Identification of the participant

Nationality: Italian

Functions: Judge of Italian Consiglio di Stato

Length of service: 8 years

Identification of the exchange

Hosting jurisdiction/institution: Supreme Administrative Court of Portugal

City: Lisbon

Country: Portugal

Dates of the exchange: 25 October-3 November 2018

SUMMARY

(see guidelines for drafting the report)

ANNEX

GUIDELINES FOR DRAFTING THE REPORT
I- Programme of the exchange

My study visit to the Supreme Administrative Court lasted from 25 October to 3 November 2018. According to the program of the visit I attended two panel discussions, one before the Administrative section and the other one before the Conflict Court. I was also provided with a general presentation about the role and the making of the Court and, in the same occasion, I had also the chance to give them back a brief overview of the Italian system of administrative justice.

The program included visits to other Courts, such as meetings with their presidents, at the South Court of Appeal, in Lisbon and the Administrative and Tax Court of Sintra, as well as visits to other institutions, such as the Committee of Access to Administrative Documents and the Data protection Authority.

The hosting institution

The Supreme Administrative Court, created in 1870, is the highest judicial authority for the administrative (and tax) litigation in Lisbon. According to the general reform of the Portuguese administrative justice approved on 2002 and came into force in 2004, the administrative jurisdiction is based on three levels: the Supreme administrative Court, the two Court of second instance, located in Lisbon and Porto, and sixteen Courts of first instance. The administrative Courts are been aggregated to the tax courts and together they are called « administrative and tax courts », divided in different chambers.
The administrative courts operate in parallel – and are similar in structure – to the judicial courts, i.e. the ordinary civil and criminal law courts. The administrative courts are generally competent to rule on disputes of a legal administrative nature, although the judicial courts may be competent to hear such cases under certain specific circumstances.

In this context the Supreme Administrative Court takes on the role of rul er of the system, for what concerns administrative cases, with the power and the duty to assure the uniformity of Court decisions, to review the Courts of appeal decision, to solve conflicts between administrative and tax Courts and conflicts between administrative Courts and ordinary (civil) Courts.

Judicial review before the administrative Supreme court against decisions handed down by the administrative courts of appeal is a sort of exception, opened in cases of "fundamental importance" from a legal or social point of view, or when such a review is required for "a better application of the law" (Article 150, CPTA).

Exceptional proceedings may be brought before the plenary session of the Supreme Administrative Court concerning the "standardisation of case law," when a contrary decision has been handed down on the same question of law either by the Administrative Court of Appeal or by a subsection of the Supreme Administrative Court (Article 152, CPTA).

There are other situations, such as of an amount exceeding €3 million in civil liability cases, when the matter may be referred for a judicial review, per saltum, if the parties raise only questions of law (Article 151(1) CPTA).

Certain cases, because of the nature of the authorities who took the administrative decisions (for instance, the President of the Republic, the Council
of Ministers and the Prime Minister), are examined from the outset by the Supreme Administrative Court ruling in a subsection, with the possibility of appeal before the plenary (administrative or fiscal) session – Articles 24 and 26 ETAF

II- The law of the host country

Considering the short term of my exchange, I didn’t have enough time to focus aspects concerning the substantial law of the Portugal, not even in the administrative field. Speaking with some judges I had the confirm that many aspects most influenced by the UE law – like, for example, the law of public procurement – are o can be quite similar to the experience of other European countries, Italy included.

My attention has been more concentrated on procedural law, to understand the way the judicial review works in Portugal, as well as the court are organized for that purpose.

Starting from this last point, as I have already observed, administrative justice in Portugal is based on a three-tier system that shows a strong separation from government. It is important to stress that administrative courts are independent for what concerns the selection, promotion and appointment of judges and that their independence is assured and strengthened by the Superior Council of Administrative and Fiscal Courts, which is the management and disciplinary body. The Superior Council is presided by the President of the Supreme Administrative Court who is elected among the judges of the Supreme Court.

Administrative judges do not give advice to the Government, neither to other public bodies, and, from what I have understood, it’s not allowed them to have
extra judiciary works. From this perspective their model seems to me more similar to the German one of administrative justice rather to the French model. Despite the French influence could be otherwise relevant.

III- The comparative law aspect in your exchange

The main features that I have been able to recognize through my visit show a relevant convergence, for what concerns the procedural law between the Portuguese system and the Italian one. The Code of administrative litigation, approved by the Law 15/2002, offers, as well as the Italian code of few years later, 2010, a variety of remedies, from the classic annulment of acts to the order (injunction) to the public bodies to adopt measures to satisfy the interests of the plaintiff, to pay compensation for damages.

The Portuguese system knows also interim measures, based on the principle of non-typicality of the claims, although the most frequent measure is the suspension of the effects of an administrative determination. It is assured as well the enforcement of decisions of the administrative courts, when the administrative authority fails to comply spontaneously with these decisions, in a similar way of what happened in Italy with what we called « ottemperanza ».

Generally speaking, the administrative Courts conduct their judicial review of the conformity of the actions of the administrative authorities on the basis of legal rules and principles and not on that of (extra-legal) policy considerations or criteria. This rule excludes from the scope of judicial review questions of whether an administrative authority’s decision is “appropriate” or “opportune”.

The same general rule is given in Italian system, although the intensity of judicial review is getting more strong in recent years and the boundaries between legal and extra legal basis are sometimes not so clear.
The code is a quite short text but is permitted to apply the civil procedural code in subsidiarity.

Probably the main difference – and one of the most interesting matter to study thoroughly - concerns the existence and the role of the Public Prosecution (« Ministerio publico ») in administrative cases, dedicated to represent the State, to defend the democratic legality and to promote the public interest implementation.

Another difference concerns the fact that, in Portugal, in the courts of first instance decision are taken by a single judge, while in Italy decision are always taken by a panel, in the second as well as in the first instance.

Speaking about hearings, one thing has had a great impression to me : the fact that the most part of cases are not discussed by lawyers before the judges of first instance and at all before the Supreme Court. For this reason I didn’t have the opportunity to meet lawyers and to listened to a discussion among the litigants.

A point of strong convergence, between Portuguese and Italian systems, is represented instead by the complete digitalisation of the trial in both experiences.

IV- The European aspect of your exchange

Unfortunately I didn’t have the opportunity to improve this aspect, not as much it would have deserved. I can only transmit the general impression about a strong influence of the EU and ECHR systems, as it is obvious considering the quite long membership of the Portugal into the EU. Discussing with the President of the Court of appeal of Porto I have touched the question – much discussed in Italy in recent years - of the possible contrast between an administrative decision taken by a national court and a decision taken by the Court of Strasbourg, also for what concerns the remedies at disposal to grant
enforcement to the last decision. He told me that this case is not frequent, being the national system able to grant that mistakes or unconformity, with respect to the ECHR rules, are not frequent or common.

V- **Good Practice within the host jurisdiction.**

As I already stressed before, the main characteristics which should be exported to other countries like the mine are, in my opinion, the presence of the public prosecutor (also) in administrative litigation on one hand, and the mechanism of the hearings on other hand. With regard to the second, it could be useful foreseen also in Italy that the public hearing be on demand, only whenever the lawyer believe that the discussion can be really useful (it is already in this way for tax cases).

VI- **The benefits of the exchange**

Although language was a real obstacle in the communication with (some of) judges of the host institution, I think that I was benefited especially in terms of having a general overview of a judicial system, which before was unknown to me. So my experience in Portugal has been useful and interesting and I have to thank the ACA and the kind hospitality of the Supreme Court.

I consider my stay in Portugal of great cultural benefit, not only at a personal level, but also for the institution I belong to.

My main regret is that I haven’t had more occasions to meet Portuguese colleagues, to share more ideas with them.
VII- Suggestions

The program could be more oriented to the communication with the judges of the host Court, which is - I believe - purpose and meaning of such an exchange program.