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

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

Rome, 23 May 2022

Answers to questionnaire: Germany



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“TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE”.

INTRODUCTION

The seminar will analyse the types of actions that can be brought before the administrative judge: action of annulment, action of declaration and action of condemnation. With particular reference to the latter, the seminar will focus on compensatory measures, including damages for loss of opportunity and damages as a result of delay.

The seminar also intends to examine the possibility of any and eventual special or fast-track procedure, for introductory terms and methods which pertain to certain subjects under consideration, for example, for their economic or political relevance, such as those to be found in the sphere of public contracts (see also transversal analysis).

The aim of this questionnaire and of the subsequent seminar is to provide a wider comprehension of the similarities and differences that exist among the various legal systems of the member States insofar as they apply to the situations to be dealt with by the administrative court, paying particular attention to the content and subject matter of the relative rulings.

SESSION I

LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

- 1. In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?**
 - An ordinary judge
 - An administrative judge
 - A judge who deals with special areas
 - Others



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As a general rule, disputes involving the public administration are dealt with by the administrative courts. In addition, parts of public law are subject to separate jurisdictions: Social law is dealt with by the social courts and tax law is dealt with by the finance courts. Also, some special regulations transfer specific matters to the ordinary courts although they are clearly public law. This is the case for example with some parts of regulatory law and with public procurement.

2. Which actions can be brought before the administrative court in view of the exercise of administrative powers?

- Annulment of administrative acts
- action of condemnation
- Other actions

If you have replied 'other actions', please clarify which.

The Code of Administrative Court Procedure (CACP)¹ provides for

Actions of annulment (rescissory action, Sec. 42 para 1 CACP)

Enforcement action (Sec. 42 para 1 CACP)

Declaratory action (Sec. 43 para 1 CACP)

Action for an injunction

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

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

Actions must be founded in the law, i.e. parliamentary law, government statutes, EU regulation. A claim can only be based in guidelines of the public authorities if these guidelines correspond to a

¹ The legal norms quoted (CACP, CAP and GG) may be found in English at: www.gesetzes-im-internet.de/Teilliste_translations.html. The German abbreviations to be found there, are: GG for the Constitution, VwGO for the Code of Administrative Court Procedure - CACP - and VwVfG for the Code of Administrative Procedure - CAP).



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constant practice of the public authority and the claimant demands equal treatment under the constitutional guarantee of such (Art. 3 para 1 of the Constitution = Grundgesetz - GG).

4. Which administrative decisions can be challenged?

- Administrative acts which have a specific recipient
- General acts and regulations
- Acts inherent to the procedure
- Political acts

The Code of Administrative Court Procedure provides for actions against administrative acts in individual cases as well as in general rulings. Also, according to Art. 47 CACP some legal provisions ranking below statutes can be challenged depending on respective regulations by the Federal State (Land). Procedural acts - as a general rule - are excluded from adjudication. They must be challenged within the action against the material decision which resulted from the procedure (Sec. 44a CACP). Political acts are not subject to administrative court actions with the exception of plans and programs against which the Aarhus Convention and in the aftermath EU law and national law provide for legal remedies.

5. On the grounds of which defects can the annulment of an administrative act be requested?

- Breaches of the law
- Breaches of competence
- Technicalities and procedural defects
- Breaches of general principles
- Other

The annulment of an administrative act is declared by the administrative court insofar as the administrative act is unlawful and the plaintiff's rights have been violated (Sec. 113 para 1 CACP. Principle of subjective legal protection). The unlawfulness results from a breach of the law (see answer to question 3). Breaches of procedural law will cause annulment only in some cases as elaborated by Sec. 44-45 of the Code of Administrative Procedure - CAP).

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

- Yes
- No



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If your reply is yes, please elaborate.

As explained in the answer to question 5 annulment is only declared "insofar" as the administrative act is unlawful. This presupposes that the administrative act is apt for partition.

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

- Yes
- No

If your reply is yes, please elaborate.

This is not possible insofar as the administrative authority is empowered to act in its discretion. In other cases, the court may announce the obligation of the administrative authority to effect the requested act (Sec. 113 para 5 CACP). Only in this context it may modify an administrative act.

8. When the judge annuls the challenged act, can he dictate provisions which the P.A. must abide by in the review proceedings of the subject-matter of the litigation?

- Yes
- No

If your reply is affirmative, please elaborate.

Especially in enforcement actions the court will dictate a new decision by the public administration "under observance of the legal reasoning by the court".

9. When do the effects of the jurisdictional annulment of an administrative act become applicable?

- From the date of the adoption of the act (*ex tunc*)
- From the date on which the judgement becomes final (*ex nunc*)
- Other

Ex tunc!

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



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- Yes
- No
- Other

This is not known in the administrative court procedure.

11. Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?

- Yes
- No
- Only in certain cases

If your reply is yes, please elaborate

An autonomous order of payments is only possible if no administrative act is necessary to found or specify the legal claim. In most cases the public authority will be ordered to deliver the administrative act which forms the legal basis of the claim. The payment should then follow automatically since the public authority is bound by this act.

12. In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?

- Implementation of an illegal and detrimental administrative act
- Non-observance of the deadline of the procedure
- Lesion of good faith and trust
- Resultant behaviour of the public administration
- Other

Please elaborate

A compensatory action can be successful if the public administration has acted in breach of the law and by this has caused the claimant damage.

13. Which are the different kinds of reimbursable damages?

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



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Only material damage.

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

- Yes
- No
- Other

If the administrative act is the legal basis of the conduct of the public administration it has to first be annulled before damages can be compensated.

15. In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?

- Yes – the party with burden of proof is...
- No

The injured party must provide proof of the responsibility of the public administration. This burden of proof may shift if certain information is only available to the public administration.

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

- Yes
- No

If the reply is yes, please elaborate

A false declaration of the kind of action will not bind the claimant. The court is obliged to determine the content and nature of the claim by evaluating the statement of the claimant.

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

- Yes
- No

If the reply is yes, please elaborate

Not applicable



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18. Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?

- Yes – explain
- No

Sec. 113 para 5 CACP reads as follows:

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 mature for adjudication.

SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

- Yes
- No

If the reply is yes, please elaborate

In principle special procedures are avoided by the Code of Administrative Court Procedure in order to speed up procedures. Thus, legal remedies concerning procedural defects, access to public documents etc. are integrated in the material procedure concerning the legality of the administrative act etc. There are, of course, procedures of interim relief. Also there are admission procedures for granting leave to appeal.

2. What do the specialities consist of?

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

See answer to question 1.



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3. The special rites are established:

- According to subject (for example, tenders, procedures of expropriation, independent administration authorities)
- According to actions
- Both of the above

Please elaborate

See answer to question 1.

4. Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?

- Yes
- No

If the reply is yes, please elaborate

Yes, in case of silence (Sec. 113 para 5 CACP mentions the omission of an administrative act) the plaintiff may trigger an enforcement action. This will - as a general rule - be admissible three months after the request (Sec. 75 CACP)

5. Do the Administrations comply spontaneously with the decisions of the administrative courts?

- Yes, always
- No, never
- In the majority of cases, in any case more than in 50% of cases
- Hardly ever, in any case less than in 50% of cases

Yes, in almost all cases.

6. . In your legal system, is there a special procedure for ensuring the integral execution of the sentence?

- Yes
- No



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If the reply is yes, please elaborate

Yes, Sec. 167 - 172 regulate the execution of a sentence. In a simplified description the execution is conducted under the following principles:

- *A sentence favourable to the public administration can be executed by the public authority itself (Sec. 169 CACP).*
- *A sentence against the public authority and obliging it to a payment can be executed by the first instance administrative court.*
- *A sentence in an annulment sentence needs no execution since the annulment is in force with the legal force of the judgment.*
- *A sentence in an enforcement action or a decision of interim relief may be executed by a coercive fine determined by the administrative court.*

The latter is not considered very effective since the fine is not paid to the claimant, but to a public authority. So, the money stay within the public branch. Fortunately, this procedure is hardly ever used since the public authorities tend to comply with sentences in almost all cases.

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

- Yes
- No

If the reply is yes, please elaborate

Only if they are declared provisionally executable by the court.

8. Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?

- Yes – elaborate
- No

If the public authority is granted discretion the court is not allowed to exert its own exercise of discretion. Yet, if the court finds that only one of several possible decisions can be deemed legal then it will oblige the public authority to adopt the requested act.



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SESSION III – PRECAUTIONARY MEASURES

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

- Yes
- No

Yes.

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

- Yes
- No

Yes, there are two precautionary procedures. One regards the order of a suspensive effect of remedies against an administrative act (Sec. 80 para 5 CACP). The other provides for interim relief decisions by the court in order to avoid effects which at a later stage could not be compensated (Sec. 123 CACP). In these interim relief decisions the judge is competent to order whatever measure is considered necessary to protect the rights of the claimant.

3. What kinds of decisions can the judge apply as a precautionary measure?

- The suspension of the challenged act;
- (if the subject of the challenge is the refusal of an application) a positive measure which provisionally anticipates the effects of the administrative act being contested;
- The order to the administration to re-examine the application on the strength of indications contextually provided by the judge;
- Whatever measure necessary to satisfy, in each case, the precautionary requests presented by both parties

See answer to question 2.

4. What are the conditions for the acceptance of a precautionary request?

- The probable validity of the action
- The probable validity of the action together with a serious prejudice



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- The prevalence of public or private interest, based on the results of the equilibrium/assessment
- The required prerequisites of trial law to accord precautionary measures vary according to the different types of litigation
- Other prerequisites (please specify)

In procedures aiming at the suspensive effect it is the probable validity of the action. In procedures for interim measures the claimant has to substantiate his claim and the urgency to act by interim measures.

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

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

No.

6. Are precautionary measures generic?

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

In principle they are generic. Yet, in actions aiming at the suspensive effect the law presumes the lack of such an effect in some matters, e.g. public charges and costs or non-postponable orders and measures of police enforcement officers (Sec. 80 para 2 CACP). In these cases it will be harder for the claimant to make his case.

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

- Yes
- No

Yes, this is provided for in Sec. 80 para 5 sentence 2 CACP. Only if the administrative act is no longer challengeable because the deadline for legal action has passed then a precautionary action will also be inadmissible.



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In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?

- Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit
- No, its effectiveness remains intact even if the main trial proceedings have not been initiated within the mandatory time-limit or even if the time-limit has expired

See answer to question 6.

8. When dealing with the precautionary request, does your legal system provide for specific procedure?

- Yes (give details of the main characteristics with regard to : trial deadlines, type of decision, motivational burden, ways for establishing debate)
- No

Compared to regular actions, in precautionary procedures an oral hearing is unusual and not necessary. Also the court works in a so-called summarized procedure, relieving it from the burden of fully investigating the case ex officio.

9. Is the precautionary decision taken unilaterally or collegiately?

- Unilaterally;
- Collegiately;
- Collegiately, but in the event of extreme urgency, the precautionary decision can be taken temporarily by means of a simple unilateral decree;

The precautionary decision is taken by a panel of three professional judges. The panel may also transfer the case to a single judge (Sec. 6 CACP). In practice this is not very usual in precautionary procedures.

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

- Yes (explain in which conditions)
- No

This will not happen since the judgment requires an oral hearing. At the same time precautionary measures are usually taken urgently, long before the case is mature for adjudication.



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11. Can precautionary measures be challenged before the Supreme Court /Council of State?

- Yes
- Yes, but only if they pass a test of eligibility
- No

Yes, if they are deemed in breach of the constitution.

12. Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?

- Yes
- No

Precautionary measures can only be adopted by the administrative courts and the higher administrative courts. The Supreme Court only has such a power in the rare cases in which the law provides for it being the first instance court (urban planning of eminent importance; actions against the secret service...).

13. On average, how many precautionary decisions are taken every year by the Supreme Court/ Council of State in comparison to the overall number of decisions taken?

Italian reply

In 2020 it was 46 of 1,160 cases.



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