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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: Italy



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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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Italian reply

In the Italian legal system, the jurisdiction of the administrative court is defined by art. 103 of the Italian Constitution and by art. 7 of the administrative process code (hereafter to be referred to by the acronym a.p.c.)

The administrative court has jurisdiction with public law litigation in any disputes in which the Public Administration acts by implementing special powers and not according to the terms of common law.

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.

Italian reply

The administrative process code highlights the following actions:

- Annulment actions of administrative provisions (art. 29 a.p.c.)
- Compensatory actions (art. 30 a.p.c.) and of a sentence to pay out sums of money in specific cases
- Compliance actions, intended as action of condemnation for the release of the requested provision (art. 34 of a.p.c.)
- Action against silence (art. 31 a.p.c.)
- Precautionary action (art 55 a.p.c.)
- Compliance action (art. 112 a.p.c. to be found under various headings of the a.p.c.)
- Any other action deemed suitable to comply with a specific protective measure (art. 34 a.p.c)

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

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



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Italian reply

In our legal system, actions that can be brought before the administrative judge are regulated by law, and specifically, by the a.p.c.

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

Italian reply

All implemented administrative decisions can be challenged, even those of a general nature, such as regulations. Political acts may not be challenged, namely “those acts or provisions issued by the government in the exercising of its political power” (art. 7, comma 1 a.p.c.). In administrative case law, the notion of a political act is restricted exclusively to those acts issued by constitutional bodies and which represent the exercise of supreme political choices. Endo-procedural acts cannot be challenged autonomously, unless they are not directly harmful.

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

Italian reply

In accordance with the provisions of art. 21 *octies* of Law 241/1990, breaches of the law, incompetence and misuse of powers are deducible defects. Misuse of power denotes an incorrect application of the administrative function compared to the intentions indicated by the law. The annulment may be requested even in cases of the breach of general principles of the administrative action, among which are the principles of reasonability and proportionality.

In the case of binding activity, the breach of formal rules and procedures (formal defects) cannot result in the annulment of the act, if the content of the acts could not have been any different.



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

- Yes
- No

If your reply is yes, please elaborate.

Italian reply

The administrative judge can partially annul an illegitimate act.

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

- Yes
- No

If your reply is yes, please elaborate.

Italian reply

Art 7, comma 6 a.p.c. makes provisions for cases, exhaustively listed by law, in which the judge may reform the act, partially or wholly, by substituting it with another act (so-called extended jurisdiction on the merit).

For example, in electoral litigation, if the judge allows the appeal, he corrects the results of the election and replaces the illegitimately proclaimed candidates with those who are truly entitled (art 130, comma 9 a.p.c.). Other examples of extended jurisdiction on the merit are: a) a compliance proceedings (art 112 a.p.c.) in which the judge, if he allows the appeal, may order compliance by prescribing the procedure, including by means of the determination of the content of the administrative decision or the enactment of the same instead of the administration” (art 114, comma 4, letter a), a.p.c.); b) the judges dealing with financial penalties including those imposed by almost all independent administrative authorities, in which if the judge allows the appeal, may modify the amount of the financial penalty if he deems that the quantification of the amount does not comply with the parameters indicated by law.

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



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- No

If your reply is affirmative, please elaborate.

Italian reply

One of the effects of the decision of the administrative court is the so called “conformity effect “: that is to say, the judge can dictate conditions which must be adhered to when the Administration makes new provisions after the annulment.

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

Italian reply

The annulment of an act in the seat of jurisdiction produces retroactive effects, that is to say from the date of adoption of the act in question (“*ex tunc*”)

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

- Yes
- No
- Other

Italian reply

In certain specific precedents, in order to ensure effective protection, the Council of State limited itself to ascertaining the illegality of the act and to indicate conformatory requirements (*pro future*) for the subsequent exercise of public function.

With regard to special procedure of public tenders, the judge who declares the contract to be ineffective establishes the starting date from which it becomes ineffective and this may be subsequent to the date of the sentence.



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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

Italian reply

Art 30, comma 1, a.p.c. requires that the compensatory action must be proposed in two ways:

- a) at the same time as other actions (action of annulment, action against silence etc.); b) autonomously.

The autonomous compensation for damages action must be proposed within a time-limit of 120 days from the fact itself or from the awareness of the fact which caused the damage (art 30, comma 3, a.p.c.).

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

Italian reply

In the Italian legal system, all detrimental conditions indicated above are relevant for compensatory damages

13. Which are the different kinds of reimbursable damages?

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



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Italian reply

In the Italian legal system, all detrimental conditions indicated above are relevant for compensatory damages

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

- Yes
- No
- Other

Italian reply

On the occasion of quantifying the amount of damages, the administrative court must exclude all damages “which could have been avoided by due diligence, also through the use of the instruments of protection provided” (art 30, comma 3, a.p.c.).

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

Italian reply

The injured party must provide proof of the responsibility of the public administration. Case law, however, recognises only some less onerous burdens of proof, by admitting some presumption of liability. As far as tenders are concerned, in compliance with the Court of Justice case law, the injured party is instead exempted from providing proof of liability of the contracting authority.

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

- Yes
- No

If the reply is yes, please elaborate

Italian reply



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No. If all the requisite conditions exist, the judge can always provide for the conversion of the action (art 32, comma 2, a.p.c.)

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

- Yes
- No

If the reply is yes, please elaborate

Italian reply

See reply to question 10.

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

Italian reply:

The administrative judge can rule that the administration issue a provision which had been requested but illegitimately denied when it is in the realm of bound activity or when no investigations are required that have to be carried out by the administration” (art 34, comma 1, letter c).



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SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

- Yes
- No

If the reply is yes, please elaborate

Italian reply

The administrative process code has provisions for the following special procedures: the procedure regarding access to administrative documents ex art. 116 a.p.c.; appeals against silence ex art. 117 a.p.c.; injunction procedures ex art. 118 a.p.c.; ex art. 119 a.p.c. abbreviated trial with regard to specific matters for example, public tenders, tender procedure ex art. 120 a.p.c., electoral procedure ex art. 130 a.p.c.

2. What do the specialities consist of?

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

Italian reply

Special procedures provide for a series of derogatory regulations compared to ordinary regulations. They generally comply with a fast-track logic by introducing reduced procedural time-limits, simplified procedures, types of decision which are different to the judgement (decree, a judgement in a simplified format).

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

Italian reply



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Special procedure regard both specific subjects highlighted in detail in art 119, comma 1, a.p.c. of the administrative trial (for example, tenders, procedures of expropriation, independent administration authorities' actions) and appeals against the silence of the public administration (art. 117 a.p.c.), for access to documents (art. 116 a.p.c.), for compliance (art.112 e ss. a.p.c.), for injunction (art 118 a.p.c.)

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

Italian reply

Art. 31 a.p.c. provides for a specific action adverse to the inertia of the public administration, the procedure of which follows special rules (ascertainment of the duty of the administration to provide). Upon completion, the judge may grant a time-limit within which the Administration must comply. He/she could order the Administration to implement the provision of the required act only if the content is restricted or if discretionary power has been fully exercised.

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

Italian reply

The enforcement remedy is used for the execution of about 15% of the SAC judgments.

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

- Yes



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- No

If the reply is yes, please elaborate

Italian reply

In the Italian legal system a specific procedure for the execution of judgements is provided for (art. 112-114 a.p.c.). Moreover, it provides also for the remedy of the so-called “*astintes*” for indirect execution. The remedy does not require the judgment to be final.

Nevertheless, the powers of the judges of the execution are different in the event that the judgment to be enforced is final or not. In the first case, the judge of the execution can declare null the administrative acts eventually adopted in contrast with the judgment itself and can completely substitute the administration in the execution of the judgment. Instead, if the decision to be enforced is not final, the judge can only indicate to the administration how to give execution to the judgment, considering without effect the administrative acts eventually adopted in contrast with the judgment itself.

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

- Yes
- No

If the reply is yes, please elaborate

Italian reply

The decisions of the Regional Administrative Tribunals are immediately enforceable. In compliance with art 98, para. 1, a.p.c., after challenging the decision, a suspension of the enforceability of the decision of the court of first instance and the implementation of other measures which are deemed necessary, can be requested.

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



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- No

Italian reply

In the Italian legal system, generally speaking, the sentence of the annulment of a decision characterized by discretionary power binds the Administration only when dealing with the illegitimacy identified by the sentence (the so-called “deduction”). The Council of State maintains that, in certain cases, the discretionary power can be “reduced” substantially, both for the effect of an auto-obligation placed by the same public administration, and for the effect of the specific trial outcome (when, for example, the investigation found that there were no other alternative reliable techniques).



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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

Italian reply

In the Italian legal system, the proposition of appeal does not entail suspensive effects

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

- Yes
- No

Italian reply

In the Italian legal system, the petitioner can request the issuance of all those precautionary measures which are most suited to avoiding having to undergo serious and irremediable prejudice during the time required to reach a decision on the appeal.

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

Italian reply

In the Italian legal system, the judge can take any of the measures indicated above. **There is, in effect, a principle of atypicality of the kinds of protection, including precautionary.**

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



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

Italian reply

The precautionary order must motivate on the basis of the assessment of the appended prejudice and indicate the outlines, which, after brief examination, would lead to a reasonable forecast of a positive result for the application.

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

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

Italian reply

In the Italian legal system, in the event that as a result of the decision of a precautionary application irreversible effects result, the chamber can require the payment of bail, to which the concession or rejection of a precautionary measure can be subordinated. The concession or rejection of a precautionary measure cannot be subordinated to bail where the interlocutory application relates to fundamental human rights or other assets of constitutional relevance.

6. Are precautionary measures generic?

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

Italian reply

In the Italian legal system, precautionary measures do have general applications insofar as they can be applied to all types of litigation.



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

- Yes
- No

Italian reply

In the event of exceptional gravity and urgency, the party entitled to apply, even before the prior declaration of the appeal, may request the adoption of urgent, temporary measures which appear indispensable during the time required to bring an action on the merit and the precautionary request in the course of the proceedings.

8. 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

Italian reply

In the Italian legal system, the provision of *ante causam* acceptance, however, loses effectiveness when, within fifteen days from issuance, the appeal with a precautionary request has not been notified. In all events, the measure conceded loses effectiveness after sixty days from the date of issue, after which, only those precautionary measures which have been confirmed or set out during the course of the litigation remain effective.

9. 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

Italian reply

In the Italian legal system, provisions have been made for a fast-track procedure in closed session.



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10. 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;

Italian reply

The decision is taken collegiately. In the event of extreme urgency, the precautionary decision can be made, as a temporary measure, by means of a simple unilateral decree.

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

- Yes (explain in which conditions)
- No

Italian reply

During the discussion of the precautionary request, the chamber, having verified the comprehensiveness of the hearing and the investigation and having heard representations from both parties, may define the judgement on merit with a sentence in a simplified form, in closed session.

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

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

Italian reply

Going against the injunctions of the Regional Administrative Tribunals, appeal can be made to the Council of State, to be put forward within a time-limit of thirty days from the notification of the decree, or within sixty days after its publication.

13. 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?



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- Yes
- No

Italian reply

In the Italian legal system, the Council of State can, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level.

14. 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 the last two-year period (2019/2020), the average number of precautionary rulings was 6,953. They account for about 39% of total judgments.



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