



Seminar organized by the Supreme Administrative Court of
the Czech Republic and ACA-Europe

Limits of judicial guarantee

Brno, 9 September 2019

Answers to questionnaire: Italy



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ACA-Europe Seminar on Measures to Facilitate and Restrict Access to Administrative Courts

September 9, 2019

Nejvyšší správní soud Brno
(Supreme Administrative Court Brno)

Questionnaire

Introduction:

The role of the administrative judiciary determines the conditions under which administrative courts work. These include the limits on the right of access to these courts, as well as the rules on such cases potentially progressing further within the judicial hierarchy. It is an area defined by an ongoing tension between two principles: the right to a fair trial that would speak in favour of opening the gates of judicial review, with the efficiency of judicial review pulling in exactly the other direction, namely of limiting access to administrative courts, in particular the higher ones.

The seminar to be held in Brno, the Czech Republic, on September 9, 2019 at the Supreme Administrative Court, follows the path opened by the seminars in Dublin and Berlin. It shares the objective of contributing to mutual understanding of the scope of judicial review of administrative cases. Consequently, it broadens and deepens the topic of access to the courts. The seminar therefore deals with the issue before the administrative judiciary as a whole, including the administrative courts of lower instances. It covers both formal and material measures which either facilitate or restrict access to the courts.

The seminar attempts to merge the principles of fair trial and efficiency. Based on shared knowledge of member states, it aims to describe the areas where the administrative judiciary should remain open to litigants and to analyse those where it may constrain its current role or, on the contrary, may exceed it. In other words, it examines the proportionality of restrictions on access to the administrative courts.

I. The structure of the administrative judiciary

- a. Please describe briefly the structure of the administrative judiciary, i. e. how many instances your administrative judiciary (including all specialized jurisdictions, e. g. financial or social security) consists of and the relations of superiority and subordination between them, unless this information is available and up to date at the ACA-Europe webpage, Tour of Europe file.

In Italy, jurisdictional oversight of the administration is carried out as follows: In accordance with art. 103 of the Constitution, the Council of State (Consiglio di Stato judge of second and last instance, article 6 Code of Administrative Procedure - CAP) and the other courts of first instance of the administrative order, called Regional Administrative Tribunals (TAR article 5 CAP) have jurisdiction over legally protected interests in matters involving the administration, and over individual rights in the specific fields laid down by the law.

All of them work in a panel of judges, single judge not being envisaged in administrative courts.

The panel is composed by three members in the TAR and by five members in the Council of State.

The Council of State in its central head-office, is subdivided into five litigation sections (the second Section of the Council of State was transformed from a consultative section into a jurisdictional section and it had its first hearings on April 2019) and one advisory section. One litigation section of the Sicilian Council of Administrative Justice (article 100 CAP) has the power of reforming decisions reached by the TAR in this region (in addition to an advisory section with a jurisdiction limited to the regional territory). The first instance administrative courts consist of twenty-one Regional Administrative Tribunals, operating in the regional capitals, and eight special separated sections.

Please see Chap I, letter C) para. 10 of Tour of Europe available at <http://www.aca-europe.eu/index.php/en/tour-d-europe-en>

- b. How many administrative courts and judges are in each of the instances? Please give numbers relevant at the end of the year 2018.

(Note: if your administrative judiciary consists of two instances, use columns I. and II.; if it consists of more than three instances, please adjust the table. The same applies to all the tables used in this questionnaire.)

Instance	I.	II.	II
Name	Reg. Adm. Tribunals (TAR)	Council of State	
Number of courts	29	1	
Number of judges	293	102	

- c. How many judges are in all jurisdictions (i. e. administrative, civil and penal) altogether? Please give numbers relevant at the end of the year 2018.

9.813

Note: In all the subsequent sections please give answers for each of the instances of the administrative judiciary, even if it is not specifically mentioned in the question.

II. Fees and access to the court

- a. Is access to the administrative court subject to a judicial (filing) fee? Please indicate the general principle (for exceptions see questions e., f. and g.). Answer yes/no.

Instance	I.	II.	III.
Judicial fee	yes	yes	

- b. If you answered *yes*, what is the amount of this fee (in euro)?

The amount of the fee before the administrative judge depends on the subject of judicial review. Article 1, paragraphs 25, 26 and 27, of the law of 24 December 2012 n. 228 has modified the amounts and the methods for calculating the fee, set by art. 13, paragraph 6-bis, of the decree of the President of the Republic n. 115 of 2002.

The ordinary amount of the fee is 650.00 euro.

In case of application concerning the inactivity of public administration, the access to the acts held by administration, the enforcement procedure of judgments, the citizenship, the immigration is 300 euro; in case of public employment is 325 euro; in case of procedures for awarding public works, services and supplies and acts of the independent Authorities, the amount goes from 2,000.00 up to 6,000.00 euros according to the value of the affair.

Article. 1, paragraph 27, of the law of 24 December 2012 n. 228 establishes that the fee due on the basis of the subjects of disputes should be increased by half for the second and last instance.

- c. Is the amount of the fee in each of the instances flat or can it differ? If the amount can differ, under what conditions and how (e.g. when the petitioner is required to correct or eliminate faults in the petition, the fee rises)?

The amount of the fee is established by law and is generally flat for each instance. If the application contains a plurality of "actions" (action for the annulment of administrative acts, investigation action, conviction to pay sums of money or to pay damages) a single fee is due. Otherwise, if the plurality of actions is the result of a subsequent enlargement of the judgment, carried out through further acts (incidental appeal and additional reasons), an additional commission will be paid for the deposit.

The same applies to both instances.

d. In what phase of the proceedings does the petitioner have to pay the fee (e.g. with the petition, after the proceedings commence, after the decision of the court is delivered)? What are the consequences of not fulfilling the duty to pay the fee?

The petitioner shall pay the fee at the same time as the filing of the application or the subsequent act (incidental application or additional reasons) that gives rise to the duty to pay the additional fee.

Failure to pay the fee does not determine the inadmissibility of the appeal, but only involves the obligation for the judicial office to proceed with the collection of the tax, even with the imposition of fines related to non-compliance.

The same applies to both instances.

e. Are any petitioners (e.g. a public authority) or areas of disputes exempt by law from the duty to pay the fee?

The victims of organized crime and the victims of duty are exempt from the duty to pay the fee.

The choice of the Italian legislator is not to exempt specific applicants from the payment of fee, but provides for a series of procedures exempt from the duty to pay the fee: e.g. proceedings concerning public employment, guarantee of support for pupils with physical or sensorial handicaps, social security, elections, access to environmental information, family reunification, competence disputes.

The same applies to both instances.

f. Are non-governmental organizations exempt from the duty to pay the fee?

There is not a special regulation to exempt non-governmental organizations from the duty to pay the fee. In Italy the application of the non-profit Associations, sports federations, consumer protection and environmental protection associations are subject to the payment of the fee.

g. Can a petitioner be exempt from the duty to pay the fee by decision of the court? What are the conditions for the exemption?

No, the court cannot exempt a petitioner to pay fee; the rules of exemption are provided by law

h. Under what conditions is the fee returned to the petitioner (e.g. in case of the withdrawal of the petition)? Is the fee returned in full or partially?

The fee is an obligation provided by law in view of the fact that the losing party is ordered to pay the costs of the judgement, so that, even in the case of failure to mention by the judge, the provision implicitly includes the imposition of the restitution on the victorious party of the amount paid

i. May a petitioner be required to pay a deposit before the proceedings commence? If you answered *yes*, please explain under what conditions.

There are no provisions about a deposit: the petitioner shall pay the fee at the same time as the filing of the appeal or the subsequent act (incidental appeal or additional reasons) that gives rise to the duty to pay the additional fee.

- j.** Are frivolous petitions penalized? Please explain how and under what conditions .

When there are manifestly unfounded reasons, article 26.1 CAP provides that the court, also ex officio, may order the unsuccessful party to pay the counterparty, a sum of money determined equitably, but no more than twice the costs incurred.

Moreover, art. 26.2 CAP says that the court orders the unsuccessful party ex officio to pay a financial penalty, of not less than twice and no more than five times the court fees due for the application initiating proceedings, when the losing party has brought the legal action or resisted recklessly in court. In disputes concerning tenders, the amount of the sanction may be increased by up to one per cent of the value of the contract, if greater than the above above-mentioned limit.

- k.** Finally, is there any analysis (based on empirical studies or just your personal assessment) of the correlation between the amount of the fees payable within your system of administrative justice and the degree of any incentive or dissuasive effect those fees have on petitioners (in general or particular groups thereof) bringing or not bringing an action?

No, there is not. Nevertheless it should be remembered that the Regional Administrative Tribunal of Trentino Alto Adige had referred to the European Court of Justice the question of the compatibility of the fee in public procurement with the principles of effectiveness, speed, non-discrimination and accessibility, referred to in article 1 of Directive 89/665, as well as with the right to effective judicial protection, reaffirmed by Article 47. With the judgment of 6 October 2015 made on case C 61/14, the U.E. The Court of Justice, Section V declared the fee provided by the Italian Administrative Justice regarding public procurement to be compatible with European legislation.

III. Costs of proceedings

- a.** Can the court adjudicate the compensation of costs of proceedings to the participant? If you answered *yes*, please explain under what conditions?

Yes, it can.

Where it issues a decision, the court will also decide on the legal costs, and condemn, as a rule, the losing party (art. 26 CAP).

Exceptionally, the judge may decide that there are fair grounds to compensate legal costs, which means that the losing party shall not be condemned to pay the winner party's expenses (i.e. each party pays their own costs).

With the order that decides on the application, the court provides for the costs of the interim phase.

- b.** Can the court adjudicate the compensation of costs of proceedings to the public authority? If you answered *yes*, please explain under

what conditions? In particular, are there any cases/situations where by default, the costs incurred by the public authorities are not recoverable, even if the (private) petitioner was not successful (and, following the normal rule that costs follow the event, a costs order should normally be awarded in favour of the public authority)?

The judge can order the administration formally successful to pay the expenses for misconduct e.g. if the public authority has violated the prohibition not to obstruct the prompt definition of the judgment allowing the case to be extended on two levels of judgment and for many years. In this case the Court can apply the rule established by art. 92, paragraph, Civil Procedure Code (CPC), according to which the judge <<.... Regardless of losing the case, order a party to reimburse the expenses, even if not repeatable, which, for violation of the duty pursuant to art. 88, it caused the other party >> ([Cons. St., sez. IV, 9 April 2018, n. 2142](#)) (artt. 88, 92 CPC).

The same applies to both parties.

- c. Can the court decide not to adjudicate the compensation of costs of proceedings, although the conditions described in answer to question a. are fulfilled? If you answered yes, please explain under what conditions?

Exceptionally, the judge may decide that there are fair grounds to compensate legal costs, which means that the losing party shall not be condemned to pay the winner party's expenses.

Article 92 CPC provides that the judge can compensate legal costs or, if the defendant is not set up, can leave them to the victorious party if there are serious and exceptional reasons. After the sentence n. 77 of 19 April 2018 of the Constitutional Court the serious and exceptional reasons are no longer just the mutual losing, the novelty of the question dealt with or the change in jurisprudence, as established by the art. 13 of the decree n. 132/2014.

See also answer to the question II J

- d. Are there any specific areas of administrative law where different rules to those discussed in this section apply? What areas are those and how and why do the rules applicable therein differ?

No, there are not.

- e. How does the court determine the amount of the costs of legal representation as a part of compensation of costs? Is it defined by a tariff (in that case describe the principal method of calculation), or is it based on a price stipulated between

an attorney and his client (in that case describe also whether there is any limitation)?

The Italian system of lawyers' fees has been reviewed, due to several interventions of the legislator since 2006. As a result, fee arrangements have become usual; if there is no agreement, a compulsory fixed tariff system will apply (decree 55/2014).

IV. Representation

- a. Does a party have to be represented by a legal professional? Answer yes/no.

Instance	I.	II.	III.
Representation of petitioner	yes	Yes	
Representation of opposing party	yes	yes	

- b. Does your legal order provide free legal aid for participants (e. g. representation appointed at the request of a participant)?

The free legal aid is an institute provided by the Decree n.115 / 2002 which allows those who are deprived of a minimum income to be defended free of charge, according with art. 24 Constitution. Legal aid is ensured for procedural defense only and does not allow any extrajudicial assistance (consultancy or other). In the administrative process it is admitted for each instance, for each phase of the process and for all the possible related procedures (art.75, c.1 D.P.R.115 / 2002). It is insured for Italian citizens, for foreigners legally residing in the national territory and for the stateless, as well as for bodies or associations that do not pursue profit-making purposes (Article 119 of the T.U. 115/2002).

- c. What are the forms and conditions of free legal aid? Please explain for all instances.

Petitioners whose revenues are below a certain threshold may be eligible for free legal assistance provided by the State.

Before administrative Courts, such eligibility is granted by a special Committee composed of 2 judges and a lawyer, under specific conditions established by the law. When legal aid is granted, the claimant can choose a lawyer to be paid by the State, according to special rates.

- d. Is there any connection between exemption from the duty to pay the judicial fee and the right to free legal aid?

Yes if the exemption from the duty to pay judicial fee is related to the income of the applicant.

V. Exclusions and immunities

(Note: If you answer yes to any question in this section, please provide details.)

- a. Are there any mandatory steps after the public authority delivers its final decision and prior to filing a petition to an administrative court (e.g. mediation)?

No there are not

- b. Are there any final administrative acts of a public authority which are not reviewable at all?

Yes, according article 7, paragraph 1, CAP "Acts or measures on the part of central Government in the exercise of political power cannot be challenged".

- c. Is there any particular public authority whose administrative acts are not subject to judicial review (e. g. acts of a head of state)?

See answer V b

- d. Are there any final acts of a public authority which are reviewable by a (state or other) authority other than the administrative court?

The administrative acts can be reviewed by the Administration itself, on the initiative of the interested person. According to the d.p.r. n. 1199/1971, there are three main different claims: in opposition, hierarchical and before the President of the Italian Republic. The first is submitted to the same administrative body that issued the act, only in the cases provided by the law. The second is a general remedy and it is brought before the higher administrative body within 30 days from the knowledge of the disputed act: the hierarchically superior can annul or reform the act; if he does not decide within 90 days, the claim is considered rejected. Both decisions can themselves be subject to judicial review by the administrative Courts. The appeal before the President of the Republic is a parallel and alternative remedy to the jurisdictional proceeding. This means that, in principle, no judicial review is granted on the decision of the President of the Republic.

- e. Are there any cases which are reviewed by the administrative courts other than review of administrative acts of a public authority (e. g. review of elections, dissolution of a political party)?

The administrative judge has competence to examine disputes concerning the conduct of electoral competition in administrative elections. The judgment for the electoral operations can be promoted by any elector of the body concerned by the elections, as well as by the candidate concerned. The applicant can sue in court, without the assistance of a lawyer. The judgment concerns any defect of the electoral procedure and the administrative judge, if he accepts the appeal, can order the correction of the electoral results, also with the substitution of the elected ones.

Traditionally it is a consolidated principle that administrative judge cannot replace the administration but he can certainly direct the administration to ensure full compliance with the judgment.

Nevertheless, article 34.1.e CAP now lays down that the administrative court, as it annuls an act, can, within the limits of the request, specify suitable measures to ensure the implementation of the judgment including appointing a provisional administrator (ad acta commissioner), to implement that specific decision.

The CAP, partly following some solutions already defined by jurisprudence, has increased the types of decisions that can be pronounced by the administrative judge.

Along with the traditional action of annulment, article 30 CAP regulates judgments ordering compensation for damage, payments of sums, and actions to be taken. These actions can be filed at the same time as another action or, only in cases of exclusive jurisdiction, they can be filed autonomously. Hence claimants can seek, at the same time, the annulment of the administrative act and the payment of compensation for damages or the restitution of wrongfully paid sums of money. The annulment of an administrative decision (adjudication of public contracting) may have an indirect effect on a contract which the administration has entered into, leading to its nullity or its ineffectiveness (subsequently obligating the administration to either enter into another contract with the petitioner or restart the process) (articles 121-124 CAP).

VI. Selection by lower and higher jurisdictions

- a.** Do the administrative courts have power to select cases? Answer yes/no.

No, the administrative courts have not the power to select cases.

Instance	I.	II.	III.
Power to select cases			

- b.** If you answered *yes*, under what conditions can they select cases? Are there any objective criteria stated in the legislation/case law of the court or is the selection a matter of full discretion?

N/A

- c.** Is the power to select cases restricted to certain fields of law? Please give details.

N/A

- d.** Does the court have power to select cases that fall under administrative criminal law? If it does, are the conditions for selection the same as in others fields of law? Please give details.

N/A

- e. Please specify who selects the cases to be heard and how. Is there a special judicial panel or case selection procedure for that purpose? Is that procedure only a matter for the higher jurisdiction that will ultimately hear the case, or do the lower courts also somehow participate in that selection?

N/A

- f. If the court decides to select/not to select a case, is it obliged to notify a petitioner? If it is, does it deliver a formal decision (e. g. rejects the petition) or does it notify a petitioner by an “informal” letter?

N/A

- g. Is the court obliged to give reasons when it decides not to select a case?

N/A

- h. If a lower court decides not to select its own case, is the decision reviewable by a higher court? Please give details.

- i. Does a lower court have power to select cases of a higher court? If it does, is its selection reviewable by a higher court? Please give details.

N/A

- j. Does a judge determine the order of the cases to decide?

N/A

VII. Other measures

- a. Does your legal order have other measures which simplify or restrict access to the courts? Please explain.

There are no specific measures which simplifies access to the court.

Each petitioner must have a current interest related to the annulment of an administrative decision; this interest, whose existence is assessed at the time of the appeal and at the time of the delivering of the ruling, may be of various kinds: moral or material, individual or collective.

Claimants must also have legal standing, which means they have to be entitled to the legally protected subjective situation affected by the challenged act.

Legal persons, associations and NGOs can lodge an appeal against the measures affecting their own interests but they may also go to court to defend the collective interest of those they represent, insofar as the disputed measure may affect this collective interest.

VIII. Statistics

- a. Please give exact numbers of case load and number of cases decided for the years 2016, 2017 and 2018 in each of the instances of the administrative judiciary (including all specialized jurisdictions, e. g. financial or social security).

Instance	I.	II.	III.
Case load 2016	54.565	14.361	
Cases decided 2016	83.736	14.378	
Case load 2017	48.555	13.067	
Cases decided 2017	75.856	14.253	
Case load 2018	49.968	14.053	
Cases decided 2018	68.120	15.427	