



Consiglio di Stato



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

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

Fiesole (Firenze), Autumn 2021

Answers to questionnaire: Ireland



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FIESOLE (FIRENZE), 19 OCTOBER 2020

"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

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

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

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

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

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

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

1.3. The seminar will cover the following topics:

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

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

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

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

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

I SESSION

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

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

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

No

Yes

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

Law

Public authority regulations

Guidelines

Supreme Court rulings

Other

Please explain and give an example.

The courts are required as a matter of pre-eminence to interpret the law in accordance with the provisions of the Irish Constitution. Certain rules of interpretation, such as the presumption against retrospective effect, are prescribed by the Constitution,¹ while substantive issues of constitutional law may also affect statutory interpretation.

Certain common law rules of interpretation² and maxims of interpretation³ have been set out in the jurisprudence of the Irish Supreme Court, and these canons of construction are employed by lower courts as a matter of precedent. The Interpretation Act 2005 also codifies certain principles of statutory interpretation.

¹ Article 15.5 of the Irish Constitution

² See, for instance, *Inspector of Taxes v. Kiernan* [1981] I.R. 117. *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, *Nestor v. Murphy* [1979] I. R. 326

³ See, e.g. the presumption of constitutionality set out in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, or the principle *generalia specialibus non derogant* as applied in *DPP v. Grey* [1986] I.R. 317.

1.3 What are the criteria for interpretation of the law?

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

Explain, if necessary.

In accordance with the principle of the separation of powers as expressed in the Irish Constitution, when interpreting the text of a statutory provision, the courts will seek to respect the legislative function and to give effect to the intention expressed within the legislation. This means that the courts will accord primacy to the text of the provision and will seek to construe it according to its plain or ordinary meaning.

Where this literal construction of the text would give rise to an absurdity or would fail to reflect the plain intention of the legislature (“the Oireachtas”), or where the text of the legislation is unclear or ambiguous, the Court may consider the general purpose and scheme of the statute. Examining the long title and preamble to the Act, its subject matter and structure, prior statutes and the pre-existing law which it was designed to alter, the Court will then seek to interpret the relevant provision in a manner which is consistent with the statutory purpose identified.

The Supreme Court has held that the legislative history of a statutory provision can be considered during the task of interpretation, being earlier relevant legislation. When construing a particular word or expression, the provisions of another statute are not normally used as an aid or a guide unless that other statutory provision is in pari materia (‘in the same matter’).

However, the Supreme Court has ruled that the parliamentary history of a statute, that is, the content of parliamentary debates and ministerial statements pertaining to the legislation during the passage of the bill through parliament, is not to be used as an aid to interpretation.⁴

Judicial decisions can also sometimes be used as an aid to interpretation; for example, where a word or expression in an earlier Act has received a clear judicial interpretation, there is a presumption that a subsequent Act which incorporates the same word or expression in a similar context should be construed so that the word or expression is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears.

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

⁴ *Crilly v. T and J Farrington Ltd* [2001] IESC 60, [2001] 3 I.R. 251

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

Explain, if necessary.

Where gaps arise in statute, generally the courts are unwilling to read in words into the provision or to fill gaps in the text, lest this be seen as an unconstitutional incursion into the legislative function. Words may be read into a provision to explain the intended meaning of an ambiguous enactment on a limited basis, but only where this does not alter the plain intention of the legislature.

Any interpretation of statute must be compatible with the Constitution and can also incorporate considerations of the requirements of justice and fundamental fairness, fundamental rights, fair procedure and other policy matters, whether contained in the Constitution or deriving from common law.

Where gaps arise in common law, the courts may develop its jurisprudence incrementally, and by reference to previous decisions of the courts and general principles of the legal system, as outlined in the preceding paragraph.

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

- No
- X** Yes

Please explain and give an example.

As explained above, the Supreme Court has articulated a number of interpretative criteria. An example of one such criterion is the presumption that penal statutes be construed strictly, and that if the legislature wishes to impose penal liability it will do so expressly in clear and unambiguous terms. The interpretative criteria set out by the Supreme Court are not applied rigidly by the courts and the identification, application and weighting of interpretive criteria vary from case to case.

One criterion which is applied with consistency is the presumption of constitutionality, which is based on an assumption that the legislature intends to act within its powers and with due regard for the provisions of the Constitution. A corollary of this principle is the 'double construction rule', which requires that the courts, where possible, interpret statute in a manner which would render them constitutional. Where two or more constructions are reasonably

*open, one of which is constitutional and the other or others are unconstitutional, a court should adopt the former where it is reasonably possible.*⁵

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

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

Please specify.

2. Tools for supporting judicial activity.

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

- No
- Yes**

⁵ *Croke v. Smith* [1998] 1 I.R. 101.

The Judicial Studies Committee is a committee composed of members of the judiciary from each jurisdiction of the Irish legal system. Its purpose is to facilitate the continuing education and training of judges with regard to their functions and in furthering this aim, it can prepare and distribute relevant materials to judges and publish material relevant to its function. This was established this year on a statutory footing by the Judicial Council Act 2019, and is the successor to a former body with similar functions.

Additionally, the Research Support Office (RSO) of the Courts Service of Ireland consists of approximately 10 Research Support Associates who are law graduates with experience in conducting legal research recruited to provide legal research and support services to judges of all jurisdictions. RSAs. The RSO is managed by a Legal Research Executive who reports to a Legal Research Manager. A liaison committee of judges also guides the work of the RSO in terms of judicial requirements and provides legal expertise.

The functions of the RSO include the following:

- *The circulation of legal updates and important case summaries to all members of the judiciary*
- *The provision of briefings to members of the judiciary and colleagues on legal research conducted on various areas of law*
- *The compilation and revision of bench books (which provide an overview of legal procedure for a judge) on various areas of law for use by members of the judiciary*
- *The provision of written memoranda in response to research requests made by members of the judiciary*

The RSO forms part of the wider Legal Research and Library Service (LRLS). This department provides information and legal research services to support members of the Irish judiciary and is led by the Head of Legal Research and Library Services. It comprises approximately 80 staff-members including:

- *Legal Research Managers;*
- *Legal Research Executives;*
- *The Research Support Office;*
- *Judicial Assistants; and*
- *The Judges' Library.*

2.2. What other activities do these Services perform?

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

Please specify.

Preparatory research for the judgments of the Supreme Court is likely to be undertaken by individual members of the Court or their personal researchers.

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

- No
- Yes**

Please explain.

The Courts Service of Ireland operates a free and open database which features the decisions of the Superior Courts of Ireland (the High Court, the Court of Appeal and the Supreme Court).

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

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

Please explain.

The Irish judiciary have access to both the public database referred to above and to some private databases, as provided by the Courts Service . The judiciary also have access to a full range of technical equipment to facilitate their research.

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

- No**
- Yes

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

n/a

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

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

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

As a common law jurisdiction, the principle of stare decisis is in effect, meaning that precedent is a principal rule of judicial decision-making in the Irish courts. As a result, decisions of higher courts are binding upon decision-makers in lower courts.

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

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

n/a

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

Please explain and give an example.

n/a

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

- No
- Yes**

If the answer is yes, please explain.

The Supreme Court regularly sits in a panel of five judges. However, where questions of particular legal significance arise, a panel of seven judges may be convened.

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

- No**
- Yes

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

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

n/a

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

- No
- Yes**

If the answer is yes, please explain.

Informal mechanisms exist to ensure the consistency of jurisprudence in the Supreme Court. For instance, judicial researchers collaborate to determine that determinations of the Court granting leave to appeal do not conflict and to ensure that judges are kept apprised of the decisions of other panels of the Court.

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

Not applicable – the Irish Supreme Court considers administrative, constitutional, civil and criminal appeals.

SESSION II.

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

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

Please explain.

As between the parties to particular proceedings, the public authority is bound by the administrative judgment handed down and is required to comply with the terms of the judgment or the order issued.

Beyond the proceedings at hand, the extent to which the public authority is bound by its terms depends on the nature of the remedy issued; while a declaration of certiorari will quash the decision of an individual decision-maker, or an order of prohibition will prevent the public authority from taking a course of action with respect to the applicant in question, the effect of the court's judgment will be likely to be broader. Decision-makers and authorities are likely to take notice of the ratio of the court's decision and take measures not to repeat the same violation, so as to avoid future litigation on the same issue.

However, should a court decide to quash certain regulations, for instance, on the basis that they are ultra vires their parent legislation, that decision would necessarily have wider direct ramifications on the relevant administrative body.

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

- No
- Yes**

Please explain.

Beyond the effects of the decision of a court on a discrete area of administrative law as detailed in the preceding question, the decisions of courts may contain dicta on general principles of administrative law, such as fair procedures or proportionality, which may guide decision makers or public authorities more generally.

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

- No**
- Yes

Please explain.

As mentioned above, administrative bodies may well take notice of the decisions of the courts and respond accordingly, by for instance reopening prior decisions or revising a scheme. However, invalidity can only be established in legal proceedings and until a court sets aside an impugned decision, for instance, the decision will enjoy a presumption of validity. Thus, administrative bodies do not have the scope to extend the binding effects of a court's judgment beyond the case.

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS.

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

No

Yes

The decisions of the courts in Ireland are executed through orders of the court which will reflect the outcome of the decisions of the court. In the administrative context, the court may decide to either quash an administrative decision (an order of certiorari), compel an administrative body to make a decision (an order of mandamus), issue an order of prohibition, issue an injunction or make an award of damages.

Once an order is made by the court, the successful party in the proceedings will proceed to attempt to enforce that court order. A number of different mechanisms are available to the individual as they attempt to enforce a court order, including a garnishee order and an order of attachment and committal directing the person who is resisting the pre-existing court order to prison. Generally speaking, the execution of orders is governed by the Rules of Court and by national laws, in the form of the Enforcement of Court Orders Acts 1926 – 2009. Different enforcement mechanisms apply depending on the form of court proceedings.

It is a criminal offence to wilfully disobey an order of court. Monetary fines or prison sentences may be imposed in such situations. In the administrative context, these measures can, in principle, apply also to public authorities should they not follow orders of the court. While the court can make mandatory orders against administrative bodies, it would only do so where appropriate action had not been taken. It is the Court's experience that state actors almost invariably comply with orders of the court.

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

In the administrative context, remedies such as mandatory orders are very rarely pursued as administrative bodies tend to comply with court orders.

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

n/a

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

No

Yes

Please explain.

Enforcement procedures are applicable in relation to both interlocutory orders and final orders. While it is rare that an interlocutory order or an interlocutory injunction would be made against a state body or public authority, in theory the same remedies are available in respect of such orders as would be available in respect of final judgments.

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

No

Yes

Please specify.

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

No

Yes

As stated previously, the administrative body or official is liable to be fined should it wilfully fail to comply with the order of the court.

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

Please explain and give an example.

As the Irish courts hear both administrative and civil law matters, this is within the jurisdiction of a judge.

SESSION IV

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

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

- No**
- Yes

The Supreme Court does not play an advisory role for the government or for the public administration. In limited circumstances, the President of Ireland may refer a Bill to the Supreme Court for a decision on its constitutionality prior to it being signed into law, under Article 26 of the Constitution, in order that it may provide an advance ruling on the constitutionality of proposed legislation.

This does not function as 'advice' as such, as a full hearing of the constitutionality of the proposed legislation will take place in court. This occurs very rarely, perhaps due to the fact that the invalidity of any one provision will defeat the entire Bill, or because Bills which pass scrutiny are henceforth immune from any further judicial scrutiny and cannot be challenged in the courts going forward.

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

(More options are possible)

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

Please specify.

n/a

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

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

n/a

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

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

n/a

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

- No
- Yes**

Both serving and retired members of the judiciary of Ireland have been appointed on a statutory basis to chair public inquiries with a view to authoritatively ascertaining the facts in relation to a particular matter of legitimate public interest. Judges may also be commissioned on a non-statutory basis to publish reports or to provide scoping reviews on matters in the public interest.

Judges may also be appointed to chair ad hoc compensation tribunals, which are established for limited periods to meet the exigencies of events which caused harm or loss to a number of individuals. Finally, when proposed changes to the Irish Constitution are put to the general public by way of vote, a member of the judiciary may be appointed to chair a Referendum Commission. This is an independent body whose primary role is to explain the subject matter of the referendum proposal, to promote public awareness of the referendum and to encourage the electorate to vote.

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

No

Yes