 13 - the Power of granting provisional orders) and the Administrative Court Rules of Court of 2015 (Rule 2).

4. **Which administrative decisions can be challenged?**
   - Administrative acts which have a specific recipient
   - General acts and regulations
   - Acts inherent to the procedure
   - Political acts

Individual acts can be challenged before the Courts of administrative jurisdiction. Unlike individual acts, general ones, i.e. regulations, are not susceptible to judicial review because of their legislative content. They contain rules of a general nature to be applied to existing and future cases. Their legality can only be tested when the competent court reviews the legality of an individual act, decision or omission. A decision based on an ultra vires regulation will be annulled by the court.

The following acts/decisions are not amenable to judicial review:

- administrative acts that fall in the domain of private law,
- preparatory acts of Administration,
- confirmatory acts, opinions and information of the Administration,
- decisions that have been revoked (in addition, a recourse instituted before the administrative court will be rejected as unfounded if the administrative decision was revoked in the mid time, unless a claim for damages under Article 146.6 of the Constitution, arises),
- administrative measures of internal nature,
- acts of government (actes de gouvernement),
- decisions of the President of the Republic in the exercise of the prerogative of mercy, entitling the President to remit, suspend or commute a sentence of a court of law with the consent of the Attorney-General,
- decisions of the Attorney-General to initiate; discontinue or withdraw criminal proceedings,
- decisions of the Supreme Council of Judicature,
- regulations and by-laws issued by an organ of the Executive,
- policy decisions of administrative authorities.
- acts of the legislature and the judiciary,
- policy decisions of administrative authorities,
- electoral acts,
- collective agreements.

5. **On the grounds of which defects can the annulment of an administrative act be requested?**
   - Breaches of the law
   - Breaches of competence
   - Technicalities and procedural defects
   - Breaches of general principles
   - Other

All of the above apply.

Paragraph 1 of Article 146 of the Constitution sets out four grounds upon which annulment is justified: (i) failure to comply with the Constitution, (ii) failure to comply with the Law, (iii) acting in excess of or (iv) in abuse of powers. Challenges for annulment under the first three headings include, inter alia, lack of competence or jurisdiction, errors or misconception of law or fact, lack of proper

enquiry – that is, failure to ascertain the facts properly –, lack of due reasoning and failure to comply with the rules of natural justice and good administration. Challenges under the fourth head include the use of legal power to achieve a purpose not contemplated by the law. Should the recourse succeed, the power of the court is confined to declaring an act or decision null or void, or, in the case of an omission, that it ought not to have occurred, so that what had not been done should now be done (Article 146.4). Two exceptions exist. For further details please see response to Question 7.

Furthermore, the **General Principles of Administrative Law, Law of 1999** codified the case law of the Supreme Court into a statute with the primary aim to safeguard decision-making, by the provision of rules. The statute incorporates the principles of fairness, competence, proper administration- bona fide and proportionality, legality, representation, natural justice- impartiality and right to be heard, equality, right to judicial review and to an appeal.

6. **Can the judge partially annul the challenged administrative act?**
   - Yes
   - No

If your reply is yes, please elaborate.

Yes, the Administrative Court as well as the Supreme Court may partially annul the contested administrative decision/act or may even declare that the omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed (Article 146.4. of the Constitution). Please see response to Question 2 for further details.

This, however, depends on whether the administrative decision/act is divisible or not. If the separation of the legitimate part of the administrative decision from the illegitimate/illegal part is feasible, then, the court will declare the decision partially null. Otherwise, the administrative decision will be annulled in whole.

7. **Can the judge substitute the Administration by modifying the content of the administrative act?**
   - Yes
   - No

If your reply is yes, please elaborate.

The role of the Courts of administrative jurisdiction is limited to testing the legality and not the correctness of the decisions from the point of view of the judiciary. The Court will not substitute itself for the decision maker nor will it amend the decision that has been challenged before it.

The jurisdiction is a 'revisional' one; the competent court acting under Article 146 of the Constitution has no power to annul the decision because it takes a different view of the merits of the decision. So long as the public authority acts within the parameters of the law, in furtherance of its purposes and according to the principles of good administration, the authority trusted with the power to determine a given matter is the sole arbiter of its decisions. Any choice between alternative course rests entirely with it. The Court will only intervene if, after taking into account all the facts of the case, it concludes that the findings of the public authority are not reasonably sustainable, or they are the result of an error of fact or law or are in excess of its discretionary powers or has acted ultra vires or in an illegal manner.

Two exceptions lie. The Administrative Court is empowered to test both the legality and the substance of the matter (merits/correctness) of the contested decisions or acts that concern tax matters (sections 11(2) and 11(4) of the Administrative Court Law, L. 131(I)/2015). Similarly, the Administrative Court of International Protection is empowered to test both the legality and the substance of the matter (merits/correctness) of the contested decisions or acts that concern the Refugees Law (section 11(3) of the Administrative Court of International Protection Law of 2018, L. 73(I)/2018). It follows that, under these provisions, the aforementioned Courts can amend a decision or act, either in whole or in part, subject to the provisions of the law.

Judgments of the Administrative Court and of the Administrative Court of International Protection can be challenged before the Supreme Court on points of law, only.

8. **When the judge annuls the challenged act, can he dictate provisions which the P.A. must abide by in the review proceedings of the subject-matter of the litigation?**
   - Yes
   - No

If your reply is affirmative, please elaborate.

By virtue of the provisions of **section 59(1) of the General Principles of Administrative Law Act of 1999**, a decision of the Court annulling an administrative act/decision operates *erga omnes* -binds all - both the applicant and the administrative body. For this reason, the administrative body, is duty-bound with an extra, positive obligation to give effect to the court's decision (active compliance), i.e. to eradicate the decision and remove its effects with a view to restore the status quo ante as well as to re-examine its decision bound by the judgment's *ratio* (Article 146.5 of the Constitution and Sections 57 and 58 of the General Principles of Administrative Law, Law of 1999).

Also, by virtue of **section 59(2)** of the **General Principles of Administrative Law, Act of 1999** Administrative authorities are bound by the order of the Court as well as the dictum of the judgment in relation to the legal and factual findings. For example, if the court annuls an administrative decision concerning appointments or promotions of civil servants, this does not mean that in re-examining its decision, the administration should appoint or promote the successful-to-the-recourse/appeal applicant. However, if the court finds that the applicant had striking superiority over the person who was appointed or promoted, then the administration is bound by the court's said positive, operative finding when it re-examines its decision.

In other words, the *ratio decidendi* of the judgment is binding, unlike *obiter dictum*. Any observations of the Court and any explanations given on legal principles which are not necessary for resolving the dispute (non-trial issues) are regarded as *obiter dictum* and are therefore non-binding; do not have the force of res judicata and hence, the administration is not bound by them. However, as a matter of fact the administration does take them into account in the re-examination of its decision.

The administration is duty-bound to give effect to the decision of the Court, correctly and timely. Otherwise, if it issues a new decision in breach of the Court's *ratio decidendi*, the legal and factual findings and the *res judicata,* an aggrieved person may challenge the re-examined decision, anew, for breach of the res judicata and for violation of Article 146.5. of the Constitution that imposes the duty of active compliance on the administration.

9. **When do the effects of the jurisdictional annulment of an administrative act become applicable?**
   - From the date of the adoption of the act (*ex tunc*)

- From the date on which the judgement becomes final (*ex nunc*)
- Other

A decision of the Court annulling an administrative act/decision operates retroactively. The administrative body is duty-bound with the obligation to give effect to the court's decision (active compliance), to eradicate the decision and to remove its effects with a view to restore the status quo ante.

10. **Can the judge modulate the effects over time of the ruling of annulment of an administrative act?**
    - Yes
    - No
    - Other

A decision of the Court annulling an administrative act/decision operates retroactively. Please see response given to Question 9.

As previously mentioned though, the court has the power to partially annul an administrative decision, provided that the decision is divisible and pleaded as such. For example, if an administrative decision armoured with retroactive force has been contested before the court, e.g. a decision for the retroactive promotion of a civil servant, the court may confirm (validate) the decision to promote but may annul the retroactive force given to the promotion.

11. **Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?**
    - Yes
    - No
    - Only in certain cases

If your reply is yes, please elaborate

Damages can only be awarded by the civil courts. The Administrative Court cannot award damages.

Under **Article 146.6 of the Constitution** an aggrieved person who has suffered damages on account of an annulled decision (there must be a direct nexus between the two), may seek compensation or another remedy and recover just

and equitable damages to be assessed by a Civil Court or to be granted such other equitable remedy as the Civil Court is empowered to grant. The liability of the State under Article 146.6 is interwoven with the duty of the State to restore legality upon the annulment of an illegal act, decision or omission. The voidance alone or the renunciation of an omission does not confer a right to damages per se. The right to compensation arises whenever, despite the restoration of the status quo ante, there is a residue of damage.

By virtue of settled precedent law, the right to damages arises if the claim is not satisfied by the authority responsible for the annulled decision.

12. **In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?**
    - Implementation of an illegal and detrimental administrative act
    - Non-observance of the deadline of the procedure
    - Lesion of good faith and trust
    - Resultant behaviour of the public administration
    - Other

Please elaborate

The dispute for damages is a civil one, for which the appropriate Courts are the Civil Courts, which are bound as to the decided matter by the Administrative Court/Supreme Court, for which there is a res judicata from its decision. (For the legal grounds of annulment before the Administrative Court, please see response to Question 5).

The Administrative Court not having decided on the rights of the applicant accrued by it and the respective obligations of the administration, does not adjudge monetary payments. This is because the administrative judge only tests the legality of an administrative act.

The obligation of the administration to strict, active compliance to an annulling judgment, delivered on an already executed act, consists of the elimination of its results, i.e. the restoration of the previous actual situation. The restoration must be complete, i.e. it must include all the results injurious to the applicant from the start. But the restoration does not include the restoration of material damage.

The right to compensation arises whenever, despite the restoration of the status quo ante, there is a residue of damage and only if the claim is not satisfied by the authority responsible for the annulled decision. Only then a civil dispute for damages arises for which the appropriate Courts are the Civil Courts.

13. Which are the different kinds of reimbursable damages?

- Material damage
- Non-material damage
- Loss of opportunity

Reiterating from above, damages can only be awarded by the civil courts. The Administrative Court cannot award damages. An aggrieved person who has suffered damages on account of an annulled decision (there must be a direct nexus between the two), may seek compensation or another remedy and recover just and equitable damages to be assessed by a Civil Court or to be granted such other equitable remedy as the Civil Court is empowered to grant (Article 146.6 of the Constitution). The right to damages arises if the claim is not satisfied by the public authority responsible for the annulled decision.

Therefore, a number of preconditions must co-exist:

- The decision of the administration has been annulled/voided or the omission has been renunciated by the administrative judge,
- The administration is duty-bound to active compliance: restoring the status quo antes and re-examining its decision (Article 146.5 of the Constitution),
- Despite the restoration of the status quo ante, there is a residue of damage.
- The aggrieved has made a claim for compensation to the public authority responsible for the annulled decision and the claim was not satisfied,
- A direct nexus between the harm suffered (residue of damage) and the annulled decision must exist. The harm must have been caused by the annulled decision or arises as a direct result of it.

Just and equitable damages under Article 146.6 of the Constitution does not mean *restitutio ad integrum* (whole, material restitution of the aggrieved). It is a *sui generis* type of compensation.

Also, every damage claimed must have a direct nexus to the annulled decision (it does not arise *ipso facto*) and the liability of the aggrieved in mitigating the loss is a factor taken into account by the court.

Just and equitable damages are awarded if the annulled decision has been proven detrimental to the claimant. In calculating the amount to be awarded the court takes into account all relevant factors.

In light of the above, the Civil courts can award, inter alia, material damages for loss or harm, pecuniary damages e.g. for loss of expectational profit due to loss of opportunity and equitable remedies (judicial remedies at common law, eg. estoppel by contact or estoppel in pais).

14. **Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?**
    - Yes
    - No
    - Other

There must be a direct nexus between the administrative act/decision being annulled and the claim for damages. As aforementioned, damages can only be claimed by an aggrieved person, under **Article 146.6 of the Constitution**, before a Civil Court, on account of an annulled decision.

Since the declaration of the administrative act as null and void is one of the preconditions, if an aggrieved person did not institute proceedings by way of a recourse before the Administrative Court, within the prescribed by the Constitution strict timeframe, the administrative act/decision was not hence challenged, nor adjudicated nor declared null and void by the administrative judge. In such circumstances, the aggrieved does not have an actionable claim for damages before a Civil Court.

15. **In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?**
    - Yes – the party with burden of proof is…
    - No

Given that all preconditions for making a claim for damages before the Civil Courts must be satisfied, including that the administrative decision was declared

null and void by the administrative court or the appellate court of administrative jurisdiction (please see answer to Question 13 above for the preconditions), the claimant has the burden of proof to prove that the administration did not satisfy his/her claim/demand for damages. He/she must also prove that those damages were caused by or have resulted from the annulled decision. Similarly, the burden of proof is on the claimant to satisfy the court that despite the restoration of the status quo ante, there is a residue of damage.

In situations where the administrative decision has been revoked, after the aggrieved has instituted proceedings before the administrative court, he/she must prove before the administrative court that a claim for damages, under Article 146.6 of the Constitution, arises in order for the recourse to continue and not be rejected by the administrative court as unfounded.

16. Can the judge convert *ex officio* one action into another?

- Yes
- No

If the reply is yes, please elaborate

No, the administrative judge cannot convert one legal action into another. The proceedings are conducted based on the pleadings and the legal grounds/issues pleaded therewith.

As regards, proceedings of administrative jurisdiction before the Supreme Court, all appeals must be brought by written notice of appeal filed and must abide to certain rules; such as, the notice must state all the grounds of appeal and set forth fully the reasons relied upon for the grounds stated, on separate paragraphs followed by the justification for each ground (Order 35, r.4 of Civil Procedure Rules). Grounds not stated in the notice of appeal will not be dealt by the Court if they are raised for the first time in the written submissions. Likewise, grounds of appeal stated in the notice of appeal which are not further argued in the written submissions are rendered forsaken. Similarly, points of law not pleaded clearly, remain unjustified and unsusceptible to judicial scrutiny[1]. The court can only

[1] Pavlides v. AHK, Case No. 227/2007, 20/3/2008, Stavros Zaharia v. Republic (2011) 3A C.L.R. 293

allow the amendment of the pleadings either by application or ex proprio motu for immaterial irregularities (e.g. typing mistake) or for a mistake due to inadvertence.

Only grounds of public order are raised by the Court on its own motion[2].

Public order grounds raised ex proprio motu, include the following:

(a) By virtue of Article 146 of the Constitution and the provisions of the Administrative Law Principles, Act of 1999, certain preconditions must co-exist for a person to file a judicial review application. All of them are assessed by the Court ex proprio motu and are as follows:

- The decision must have been taken by an organ, or authority or person exercising executive or administrative authority in the domain of public law.
- The executory nature of the administrative decision; that is an action expressive of the will of the administrative body.
- Judicial review may only be brought by an applicant who has an existing and direct legitimate interest in the matter.
- Strict time limitation conditions.

(b) Further to the above, the Court may raise the following points of law ex proprio motu:

- The Supreme Court, by virtue of Article 134.2 of the Constitution and Rule 10(i) of the Procedure Rules of 1996, may strike out any appeal that appears to be prima facie frivolous, after hearing the parties' arguments and may dismiss it if satisfied that it is in fact frivolous.
- Validation of the notification of the administrative decision to parties affected and the information necessary to fix an affected party with knowledge.
- The decision was taken by a non-competent authority.
- Breach of statutory provisions (procedural impropriety).
- Unlawful composition of the administrative authority.

[2] Avraamidou v. CYBC (2008) 3 C.L.R. 88, Republic v. Koukkouri and others (1993) 3 C.L.R. 598, Raju Banik v. Refugees Review Authority (2012) 3 C.L.R. 50, Georghios Economides v. Republic (1998) 3 C.L.R. 47, 52, Lavar Shipping Ltd v. Republic (2013) 3 C.L.R. 260, Triantafyllides and others v. Republic (1993) 3 C.L.R. 429, 439, Kyprianou v. Republic (1993) 3 C.L.R. 510, 516

Lastly, it is settled precedent law that issues not raised during the proceedings at first instance cannot be raised for the first time on appeal, with the exception of public order grounds that may be raised by the court on its own motion[3].

17. Is there a time-limit for the proposition of the compensatory action?

- Yes
- No

If the reply is yes, please elaborate

There is no statutory time-limit for bringing a claim for damages to the Civil court. Despite the enactment of the Limitation Law of 2012, L. 66(I)/2012, this particular cause of action does not fall under its provisions.

Since the Administrative Court does not adjudge monetary payments, a claim for damages must be instituted before the Civil Courts.

However, an actionable cause for damages pursuant to Article 146.6. of the Constitution only arises if the following conditions co-exist:

- The decision of the administration has been annulled/voided or the omission has been renunciated by the administrative judge,
- The administration is duty-bound to active compliance: restoring the status quo antes and re-examining its decision (Article 146.5 of the Constitution),
- Despite the restoration of the status quo ante, there is a residue of damage.
- The aggrieved has made a claim for compensation to the public authority responsible for the annulled decision and the claim was not satisfied,
- A direct nexus between the harm suffered (residue of damage) and the annulled decision must exist. The harm must have been caused by the annulled decision or arises as a direct result of it.

Due to the fact that the above conditions need to be met, before making a civil claim for damages, some claims are brought before the Civil courts, prematurely and are hence, ruled as such.

[3] Avraamidou v. CYBC (2008) 3 C.L.R. 88, Republic v. Koukkouri and others (1993) 3 C.L.R. 598, Raju Banik v. Refugees Review Authority (2012) 3 C.L.R. 50, Georghios Economides v. Republic (1998) 3 C.L.R. 47, 52, Lavar Shipping Ltd v. Republic (2013) 3 C.L.R. 260, Triantafyllides and others v. Republic (1993) 3 C.L.R. 429, 439, Kyprianou v. Republic (1993) 3 C.L.R. 510, 516

18. **Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?**
    - Yes – explain
    - No

Under Article 146.4 of the Constitution the Court may:

- Confirm, either in whole or in part, the decision, act or omission; or
- Declare, either in whole or in part, the decision or act to be null and void and of no effect whatsoever; or
- Declare that the omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed; or
- Amend, either in whole or in part, the decision or act, subject to the provisions of the law, and provided that the decision or act concerns tax matters or international asylum procedures under European Union law.

In light of the above, when the administrative judge annuls an administrative decision/act, he or she will not indicate to the public authority how the decision/act should have been nor can it indicate the content of the new decision to be taken after the public authority re-examines its decision, at the active compliance stage. Only in tax or asylum cases can the Administrative court annul and modify a decision of a public authority.

SESSION II – SPECIAL PROCEDURES

1. **Does your administration have provisions for special procedures**
    - Yes
    - No

If the reply is yes, please elaborate

The following special procedures can be identified:

- **Hierarchical recourses**: Sometimes, by virtue of relevant statutory provisions, the decisions of certain administrative authorities, can first be challenged before a higher administrative authority, by way of a hierarchical recourse. This can be done before instituting judicial proceedings. This procedure is not final or conclusive; an aggrieved person

may then contest the decision of the Higher Administrative Authority before the Administrative Court at first instance and before the Supreme Court on appeal. Usually, the hierarchical recourse is not a prerequisite before lodging a recourse to the Administrative Court (e.g. for public tenders – before lodging a claim to the Administrative Court an aggrieved person could first lodge a hierarchical recourse before the Tenders Review Authority) but in certain situations, the relevant piece of legislation, makes it a precondition.

- **Inspection of the administrative documents** after the recourse has been instituted.
- **Article 29 complaints**: Complaint made to a public authority under **Article 29 of the Constitution.**
- **Active compliance** of the administration to give effect to the court's judgment by which an administrative act/decision has been annulled.
- **Claim for damages** made by the aggrieved to the administration for residual damage incurred on account of an annulled decision.
- **Interim orders issued by the Courts**: The Supreme Constitutional Court Rules of Court (Rules of Procedure) of 1962 (Rule 13) and the Administrative Court Rules of Court of 2015 (Rule 2), provide the procedure for granting interim orders after a recourse/appeal has been lodged.

2. **What do the specialities consist of?**
   - Ways of introducing the appeal
   - Procedural time-limits
   - Jurisdiction of the court
   - Other

Hierarchical recourses take place before the competent Higher Administrative Authority. Specific timeframes for lodging a hierarchical recourse apply, which are usually abridged (e.g. the timeframe for lodging a hierarchical recourse before the Tenders Review Authority is 15 days).

Similarly, an aggrieved person may lodge a recourse under Article 146 of the Constitution against the administration's omission to respond to a complaint made pursuant to Article 29 of the Constitution if the subject matter of the complaint falls within the jurisdiction of the Administrative Court (justiciable act under Article 146.1 of the Constitution). By virtue of the provisions of Article 29

of the Constitution, an authority must respond to a complaint within 30 days (indicative time-limit).

Provided that the administration does not satisfy an aggrieved person's demand for damages on account of an annulled decision, a civil claim for damages for residual damage incurred can only be awarded by the civil courts (provided that all preconditions mentioned in our response to Question 13 and 17 of Session I, are satisfied). The Administrative Court cannot award damages.

Interim orders issued by the Courts adhere to a fast-track procedure of urgency. Under Rule 13 of the Supreme Constitutional Court Rules of Court of 1962 (Rules of Procedure) and Rule 2 of the Administrative Court Rules of Court of 2015, an interim order may be granted by the court on its own motion or by a party's application. It may, even, be granted without notice as a matter of urgency or other exceptional circumstances. However, if granted without notice, the order must be served immediately upon all affected parties for any objections to be filed. If objections are filed and once, they are, the Court will hear all parties and may annul, amend or uphold the interim order. All decisions / orders of the Courts must be well-reasoned pursuant to the provisions of Article 30.2. of the Constitution.

3. **The special rites are established:**
   - According to subject (for example, tenders, procedures of expropriation, independent administration authorities)
   - According to actions
   - Both of the above

Please elaborate

The procedure of hierarchical recourses is followed when the relevant piece of legislation provides for it or makes it a precondition before lodging a recourse to the Administrative Court). Public tenders are one such example; a hierarchical recourse can be lodged before the Tenders Review Authority. Nevertheless, an aggrieved may challenge the decision directly before the Administrative Court, without following the hierarchical recourse procedure first. In that respect, hierarchical recourses are filed before the competent higher administrative authority, solely for certain areas of law, as the relevant piece of legislation provides.

Other special procedures, depend on the type of action sought, e.g. interim orders or for contempt of court.

The rest of the procedures, i.e. (a) inspection of administrative documents, (b) active compliance of the administration, (c) claims made to the administration, for damages, on account of an annulled decision and (d) Article 29 complaints, do not relate to specific areas of law or to the type of action sought. They apply to all administrative proceedings.

4. **Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?**
   - Yes
   - No

If the reply is yes, please elaborate

An aggrieved person may lodge a recourse under Article 146 of the Constitution against the administration's omission to respond to a complaint made pursuant to Article 29 of the Constitution. By virtue of the provisions of Article 29 of the Constitution, an authority must respond to a complaint within 30 days.

Similarly, a recourse under Article 146 of the Constitution may be lodged against an omission of any executive or administrative authority which is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

Such recourses must be made within seventy-five (75) days from the day the omission came to the knowledge of the person filing the recourse.

5. **Do the Administrations comply spontaneously with the decisions of the administrative courts?**
   - Yes, always
   - No, never
   - In the majority of cases, in any case more than in 50% of cases
   - Hardly ever, in any case less than in 50% of cases

The administration is duty-bound to give effect to the decision of the Court, correctly and timely.

Article 146.5 of the Constitution and **sections 57** and **58** of the **General Principles of Administrative Law, Law of 1999** impose an obligation on public bodies to give effect to judgments delivered under **Article 146 of the Constitution**.

More specifically, as stipulated by section 59 of the General Principles of Administrative Law, Law of 1999, judgments issued are final and will acquire the force of res judicata. Furthermore, according to the provisions of **section 59(1) of the General Principles of Administrative Law Act of 1999**, a decision of the Court annulling an administrative act/decision operates *erga omnes* -binds all; both the applicant and the administrative body. The administrative body, however, has a positive obligation to give effect to the court's decision (active compliance), i.e. to eradicate the decision and remove its effects with a view to restore the status quo ante as well as to re-examine its decision bound by the judgment's *ratio* (Article 146.5 of the Constitution and Sections 57 and 58 of the General Principles of Administrative Law, Law of 1999). By virtue of **section 59(2)** of the **General Principles of Administrative Law, Act of 1999** administrative authorities are bound by the order of the Court as well as the dictum of the judgment in relation to the legal and factual findings.

By virtue of **Article 146.5A of the Constitution**, both the Administrative Court and the Supreme Court are empowered to assess whether effect has been given to their decisions and if not, impose sanctions accordingly, in so far as statute law prescribes. Until now, no statute has been enacted to regulate the aforementioned constitutional provision. In practice, judgments against administrative bodies are always complied with.

Furthermore, an aggrieved person has the right to file, anew, a recourse to the Administrative Court for a declaration that the non-compliance must be remedied.

On the other hand, a decision confirming an act/decision of the Administration operates *in personam*, binds the applicant only, rendering the subject matter res judicata between the pursuer and the Administration (*inter partes*).

6. **In your legal system, is there a special procedure for ensuring the integral execution of the sentence**?

   - Yes

   - No

If the reply is yes, please elaborate

- **Final Judgments with the force of res judicata**: By virtue of **Article 146.5A of the Constitution**, both the Administrative Court and the Supreme Court are empowered to assess whether effect has been given to their decisions and if not, impose sanctions accordingly, in so far as statute law prescribes. Until now, no statute has been enacted to regulate the aforementioned constitutional provision. In practice, judgments against administrative bodies are always complied with.
  Furthermore, an aggrieved person has the right to file, anew, a recourse to the Administrative Court for a declaration that the non-compliance must be remedied (i.e. for the court to declare null and void the new administrative act issued after re-examination and which is in contrast with the judgment of the court).

- **Non-final decisions:** Interim orders (provisional orders) for stay of execution are non-final and do not deal with the merits of the case. If disobeyed, then liability may be found for contempt of Court, under **Article 150 of the Constitution**. The power is instrumental in the sustenance of the efficacy of the judicial process[4]. For one to be held in contempt of Court, the court must decide whether an action constitutes contempt. Broadly speaking, contempt is found when disrespect to the Bench is shown or by willfully failing to obey a court decision or order.

7. **Are the judge's decisions which are not of the last resort immediately enforceable?**
   - Yes
   - No

If the reply is yes, please elaborate

[4] Ioannides v. Republic (1971) 3 C.L.R 8.

Yes, the rule of *res judicata* applies to decisions issued by the first instance Administrative Court and therefore, the administration is duty-bound to enforce a first instance judgment annulling its administrative act/decision, unless a stay of execution (suspending enforcement) was requested by a party or was granted by the Administrative Court ex proprio motu. A stay of execution of the first instance judgment may also be granted by the last instance court if appealed.

8. **Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?**

   - Yes – elaborate

   - No

Since the powers of the Courts of administrative jurisdiction are limited to testing the legality and not the correctness of administrative decisions, the Courts examine whether the public authority has exercised its discretionary powers, within lawful limits. Their jurisdiction does not extend:

- to issues of technical nature or issues that require specialised knowledge nor
- do they substitute[5] or reduce the discretionary powers of the administration. The Court examines solely, whether the public authority has exercised its discretionary powers, within lawful limits.

The Court will only intervene if, after taking into account all the facts of the case, it concludes that the findings of the administrative authority are not reasonably

[5] Recourses in relation to tax disputes and asylum provide two exceptions; both the legality and correctness of the administrative decision is reviewed by the court.

sustainable, or they result from an error of fact or law or are in excess of its discretionary powers. In essence, the court reviews the decision in order to ascertain whether:

- there is a clear statutory legitimacy of discretion and its extent,
- the public organ has exercised its discretionary powers,
- there has been sufficient enquiry of all relevant facts for the discretion to have been exercised correctly, reasonably and under no misconception and
- there was due reasoning for the decision.

In light of the above, if the court has annulled an administrative decision because the public authority has abused its discretionary powers, the administration in re-examining its decision is bound by the legal and factual findings of the court (active compliance). If it does not comply, then the aggrieved party can lodge anew a recourse for breach of the res judicata and for violation of Article 146.5. of the Constitution that imposes the duty of active compliance on the administration.

SESSION III – PRECAUTIONARY MEASURES

1. **Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?**
   - Yes
   - No

Filing an appeal against a first instance judgment does not automatically suspend the effects of the first instance judgment which has acquired the force of res judicata.

2. **In your legal system, are precautionary measures provided for?**
   - Yes
   - No

- Stay of execution (suspension) of the contested administrative decision/act requested by a party before the first instance administrative court or ordered by the first instance court on its own motion (Rule 13 of the Supreme Constitutional Court Rules of Court of 1962- the Power of

granting a provisional order and Rule 2 of the Administrative Court Rules of Court of 2015 (Rule 2).

Stay of execution may be granted at any stage of the proceedings even when the judgment is handed down by the Administrative court. It is an exceptional measure because it disrupts the direct enforceability of administrative acts/decisions principle. It may be ordered if the party will suffer serious and irreparable/irrevocable harm/damage either in material or moral terms. The court will rule against stay of execution if such stay will induce a substantial impediment in the proper functioning of the administration even if irreparable harm may be caused to the party (general interest outweighs the individual one). One exception applies and that is if the administrative act/decision is manifestly/flagrantly illegal (meaning self-evident and clearly deduced). In such case, stay of execution will be order even if the proper function of the administration will be disrupted. Flagrant illegality involves a clear violation of the procedure envisaged in the law or unquestionable disregard of the fundamental precepts of administrative law. The notion does not encompass any defective exercise of discretionary powers vested in the public authority. Allegations of flagrant illegality of the administrative act are examined by the court with great caution, otherwise the court might be 'carried away' in deciding on the merits of the recourse and this is by no means acceptable.

- Stay of execution (suspension) of the appealed first instance judgment may be ordered by the first instance administrative judge when delivering/pronouncing his/her judgment. It may also be ordered by the Supreme Court (last instance court) under exceptional circumstances. This means that the court will weigh the effects the first instance decision will have if immediately enforced against any adverse effects in restoring the status quo ante, if the appeal is successful.

  Other reasons, inter alia, that may substantiate/support the issuance of an order for stay of execution:

  - Severity of the case (for example, if constitutional matters are raised),
  - General public interest.

It should be noted that stay of execution of an administrative act can only be ordered for positive and not negative administrative acts. If the Courts of administrative jurisdiction were to order stay of execution against negative administrative decisions that would mean that the court is substituting itself with the administration.

Also, if the recourse was rejected by the Administrative Court, no stay of execution may be requested since there is no declaratory or operative part of the judgment for it to be stayed.

3. **What kinds of decisions can the judge apply as a precautionary measure?**
   - The suspension of the challenged act;
   - (if the subject of the challenge is the refusal of an application) a positive measure which provisionally anticipates the effects of the administrative act being contested;
   - The order to the administration to re-examine the application on the strength of indications contextually provided by the judge;
   - Whatever measure necessary to satisfy, in each case, the precautionary requests presented by both parties

Please see response to Question 2 for stay of execution of challenged acts / appealed first instance decisions.

In as far as active compliance to final decisions of the courts of administrative jurisdiction, by virtue of the provisions of **section 59(1) of the General Principles of Administrative Law Act of 1999**, a decision of the Court annulling an administrative act/decision operates *erga omnes*, binding the administrative authority with the obligation to give effect to the court's decision, i.e. to eradicate the decision and remove its effects with a view to restore the status quo ante as well as to re-examine its decision bound by the judgment's *ratio* (Article 146.5 of the Constitution and Sections 57 and 58 of the General Principles of Administrative Law, Law of 1999). By virtue of **section 59(2)** of the **General Principles of Administrative Law, Act of 1999** Administrative authorities are bound by the order of the Court as well as the dictum of the

judgment in relation to the legal and factual findings. The administration is duty-bound to give effect to the decision of the Court, correctly and timely. Otherwise, if the administration does not uphold its duty to comply with the court's decision or complies in contrast to it then, the aggrieved person may file a new recourse for the aforementioned reasons.

On the other hand, a decision confirming an act/decision of the Administration operates *in personam*, binds the applicant only, rendering the subject matter res judicata between the pursuer and the Administration.

4. **What are the conditions for the acceptance of a precautionary request?**
   - The probable validity of the action
   - The probable validity of the action together with a serious prejudice
   - The prevalence of public or private interest, based on the results of the equilibrium/assessment
   - The required prerequisites of trial law to accord precautionary measures vary according to the different types of litigation
   - Other prerequisites (please specify)

Please see response to Question 2 as regards the conditions on stay of execution before both courts of first and last instance.

Furthermore, if an interim order for stay of execution is disobeyed, proceedings for contempt of Court may be instituted, under **Article 150 of the Constitution**. The power is instrumental in the sustenance of the efficacy of the judicial process[6]. For one to be held in contempt of Court, the court must decide whether an action constitutes contempt. Broadly speaking, contempt is found when disrespect to the Bench is shown or by willfully failing to obey a court decision or order.

5. **Can the judge force the petitioner to pay bail?**
   - Yes
   - No
   - If yes, in which cases?

[6] Ioannides v. Republic (1971) 3 C.L.R 8.

An interim order may be granted pursuant to Rule 13 of the Supreme Constitutional Court Rules of Court of 1962, under such terms that the court deems fit under the circumstances. Payment into court by surety (bail) is at the discretion of the court and may be ordered when issuing an interim order.

6. **Are precautionary measures generic?**
   - Yes
   - No – are there some subjects in which precautionary measures are not admitted? Which?

An application for an interim order may be made or the administrative judge may issue an interim order ex proprio motu, irrespective of parties and of the area of law of the administrative proceedings at hand.

7. **Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?**
   - Yes
   - No

Interim orders for stay of execution are interlocutory, hence proceedings must have been instituted. The recourse challenging the administrative act must have been lodged before filing an application for an order for stay of execution (the application can be filed simultaneously with the recourse) or before the court orders by the court on its own motion. Similarly, for an order of stay of execution to be granted by the Supreme Court, the first instance decision must have been appealed (again the application can be filed simultaneously with the appeal). This is because the interim order for stay of execution is of monitoring character intending to uphold the efficiency of administrative justice and hence, can only be examined by the court in relation to the recourse/appeal.

Having said that, it is also possible for the Administrative judge of first instance to order the stay of execution at the time he/she delivers his/her judgment.

8. **In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?**
   - Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit
   - No, its effectiveness remains intact even if the main trial proceedings have not been initiated within the mandatory time-limit or even if the time-limit has expired

Not applicable. Please see response to Question 7.

9. **When dealing with the precautionary request, does your legal system provide for specific procedure?**
   - Yes (give details of the main characteristics with regard to : trial deadlines, type of decision, motivational burden, ways for establishing debate)
   - No

Under Rule 13 of the Supreme Constitutional Court Rules of Court of 1962 (Rules of Procedure) and Rule 2 of the Administrative Court Rules of Court of 2015, an interim order may be granted by the court on its own motion or by a party's application. It may, even, be granted without notice as a matter of urgency or other exceptional circumstances. However, if granted without notice, the order must be served immediately upon all affected parties for any objections to be filed. If objections are filed and once, they are, the Court will hear all parties and may annul, amend or uphold the interim order.

The procedure therefore, adheres to a fast-track procedure of urgency.

10. **Is the precautionary decision taken unilaterally or collegiately?**
    - Unilaterally;
    - Collegiately;
    - Collegiately, but in the event of extreme urgency, the precautionary decision can be taken temporarily by means of a simple unilateral decree;

Under Rule 13 of the Supreme Constitutional Court Rules of Court of 1962 (Rules of Procedure) and Rule 2 of the Administrative Court Rules of Court of 2015, an interim order may be granted by the court on its own motion or by

application of any party to the proceedings. The application may be made *ex parte* (unilaterally). It may, even, be granted without notice as a matter of urgency or other exceptional circumstances. However, if granted without notice, the order must be served immediately upon all affected parties for any objections to be filed. If objections are filed and once, they are, the Court will hear all parties and may annul, amend or uphold the interim order.

11. **During the discussion of the precautionary request, can the judge directly define the judgement on the merit?**
    - Yes (explain in which conditions)
    - No

Absolutely not. It is explicitly provided in Rule 13 of the Supreme Constitutional Court Rules of Court of 1962 that the court, when issuing an interim order cannot deal with the merits of the case. The court will only deal with the merits at the stage of the recourse/appeal's final determination.

12. **Can precautionary measures be challenged before the Supreme Court /Council of State?**
    - Yes
    - Yes, but only if they pass a test of eligibility
    - No

An appeal can be lodged before the Supreme Court against a decision of the first instance court as regards an application for an interim order for stay of execution of the administrative act. All judgments of the court, either interim or final, can be appealed if they are determinative of the rights of the parties. The appeal must concern the *ratio decidendi* of the first instance judgment and not the *obiter dictum*. In addition, it is also possible to challenge the interim decision of the first instance court (on an interim order application) before the appellate court, in an appeal lodged against the final first instance judgment.

Furthermore, if an interim order for stay of execution is disobeyed, proceedings for contempt of Court may be instituted, under **Article 150 of the Constitution**. The power is instrumental in the sustenance of the efficacy of the judicial process[7]. For one to be held in contempt of Court, the court must

[7] Ioannides v. Republic (1971) 3 C.L.R 8.

decide whether an action constitutes contempt. Broadly speaking, contempt is found when disrespect to the Bench is shown or by willfully failing to obey a court decision or order.

13. **Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?**
    - Yes
    - No

Stay of execution (suspension) of the appealed first instance judgment (final decision on the merits of the first instance court) may be ordered by the Supreme Court (last instance court) ex proprio motu or by an application. It may be ordered under exceptional circumstances. This means that the court will weigh the immediate effects of the enforcement of the first instance decision against any adverse effects in restoring the status quo ante, if the appeal is successful.

However, if the recourse was rejected by the Administrative Court, no stay of execution may be requested since there is no declaratory or operative part of the judgment for it to be stayed.

14. **On average, how many precautionary decisions are taken every year by the Supreme Court/ Council of State in comparison to the overall number of decisions taken?**

No such data is held.

Ms Justice Lena Demetriades-Andreou

Supreme Court of Cyprus