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"

Rome, 23 May 2022

General report

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GENERAL REPORT ACA-EUROPE

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Dear Colleagues

Last year the Italian Presidency of ACA-Europe was inaugurated in Fiesole with the seminar entitled "*Law, Courts and guidelines for the public administration" and continued with the seminar organised in December in Paris entitled "The judicial review of regulatory authorities*".

Both events provided an opportunity to start exploring the potential of the "horizontal dialogue" between the various Supreme Administrative Courts – this topic represents, as you now know, the leitmotif of our Presidency and will accompany us during our next meetings.

The General Report on "*Techniques for the protection of private subjects in contrast with public authorities: actions and remedies - liability and compliance*" allows us to take a further important step towards the "ever-closer union among the peoples of Europe", a very forward-looking objective of the Treaties of Rome.

Through the analysis of the actions that can be brought before the administrative judge, through the investigation on the techniques of protection ensured, through the study on the existence of special rites, aimed at the protection of "sensitive" interests of "economic and social" impact or characterised by the speeding-up of time-limits, mutual knowledge of our respective systems is further intensified.

The foundations are laid for making the protection of the rights and interests of individuals and businesses as homogeneous as possible in the single European area, while continuing to respect "domestic" specificities.

The Court of Justice of the European Union, in its judgment of 6 October 2021 in Case C-561/2019 Consorzio Italian Management, reaffirming principles on the obligation to make a preliminary reference under Article 267 TFEU, stated that the national court of last instance, when faced with a doubt on the interpretation of EU law, must verify the actual or presumed attitude of the other interpreters in the various EU Member States.

The Court of Justice itself has, therefore, drawn attention to the desirability of widening the horizontal dialogue among national courts, which is all the more useful when EU law might lend itself to divergences in interpretation within the different legal systems.

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The strengthening of the dialogue between the Court of Justice and the national courts has made and continues to make the integration of European and national law more harmonious.

The dialogue among the various national courts will subsequently be able to develop a homogeneous method of controlling public administrations and, while continuing to respect the specific features of each individual system, standardise the methods for protecting and safeguarding the rights of citizens and businesses in their relations with the public authorities.

This is a fundamental element for the achievement of effective "European citizenship."

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SESSION I

ACTIONS BEFORE THE ADMINISTRATIVE JUDGE

I. 1. IDENTIFICATION OF COMPETENT JURISDICTION

I. 2. ACTIONS WHICH MAY BE BROUGHT AND THE SOURCES OF THE RULES GOVERNING THEM

I. 3. ACTION FOR ANNULMENT: MEASURES AGAINST WHICH ACTION MAY BE BROUGHT AND DEFECTS IN CANCELLATION

I. 4. CONTENTS OF THE JUDICIAL DECISION TO ANNUL: PARTIAL ANNULMENT, SUBSTITUTION OF THE MEASURE AND SHAPING OF SUBSEQUENT ADMINISTRATIVE ACTION

I. 5. EFFECTS OF THE JUDICIAL DECISION OF ANNULMENT AND ITS MODULATION

I. 6. ACTION FOR AN ORDER FOR DAMAGES: PROCEDURE, TORTIOUS CONDUCT AND COMPENSABLE DAMAGE

I. 7. RELATIONSHIP WITH AN ACTION FOR ANNULMENT AND ALLOCATION OF THE BURDEN OF PROOF OF LIABILITY

I. 8. ACTION FOR AN ORDER FOR THE RELEASE OF THE MEASURE

I. 9. POWERS OF THE COURT: CONVERSION OF ACTIONS

I. 1. IDENTIFICATION OF THE COMPETENT JURISDICTION

A first aspect, with regard to the techniques for protecting private persons against the public authorities, which is of central importance for highlighting the similarities and differences existing among the different legal systems of the Member States, is the identification of the competent court.

The replies show that, in general, both administrative courts and ordinary courts have jurisdiction in disputes involving the public administration depending on the type of dispute.

In most legal systems, administrative courts belong to a distinct jurisdictional area compared to that of the ordinary courts (e.g. Austria, France, Italy, Lithuania, Luxembourg, Portugal, Romania), but in some countries, the administrative courts operate within the ordinary courts (e.g. Ireland, Norway, Spain, United Kingdom). Some countries have provided details on the structure of their court system. While, in most countries there are at least two, if not three, levels of jurisdiction (e.g. Estonia, France): in Belgium, the Council of

State is the sole administrative jurisdiction with general powers at only one level (except for the relative jurisdiction of the administrative Court of Cassation with regard to the decisions of special administrative courts set up at state or federal level to deal with specific matters).

I. 2. ACTIONS WHICH MAY BE BROUGHT AND THE SOURCES OF THE RULES GOVERNING THEM

All the countries taking part in the questionnaire replied that their legal systems provide for the possibility of bringing different types of action before the administrative courts. In particular, in those countries where jurisdiction over disputes against the public authorities lies with the administrative judge, there are (at least) actions for the annulment of administrative acts and actions against silence. On this point, the countries concerned provided further indications in reply to question no. 4 of Session II (see below).

Not in all systems do the administrative courts have jurisdiction over actions for damages. For example, the administrative courts do not have jurisdiction in, Cyprus, the Czech Republic, Finland and Sweden. In several countries, there is an action for performance (for example, in addition to Italy, this is true for Germany, Hungary, Ireland, Portugal, Romania and the United Kingdom). In France, there is also an action to obtain the interpretation of an act whose meaning is obscure or ambiguous.

In response to the question, some countries also referred to precautionary protection: Belgium specified that the Council of State may order the suspension of the execution of an act or a regulation and may order all measures necessary to safeguard the interests of the parties or persons concerned; Portugal referred to injunctions; Cyprus, Romania (HCCJ) and Serbia admit precautionary suspension. On this point, the States concerned provided further information in Session III (see below).

With regard to the sources governing the actions that can be brought, the replies show that the main source cited is the law.

France's reply on this point is worth noting as it specified that *"Les principes essentiels du droit du contentieux administratif sont issus de la jurisprudence du juge administratif mais ces principes trouvent de plus en plus un ancrage textuel*".
Ireland and the United Kingdom, in keeping with their tradition of *common law,* also cite jurisdictional precedent as sources. In Sweden, too, jurisdictional precedents are cited as sources.

Some countries also consider the regulations of tribunals as sources (Cyprus, Ireland).

I.3. ACTION FOR ANNULMENT: MEASURES AGAINST WHICH ACTION MAY BE BROUGHT AND DEFECTS IN CANCELLATION

A) Contestable acts

The replies show that it tends to be the case that all administrative acts can be challenged, even those of a general nature, such as regulations.

Several countries, however, replied that regulatory acts cannot be annulled by administrative courts. For example, in Austria, regulations can only be annulled by the Constitutional Court. Swedish courts can only disapply regulations and not annul them.

In some countries, even general acts cannot be appealed (Cyprus, Estonia). Serbia and Slovakia also replied that only administrative acts with a specific addressee can be challenged in their systems.

In Lithuania, on the contrary, there is an *ad hoc* procedure for challenging general administrative acts and regulations. In the Netherlands, general acts and regulations can be challenged before the civil courts.

An analysis of the replies subsequently reveals that acts within the procedure cannot, as a rule, be the subject of an independent appeal. In some cases, this has been expressly stated (e.g. Austria, Germany), in others it is implicitly deduced from the characteristics of the acts that can be challenged and, in particular, from the fact that they are acts that definitively decide upon a certain issue. Some countries have specified that the challenge of acts internal to the procedure is admitted as an exception: for example, when they affect important rights or interests of the addressees or significantly impede their exercise (Latvia) or when they bring the procedure to a halt (Spain).

With regard to political acts, most countries agree that they cannot be challenged. Spain replied that control of political acts is allowed, as far as their "*regulated elements*" are concerned or when they affect fundamental rights guaranteed by the Spanish Constitution. Belgium specified that "administrative" acts of the Constitutional Court and legislative assemblies, the Court of Auditors, the Council of State and administrative courts, as well as organs of the judiciary and the High Council of Justice may be challenged before the administrative courts, unless the dispute is assigned by law to another jurisdiction.

B) Objectionable defects

With reference to the defects which can lead to the annulment of administrative acts, the replies showed that all the systems consider the infringement of the law - understood as the infringement of formal and substantive rules - as a defect of the administrative act.

There are, however, differences as to the consequences of this defect.

Some countries state that administrative acts can be annulled for breach of substantive and procedural law, without anything else being specified (e.g. Austria, Bulgaria, Spain, Sweden). Several jurisdictions limit the possibility of obtaining annulment of the act on the basis of procedural defects to cases where the forms are "substantial/essential or prescribed on penalty of nullity" (Belgium, Bulgaria, Greece, Hungary, Slovakia). In Germany, breaches of procedural law result in annulment only in certain cases, as provided for in Section I of the Code of Administrative Procedure (Sec. 44-45 of the Code of Administrative Procedure-CAP). In Portugal, annulment can only be obtained if there is a total lack of legal form or a total breach of procedural rules. Hungary allows annulment for breach of procedural rules but only if the breach cannot be remedied in the course of the proceedings. In Estonia, Italy, Norway and Slovenia the breach of formal/procedural rules does not provide grounds for annulment if the final content of the act could not have been different to what was effectively adopted.

Several legal systems provide for forms of judicial review of the conformity of the act with the purpose of the law through the figures of excess or misuse of power (e.g. France, Greece, Italy). Bulgarian law provides for the defect of "non-conformity" with the purpose of the law.

In the United Kingdom, annulment can be obtained on the basis of a number of defects elaborated by *case law* such as incorrect interpretation or misuse of powers granted by Parliament ("*illegality"),* breach of procedural rules (e.g. infringements of the "*right to be heard*") or irrationality. Also in other legal systems, non-codified principles can be invoked to obtain annulment, as is the case of the Netherlands in reference to the principle of legal certainty.

Incompetence is an objectionable defect in the majority of jurisdictions interviewed and is often considered as "*species"* of the general category of infringement of the law.

I. 4 CONTENTS OF THE JUDICIAL DECISION TO ANNUL: PARTIAL ANNULMENT, SUBSTITUTION OF THE MEASURE AND SHAPING OF SUBSEQUENT ADMINISTRATIVE ACTION

A) Partial annulment

Most countries replied that the court may partially annul an unlawful act. Some countries specified that partial annulment is subject to the condition that the act is divisible (e.g. Austria, Cyprus, Czech Republic, France, Germany, Slovenia, Spain, United Kingdom). Finland specified that partial annulment is not allowed if it can modify the decision *in toto* in a way that is incompatible with its content.

B) Replacement of the measure

The replies showed that the administrative judge can, in theory, replace the administration, but the models differ considerably.

In several countries, the judge can replace the administration only in the case of binding activity, "in concreto" or "in abstracto" (Bulgaria, Germany, Italy and Spain). In Austria, the courts of first instance may replace the public administration if the relevant facts emerge from the case file, but they may also verify the factual findings for reasons of speed or if this leads to significant cost savings (Art. 28, para. 2 VwGVG).

Croatia replied that the court replaces the administration in the event of annulment, except when the decision is of a discretionary nature or when it is not possible due to the "nature of the issue" (Art. 58 *of the Code*). In Sweden, substitution is the rule. In Luxembourg, replacement depends on the action brought (it is allowed in case of an appeal "for reform", but not for annulment). Latvia allows the possibility in theory, in cases provided for by law, but the law does not provide for specific cases.

Other countries replied that substitution is possible for certain matters. For example, in Cyprus, Estonia and Finland, the court may substitute the administration only in tax and immigration matters. In the Czech Republic, substitution is possible in matters of sanctions, access, referendums and elections.

Substitution is generally not allowed in Ireland, Romania, Turkey and the United Kingdom. However, the United Kingdom has specified a number of cases in which substitution is exceptionally permitted

Most countries replied in the affirmative.

Some countries replied that, in their systems such a power is always or is, as a rule, excluded (Greece, Ireland, Turkey). In the United Kingdom it is possible, but with strict limitations.

In France, if the judge of the excess of power cannot replace the administration, the judge, "*de plein contentieux*", in this case, has very broad powers, including the power to reform an administrative act and to replace the administration's decision with his own.

Germany has specified that modification is not possible when the administrative authority is authorised to exercise a discretionary power. In other cases, the court may oblige the administrative authority to perform the act requested (art. 113 para. 5 CACP). Only in this case can the judge modify an administrative act.

C) Conformation

Luxembourg emphasised that, in the event of an action for annulment, the court may, by means of the reasons for its decision, outline the new decision to be implemented by the administration following the referral after the annulment of the previous decision.

I. 5. EFFECTS OF THE JUDICIAL DECISION OF ANNULMENT AND ITS MODULATION

The replies showed that, in most jurisdictions, annulment has retroactive effect. In some states, however, annulment always, or for certain acts, has *ex nunc* effect. In Finland, annulment is as a rule *ex nunc* (in this regard, for example, it is specified that "*if the election of a member of a municipal board or commission by a later court judgment is declared illegal, the decisions made by the board or commission do not become void retroactively. But, e.g., if a building permit has been granted and the applicant has been afforded the right to start the work before the decision has gained legal force, the revocation of the permit by a later court judgment will make the permit void so that the works done in the meantime must be demolished*"). In Portugal, as a rule, the annulment of an administrative act takes effect from the date on which the judgment becomes final (*ex nunc),* but by decision of the administrative judge or of the administration itself, it can take effect *ex tunc*, eliminating the effects produced in the meantime by the illegitimate act. On the contrary, in Norway, annulment generally takes effect from the date of adoption of the measures (*ex tunc*), but for annulment pronouncements concerning permits or benefits, annulment takes effect from the date on which the judgment becomes final.

In Latvia, it is the judge who determines the date from which the administrative act is to be considered annulled (in most cases, from the date of its adoption).

Some countries have given specific answers for the annulment of general acts and regulatory acts. In Croatia, the annulment of general acts takes effect from the day of publication of the judgment in the Official Gazette. Luxembourg specified that while the annulment of individual acts is normally retroactive, with the possibility for the court to give it *ex nunc*

effect, for regulatory acts, annulment takes effect *ex lege* only from the moment the judicial decision has become final. However, the Luxembourg Constitutional Court doubted the constitutional compatibility of such a clear-cut provision, and an amendment to the legislation is under way to introduce the possibility of modulating the effects of the annulment decision also for regulatory acts.

Lithuania specified that the annulment of regulatory acts has, as a rule, *ex nunc* effect but, taking into account the circumstances of the case, annulment may take effect as soon as the act is adopted. The Czech Republic specified that the annulment of general acts takes effect *ex nunc* or from the future date otherwise indicated by the court.

With regard to the possibility recognised by the court of modulating the effects of the annulment decision over time, it should be noted that the answers to this question overlap, in part, with the answers given to the previous one.

Several countries replied that in their respective legal systems, the judge is not allowed to vary the effects of his annulment decisions over time (Austria, Bulgaria, Croatia, Cyprus, Germany, Norway, Poland, Serbia, Slovenia, Sweden, Turkey). Others, (Belgium, Italy, Luxembourg and Portugal), on the contrary, replied that the law provides for this possibility. As for Italy, the variation over time of the annulment decisions is not provided for by law but by case law concerning specific cases.

In France, case law held that the administrative court may exceptionally order the preservation, even partial, of the effects of the annulled act, if the retroactive effect of the annulment is such that it entails consequences that are manifestly excessive in relation to the principle of legal certainty.

Spain replied that sometimes ("*in certain procedures")* the judge may vary the effects of the judgment: in this respect, it has been reported, by example, that in environmental litigation the judge may postpone the effect of annulment to allow a new ruling to come into effect.

In Lithuania, the court may modulate the effects of a judgment annulling a regulatory act by making it retroactive or it may order that the judgment be published after a certain period of time so as to postpone its effects.

In Latvia, the court always decides, on a case-by-case basis, the moment from which annulment takes effect.

In the Czech Republic it is possible to modulate the effects of the judgment in time only when the annulment concerns measures of a general nature. In Greece, temporal modulation of the effects of the judgment is permitted in the context of the review of excess of power. In Hungary, modulation is allowed only if it is justified by the public interest, legal

certainty or interests which are particularly important to the parties involved. Finland replied that modulation is allowed in theory but that " *there are not specific doctrines on this issue*".

I. 6. ACTION FOR AN ORDER FOR DAMAGES: PROCEDURE, TORTIOUS CONDUCT AND COMPENSABLE DAMAGE

The majority of countries replied that an action for damages can be brought separately from other actions (e.g. Belgium, Bulgaria, Estonia, France, Greece, Ireland, Italy, Norway, Turkey).

In some countries, an action for an order to pay money must necessarily be brought together with another action (Croatia, Serbia, Spain). Germany has specified that "*An autonomous order of payments is only possible if no administrative act is necessary to find or specify the legal claim*".

In several systems, the civil court has jurisdiction over the claim for damages and, therefore, the latter must necessarily be filed separately from the claim for annulment (Cyprus,Czech Republic, Poland). In the United Kingdom, the claim for damages cannot be dealt with in the judicial review proceedings but only in the civil tort proceedings.

Slovenia replied that, in theory, the administrative court can hear claims for compensation, but in practice it always declines to do so. Therefore, these claims are heard in civil proceedings. In Sweden, the civil courts have jurisdiction, but the Chancellor of Justice has the power to settle out-of-court claims on behalf of the State.

In Latvia and the Netherlands, a claim for compensation may be brought at the same time as another action or, after annulment, it must be submitted to the administration and only after that is it possible to challenge any refusal.

The time limits for bringing an action vary substantially among the various jurisdictions and the answers provided do not always specify the starting date of the limitation or prescription period for bringing an action. Many countries replied that the time limit for bringing an action for damages before a civil or administrative court is the ordinary limitation period for obligations arising from non-contractual wrongdoing (3-5 years on average).

In Italy, the action for compensation for damages for injury to legitimate interests, if it is brought independently, must comply with the limitation period of one hundred and twenty days starting from the day on which the event occurred or from the moment of awareness of the measure if the damage derives directly from it.

Slovakia specifies that the time limit of three years is valid from the moment of awareness of the damage or from the notification of the annulment or modification of the act if the right to compensation derives from that decision.

The United Kingdom highlighted that the time limit is one year if it regards an infringement of the *Human Rights Act*, unless the court considers that a different time limit is appropriate; in other cases, the time limit is six years.

In the Czech Republic, the time limits differ depending on whether the claim is for compensation for material or non-material damages: for material damages, the time limit is from 3 – 10 years and from 6 months to 10 years for non-material damages.

In Croatia, the action for damages must be brought together with the application for annulment, within the time limit provided for the latter (30 days).

In Spain the time limit is two months and corresponds to the time limit for challenging the act.

In Turkey, the interested parties may bring "Actions for annulment and full remedy actions" directly before the Council of State or before the administrative and fiscal courts or by "Directly filing a full remedy action". In the latter case, the law requires an application to be made to the administration before asking the court for compensation for the damage resulting from the administrative action ("full remedy action"). The prior application must be filed within one year of written notice or of the knowledge of the harmful action and, in any event, within five years from the date of the action. The provision then specifies that "*If these requests are partially or wholly rejected, an action can be filed within the time limit for the action as of the day following the notification of the procedure on this matter, or if no answer is given within thirty days about the request, from the end of such period".*

I. 7. RELATIONSHIP WITH AN ACTION FOR ANNULMENT AND ALLOCATION OF THE BURDEN OF PROOF OF LIABILITY

A) Types of compensable damage

Most countries replied that commission and omission activities unlawfully carried out by the public administration may result in compensable damages.

Some countries replied that an action for damages against the public administration is possible in all of the above-mentioned cases (Bulgaria, Croatia, Italy, Lithuania, Romania).

Ireland and the United Kingdom provide for the possibility of bringing an action for damages in certain circumstances.

The United Kingdom has specified that an action for damages may be brought in the event of a breach of a statutory duty if the person concerned can prove that the duty was imposed for the protection of a restricted group of citizens and that Parliament intended to confer on them a private right of action, or if a common law duty of care is breached, or if the administration has deliberately misused its power (misfeasance of public office). In Ireland, on the other hand, compensation may also be awarded in cases of state liability for misapplication of EU law in compliance with the *Francovich* case law; this type of damage is no longer compensable in the United Kingdom as of 2018, following the UK's withdrawal from the European Union.

In Luxembourg, the 'dysfonctionnement objectif' of the administration is a cause for compensation for material and non-material damages, including loss of opportunity, but the relative litigation falls under the jurisdiction of the ordinary courts. In Slovakia, damages for maladministration ("*maladministration*" integrated by "*breach of the duty of an administrative authority to take action or issue a decision within the time limit laid down by law, omission of an administrative authority in the exercise of public power, unnecessary delay in proceedings or other unlawful intervention in the rights and legally protected interests of natural and legal persons")* are also deemed relevant.

Belgium referred to the possibility of obtaining equitable compensation from the administrative judge for "*la réparation d'un dommage exceptionnel, moral ou matériel, causé par une autorité administrative*" In this case, the condition for the admissibility of the action to obtain this form of compensation ("indemnité") is the previous total or partial rejection of the request addressed to the public administration for this purpose or the silence - non-fulfilment of the same and results in the preclusion to claim compensation for the same prejudice in civil proceedings (preclusion which also operates in the opposite sense).

In general, countries have replied that both material and non-material damages are compensable. In some countries, such as Germany and Serbia, only material damage is compensable.

France clarified that *pretium doloris* and loss of *opportunity* are compensable only if the injury is not merely possible.

Luxembourg and the Netherlands replied that loss of opportunity was compensable under their respective laws, while Sweden stated that both material and non-material damages were compensable. Sweden pointed out that its law does not use the expression loss of opportunity, but that loss of opportunity for financial gain due to a mistake by a governmental body can be compensated as material damage.

B) Avoidable damage and relations with actions of annulment

The replies showed that, in most jurisdictions, damages that could have been avoided by taking appropriate legal action are not recoverable.

In some jurisdictions, the prior annulment of the act is a condition of admissibility for obtaining compensation for damage resulting directly from it (Cyprus Germany, Latvia, Portugal, Romania, Spain and Luxembourg by case law).

In the Netherlands, the rule of case-law is that a measure that is not challenged within the time limit is consolidated, so that both the administrative and civil courts will consider it legitimate, regardless of any substantial or procedural shortcomings. The administrative act assumes the status of "formele rechtskracht". However, case law itself has drawn up exceptions to this rule, for example in the case of decisions permitting the performance of activities entailing major risks for persons and property, since the damage often occurs at a later date and the persons involved cannot be expected to challenge the administrative act in order to prevent possible damage in the future.

In other jurisdictions, failure to bring an action for annulment or other action is not an obstacle and is not assessed in terms of negligent conduct (Croatia, France, Greece, Serbia, Turkey). France and Greece specified that failure to bring an action for annulment is not a condition for the admissibility of the action for damages and does not affect the total amount of damages sought.

The United Kingdom stated, in general terms, that in some specific cases, the failure to bring an action for annulment could affect the right to damages or the amount of damages, and that the bringing of a damages claim in civil proceedings may be regarded as an abuse of process in cases where the claimant could have sought *judicial review*.

C) Subjective element

From the replies, it emerges that most countries consider the liability of the administration as an objective liability (without fault) and the burden of proof of the elements of the tort lies with the claimant.

Few jurisdictions require the subjective element of the tort (malice or negligence).

D) Burden of proof

In France, the burden of proof is always on the injured party, but may vary depending on whether the administration is at fault or not, as in cases of objective liability ("*responsabilité sans faute").*

Germany and Latvia specify that the burden of proof is mitigated by the powers of the judge at the preliminary stage.

The United Kingdom replied that "*the claimant bears the burden of establishing that a relevant wrong has been committed in respect of which damages are recoverable and of establishing on the balance of probabilities that he has suffered loss (see R (Sturnham) v Parole Board [2013] UKSC 23 at para 82)".*

In Estonia, the burden of proof of the constituent elements of liability rests with the claimant, i.e. the identification of the right infringed and of the damage suffered, while there is a legal presumption in relation to non-asset damage, when, for instance, a person sues for the prejudice suffered due to the unjustified loss of personal liberty or in case of damage to personal safety and health caused by the administration, as well as in matters of "*common knowledge".*

Romania (HCCJ) specified that, as a rule, the burden of proof of the liability of the public administration lies with the injured party. In disputes concerning the determination of civil servants' remuneration, case law holds that the burden of proof lies with the employer who must produce all relevant documentation, while in tax disputes, the burden of proof of the legality of the act and the determination of the tax claim lies with the tax authority.

In Slovenia, the general rules of civil law apply, but there is a presumption of (relative) fault on the part of the administration.

Turkey, on the other hand, affirms that an administrative act carried out in the general interest, even if lawful, may give rise to a right to compensation when it creates an exceptional burden exclusively for certain individuals, such as risky activities. The fundamental principle of equality in the bearing of public burdens and the principle of social equity justify in these cases the liability of the administration for damage caused by its acts or actions without fault and it is for the court *ex officio* to determine the 'fault of the service'.

I. 8. ACTION FOR AN ORDER FOR THE RELEASE OF THE MEASURE

The majority of countries replied in the affirmative (Bulgaria, Czech Republic, Germany, Greece, Hungary, Italy, Latvia, Poland, Portugal, Romania, Spain).

France pointed out that "*La situation évoquée dans cette question se plie difficilement aux catégories traditionnelles du contentieux administratif français*".

Germany referred to art. 113 co. 5 CACP: "*Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff's rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is ripe for adjudication".*

In Portugal, the Public Administration may be ordered to adopt the unlawfully omitted administrative act if the following conditions exist: (a) absence of a decision within the statutory time limit; (b) rejection or refusal to examine the application; (c) failure to comply with the obligation to decide, irrespective of the existence of an application; (d) replacement of an administrative act with a positive content that does not fully satisfy the request of the interested party.

Greece specified that the administrative judge may order the administration to adopt an act that it has unlawfully refused, when its adoption is mandated by law.

Luxembourg stated that the administrative judge cannot order the adoption of a specific administrative act. However, in the context of the *recours en réformation,* the administrative judge may adopt a decision which replaces the one found to be unlawful. As already specified in reply 8, in the context of the action of annulment, the judge can, by means of the motivation of his decision, indicate instructions to be followed for the new decision to be adopted.

Other countries replied that this possibility is excluded, without further specification (e.g. Lithuania, Norway, Slovakia, Slovenia).

Finland replied that the courts do not have a general remedy in the event that an administrative authority persistently delays in taking a decision or even totally neglects to do so.

I. 9. POWERS OF THE COURT: CONVERSION OF ACTIONS

It should be noted that the question has been interpreted in different ways, as can be seen from the fact that some answers concern the conversion of the action, while others concern the re-qualification of the application.

In Italy, the Code of the Administrative Procedure gives the judge the task of qualifying the action brought, in accordance with the principle *"iura novit curia"*. The judge may, therefore, requalify the application with the consequent conversion of the action into another, only if the action originally proposed has all the prerequisites for the one into which it is converted. For example, an action to ascertain the right of a company to obtain a revision of the price of a supply contract by a public administration may be converted into an action against the silence maintained by the administration on the request for revision.

However, most countries state that conversion of the *ex officio* action is not possible in their respective jurisdictions.

In many countries, however, the re-qualification of the application by the judge is allowed.

France specified that, since *'recours pour excès de pouvoir '* do not require the services of a lawyer, unlike *' recours de plein contentieux,'* the re-qualification of the action by the judge assumes particular importance *("Si une requête, introduite sans avocat, se présente sous la forme d'un recours pour excès de pouvoir alors qu'il s'agit en fait d'un recours de plein contentieux (...), alors le juge peut prétoriennement requalifier lesdites conclusions et rejeter ladite requête pour irrecevabilité").*

Hungary replied that conversion is allowed only in cases brought by the central government against the failure of local governments to exercise their decision-making or regulatory powers.

Ireland pointed out that the Supreme Court, if it considers that it cannot convict the administration on *judicial review*, may order that the case be continued in civil proceedings.

SESSION II

THE SPECIAL RITES

II. 1. THE "SPECIAL" RITES AND THE FORMS OF DIFFERENTIATION OF PROTECTION WHICH EMERGE FROM THE ANSWERS GIVEN BY THE STATES

II. 2. JUDICIAL PROTECTION AGAINST "SILENCES"

II. 3. THE ENFORCEMENT OF JUDGMENTS OF THE ADMINISTRATIVE JUDGE: RATE OF COMPLIANCE AND REMEDIES AGAINST NON-COMPLIANCE

II. 4 A REGIME OF ENFORCEABILITY OF JUDGMENTS OF FIRST INSTANCE

II. 5. THE "EXHAUSTION" OF ADMINISTRATIVE DISCRETION AFTER JUDICIAL ANNULMENT

II. 1. THE "SPECIAL" RITES AND THE FORMS OF DIFFERENTIATION OF PROTECTION WHICH EMERGE FROM THE ANSWERS GIVEN BY THE STATES

Most legal systems provide for "differentiated" procedural rules. The matters and areas in which this differentiation operates coincide only in part. These choices either reflect the "domestic" peculiarities of the individual legal systems or show a partial "uniformity" of the European Union system.

The spheres and matters where, most commonly, the legal systems provide for "differentiated" procedural rules concern the protection of "sensitive" interests or of relevant "economic-social" impact, such as, for instance, immigration, planning, public contracts, environment, expropriation proceedings, taxation, elections and disputes with independent administrative authorities. There are also rites in which there is a common and generalised need for simplification and speeding-up of judicial protection, such as, for instance, in the case of access to documents, silence of the administration (in its different meanings in the various legal systems), in injunction proceedings and enforcement of administrative judgments and also in proceedings for damages.

In many cases the provision of special procedural rules is instrumental to providing greater protection with respect to particular areas that respond to national specificities: examples of this are the Hungarian and Polish systems that provide for a "simplified" protection for the issuance of certificates, or the Portuguese system in which a simplified procedure is regulated for litigation in the so called "mass procedures".

There is also a tendency for many legal systems to converge with regard to the provision of differentiated protection to ensure better safeguarding of fundamental rights (e.g. health or

safety). In most jurisdictions, there are also "special" rules for the granting of interim measures. This point will be discussed in more detail below in Session III.

In some cases (e.g. in Bulgaria and Norway) the existence of "special" substantive rules (e.g. for the compensation of damage resulting from an unlawful administrative measure) does not correspond to a special procedural regime, the ordinary rules continue to apply.

In particular, in Germany and Norway, instead of providing for the recourse to differentiated procedural rules, the system anticipates the "specialness" of certain matters by applying a differentiated procedural regime to them (e.g. by providing for the speeding-up of the time-limits for requesting and inspecting administrative acts).

As for the source of the "special" discipline, in some countries, such as Italy, it is contained directly in the Code, in others it is in the legislative sources that generically regulate the administrative process (Austria, France, and the United Kingdom), in others still, it is contained in special laws (Belgium). Sometimes, as in Sweden, the legal provisions are accompanied by the possibility for individual courts to further "calibrate" the differentiation of protection in their internal procedures.

The states which answered in the affirmative with regard to the existence of "special" procedural rules also pointed out that the "differentiation" coincides, in most cases, with the provision of "*fast-tracked procedures*" for the lodging of an application at first instance, or for the conduct of the trial or for the adoption of the judicial decision or in the provision of exceptions to the ordinary procedural rules ("*simplified procedures").* This emerges from the replies given by Austria, Croatia, the Czech Republic, France, Greece, Ireland, Malta, Poland, Romania, Serbia and Turkey.

In addition to these differentiating profiles, other countries add that in their legal systems there are some exceptions regarding "jurisdiction" of the administrative courts (Belgium, Finland, Latvia, Lithuania, Luxembourg, the Netherlands, Slovenia). With regard to this last profile, some countries specify that this exception consists in the preclusion, in certain disputes, of the possibility of appealing against decisions of first instance (in Latvia with regard to electoral disputes and in Luxembourg for immigration disputes and for those generated during the Covid-19 pandemic). In some cases, however, the specialness is determined by the possibility to appeal directly to the SAC (in Luxembourg and in Slovenia when dealing with electoral disputes).

Norway replied that, in general, there are no special rules in its legislation on time limits for lodging an appeal or for the course of the proceedings.

Some countries noted that the area of differentiation of procedural protection is much wider, involving also a greater extension of the powers of the judge, the widening of the adversarial process (Estonia), the type of rulings that can be made (Greece and Lithuania), the possibility for the judge to provide a more streamlined reasoning (Greece and Italy) or to take evidence more informally and more quickly. Greece also pointed out that interim measures *ante causam* can only be granted in regard to public contracts.

Further specificities reflecting "domestic" peculiarities also emerge from the replies.

According to the answer given by Cyprus, it emerges that the latter, within the area of "speciality", also includes cases in which the exertion of the hierarchical appeal is a condition for access to the administrative judgment (e.g. in matters of public contracts). Slovakia, on the other hand, indicated that each jurisdictional action has its own differentiated discipline and the greater speciality consists in the specific conditions - in addition to the "ordinary" ones - of the legitimacy to appeal.

It is also worth mentioning the reply from the Netherlands which pointed out that the administrative courts have the power to adopt an interim decision, allowing the administrative authority to correct, for example, a procedural defect or failure to state reasons. This procedure is called "*administrative loop*" ("*bestuurlijke lus").*

In their replies, most countries pointed out that "differentiated" procedural rules are established both "by subject matter" and by the jurisdictional actions which may be brought Austria, Belgium, Cyprus, Croatia, Finland, Greece, Hungary, Italy, Latvia, the Netherlands, Portugal, Romania, Spain, Sweden Turkey and the United Kingdom). Other countries replied that the speciality concerned exclusively, or principally, "matters", but not actions (Czech Republic, France, Ireland, Lithuania, Luxembourg, Poland, Serbia, Slovenia).

In a very few cases, the differentiation of protection concerns only the actions which can be brought (Slovakia) and not specific matters.

II. 2. JUDICIAL PROTECTION AGAINST "SILENCES"

Almost all the countries replied that their legal systems provide for judicial action against the silence of the administration (Austria, Belgium, Bulgaria, , Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, the United Kingdom), but do not always clarify whether it refers to mere *inertia*, understood as failure to comply with the general obligation to provide, or to a silence with the value of consent or rejection.

Finland and Norway replied that no specific procedural action is provided for in their legislation for these purposes: in the Norwegian system, preference was given to procedural remedies, limiting judicial protection to actions for damages, while in the Finnish system only the Chancellor of Justice or the Ombudsman can react against silence in defence of "legality". On this point, Finland also specified that, even in the absence of any legal provision for an action by private individuals against the silence of the administration, a particularly protective line of case-law stated that the administrative judge, in order to prevent inertia resulting in an infringement of the individual's rights, may refer the matter to the competent administration by making express reference to its obligation to take a decision.

With regard to the source of regulation of the protection against silence, it was found that in only one legal system is it directly provided for by the Constitution (Cyprus), while in the others it is contained in general procedural provisions or special laws. In some countries (Lithuania and Spain) the discipline of judicial protection against silence is not properly qualified as "special", since it is considered as an "ordinary" remedy.

There is some convergence in substance and procedure.

In Belgium and Greece, for example, silence is equivalent, as a general rule, to rejection of the application. France's reply shows that although, in principle, silence takes on the value of consent, there are numerous provisions of the *Code des relations entre le public et l'administration* in which it takes on the value of implicit rejection ("*décision implicite de rejet*") and in these cases silence corresponds to a "*décision préalable*" that can be challenged directly before the administrative court.

The Czech Republic pointed out that a private individual who has exhausted his domestic remedies before an administrative authority without success may ask the court to compel it to give a decision on the substance of the matter. This procedure, the Czech Republic specifies, does not apply in cases where there are special laws that give silence the value of consent.

Turkey replied that, in addition to total inertia, the action to contest the adoption of a non-final measure by the Public Administration is also available instead of waiting for the final decision. In this case, the non-final decision is considered as a rejection of the application.

There are also differences with regard to the time limits for bringing an action against silence. In Luxembourg, the action can be brought three months after the administration should have issued its decision. In Poland it can be brought without any time limit. In Romania, the court, as well as setting a time limit, may impose a penalty on the administration for each additional day of delay.

II. 3. THE ENFORCEMENT OF JUDGMENTS OF THE ADMINISTRATIVE JUDGE: RATE OF COMPLIANCE AND REMEDIES AGAINST NON-COMPLIANCE

With reference to the data representing the rate of spontaneous compliance with the rulings of the administrative judge by the Administrations, this data tends to converge.

Most of the countries report that the Administration complies spontaneously, always or almost always, without indicating a reference percentage (Austria, Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Portugal, Slovenia, Turkey, the United Kingdom), but underlining that this aspect is not particularly problematic.

Some countries report that the administration complies in more than 50 % of cases (Belgium, Croatia, Czech Republic, France, Ireland, Italy, the Netherlands, Romania, Slovakia, Spain, Sweden), others even more than 90 % (Hungary, Luxembourg), recording a very low rate of appeals necessary to enforce judgments (Czech Republic, France).

Serbia does not indicate a percentage, as there is no remedy before the administrative court to challenge the non-enforcement of its judgments. Norway, also, does not indicate a number as there is no system of administrative jurisdiction. It is worth noting the peculiarity of Slovakia where, in those rare cases where the administration considers that the administrative judge has erred in his decision in law, it can challenge it in a new trial.

Many countries replied that in their own legal systems there are jurisdictional procedures, more or less articulated, to ensure the enforcement of administrative judgements (Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Romania, Spain). On this point, Cyprus pointed out that such a provision exists at constitutional level: Article 146.5A of the Constitution provides that both the Administrative Court and the Supreme Court have the power to assess whether their decisions which have become legally binding have been correctly and promptly executed and, if they have not, they may impose sanctions to the extent provided for by law. Cyprus further emphasised that guidelines for implementation have never been drawn up as there has been no need to do so, given the absolute rate of compliance by the administrations. For the enforcement of non-final decisions, suspension orders are adopted which, if disregarded by the administration, may constitute contempt of the Court. The Czech Republic also indicated that although a specific judicial procedure exists, it is never used.

Belgium, France and Germany replied that in their legal systems there are specific procedural actions for obtaining the full execution of the judgments of the courts of first instance and, in the event of non-compliance, a financial penalty may be imposed, quantified as a global amount, per unit of time *(astreinte*) or calibrated in relation to the individual infringement. On this point, Germany points out that an order by the administration to pay a

sum of money to compensate for the non-execution of a decision is, however, not considered an effective remedy, as this sum is not paid in favour of the claimant, but to another authority, thus remaining within the public sector.

In Bulgaria, there are specific actions to enable both the administration and the individual citizen to obtain enforcement of judicial decisions (even if they are not final) or compensation for their non-execution or incorrect execution. Greece emphasised that "forced" enforcement actions can only be brought to "attack" the private property of the State.

Luxembourg pointed out that if the Administration, within three months of the judgment of annulment, does not adopt the consequent acts, the interested party may apply to the court which pronounced the judgment for the appointment of an extraordinary commissioner and that, in more than 95% of cases, the mere filing of such an application determines the immediate compliance with the judgment on the part of the Public Administration, with the resultant cessation of the matter in dispute. However, spontaneous compliance does not exclude the possibility of bringing an action for damages before the same court.

Some countries replied that there are no specific legal actions or procedures to ensure the full enforcement of the administrative judge's decisions (Malta, the Netherlands, Poland, Portugal, Serbia, Slovakia, Sweden , Turkey): nevertheless, it emerges from the answers given, that some legal systems provide for instruments for (*"enforcement"*) that generally allow the "soliciting" or "order" of such enforcement.

Malta, for example, stated that its legislation contains *executive warrant procedures* which enable the interested party to request the enforcement of judgments. The Netherlands replied that the competence for the enforcement of judgments is, in general, vested in the ordinary judge, but the administrative judge may establish from the outset, in his decision, that failure to enforce it will entail the imposition of an *astreinte* (quantified by the judge himself). Estonia also noted out that its legislation provides for a mechanism of financial penalties (of 32,000 euros), which can be imposed by the administrative courts themselves in the event of non-compliance. Finland highlighted the observation that the administrative court does not, in principle, have the jurisdiction to enforce its decisions, but that the law provides for cases in which the interested party may challenge, in the courts, those administrative measures taken contrary to a previous court decision.

The replies of Portugal and Turkey showed that the non-enforcement of judicial decisions results in various liabilities on the part of the Administration. (in Portugal: disciplinary, civil and criminal). Austria also pointed out that the enforcement of judgments by *first instance*

administrative courts is the specific responsibility of the *district administration authorities,* which are responsible for this.

In Sweden, on the contrary, in the rare cases where the Administration does not comply with judicial decisions, the interested party can only turn to supervisory bodies within the Administration. In Turkey, if the judgment is not complied with, an action for compensation for pecuniary and/or non-pecuniary damage may be brought before the competent administrative court.

The UK *enforcement* system, on the other hand, is quite peculiar. In this system, failure to comply with a *mandatory order* can be punished as "contempt of court" (see M v Home Office [1994] 1 AC 377) and result in a fine or imprisonment for up to two years. Conversely, the infringement of a *"declaration"* contained in a judgment does not give rise to such serious consequences, because of its non-coercive content, but the person concerned may take legal action to have it enforced. However, this is a remedy that is never resorted to, given the rate of immediate compliance with judicial decisions, by administrations.

II. 4 A REGIME OF ENFORCEABILITY OF JUDGMENTS OF FIRST INSTANCE

As regards the enforceability of judgments at first instance, the replies given by the States reveal several different trends.

The first is that decisions of administrative courts of first instance are, in principle, immediately enforceable (Austria, Belgium, Czech Republic, France, Greece, Ireland, Italy Malta, the Netherlands , Norway, Romania, Spain, Turkey, the United Kingdom). The second is that decisions of the courts of first instance are enforceable only when they become *"final*" (i.e. no longer subject to appeal) (Bulgaria, Estonia, Hungary, Latvia, Poland, Portugal, Slovakia, Slovenia).

In Finland, as a rule, judgments are enforceable only when they become final, but they can also be enforced if (i) the law provides for it; (ii) their nature is such that they must be enforced immediately; (iii) enforcement cannot be deferred for reasons of public interest. Serbia pointed out that all decisions issued by the administrative courts have "mandatory" effects, but that only decisions that are no longer subject to appeal ("*final judgement*") are immediately enforceable, adding that, following judicial annulment, if the administration does not issue - immediately or within thirty days - a new measure, or does not execute the judicial decision, the interested party may, by means of a separate act, request the court to adopt the measure.

Some countries replied that only first instance decisions are not immediately enforceable (Croatia and Luxembourg). Others specified that first instance judgments take effect only if provided for by law or if declared provisionally enforceable by the court (Germany and Sweden). Lithuania replied on this point that first instance judgments are not immediately enforceable and that only SAC judgments are not appealable and therefore immediately enforceable.

There is also no agreement on the suspensive effect of the appeal.

In Cyprus, the enforceability of the judgment may be suspended not only at the request of the interested party but also subsequently, *ex proprio motu*, by the *Administrative Court.* There is, however, a specific procedure for opposition by the parties after the communication of the decision.

In some countries, the lodging of an appeal does not, as a rule, suspend the decision at first instance level (Finland, France). In France, however, the appeal against a judgment in electoral matters has a suspensive effect. In Romania, on the other hand, the lodging of an appeal has an automatic suspensive effect.

II. 5. THE "EXHAUSTION" OF ADMINISTRATIVE DISCRETION AFTER JUDICIAL ANNULMENT

The verification of the instruments available to the parties to contest any unlawfulness which may arise from a judgment annulling an administrative measure characterised by discretionary power, has led to difficulties for most countries in finding an immediate response within their own legal system because it is linked to the Italian system.

In Italy, the judgment annulling an administrative measure characterised by discretionary power binds the Administration with regard to the illegitimacy recognised by the judgment (so-called "*deduction*"). The Council of State maintains that, in some cases, the discretionary power may be "reduced" either as a result of a self-imposed constraint by the public administration itself, or as a result of the outcome of the judgment (when, for example, the preliminary investigation has found that there were no other alternative practicable technical choices).

Not being in a position to give a precise answer, most countries stress, in general, that the administrative judge's review of discretionary decisions is rather limited and that there are no specific mechanisms for the progressive "reduction" of administrative discretion.

There is a general tendency to consider the annulment decisions of the court of first instance suitable for guiding the Administration, through its own motivation ("*legal reasoning*"), as to

the correct re-exercise of administrative power. Some countries emphasise that judicial review is always limited to profiles of legitimacy and can never limit the discretion that characterises administrative action (Belgium, Bulgaria, Croatia, Hungary). Cyprus emphasised that the *review* is principally aimed at verifying the reasonableness of the decision. Estonia, Latvia and Portugal replied that the judge must verify that the administration has re-exercised its power *according to the instructions indicated* by the judge, but cannot directly replace it.

Some countries (France) replied by differentiating between the case in which the administration did not respond to a private party's request - by remaining silent, thus, not exercising its discretionary power - from that in which there was an express rejection. In the first instance, if the court finds that the administration has misrepresented ("*méconnu")* its discretionary power, denying the citizen the right to which he was entitled, the judicial decision leaves the administration with no alternative but to grant what was requested. The judgment in these cases contains an injunction ("injonction") to the administration to that effect. The second hypothesis leaves more room for manoeuvre for the administration: if it has wrongly rejected a private party's request, the judgment annulling the measure often contains an injunction ("injonction") not to grant the measure but to reconsider the matter. In such a case, the administration, although having originally given erroneous reasons for the first refusal, which was then annulled, may legitimately invoke another reason for the new refusal, by adopting a decision that will be independently contestable.

Some jurisdictions (the Czech Republic and Slovenia) pointed out in their replies that there is a general correspondence between the reduction of discretion and the acceptance of the grounds put forward by the claimant (at first instance or possibly on appeal). The Czech Republic stated that the reduction of administrative discretion is closely related to the principle of correspondence between "requested and pronounced", so that discretion is "reduced" according to the reasons for which the annulment of the measure was ordered.

Sweden observed that the "reduction" of discretion may be accentuated in the passage from the first instance to the appeal on account of the claimant's choice regarding which parts of the judgment are to be appealed: a choice which allows the claimant to obtain with priority ("*precedence")* a ruling by the SAC on the aspects of immediate interest with respect to the re-exercise of power.

Slovenia replied that the discretionary power may be reduced in exceptional cases in which, as there is an already established practice of the administration, the court is careful to avoid unequal or unfair treatment.

Romania replied that, as a rule, a judgment annulling an administrative act on the ground of excess of power obliges the administration to comply with the illegality established in the judgment; whereas, when the administrative judge suspends the execution of administrative acts, the discretionary power is "reduced" entirely by the effect of the judicial decision and the law. Thus, if a new administrative act is issued with the same content as the one suspended by the judge, it is automatically suspended.

The Netherlands reported that the system does not allow the administrative judge to annul further decisions similar to the one already annulled. However, there are mechanisms which allow the administrative judge to resolve disputes "once and for all". In this context, it is worth mentioning the rule that if the administration modifies the measure *sub iudice,* the appeal is automatically considered to be "extended" also to this new measure, unless the latter completely satisfies the applicant's claims. The reply emphasises that this mechanism fully guarantees the effectiveness of judicial protection, in that the interested party does not need to challenge the new measure. Another mechanism favouring the swift 'final' resolution of disputes is the previously mentioned (*'administrative loop' - 'bestuurlijke lus'*) whereby the administrative courts may adopt an interim decision, allowing (or, if in the last resort, requiring) the administrative authority to remedy errors committed during the procedure (e.g. breaches of procedural rules or failure to state reasons). This instrument relieves the interested party of the burden of challenging new decisions taken by the administrative authority. Finally, Dutch law provides for the so-called "*judicial loop*" ("*judiciële lus"),* on the basis of which, in the event that the judgment of the SAC orders the administrative authority to take a new decision, the judgment may stipulate that the new measure can only be challenged before the same Court.

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SESSION III

INTERIM RELIEF

III. 1 THE SUSPENSION OF THE MEASURE AS AN "AUTOMATIC" EFFECT OF THE LODGING OF THE GRIEVANCE: SYSTEMS THAT PROVIDE FOR IT AND LIMITS TO THE RULE

III. 2 THE TYPES OF PRECAUTIONARY MEASURES AND THE GENERALISED NATURE OF THE REMEDY

III. 3 CONDITIONS FOR THE GRANTING OF PRECAUTIONARY MEASURES AND PROVISION OF SECURITY

III. 4 PRECAUTIONARY MEASURES ANTE CAUSAM

III. 5 THE INTERLOCUTORY PROCEEDINGS: TERMS, COLLEGIATE OR MONOCRATIC NATURE OF THE RULING AND THE POSSIBILITY OF APPEAL

III. 6 DEFINITION OF THE MERITS OF THE CASE IN THE INTERLOCUTORY PROCEEDINGS

III. 7 SUSPENSION OF THE EFFECTS OF THE JUDGMENT AS A PROTECTIVE MEASURE ON APPEAL

III. 8 STATISTICS ON THE AVERAGE NUMBER OF PRECAUTIONARY RULINGS

III. 1 THE SUSPENSION OF THE MEASURE AS AN "AUTOMATIC" EFFECT OF THE LODGING OF THE GRIEVANCE: SYSTEMS THAT PROVIDE FOR IT AND LIMITS TO THE RULE

Most of the countries replied that the lodging of a judicial appeal does not automatically suspend the effectiveness of the measure, since the suspension must be the subject of an application by the interested party.

In reporting the data below of the only countries that answered the question in the affirmative or that, although answering in the negative, indicated some exceptional cases in which the suspension of the measure follows as an automatic effect upon the filing of the appeal, it should be noted that the automatic suspension, even if declared operational (Austria, Bulgaria, Croatia, Finland, Germany, Latvia, Malta, Portugal, Sweden), is not absolute but is subject to certain conditions, such as the timeliness and admissibility of the appeal (Austria) or its possible justification (Germany). In Austria, moreover, the authority may exclude the automatic suspensive effect if, following a balancing of opposing interests, it appears that urgent execution of the measure is necessary to avoid imminent danger.

In other countries, certain matters are exempted from the rule of automatic suspension by express legal provision. This exception may be reserved for specific matters (as in the case of

asylum applications in Austria or municipal matters in Finland) or extended to the numerous expressly-listed cases of derogation (Latvia, Portugal, Sweden).

A different derogation mechanism operates in Germany, where, in certain matters, there is a presumption of non-suspensibility which hinders the application of the rule (such as taxation or police orders).

Finland referred to the automatic suspension of the judgment, pointing out that it follows from the procedural rule that court decisions cannot be enforced until they have become "*final*". It underlined, however, that this rule is derogated from in those cases where the appeal to the SAC is subject to a prior "*leave to appeal":* in these specific cases, the lodging of the appeal does not hinder the enforceability of the contested decision, with the consequent inoperability of the mechanism of automatic suspension.

Croatia too, referred to the suspension of the judgment, specifying that the rule of automatic suspension is also applicable in the event of an appeal.

Among the legal systems which, while answering the question in the negative, illustrated the exceptional cases in which the automatic suspension operates, a distinction should be made between those which provide for such a suspension at first instance only for specific matters (Czech Republic) or in exceptional cases expressly provided for by law (Slovenia), and those which illustrated the exceptional cases in which the appeal of the judgment before the higher court results in its immediate suspension (in social security matters in the Netherlands and in the case of appeals brought by the *Immigration and Asylum Chamber of the Upper Tribunal* in the United Kingdom).

Some countries replied that precautionary measures can be ordered *ex officio* by the judge (Cyprus, Estonia, Finland, Lithuania, Norway). On this point, Norway specified that the Court may decide, on its own initiative, to suspend the effectiveness of the contested measure, in certain cases only, such as in matters regarding social services.

III. 2 THE TYPES OF PRECAUTIONARY MEASURES AND THE GENERALISED NATURE OF THE REMEDY

As for the types of interim measures, while some legal systems are atypical (Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Spain, Sweden, the United Kingdom), others have only the suspension of the effectiveness of the measure (Bulgaria, Croatia, Cyprus, Norway Romania, Serbia, Slovakia, Turkey,) or, more specifically, the suspension of the execution of the act or of the action of the Public Administration (Poland).

In some countries, the openness to forms of precautionary protection other than suspension operates exclusively in areas of EU relevance (Austria).

Some countries provided examples of atypical precautionary measures that can be granted: the admission of a candidate to a competition from which he had been excluded (Luxembourg), the granting of a provisional licence in the event of an appeal against the refusal (the Netherlands).

The absolute majority of the countries that replied to the questionnaire stated that interlocutory protection is a generalised remedy and, therefore, not limited to certain types of disputes.

In Hungary, interlocutory protection is excluded against administrative measures which (a) are taken in execution of a final court decision, (b) require the exercise of civil protection functions or the provision of services falling under national defence obligations; (c) concern defence and military areas and buildings.

Poland also clarified that the general application of interim protection is subject to exceptions provided by local laws which have come into force ("*provisions of local enactments which have come into force*") or in cases where the statute or the nature of the act (e.g. act of refusal) precludes it.

Romania specified that the suspension does not apply to acts adopted, in times of war, a state of siege or emergency, those relating to defence and national security or those adopted for the restoration of public order or to eliminate the consequences of natural disasters and epidemics.

Sweden, while affirming the general nature of the remedy, pointed out that there are particular matters, such as public contracts, where special rules apply as to the issues to be considered and the rules of evidence.

Ireland specified that interlocutory protection is by nature "equitable", this means that the Court may deny it even if the criteria set out in the *case law are met*.

III. 3 CONDITIONS FOR THE GRANTING OF PRECAUTIONARY MEASURES AND PROVISION OF SECURITY

With regard to the conditions for granting a request for interlocutory measures, it is generally necessary to demonstrate the existence of an urgent situation requiring immediate intervention, as well as a reasonable fear of damage or loss. In addition, some jurisdictions require profiles of the merits of the claim (Belgium, Estonia, France, Italy, Latvia, Lithuania,

Luxembourg, the Netherlands, Norway, Portugal, Romania, Sweden, Turkey, the United Kingdom).

The relationship between the two requirements may vary from country to country: in Greece, for example, the manifest justification of the claim may be an alternative condition to injury.

Finland pointed out that the appearance of merits, although not a legal requirement, is in practice taken into account by the court in the interlocutory decision.

Some countries observed that when assessing the application for protective measures, the court generally balances any conflicting interests (e.g. Hungary, Slovenia, Spain).

The United Kingdom referred to a number of *case laws* according to which the claimant must show that he has a real prospect of a favourable outcome of the dispute and that the balancing of interests presupposes the adoption of the interim measure.

Some countries pointed out that non-contradiction to the public interest is considered a condition for granting suspensive measures (Czech Republic, Serbia, Slovakia). Cyprus pointed out that the manifest unlawfulness (self-evident and clearly deduced) of the contested decision reverses the rule that the public interest takes precedence over the claimant's interest when balancing it. In the Netherlands, too, the *prima facie* assessment of the illegality of the contested measure assumes autonomous relevance, so much so, that it alone can justify the granting of precautionary measures, even irrespective of the recurrence of the requirement of damage.

In Ireland, the Rules of Court and case law have established the conditions under which interim measures may be granted. The Court must verify, in the following order: (a) the seriousness of the claim brought before it; (b) the irreparability of the damage that the claimant would suffer as a result of the proceedings and (c) the reparability of the damage suffered by the administration. Finally, at the end of the process of verification of the existence of the above conditions, the Court balances the opposing interests in the light of the objective of maintaining the *status quo*.

Most countries replied that their legislations do not provide for the possibility of imposing bail (Austria, Belgium, Croatia, Czech Republic, Estonia, France, Germany, Greece, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Serbia, Slovakia, Sweden).

In addition to Italy, Bulgaria, Cyprus, Hungary, Malta, Portugal, Romania, Slovenia and Spain replied in the affirmative, specifying, however, that bail is only foreseen for specific cases (in case of suspension of tax measures and in other cases provided for by law).

In turn, Bulgaria specified that the court may order the payment of bail to allow the immediate enforcement of a measure subject to automatic suspensive effect if the administrative authority or the party against whom the measure has favourable effects so requests. In this case, the Court may set bail for them.

In Hungary and Norway, the bail is linked to the possibility that the protective measure may cause compensable damage. Hungary specifies that, when determining the bail, the court takes into account the degree of substantiation of the claim.

In Ireland, provision is made for the granting of bail only to guarantee the payment of court costs (*security of costs).* This form of security is also provided for in Norway, but applies only at the request of the administration involved and only to claimants who are not resident in an EEA State.

Latvia replied to the question by referring to the security deposit of €15 to be paid at the time of the application for interim measures, this deposit is fully refunded if the application is granted in whole or in part.

The Netherlands, after clarifying that there is no provision for the imposition of a security deposit for the application for protective measures, illustrated the rules applicable to the registration fees for the commencement of the interlocutory proceedings (the amount of which is similar to that applicable to proceedings on the merits) and the cases in which they may be reimbursed.

III. 4 PRECAUTIONARY MEASURES ANTE CAUSAM

As regards the possibility of introducing the precautionary request before the introduction of the case on the merits (*ante causam),* some countries replied that they were not aware of this remedy (Austria, Croatia, Cyprus, Czech Republic, Finland, Latvia, Lithuania, Luxembourg, Poland, Slovakia, Slovenia, and Turkey. Poland, however, specifies that the administrative authority, having been preliminarily seized, may suspend the measure before the commencement of the proceedings).

Among the countries that provide for precautionary measures *ante causam*, Estonia, Germany, , Norway, Serbia, Spain, and the United Kingdom, they do not expressly specify whether they lose their effectiveness if the appeal on the merits is not brought within the time limit, whereas this time-limit rule applies in Belgium, Bulgaria, Ireland, Italy, Malta, the Netherlands, Portugal and Romania.

In Italy the precautionary measure *ante causam* loses its effectiveness if, within fifteen days from its adoption, the appeal has not been notified. In any event, the measure granted loses

effect sixty days after the date of its adoption, while only the provisional measures that have been confirmed in the course of the litigation in the collegiate court, remain effective.

Serbia replied that measures granted *ante causam* take effect irrespective of the commencement of proceedings on the merits. Norway and the United Kingdom emphasised that the determination of the duration of such measures is left to the Court to decide.

Sweden replied that although the possibility of applying for provisional measures *ante causam* was not expressly provided for, the particular flexibility of the procedure would allow the claimant to apply for them, specifying the merits at a later stage.

Particular mention should be made of those countries in which only certain provisional measures can be applied for on a stand-alone basis (e.g. *référé-liberté* in France, or the request to obtain evidence in advance in Hungary). In Greece, interlocutory measures *ante causam* are allowed only in the sphere of public contracts and remain effective irrespective of the introduction of proceedings on the merits.

III. 5 THE INTERLOCUTORY PROCEEDINGS: TERMS, COLLEGIATE OR MONOCRATIC NATURE OF THE RULING AND THE POSSIBILITY OF APPEAL

Some jurisdictions do not have specific rules on interlocutory proceedings (Austria, Croatia, Finland). They therefore follow the rules of the main proceedings, sometimes adapted only for minimal indications, such as the speeding-up of the procedure (Czech Republic).

Generally speaking, the interlocutory procedure is speeded up in comparison to ordinary procedures (Poland, Romania, Serbia, Slovenia, Spain, Sweden, Turkey) and may be characterised by a lighter adversarial process (Lithuania, the Netherlands), also in terms of it not requiring oral evidence (Germany, Hungary, Norway, Serbia, the United Kingdom) and a less complete preliminary investigation (Germany).

In some cases, the collegial or monocratic nature of the decision depends on the general rules of procedure of each country (Greece, Hungary, Latvia, Lithuania, Norway). In others, the protective decision is usually delivered by a single judge (Ireland, Luxembourg, Malta, the United Kingdom and, the Netherlands where the protective decision is delivered by a single judge at all stages of the procedure), except in the event of exceptional hypotheses, the subject-matter of which is particularly sensitive**.**

In Luxembourg, the judge who decides on the application for a protective measure may not be part of the panel that decides on the substance of the case, in compliance with the principle of impartiality set out in Article 6 ECHR.

In Portugal (as in Italy), collegiality is the rule, except in cases of extreme urgency. In Italy, if it is not possible to wait for the collegial hearing to be fixed, the president of the Regional Administrative Court or the president of a section of the Council of State or a judge delegated by them, rules on the application for a precautionary measure with a monocratic decree that loses its effects if it is not confirmed by a subsequent collegial decision.

The decision is always collegial in Serbia, Slovenia, and Spain.

In Portugal, the procedure to be followed differs depending on the type of protective measure requested (suspension, injunction, payment of provisional sums, preventive evidence, etc.).

In general, the precautionary order can be appealed before the SAC, irrespective of whether the appealed decision is issued by a single or collective court (Bulgaria, Croatia, Estonia, France, Latvia, Lithuania, Malta, Norway, Romania, Slovenia, Sweden, Turkey, and Spain, which, however, specifies that no appeal in cassation is possible against the precautionary decision).

In some countries, the possibility of appealing is excluded due to the temporary nature of the measure (Czech Republic, Finland). In others, it is only allowed for certain categories of defects (unconstitutionality in Germany or particularly important defects in Ireland) or after passing a "*test of eligibility*" of the appeal (Portugal, the United Kingdom).

In Luxembourg and the Netherlands, the single judgement taken on remand cannot be appealed.

The interim decision cannot be appealed in Serbia, even if it is always collegial. Hungary specified that interim measures rejecting the modification of previous decisions which reject the same application, cannot be appealed, in the absence of new legal or factual arguments.

In Greece provisional measures are not appealable, but may be revoked by the same court that issued them. Poland has made it clear that the protective order (always suspensive) can be reviewed at any time by the Court if circumstances change, irrespective of the party's request.

III. 6 DEFINITION OF THE MERITS OF THE CASE IN THE INTERLOCUTORY PROCEEDINGS

In some countries, it is expressly provided for that, when examining the application for interim measures, the court may directly determine the merits of the case (Belgium, Greece, Italy, Luxembourg, the Netherlands, Portugal, Sweden). However, a number of conditions must be met: verification of the integrity of the adversarial process and of the preliminary

investigation or the prior agreement of the parties in the Netherlands; the granting of a time-limit to the parties to defend themselves in writing with reference to the proposal for early settlement in Belgium where, in the event of opposition, the President may refer the matter to the ordinary procedure; the simplicity of the case and the urgency of its resolution in Portugal, where the parties must also be heard in advance on this point; the complete annexation of the parties' requests in Sweden.

The majority of the countries stated that there is no provision for determining the merits of the case in the interlocutory proceedings (Croatia, Czech Republic, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Romania, Serbia, Slovenia). Others replied that it is excluded by the autonomous nature of the interlocutory proceedings with respect to the main proceedings (France), by the lack of orality characterising the interlocutory proceedings (Germany) or by the interim nature of the interlocutory phase (Cyprus, the United Kingdom).

The United Kingdom, furthermore, pointed out that the interim nature of the interlocutory phase does not exclude the possibility that the granting of provisional measures may, in practice, settle the dispute definitively: in that case, a particularly rigorous assessment of the conditions for granting the requested measure is required. Luxembourg pointed out that the arguments used by the court to assess the merits of the application for provisional measures are indicative of the final resolution of the dispute.

III. 7 SUSPENSION OF THE EFFECTS OF THE JUDGMENT AS A PROTECTIVE MEASURE ON APPEAL

From the specific answers to the specific question, it emerged that the possibility for the SAC to suspend the enforceability of judicial decisions in case of appeal, is excluded only in a few countries (Bulgaria, Estonia, Germany, Greece, Latvia, Lithuania, Norway, Poland and Serbia, which means that the SAC can grant provisional measures only in the rare cases where it is the sole judge).

It is interesting to note that in Estonia, where this possibility is not permitted since the judgment is generally enforced only after it has become "*final*" (i.e. no longer subject to appeal), the possibility of a single instance appeal against any order for immediate enforcement of the judgment is nevertheless provided for.

In Romania, an appeal automatically suspends the enforcement of the contested judgment.

The Czech Republic and Finland replied that the suspension of the judgment on the substance of the case by the first court is allowed, although the possibility to appeal protective measures is not.

Luxembourg noted that such a measure can be granted, upon request, only by the same court whose decision is appealed and that this mechanism is considered as a compensation for the non-appealability of provisional measures. Cyprus stated that only the suspension of judgments of rejection is precluded.

In the United Kingdom, the suspension of the enforceability of a lower court judgment before the SAC is quite exceptional; it is the same court whose decision is challenged that decides, as a rule, on the application for suspension of its effects.

III. 8 STATISTICS ON THE AVERAGE NUMBER OF PRECAUTIONARY RULINGS

The lack of data prevented some countries from answering this question (Austria, Bulgaria, Cyprus, Finland, Malta and Spain).

Some countries only provided the absolute number of interim rulings made by the SAC:

- 3 in the UK in 2021 and 0 in 2020;

- less than 10 (Estonia):

- between 500 and 600 (Serbia);

- less than 1 000 (Belgium);

- around 2,100 as a first instance judge and around 5,600 as an appeal judge (Turkey);

In Ireland, due to the strict conditions in place for approaching the SAC, the likelihood of it being required to rule on the granting of an interim measure is almost non-existent.

Among the countries that were able to provide a percentage figure on the average number of interim relief decisions taken each year by the SAC as a proportion of total decisions, the results diverged considerably, although this overall percentage remained at less than 4%.

The percentage is below 1% in Croatia and Norway (where, moreover, most of the disputes concern relations between private individuals and do not involve the public administration).

In Portugal it is slightly above 1%. Around 3% in the Czech Republic, Lithuania, Poland (500 out of 15,000) and Sweden (183 out of 6,314). The percentage is between 3-4% in Germany, Latvia and France, where, however, there has been a significant increase in the number of

rulings in connection with the health emergency in 2020 (in proportion, precautionary rulings have tripled compared to figures for the previous two years).

The average number of precautionary rulings is around 10% in Greece, 11% in Romania, 15% in Slovenia and 20% in the Netherlands. The Italian percentage of 39% is the second highest, surpassed only by Hungary, where 50% of appeals to the Supreme Court include interlocutory measures and where, in tax matters, the percentage is significantly higher as almost all appeals contain interlocutory measures.