



Consiglio di Stato



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

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

Rome, 23 May 2022

Answers to questionnaire: Slovenia



**Co-funded by
the European Union**

“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

The Administrative Court as a specialized court provides legal protection of persons in administrative disputes in the first instance. It has the status of a higher court. The judges who review administrative acts do not belong to a specific category. Administrative Dispute Act¹ (hereinafter ADA-1) stipulates, that the provisions of the Judicial Service Act (which in general regulates judicial service) also apply to the office, election, appointment or dismissal of Administrative Court judge. There is a special criteria, that one must fulfil to be elected as an Administrative Court judge. That criteria, stipulated by ADA-1, is, that a person has to meet conditions set for high court judge or, in addition to the general requirements for the election to the office of a judge, also has to have at least ten years of experience in making decisions in administrative matters.

¹ Act on Administrative Dispute (Official Gazette RS, No. 50/97, 65/97 – amended and 70/00), now replaced with a new Act on Administrative Dispute (ZUS-1, Official Gazette RS, No. 105/06, 62/10, 109/12 and 10/17).

The competence of Administrative court is limited to public law disputes. Private law disputes, including cases where the plaintiff claims damages inflicted to him by public authorities in exercise of their judicial functions, fall within the competence of ordinary 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.

Pursuant to the Paragraph 1 of the Article 33 of the ADA-1 an action may include the following claims: annulment of the administrative act (challenging action), establishment of illegality of an administrative act that infringed on the plaintiff's rights or legal benefits (declaratory action), issuing or service of an administrative act (action due to silence), amendments to an administrative act (action in a dispute of full jurisdiction).

In cases of infringement of human rights and fundamental freedoms, the following may be requested (Paragraph 2 of the Article 33): annulment, issuing or amendment of a particular act, establishment that the individual act has illegally infringed on the human rights or fundamental freedoms of the claimant, prohibiting the continuation of the individual act and elimination of the consequences of the individual act. In this case the possible actions can be extensive and varied, depending on the subject-matter of a particular case.

In an administrative dispute the claimant may also claim the return of seized items and compensation for damages caused by the execution of the contested administrative act, but only together with one of the actions mentioned above. The decision about such a claim can be referred to ordinary courts after the judgement about the main action is issued, if the matter would unduly burden the decision making of Administrative court.

3. From which sources can actions be brought before the administrative court?

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

According to the ADA-1 an administrative dispute begins with an action or other legal remedy, if so provided by the law.

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

Any final administrative act that is in substance a decision on rights or obligations of persons (private or legal entities) can be challenged by an appropriate claim in a specialized judicial procedure.

An administrative act according to the ADA-1 is an administrative decision and other public law, unilateral, authoritative individual act, issued within the framework of implementing administrative function, in which a body makes a decision on a right, obligation or legal benefit of an individual or legal entity, or of any other person who may be party to the proceeding of issuing the act. The Constitutional Court stressed in a recent case that the state has to act through administrative acts for its decisions *ex iure imperii* to have a legally valid effect. If the State uses another form of action contrary to the law, there can be no change in rights and obligations of individuals and legal entities.

In an administrative dispute, the court also adjudicates on the legality of individual acts and actions, which interfere with the constitutional rights of an individual, unless a different form of judicial protection has been guaranteed.

Acts adopted by state authorities and issued in the form of a regulation can be subjected to judicial review in case they regulate individual relations.

Decisions adopted by the representatives of judicial and legislative authorities in order to exercise their constitutional powers, as well as acts adopted by the holders of executive powers based on political discretion granted under constitutional and legal authorisation, are not administrative acts and not subject of judicial review, so they can not be challenged in Administrative court.

Acts, by which an administrative act was annulled, may only be challenged in case the proceedings of deciding upon the subject-matter were concluded by them. Procedural rulings can be subjected to judicial review only if the proceedings were concluded by them.

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

In accordance with the provisions of the Article 27 of the ADA-1 an administrative act may be contested in the following cases:

- if an Act, a regulation based on an Act, or any other legally prescribed regulation or general act issued in order to execute public authority, was not applied or was applied incorrectly in the procedure for issuing an administrative act;
- if, in the procedure prior to the issuing of the administrative act, the rules of the procedure were not applied, and this affected or could have affected the legality or correctness of the decision (substantial violation of procedural provisions);
- if the facts of the case were erroneously or incompletely determined, or if an incorrect conclusion was drawn from the facts that had been determined;
- for reasons for which an administrative act may be proclaimed void.

6. Can the judge partially annul the challenged administrative act?

- Yes
- No

If your reply is yes, please elaborate.

The administrative judge can partially annul an illegitimate act, if the decision on rights or obligations by the administration can be divided in separate parts.

7. Can the judge substitute the Administration by modifying the content of the administrative act?

- Yes
- No

If your reply is yes, please elaborate.

According to the Paragraph 1 of the Article 65 of the ADA-1, the court may annul the act ab initio and decide on the subject matter, if the facts of the case give a reliable basis for such decision or if the court examined the state of facts itself in a main hearing, in particular:

- if the annulment of the act and returning the case for new proceedings would cause to the plaintiff damage difficult to repair or
- if the competent authority issues a new decision after the annulment of the challenged act which is contrary to the legal standpoint of the court or the court's procedural standpoint.

In accordance with the preceding paragraph, the court may also decide where the competent authority does not issue a new administrative act within thirty days of the annulment of the administrative act, or within the time period set by the court, or within seven days of a special request made by the party, if the party demands in an action, that the court adjudicates on a right, obligation or legal benefit and if this is necessary, due to the nature of the right or the protection of a constitutional right.

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.

If the administrative act is annulled, the administrative authority has to issue a new act within a given time-frame, acting in accordance with the instructions (legal reasoning) of the court. The interpretation of material and procedural law is binding for 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

According to the Paragraph 3 of the Article 64 of the ADA-1, by the annulment the case is returned to the state before the acts were issued, therefore retroactively.

10. Can the judge modulate the effects over time of the ruling of annulment of an administrative act?

- Yes
- No
- Other

The ADA-1 does not provide a legal basis for the judge to determine the time-point as to which the annulment would take effect.

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

The question of granting the affected plaintiff damages in cases that the administration has acted unlawfully is a very complex one in the Slovenian legal system. The Constitution guarantees that everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or

authority performing such function or activity within a state or local community authority or as a bearer of public authority. The competence for deciding on this responsibility lies with the courts of general competence, which base their decisions on general provisions of the Civil code. This is valid for all types of actions of public authorities. However the question, whether they have the competence to decide on the legality of an administrative act in these proceedings is still a disputed one, since in principle this competence lies with the Administrative Court and should firstly be challenged in this court. The Administrative Court also has the power to award damages to the plaintiff seeking them, if it finds the administrative act to be unlawful and violating the rights or legitimate interests of the plaintiff. In practice the Administrative Court almost never uses these powers, mainly as a measure to limit its overburdening, so the plaintiff is after the end of administrative dispute – even if his actions are successful and e.g. the administrative act is annulled - directed to lodge his claim with the court of general competence.

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

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

13. Which are the different kinds of reimbursable damages?

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

In the Slovenian legal system, all above mentioned different kinds of damages are relevant for compensatory damages.

14. Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?

- Yes
- No

- Other

There is no special provision in the law regarding consequences of the omission of lodging an action of annulment for the amount of compensation, but in practice the issue is a complex one (see above, answer to question 11).

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

For determining cases on state liability for damages the general civil law applies. The general rule is that the claimant bears the burden of proof. However, the rebuttable presumption of the defendant's fault exists in damage claims.

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

- Yes
- No

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

- Yes
- No

If the reply is yes, please elaborate

Under the provisions of the ADA-1 an action must be filed within thirty days of the receipt of the administrative act. Special laws can stipulate different time-limits for filing an action (for example Asylum act - 15 days or 3 days). Prescribed time-limits for filing an action are explicit and it is not possible for the court to grant an extension. Under the provisions of the General Administrative Procedure Act an administrative act has to contain information on the right of lodging a legal remedy (action) and the prescribed time-limit for doing it. Time-limit determined in days begins to run on the first day after the occurrence (the receipt of the act) and it expires on the last day of the time-limit.

The time-limit for claiming compensation before ordinary courts is determined by general civil code and is three and/or five years.

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

SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

- Yes
- No

If the reply is yes, please elaborate

In ADA-1 the only special procedure is the request for an interim measure (Art. 32). There are special procedures in legislation dealing with specific areas of administrative law (cases regarding international protection, independent regulators, etc).

2. What do the specialities consist of?

- Ways of introducing the appeal
- Procedural time-limits
- Jurisdiction of the court
- Other

With special administrative dispute regulations, entire procedural institutes can be regulated differently, such as procedural time limits (very strict in e. g. election cases), jurisdiction of the court (Supreme Court deciding in first instance), legal remedies, etc. Special administrative disputes can also stipulate different types of decisions, different time-limits for filing an action, etc.

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

Special procedures are (almost always) related to the subject matter and have to be determined by law (as mentioned above). The specifics are related to the urgency of cases (elections cases, interim measures etc) or their complexity (disputes against independent administration authorities).

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

The 'silence of administration' can be a ground to appeal, on the basis of a legal fiction that the party's application was rejected or that the procedural outcome in *ex officio* proceedings was unfavourable. This fiction appears after expiry of a time limit, given to administrative bodies by law to reach a decision, which is one month in simple and two months in complex matters. If the administrative case has not been decided on merits by the administration in three years after the start of the procedure, this action can be brought to Administrative court regardless of other procedural considerations that would otherwise apply (e.g. legal remedies used in public administration procedure, etc.).

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 complies spontaneously with the decisions of the Administrative court in the vast majority of cases. In extremely rare cases the administration tries to argue that the Administrative court has missed an important point of law that has to be observed and that the issue has to be resolved differently, so the case can be subject of a new judicial review in Administrative court.

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

In the Slovenian legal system a specific procedure for the execution of judgments is foreseen (Article 102 and 103 of the ADA-1), albeit only in those cases, where the Administrative Court has decided on the merits of the case itself and resolved the administrative case with a final judgement with an obligation imposed on the administration (in full jurisdiction). If an administrative judgement imposes an obligation on the State the private person (beneficiary) can enforce the implementation of the judgement through separate execution proceedings regulated by Claim Enforcement and Security Act. According to first paragraph of Article 103 of Administrative Dispute Act where execution is enforced against the state, local community or their authorities or organizations, the court competent for the execution under the Claim Enforcement and Security Act shall, prior to issuing the order of execution, inform the authority or organization of the intended execution with an invitation to avoid the execution by a voluntary fulfilment of obligations. The time limit for the voluntary fulfilment

of obligations shall not exceed three months. Certain procedural decision issued, e. g. an interim injunction to temporarily regulate the situation in connection with the contentious legal relationship, are also executed under the provisions of the Claim Enforcement and Security Act. The implementation of other judgements by administrative authorities (following annulment of the administrative act etc.) is regulated in the General Administrative Procedure Act. This is also the case if an obligation is imposed by the administrative judgement on a private person.

7. Are the judge's decisions which are not of the last resort immediately enforceable?

- Yes
- No

If the reply is yes, please elaborate

The decisions of the Administrative Court which are not of the last resort are not immediately enforceable. They become enforceable when they are final, that is, when they can no longer be challenged by an appeal.

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

If the administrative act is annulled, the administrative authority has to issue a new act within a given timeframe, acting in accordance with the instructions (legal reasoning) of the court. If the administrative body is authorised to adopt discretionary decisions (by an Act or local community regulation), the court shall test whether the administrative act is illegal because the limits of discretionary decision-making have been transgressed, and whether the discretionary right was used in a manner that does not suit the purpose for which it was granted. In practice discretionary power can be reduced in exceptional cases where there is an established practice of administration that has to be observed to prevent inequality of treatment of a particular person (plaintiff) and the Administrative court establishes that in its judgment.

SESSION III – PRECAUTIONARY MEASURES

1. Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?

- Yes
- No

The filing of the claim does not suspend the implementation of the challenged administrative act, unless otherwise determined by law for particular cases (Article 32 of the ADA-1).

2. In your legal system, are precautionary measures provided for?

- Yes
- No

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

The court shall, at the request of the plaintiff, suspend the execution of the contested act or temporarily regulate the situation in relation to the disputed legal relationship (Article 32 of the ADA-1).

If the claim is filed against an action interfering with the plaintiff's constitutional rights (Article 4 of the ADA-1), the court shall without delay adjudicate on the prohibition of further interference and measures to establish a legal state of affairs, if the unlawful action is still in force (Article 66 of the ADA-1).

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)

The court shall suspend the execution of the contested act until the issuing of a final decision, if the enforcement of the challenged administrative act would cause the plaintiff damage difficult to repair. In deciding, in accordance with the principle of proportionality, the court shall take into account the damage to the public interest and the interests of counterparties.

If the enforcement of the challenged administrative act would cause the plaintiff damage difficult to repair, the court shall temporarily regulate the situation in relation to the disputed legal relationship, if such regulation, particularly concerning long-term relations, is deemed necessary by the court.

5. Can the judge force the petitioner to pay bail?

- Yes
- No
- If yes, in which cases?

The court may set as a condition the payment of a security deposit for the damage that may arise to the opposing party due to the issuing of the injunction.

6. Are precautionary measures generic?

- Yes
- No – are there some subjects in which precautionary measures are not admitted? Which?

In the Slovenian legal system, precautionary measures do have general application insofar as they can be applied to all types of litigation.

7. Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?

- Yes
- No

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.

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

The decision must be reached in seven days from the filing of the motion. The parties may file an appeal against the order for the temporary injunction, which does not suspend the enforcement of the injunction. The appellate court must decide on the appeal without undue delay and at the latest in 15 days from the filing of the appeal.

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;

11. During the discussion of the precautionary request, can the judge directly define the judgement on the merit?

- Yes (explain in which conditions)
- **No**

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

Precautionary measures can be challenged before the Supreme Court in an appeal procedure.

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

The Supreme Court can, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level or temporarily regulate the situation in relation to the disputed legal relationship.

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?

In the last three-year period (2019-2021), the average number of precautionary rulings was 32. They account for about 15% of total judgments.