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Research Article

ENSURING EFFECTIVE JUDICIAL PROTECTION IN ADMINISTRATIVE DISPUTES THROUGH THE ANNULMENT POWER OF THE ADMINISTRATIVE JUDICIARY

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ABSTRACT

Background: *Judicial control of administrative action has traditionally focused on the legality of administrative acts with little regard for the consequences of the administrative dispute. This was changed by the European Court of Human Rights (ECtHR) through its interpretation of the right of access to court under Article 6 of the European Convention on Human Rights. The ECtHR expanded this right to include the enforceability of administrative court judgments, prompting a shift in the role of the administrative judiciary toward ensuring the effective resolution of disputes. This has influenced reforms across European countries, many of which have introduced mechanisms to support administrative courts in delivering more effective judicial protection.*

This article has two main objectives: first, to examine how administrative disputes have evolved from merely assessing the legality of administrative acts to ensuring effective judicial protection of individuals by expanding the right to a fair trial, and second, to analyse how this shift has influenced national legal frameworks, with a focus on mechanisms that empower courts to enforce their decisions and conclusively resolve disputes.

Methods: *The historical method is employed to trace the development of judicial control in administrative disputes and the influence of ECtHR case law. The logical method supports the analysis of key judgments, demonstrating the evolving interpretation of the right to a fair trial. The comparative method assesses how different European legal systems have adapted their frameworks to strengthen the enforceability of administrative court decisions. The systemic method ensures the internal coherence of findings, while the dogmatic method interprets relevant legal norms. Finally, the axiological method is employed to critically evaluate reforms and their alignment with core legal values.*

Results and Conclusions: *The enforceability of administrative court judgments gained prominence with the ECtHR's Hornsby case, which recognised that the right to a fair trial includes the execution of judgments. This understanding has led to substantial reforms across Europe to increase the effectiveness of administrative justice. While these reforms have improved individual rights protection and dispute resolution, they must respect constitutional principles, particularly the separation of powers and judicial impartiality.*

1 INTRODUCTION

Administrative dispute is one of the fundamental mechanisms for protecting individual rights and legal interests in the field of administrative law. However, its effectiveness depends on the legal system's ability to ensure that judgments of administrative courts are implemented promptly and comprehensively. This article examines this dimension of administrative judicial decision-making by analysing the mechanisms available to administrative courts to ensure the effective implementation of their judgments, particularly in cases where they annul contested administrative acts and refer the matter back to the administrative authority for reconsideration.

In this context, it is crucial that the administrative court's judgment is correctly and promptly implemented, allowing for the definitive resolution of the conflict between the public authority and the individual. Only such judicial decision-making that aims to comprehensively resolve the administrative dispute can ensure that the party effectively protects its legal position.

In the past, little attention was paid to effectively protecting parties' interests. Instead, the primary focus was on ensuring the objective legality of administrative acts, often resulting in removing an unlawful administrative act without considering whether this alone sufficiently safeguarded the party's rights. However, gradual developments in this field have led to a paradigm shift in administrative dispute resolution. This shift, mainly influenced by the European Court of Human Rights (hereafter ECtHR), emphasised the administrative dispute as a mechanism for comprehensive judicial protection of individuals. Under this new approach, administrative courts aim to fully protect parties' legal positions and ensure that administrative authorities comply with court judgments.

The first part of the article delves into the developments in the ECHR practice that led to the current understanding of the administrative dispute in Europe as a means for effective judicial protection of parties. This approach addresses all dimensions of a dispute and allows for its comprehensive resolution. The second part of the article presents a comparative legal analysis of the mechanisms that empower European administrative courts to achieve this new understanding of administrative disputes. One such mechanism is the full jurisdiction procedure, whereby the court replaces an unlawful administrative act with its own ruling. However, due to its constitutional and procedural complexity, a more

detailed analysis of this mechanism exceeds the scope of this article, which is focused on the problems of the enforcement of annulling judgments. These mechanisms also ensure that administrative authorities consistently comply with the judgments of the administrative court during repeated proceedings. While most of the development in this field has been carried out by Western European countries, recent reforms in Central and Eastern European jurisdictions—such as Slovenia, Poland, and Hungary—have led to the incorporation of at least some such mechanisms in their respective legal orders. The article concludes by presenting the main findings of this research.

2 RESEARCH METHODOLOGY

This article employs a multifaceted research methodology to achieve its dual objectives.

In the first part, the historical method is predominantly utilised to trace the evolution of administrative disputes—from mechanisms ensuring the legality of administrative acts to instruments providing effective judicial protection of individual rights. This involves a chronological analysis of the European Court of Human Rights case law, highlighting the significance of the *Hornsby* case, which significantly shaped the current understanding of administrative disputes.

The second part combines several methodologies to analyse the impact of this evolution on national legal frameworks across Europe. The comparative method serves as the principal tool for evaluating different approaches adopted by various legal systems to enhance the effectiveness of administrative court judgments, facilitating cross-jurisdictional insights. The systemic method ensures the legitimacy of findings by considering the interconnectedness of legal norms and institutions within different legal systems, acknowledging that changes in one area may impact others.

This section also applies the historical method to contextualise the development of specific legal frameworks governing administrative disputes. The logical method is employed to dissect relevant case law through analysis and to identify patterns indicating the growing importance of the right of access to court in the jurisprudence of various European administrative courts through induction. The dogmatic method is applied in interpreting legal norms analysed in this section, providing a doctrinal perspective on statutory provisions and judicial decisions.

Finally, the axiological method underpins the critical assessment of the evolution of administrative judicial review, focusing on the values and principles that have driven and shaped this transformation.

3 THE DEVELOPMENT OF THE NATURE OF THE ADMINISTRATIVE DISPUTE FROM PROTECTING (OBJECTIVE) LEGALITY TO EFFECTIVE PROTECTION OF HUMAN RIGHTS

Throughout most of the twentieth century, limited attention was given to the mechanisms available to administrative courts for resolving issues arising from unlawful administrative acts.[1] As part of the judicial branch, it was accepted that courts could annul unlawful administrative acts and refer the matter back to the administration, with minimal concern for the effects and proper implementation of their judgments.[2] Only in rare cases and within a few jurisdictions, were courts able to go further by deciding the case themselves through full jurisdiction proceedings.[3]

However, this lack of attention to the practical consequences of administrative courts' judgments was reversed at the end of the twentieth century, largely due to the efforts of the ECtHR.[4] In the landmark *Hornsby* case,[5] in which Greek administrative authorities failed to implement an administrative court judgment, the ECtHR held that Article 6 of the European Convention on Human Rights[6] (hereafter ECHR) guarantees everyone the right to have a case tried by a court. However, this right would be illusory if a state's domestic legal system allowed a final, binding judicial decision to remain ineffective to the party's detriment. Thus, the execution of a judgment must be regarded as an integral part of the trial within the meaning of Article 6 ECHR.[7]

This is of particular importance in the context of administrative proceedings concerning the civil rights of litigants[8] since by bringing an application for judicial review, they seek not only the annulment of the contested administrative act but, above all, the removal of its effects. For this reason, the effective protection of the party presupposes an obligation on the part of the administrative authorities to comply with

1 Françoise Sichler-Ghestin, 'L'exécution des Décisions du Juge Administrative' (2017) 39(2) Civitas Europa 7.

2 Marc Gjidara, 'Les causes d' inexécution des décisions du juge administratif et leurs remèdes' (2015) 52(1) Zbornik Radova Pravnog Fakulteta u Splitu 71.

3 Robert Siuciński, 'Between Judicial Review and the Executive: The Problem of the Separation of Powers in Comparative Perspective' (2020) 9(2) Perspectives of Law and Public Administration 138.

4 Gjidara (n 2) 71.

5 *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997) para 38 et seq <https://hudoc.echr.coe.int/eng?i=001-58020> accessed 16 January 2025.

6 European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5.

7 ibid, para 40.

8 Art. 6 of ECHR applies only to judicial proceedings regarding civil rights and obligations and criminal charges, however the concept of 'civil rights and obligations' has its own meaning under ECHR, subject to the interpretation by ECtHR, regardless of how the term may be understood in domestic legislation. William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 273 et seq.

the court's judgment.[9] As the ECtHR has pointed out in several subsequent cases, a failure by the authorities to comply with the judgments of the administrative courts constitutes a violation of Article 6(1) ECHR.[10]

This principle has gained further traction through the work of the Council of Europe, whose Committee of Ministers has adopted Recommendation Rec(2004)20,[11] which seeks to ensure effective judicial review of administrative acts as a means of protecting the rights and interests of individuals—an essential element of the human rights protection system. The Recommendation states that judicial review of administrative acts must be effective to ensure the effective protection of citizens' rights and interests while guaranteeing the administration's credibility in the eyes of society and the efficiency of the administration itself.[12] It also seeks to ensure that a court has at its disposal all the measures necessary to restore the lawful situation, which covers, among other things, the power to order the adoption of a new administrative act and the possibility of preventing the adoption of such acts.[13]

Although the case law of the ECtHR doesn't require administrative courts to replace unlawful administrative acts with their own judgments, it does require them to possess the necessary tools to ensure that administrative authorities comply with judicial rulings when issuing a new administrative act following the annulment of the original.[14]

The Council of Europe made similar recommendations in Recommendation Rec(2003)16,[15] which obliges Member States to ensure that administrative authorities implement judgments within a reasonable time and take all necessary measures under national law to give them full effect. In cases of non-compliance by a public authority, an appropriate procedure should be provided, for example, through the use of injunctions or coercive fines. The Recommendation also states that public authorities and individual officials should be held liable for refusing to implement court judgments.[16]

9 *Hornsby v Greece* (n 5) para 41.

10 *Sharxhi and Others v Albania* App no 10613/16 (ECtHR, 11 January 2018) para 92 et seq <https://hudoc.echr.coe.int/eng?i=001-179867> accessed 16 January 2025; *Okyay and Others v Turkey* App no 36220/97 (ECtHR, 12 July 2005) para 72 et seq <https://hudoc.echr.coe.int/?i=001-69672> accessed 16 January 2025.

11 Recommendation Rec(2004)20 of the Committee of Ministers to Member States 'On Judicial Review of Administrative Acts' (adopted 15 December 2004) <https://rm.coe.int/cmrec-2004-20-on-judicial-review-of-administrative-acts/1680a43b5b> accessed 16 January 2025.

12 ibid, para 86.

13 ibid, para 87.

14 ibid, para 88.

15 Recommendation Rec(2003)16 of the Committee of Ministers to Member States 'On the Execution of Administrative and Judicial Decisions in the Field of Administrative Law' (adopted 9 September 2003) <https://search.coe.int/cm?i=09000016805df14f> accessed 16 January 2025.

16 ibid, para II/1.

These developments at the European level have significantly impacted the administrative justice systems within states, which have, in turn, begun to place greater emphasis on the question of effective legal protection in administrative disputes.[17] The power to annul an unlawful administrative act without ensuring a definitive end to the dispute between the private person and the state was no longer deemed adequate. Therefore, the administrative courts were increasingly seen as the final phase of the administrative decision-making process, where the dispute between the private person and the state would be settled finally and concretely.[18]

Driven by the case law of the ECtHR, these developments have not only extended the powers of administrative courts by allowing them to exercise full jurisdiction in an increasing number of cases,[19] but have also encouraged the introduction of new mechanisms. These mechanisms aim to ensure that judgments which annul unlawful administrative acts and remit the matter back to the administration also bring about a definitive resolution of the dispute, thereby providing effective protection of private persons' interests. These mechanisms are presented and analysed below.

4 JUDICIAL POWERS AND MECHANISMS FOR EFFECTIVE JUDGMENT IMPLEMENTATION

Respect for the rule of law requires that public and private persons comply with court judgments. The judge must settle the dispute completely and definitively, as the plaintiff who brings a case before them does not expect only a theoretical satisfaction by annulment of an unlawful administrative act, but also the correct application of the law in their case. This must be manifested in the concrete effects of the judgment.[20] To achieve this, the administration must implement the judgments of administrative courts correctly, thus ensuring the effectiveness of administrative disputes.

17 Konrad Lachmayer, 'The Principle of Effective Legal Protection in International and European Law: Comparative Report' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 339.

18 See eg: Karianne Albers, Lise Kjellevold and Raymond Schlössels, 'The principle of effective legal protection in administrative law in The Netherlands' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 241; Sylvia Calmes-Brunet, 'The Principle of Effective Legal Protection in French Administrative Law' in Zoltán Szente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: A European Comparison* (Routledge 2017) 159; Stefano Vaccari, 'The Problems of Res Judicata in the Italian Administrative Justice System' (2019) 11(1) Italian Journal of Public Law 244.

19 Perhaps the clearest example of this is Austria, where the 2014 reform gave administrative courts the power to decide on the substance of administrative cases as a rule. See: Martin Köhler, 'The Reform of the Administrative Jurisdiction in Austria: Theoretical Background and Main Features of the System' (2015) 14 Public Security and Public Order 49.

20 Gjidara (n 2) 70.

Although, at least in Western European countries, the administration generally ensures the correct implementation of administrative court judgments,[21] poor executions or even non-executions can occur for various reasons, such as negligence, institutional rigidity, or the complexity of enforcement.[22]

Administrative judges in European countries are equipped with more and more mechanisms to ensure the correct and speedy implementation of their judgments. In line with the growing importance of administrative dispute as the final and definitive phase of dispute resolution, these mechanisms are being established at any of the three phases of an administrative dispute—the trial, the judgment, or the post-judgment phase. The nature and functioning of such mechanisms depend mainly on the type of alleged irregularities and their potential effect on the legality of the disputed administrative act and each country's specific culture and legal traditions. These mechanisms will be presented and analysed in depth below.

It is worth pointing out that not all administrative court judgments suffer from the risk of incorrect or delayed implementation. Judgments where the lawsuit is dismissed and the contested administrative act is confirmed, or judgments where the contested administrative act is annulled with no further proceedings allowed, are clear examples of situations where no further action from the administration is necessary. The same applies to reformatory or full jurisdiction judgments, whereby the administrative act is annulled and replaced by the judgment itself. Such judgments require no further action from the administration.

A. Trial Phase

Some legal systems have introduced mechanisms for remedying potential defects in administrative acts to conclude administrative disputes without the need for court intervention in the form of a judgment. Such measures can reduce the workload of administrative courts and enable them to work on cases where a judgment is necessary to resolve disputes between the parties. They can also allow both parties to continue attempting to resolve the dispute even after it has been brought before the administrative court, thereby achieving similar results to those of alternative dispute resolution.

The scope of the mechanisms available for dispute resolution during the trial phase can vary from country to country. In some cases, their use may be limited to resolving procedural irregularities in the administrative procedure. These mechanisms can, however, also be used to change the substance of the administrative act. Since using such mechanisms means that the trial does not end with a judgment, they must be implemented carefully so as not to violate any fundamental rights and principles, such as the impartiality and neutrality of the judge or the right of access to the court.

21 Eg in France the rate of decisions, which present difficulties of execution, is generally low, at around 1%. See: Sichler-Ghestin (n 1) para 19.

22 Gjidara (n 2) 71.

Another important factor in implementing such mechanisms is determining who has the power to use them—either the administrative court itself or the authority that issued the administrative act. This consideration is important in determining the scope of such mechanisms, as placing the power solely in the hands of the authority may severely limit the plaintiff's access to the court. Therefore, adequate checks and balances must be in place to prevent potential abuse.

1. Mechanisms at the Disposal of the Administrative Authority

During an administrative dispute, the authority may remedy violations in the substance of the administrative act or the procedure of its adoption. In Germany, for example, the administrative authority can remedy some procedural irregularities during the administrative dispute proceedings until the end of the phase of consideration of facts.[23] Following the German example, some other countries have established similar institutes.[24]

The legal consequence of such a correction is the dismissal of the lawsuit for annulment by the court, provided it finds that the administrative act has been duly corrected and that no substantive irregularity remains.[25] Despite the dismissal of the lawsuit, the judge can consider the correction of the procedural irregularities when deciding on the amount of costs.[26]

The administrative authority's ability is limited to correcting procedural irregularities; only the court may correct substantial irregularities. It is, in principle, also not possible to correct a procedural violation that could influence the weighing of interests when the authority adopts an administrative act—such as a missing hearing of the party in the administrative procedure.[27] Furthermore, procedural irregularities, which also violate fundamental procedural human rights—such as the right to a fair procedure or the right to effective judicial protection—cannot be remedied in this way.[28]

23 For example the procedure was conducted without a party's application; the administrative decision is lacking required justification; the decision was taken without the opinion or consent of the authority which should have been involved in the decision. See: German Administrative Procedure Act of 25 May 1976 'Verwaltungsverfahrensgesetz (VwVfG)' (amended 15 July 2024) s 2, § 45 <https://www.gesetze-im-internet.de/vwvfg/BJNR012530976.html> accessed 16 January 2025.

24 See for instance instance Art. 273 (Modification or annulment of decisions concerning administrative disputes) in: Slovenian General Administrative Procedure Act of 16 September 1999 'Zakon o splošnem upravnem postopku (ZUP)' (amended 7 January 2022) <https://pisrs.si/pregledPredpisa?id=ZAKO1603> accessed 16 January 2025.

25 Franziska Grashof, *Neighbours "Reinventing the Wheel" or Learning From Each Other? The Belgian Administrative Loop and its Constitutionality: A Comparison to the German Debate* (Maastricht Faculty of Law Working Paper series 2017-4, Maastricht University 2017) 9, doi:10.2139/ssrn.2943939.

26 ibid.

27 ibid 13.

28 ibid 15.

In our opinion, such a mechanism can speed up proceedings and ensure a swift resolution of administrative disputes, especially when the administrative act is contested purely on alleged procedural irregularities. Since this mechanism is at the disposal of the administrative authority, it raises no doubts regarding its constitutionality from the point of view of the principle of separation of powers or impartiality of the judge. However, whenever such a mechanism is used—and it only allows for the correction of procedural, not substantive, irregularities—there must be no doubt that procedural irregularity did not lead to a substantially different decision. If such doubt exists, the mechanism should not be used, and the administrative court must be given the chance to rule on the legality of the substance of the administrative act.

2. Mechanisms at the disposal of the court

One common mechanism is the court's ability to supplement the grounds of an administrative act during court proceedings, even in discretionary decisions. For example, in Germany, this applies to a formal lack of reasoning or a deficiency in the substantive content of the reasoning.[29]

The 1996 reforms introduced additional solutions for remedying procedural irregularities without the need to annul the administrative act. Firstly, under Article 87 (1) (2) Nr. 7 of the German Code of Administrative Court Procedure (hereinafter VwGO),[30] the judge could allow the administrative authority to remedy procedural irregularities within a certain period if it considered that this would not delay the resolution of the dispute.[31] Similarly, under Article 94 (2) VwGO, the judge could suspend court proceedings upon application by the administrative authority to enable it to correct procedural irregularities.[32] Both provisions were removed in the 2002 reform. The official reason for their removal was that they did not work in practice.[33]

Similar mechanisms can be observed in the Netherlands, which recently adopted several reforms to its General Administrative Law Act (hereinafter Awb)[34] to enforce administrative court judgments effectively. This reflects the increasing importance of administrative courts as a conflict resolution mechanism. For this reason, Article 8:41a Awb stipulates that administrative courts shall, if possible, settle the dispute between the parties. Although

29 ibid 6.

30 German Code of Administrative Court Procedure of 21 January 1960 'Verwaltungsgerichtsordnung (VwGO)' (amended 15 July 2024) <https://www.gesetze-im-internet.de/englisch_vwgo/index.html> accessed 16 January 2025.

31 Grashof (n 25) 6.

32 ibid.

33 ibid 7.

34 Netherlands General Administrative Procedure Act of 4 June 1992 'Algemene wet bestuursrecht (Awb)' (amended 1 January 2025) <https://wetten.overheid.nl/BWBR0005537/2025-01-01> accessed 16 January 2025.

symbolic, the provision encourages the administrative courts to focus on effective and final dispute resolution to serve society.[35]

Since 2010, Dutch courts have been able to use a new instrument called *bestuurlijke lus* (the administrative loop). Its purpose is to allow the authority to remedy all the defects and unlawful elements in its administrative act identified by the court.[36] This is done by an interim judgment, in which the court states that it has found unlawful elements in the contested administrative act and will annul it in its final judgment unless the irregularities have been duly remedied. The judge may also provide the authority with guidelines or concrete instructions for remedying the administrative act.[37] In this way, the court allows the public authority to remedy the unlawfulness of the contested act while ensuring that a final judgment is issued to end the dispute.[38] The mechanism was introduced to avoid further rounds of administrative litigation after repeated administrative procedures, which had been widely criticised as too lengthy and ineffective.[39]

The administrative loop appears to be a reasonably effective method for achieving definitive dispute resolution. The Dutch Council of State has used it in about 10-15 per cent of cases yearly since 2012,[40] and the dispute was resolved definitively in approximately 90 per cent of cases.[41]

A similar (though narrower in scope) mechanism was adopted by the Flanders region of Belgium in 2012.[42] The Flemish version of the administrative loop only allowed the authority to remedy irregularities in its decision without changing its substance. Still, if a substantially different decision were required, the court would annul the contested administrative act and refer the matter back to the authority. Additionally, the Flemish administrative loop did not permit appeals against an administrative act that had been remedied through the

35 Kars J de Graaf and Albert T Marseille, 'On Administrative Adjudication, Administrative Justice and Public Trust' in Suzanne Comtois and Kars de Graaf (eds), *On Lawmaking and Public Trust* (Eleven 2016) 117.

36 ibid.

37 Sander Jansen, *The Dutch Administrative Loop under Scrutiny: How the Dutch (Do Not) Deal With Fundamental Procedural Rights* (Maastricht Faculty of Law Working Paper series 2017-3, Maastricht University 2017) 3, doi:10.2139/ssrn.2943938.

38 Graaf and Marseille (n 35) 117.

39 Jansen (n 37) 4.

40 In the cases where an appeal is well-founded, the Dutch Council of state uses one of the mechanisms for definitive dispute resolution in about 50 % of cases. See: Jurgen CA de Poorter, 'Increasing the Efficiency of the Administrative Courts' Powers: A Dutch Success Story?' (Scientific Cooperations Workshops on Social Sciences: Proceedings booklet: Branches Titanic Business Hotel, Istanbul, Turkey, 8-9 May 2015) 370.

41 ibid.

42 Heidi Bortels, *The Belgian Constitutional Court and the Administrative Loop: a Difficult Understanding* (Maastricht Faculty of Law Working Paper series 2017-2, Maastricht University 2017) 6, doi:10.2139/ssrn.2943929.

administrative loop. Due to its peculiarities, this version of an administrative loop had a limited scope and was rarely used.[43]

However, several applicants brought a complaint regarding the administrative loop to the Belgian Constitutional Court, claiming that it violated the principle of the rule of law and fundamental procedural rights.[44] The Constitutional Court found that the contested provisions violated, *inter alia*, the principles of judicial independence and impartiality. Specifically, by suggesting the use of the administrative loop, the court revealed its position on the outcome of the case—particularly since a substantially different decision could not be issued within the administrative loop.

Furthermore, the Constitutional Court found a violation of the principle of separation of powers, as the provisions did not leave the administrative authority any discretion in how to remedy the irregularities in its administrative act. Since the decision could not be substantially changed within the administrative loop, the administrative authority could not determine whether the irregularities required a substantially different outcome.[45]

The Constitutional Court also found it unconstitutional that a party cannot initiate an administrative dispute against an administrative act that has been remedied through the administrative loop, as this violates the right of access to the court. Although the Constitutional Court declared this version of the administrative loop unconstitutional, it emphasised that the legislator's efforts to achieve an effective and definitive dispute settlement should be welcomed.[46]

Following the Constitutional Court's decision, the Flemish legislator adopted a new version of the administrative loop that resolved all objections to unconstitutionality. Still, there is much less academic and political support for its use than in the Netherlands, primarily because it requires a more active administrative court—one that can now impose an obligation on the administrative authority to issue a substantially different administrative act.[47]

Implementing the mechanisms listed in this section demonstrates the efforts of several countries to improve the effectiveness of administrative disputes already in the trial phase of the proceedings. However, it also highlights that such efforts can conflict with fundamental procedural rights and constitutional principles.[48] Therefore, any reform towards more efficient administrative dispute resolution must consider protecting fundamental procedural rights.

43 ibid.

44 ibid 8.

45 ibid 9.

46 Case no 74/2014, B.14 [2014] Belgian Constitutional Court.

47 Bortels (n 42) 18.

48 Sander Jansen and Mariolina Eliantonio, *The Modernisation of the Rules of Administrative Judicial Procedure under Scrutiny: the Rulings of the Belgian Constitutional Court on the "Administrative Loop" in a Comparative Perspective, Concluding Remarks* (Maastricht Faculty of Law Working Paper series 2017-7, Maastricht University 2017) 9, doi:10.2139/ssrn.2943945.

While these mechanisms are effective for achieving definitive dispute resolution, their implementation must not violate the principle of separation of powers. This risk arises especially in the assessment of administrative action where the administration has discretion. In such cases, judicial review is typically limited to assessing whether the limits of discretion have been breached. Such mechanisms might be challenging even when administrative courts exercise deference to the authority during review.[49]

B. Judgment Issuance Phase

The judgment is the most important tool of the administrative court for dispute resolution between the administrative authority and the individual. It enables the court to decide on the legality of the disputed administrative act and the consequences if it is found to be unlawful. The growing importance of the principle of effective legal protection in administrative disputes has greatly expanded the scope and effects of administrative court judgments. This includes not only the expansion of powers to decide on the matter in the full jurisdiction proceeding but also, even in annulment judgments, an increase in the judge's powers to ensure the judgment's speedy and accurate implementation for full dispute resolution. This section analyses those newly gained powers.

1. *Instructions to the Administrative Authority on How to Proceed After Annulment—The 'Didactic' Function of the Judgment*

The most widespread mechanism for ensuring the effectiveness of a judgment that annuls an administrative act is to include in it the instructions to the administration on how to proceed in the matter, whether from the procedural point of view or the point of application of substantive law. In Austria, for example, from 1875 until the reforms of 2012 (which established reformatory judgments as the core remedy for unlawful administrative acts), the administrative court had the option to include binding instructions to the administration in its judgment.[50] Kelsen recognised an indirect

49 The administrative courts may practice deference in their review when reviewing actions of a specific public person (ratione personae) or when they review an issue with specific legal nature (ratione materiae). See: Guobin Zhu (ed), *Deference to the Administration in Judicial Review: Comparative Perspectives* (Ius Comparatum – Global Studies in Comparative Law 39, Springer 2019) 8.
Most notable example of limited scope of review due to deference is known from the Chevron case in the USA, where the Supreme court granted deference to the agency's interpretation of a statue that it administers, as long as such interpretation is based on a permissible and reasonable construction. See: *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 [1984] US Supreme Court <https://supreme.justia.com/cases/federal/us/467/837> accessed 16 January 2025.

50 Marco Mazzamuto, 'The Formation of the Italian Administrative Justice System, European Common Principles of Administrative Law, and "Jurisdictionalization" of Administrative Justice in the Nineteenth Century' in Giacinto della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de siècle: Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (The Common Core of European Administrative Law, OUP 2021) 300, doi:10.1093/oso/9780198867562.003.0011.

reformatory effect of the court's findings, with the only exception being that the Austrian administrative court could not decide directly on the matter.[51]

Such instructions can exist in many forms and have various levels of binding effect, depending on the procedural rules of a country. They most commonly appear in the reasoning section of a judgment, usually in the form of a paragraph instructing the administrative authority on how to carry on the proceedings following the annulment. However, they may also be included in the judgment tenor.[52] Differences may also arise in the source of their binding power—whether through an explicit provision of the law or a (broader) definition of the concept of *res iudicata*, encompassing not only the (often generic) tenor of the judgment but also its key grounds.[53]

In some cases, difficulties in implementing the administrative court's judgment do not stem from the unwillingness of the administration to comply but rather from the complexity of the matter itself. In such cases, the judge can anticipate future developments and, using a didactic drafting of their judgment, precisely indicate the measures necessary for its correct implementation.[54] The desire to improve the clarity and comprehensibility of judgments has led to changes in practice in some legal systems, such as in France. French judges were once known for their very distinct laconic style—writing judgments in a single sentence beginning with "Considering that …", followed by a syllogistic organisation of the argument[55] However, recent trends have moved towards more didactic judgments, which provide in-depth reasoning and comprehensive guidance to the administration comprehensively, thus abandoning the tradition of *imperatoria brevitas*.[56] In 2019, the style was formally changed to align with that of the ECtHR and the Court of Justice of the European Union (hereinafter CJEU).[57]

In Slovenia, the binding nature of administrative court judgments has seen significant development in recent years. Prior to the 2023 amendment of the Slovenian Administrative Dispute Act (hereinafter ADA),[58] the law already stipulated that, when repeating the proceedings following the annulment of a contested administrative act in an administrative

51 Thomas Olechowski, 'Zwischen Kassation und Reformation: Zur Geschichte der Verwaltungsgerichtlichen Entscheidungsbefugnis' (1999) 16 Österreichische Juristen-Zeitung 581.

52 In such a case, the instructions are similar to an injunction, which is further analyzed below.

53 Slovenian administrative dispute act has been recently amended so that it contains both such options. More on that below.

54 Gjidara (n 2) 79.

55 John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) 56, doi:10.1017/9781009057127.

56 Jean Massot, 'The Powers and Duties of the French Administrative Judge' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Research Handbooks in Comparative Law series, Edward Elgar 2010) 422, doi:10.4337/9781849808101.00035.

57 Bell and Lichère (n 55) 56.

58 Slovenian Administrative Dispute Act of 28 September 2006 'Zakon o upravnem sporu (ZUS)' (amendment 26 April 2023) <https://pisrs.si/pregledPredpisa?id=ZAKO4732> accessed 16 January 2025.

dispute, the administrative authority must adhere to the legal opinion of the administrative court regarding both substantive law and procedural matters. It was also provided that any other administrative authority deciding on ordinary or extraordinary legal remedies against a newly issued administrative act, following a court judgment, was similarly bound by the court's legal opinion and views.[59]

Under older case law, administrative authorities could reconsider decisions and choose an alternative course, even if it contradicted the legal opinions and views of the court. However, they had to provide specific reasons for doing so.[60] Interestingly, the older case law did not indicate, even by example, which grounds could justify such a derogation from the legal view of the administrative court.

Recent case law has clarified that a derogation from the obligation to be bound by the judgment of the administrative court is possible only in exceptional circumstances—specifically, where compelling legal circumstances have occurred. These include, for instance, the enactment of a new law applicable at the time of reconsideration by the administrative authority, the annulment of the governing law by the Constitutional Court, or if the position of the court of first instance is contrary to the position taken by the Court of Justice of the European Union in the preliminary ruling procedure on the interpretation of a rule of European Union law. Likewise, a subsequent divergent ruling by the Supreme Court of the Republic of Slovenia in a substantially identical case also constitutes valid grounds.[61]

What these cases share is a fundamental change in the legal or factual circumstances of the case. Since the administrative authority is only bound by the judgment of the administrative court insofar as the legal and factual basis for the decision remains unchanged, recent case law affirms that the authority must comply with the views expressed in the administrative court's judgment in all other circumstances.

The concept of the binding nature of the administrative court's judgment has also been significantly influenced by a notable procedural shift in the adjudication of administrative disputes: courts now more frequently issue final decisions after oral hearings rather than in sessions without them.[62] Critics have argued that oral hearings do not contribute to the

59 ibid, arts 64/4, 64/5.

60 Case X Ips 519/2007 [2007] Slovenian Supreme Court; Case X Ips 706/2008 [2008] Slovenian Supreme Court ; Case X Ips 169/2010 [2011] Slovenian Supreme Court.

61 Case I Up 183/2016 [2016] Slovenian Supreme Court.

62 In recent years, the oral hearing in administrative dispute has become increasingly important in Slovenia. Today, the oral hearing in administrative dispute is considered an independent human right. Its nature and purpose are the same as the oral hearing in other court proceedings. More on this see: Bruna Žuber, 'Oral Hearing in the Procedure of Judicial Control of Administrative Acts: A Tool for Empowering the Principle of Effective Judicial Protection?' (2020) 61 Jahrbuch für Ostrecht 305; Bruna Žuber e Giacomo Biasutti, 'L'udienza di discussione nel contenzioso amministrativo come diritto umano: un confronto tra il sistema sloveno e quello italiano' (2023) 2 Ceridap 85, doi:10.13130/2723-9195/2023-2-26.

effectiveness of administrative disputes when the court conducts a fact-finding procedure during the hearing but ultimately refrains from ruling on the merits. Instead, it merely annuls the contested administrative act and remands the case to the administrative authority for reconsideration.

The Supreme Court responded to these criticisms in its decision No. X Ips 220/2016 of 17 May 2017.[63] It stated that, in cases where a court in an administrative dispute establishes facts of the case at an oral hearing and subsequently annuls the contested administrative act, the administrative authority is also bound by those established facts. This obligation is inextricably linked to the court's legal positions on evidentiary matters and to the operative part of the judgment. Thus, according to the view of the Supreme Court, the administrative authority is bound not only by the substantive final judgment, but also by the operative part of the judgment and the underlying reasons that justify it.

Moreover, in a recent case, the Supreme Court also explicitly addressed the binding effect of a final judgment on future decisions in the same matter, including those made by the administrative court itself. The Court took the view that the binding effect of a final judgment rendered in the same case also applies to the administrative court when it would rule in an administrative dispute against a new administrative act in the same matter.[64] Neither the administrative authority nor the administrative court may depart from the positions previously established by the final judgment.

Recognising these developments, the legislature codified this evolving jurisprudence through amendments to the ADA. Under Article 64(5), when a contested administrative act is annulled and remanded for reconsideration, the public authority is required to adhere to the operative part of the judgment, as well as to the facts established by the court at the oral hearing in which it upheld the lawsuit and annulled the act. In addition, the authority must follow the court's legal opinion on the application of the substantive law and its views relating to the procedure. It should be borne in mind that the court in an administrative dispute can also determine the method in which its decision is to be implemented in the operative part of the judgment, and that the binding effect also applies in that respect (64(5) of ADA).

2. Administrative Court Injunction Requiring the Administration to Act in a Particular Way to Implement an Administrative Court Decision

An injunction can be the next step in ensuring the effectiveness of judicial instructions to the authority on how to proceed following the annulment of an unlawful administrative act. Such a mechanism is available to the courts in many European countries. Italy, for example, provides a special procedure in Articles 112 to 115 of its code of administrative trial[65] for

63 Case X Ips 220/2026 [2017] Slovenian Supreme Court.

64 Case X Ips 12/2023 [2023] Slovenian Supreme Court.

65 Italian Code of Administrative Procedure of 2 July 2010 no 104 'Codice del processo amministrativo approvato' (amended 31 December 2024) <https://www.altalex.com/documents/codici-altalex/2014/09/10/codice-del-processo-amministrativo> accessed 16 January 2025.

the cases of non-execution of an administrative court decision.[66] By its legal nature, this procedure allows the administrative judge to establish all appropriate measures to ensure the execution of the judgment if the public administration fails to comply with it.[67] In principle, the judge who issued the judgment in an administrative dispute is also competent to decide on the execution of the judgment.[68] In principle, the judge may order compliance by prescribing the means of execution, including determining the content of the new administrative act or by adopting a new administrative act *in lieu* of the public administration.[69] In such cases, the administrative judge effectively replaces the public administration in exercising its powers. This is often done by appointing an *ad acta* commissioner—an official appointed by the court to act on behalf of the non-compliant public administration.[70] This mechanism is a crucial instrument for ensuring the effectiveness of the administrative dispute in Italy.[71]

In the Netherlands[72] and Belgium,[73] the court may order in its judgment that a new administrative act be adopted within a specified period and may also impose a penalty in the event of non-compliance. Similarly, in France, if the court requires the administrative authority to decide on specific content within a certain period, it can issue an injunction to that effect. Traditionally, French administrative courts did not specify in the text of the judgment what steps the administrative authority had to take to implement the judgment correctly, as it was considered that giving instructions to the authority on how to implement a judgment would violate the principle of separation of powers.[74] This practice

66 ACA-Europe, *Administrative justice in Europe: Report for Italy* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2018) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025.

67 Ivone Cacciavillani, *Il Giudizio di Ottemperanza: Il Processo Esecutivo Amministrativo* (Istituto Editoriale Regioni Italiane 1998); Giuseppina Mari, 'Il giudizio di ottemperanza' in Maria Alessandra Sandulli (ed), *Il Nuovo Processo Amministrativo: Studi e Contributi*, vol 2 (Giuffrè Editore 2013) 457; Mario Sanino, *Il Giudizio di Ottemperanza* (Giappichelli 2014).

68 See: Italian Code of Administrative Procedure (n 65) art 113/1.

69 ibid, art 114/4.

70 Simona D'Antonio, Il Commissario ad Acta Nel Processo Amministrativo: Qualificazione Dell'organo e Regime Processuale Degli Atti (Editoriale Scientifica 2022).

71 Giuseppina Mari, *Giudice Amministrativo ed Effettività Della Tutela: L'evoluzione del rapporto tra cognizione e ottemperanza* (Editoriale Scientifica 2013).

72 ACA-Europe, *Administrative justice in Europe: Report of Netherlands* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2017) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025. See also: Netherlands General Administrative Procedure Act (n 34) art 8:72, subs 4-6.

73 ACA-Europe, *Administrative justice in Europe: Report of Belgium* (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union 2018) answer to question 53 <https://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 16 January 2025. See also: Consolidated Acts on the Council of State *of Belgium* 'Lois sur le conseil d'état', art 36, § 3–5 (amended 1 January 2025) <http://www.raadvst-consetat.be/?page=proc_consult_law&lang=fr> accessed 20 February 2025.

74 Jean Waline, *Droit Administrative* (26th edn, Dalloz 2016) 708.

changed with the enactment of the law of 8 February 1995—now Articles L911-1 and L911-2 of the French Code of Administrative Justice (hereinafter CJA)[75]—which introduced the power of the administrative courts, in their final judgment on the matter, to issue injunctions requiring administrative authorities to adopt a particular act or measure with particular content within a specified time (Article L 911-1), or to review the facts and adopt a new administrative act based on the outcome of factual review in specified amount of time (Article L 911-2).[76] Injunctions may be used to prevent an authority from acting in the matter or oblige it to act in a particular way.[77] However, if the authority has several options for implementing the administrative court's judgment, issuing an injunction is not possible.[78]

The Conseil d'Etat has gone even further with regard to the implementation of its own judgments by adopting what it calls '*véritable guide de l'exécution de la chose jugée*' (a true guide to the execution of the *res iudicata*). Through this approach, the court outlines, as clearly as possible in the grounds of the judgment, the precise measures required for execution and includes in the operative part of the judgment the formula: "This annulment entails for the State the obligations set out in the grounds of the present decision, which constitute the necessary support for it."[79]

It is generally accepted in France that the power of injunction has played an important role in the evolution of the French administrative judge—from a mere guardian of legality, whose role was primarily to assess the lawfulness of contested administrative acts, to an actor seeking to ensure the resolution of the conflict between the litigants. Although an injunction can only be issued if a litigant requests it, this power has extended the judge's horizon to the post-judgment period, whether this request has been made or not.[80]

3. *Res Iudicata as a Mechanism for Ensuring Compliance with an Administrative Court Decision*

The concept of *res iudicata,* or the finality of the administrative court's judgment, is crucial in establishing a legally binding judgment and ensuring the long-term resolution of a dispute between the parties. Many states that know this concept separate its effects into two spheres: formal/procedural *res iudicata* and substantive/material *res iudicata*.[81] In general, if a judgment becomes a formal *res iudicata*, it can no longer be subject to an appeal or other

75 French Code of Administrative Justice 'Code de justice administrative (CJA)' (amended 1 January 2025) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933> accessed 16 January 2025.

76 Bell and Lichère (n 55) 172.

77 ibid 173.

78 Waline (n 74) 708.

79 ibid.

80 Jean-François Lafaix, 'L'injonction au Principal: Une Simplification de L'exécution ?' (2017) 39(2) Civitas Europa 109.

81 International Association of Supreme Administrative Jurisdictions, *The Execution of Decisions of the Administrative Court: General Reports of 8th Congresses* (Madrid 2004) 14.

regular legal remedy. Substantive *res iudicata*, on the other hand, means that the judgment has definitively resolved the dispute between the parties, which is why new disputes concerning the same legal and factual situation are not allowed. This dimension of *res iudicata* is manifested in the principle of *ne bis in idem*. Such a definition is used, for example, in Germany[82] and Italy.[83] In France, the judgment obtains *autorité de chose jugée* (which can be equated with the substantive *res iudicata* effect mentioned above) when it is rendered, whether or not an appeal is lodged against the judgment. However, this judgment obtains *force de chose jugée* (which can be equated to formal *res iudicata*) only once no ordinary legal remedy with suspensive effect can be brought against it.[84]

The substantive dimension of *res iudicata* can have important effects on the duty of the administration to respect and properly implement the judgment of an administrative court. Whenever the court decides on the matter itself in a full jurisdiction proceeding or whenever it annuls the administrative act but does not refer the matter back to the administrative authority—because no new administrative act on the matter is necessary—the effects of substantive *res iudicata* are easy to understand: the particular legal and factual situation between the parties has been resolved, and no new administrative or judicial procedure is allowed concerning it. However, when the court annuls the administrative act and refers the matter back to the administrative authority, the concept of *res iudicata* can be important in determining what kind of decisions the latter can take regarding the case.

In Germany, for example, one of the effects of substantive *res iudicata* is called *Präjudizialität* (prejudiciality), which means that the judgment of an administrative court acts as a binding precedent in any further proceedings between the parties.[85] This is particularly important in cases where the administration is obliged to issue a new administrative act. In such cases, the court's decision in the initial proceedings creates a binding relationship between the parties so that the administrative act with the same content, which has already been declared unlawful, cannot be issued.[86] This limitation also cannot be bypassed by issuing an administrative act that is only marginally different in content[87] because the effect of *res iudicata* from previous administrative disputes applies to the disputed administrative act and the regulation of a singular situation established by this act.[88] By issuing a slightly

82 Yuval Sinai, 'Reconsidering Res Judicata: A Comparative Perspective' (2011) 21(2) Duke Journal of Comparative & International Law 353.

83 Vaccari (n 18) 226.

84 Silja Schaffstein, *The Doctrine of Res Judicata before International Commercial Arbitral Tribunals* (Oxford International Arbitration Series, OUP 2016) 40.

85 Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsrecht VwGO: Kommentar* (CH Beck 2021) 24.

86 ibid 26.

87 Steffen Detterbeck, 'Das Verwaltungsakt-Wiederholungsverbot' (1994) Neue Zeitschrift für Verwaltungsrecht 37.

88 ibid.

different administrative act in a repeated procedure, the authority restores the previous regulation of a singular case, which the court has already annulled. Thus, if the administrative authority issues an administrative act similar to the annulled one, and there has been no change in the factual or legal situation in the matter, this administrative act may be annulled by the administrative court in a new administrative dispute without examining the merits because of the prejudicial effect of the decision from the first proceeding.[89]

It should be noted that, due to a generic wording of the tenor of a judgment annulling an unlawful administrative act and referring the matter back to the authority, the tenor of the judgment alone does not reveal the content of the judicial regulation of the relationship.[90] It is, therefore, widely recognised in German theory that the grounds of a judgment are a part of its *res iudicata*, meaning that their use in a specific case may be indispensable for determining the content of the operative part of the judgment.[91] In such cases, the judgment's grounds concerning the irregularity in the annulled administrative act also determine the possible courses of action for the administrative authority. For example, suppose the court has annulled an administrative act solely because of procedural irregularities. In that case, the authority may issue a new administrative act identical to the old one while avoiding said irregularities.[92] However, if the annulment of the administrative act is based on a violation of substantive law, the authority may not, in principle, issue a substantially identical act without any change in the factual or legal situation.[93]

The development of the concept of *res iudicata* has also had a major impact on the effectiveness of administrative disputes in Italy. There, great emphasis has been placed on the objective limits of *res iudicata*, which determine the extent to which the judgment in a repeated proceeding binds the administration. Suppose the objective limits of *res iudicata* are set as broadly as possible and cover the dispute's entire legal and factual dimension. In that case, the public administration has less or possibly no freedom to adopt substantially the same administrative act as the last time. On the other hand, if the objective limits are as narrow as possible, the administration may even be able to adopt the same administrative act on the same legal grounds as in the annulled one.[94] Both legal theory and practice have gradually moved toward widening the objective limits of *res iudic*ata, thus establishing it as an important element in ensuring the stability of the outcome of administrative disputes at the cost of the "inexhaustibility of administrative power".[95] Thus, by the beginning of the second half of the twentieth century, the objective

89 Schoch and Schneider (n 85) 81.
90 ibid 52.
91 ibid 50.
92 ibid 81.
93 ibid.
94 Vaccari (n 18) 233.
95 ibid 265.

limits of *res iudicata* were set at the simple "loss of effect" of the contested measure, meaning that with the annulment of the administrative act—as defined in the tenor of the judgment—the effects of substantive *res iudicata* were exhausted.[96]

Ever since the 1980s, however, the objective limits of *res iudicata* have been understood in a much broader way, based on the idea that by contesting an administrative act, the plaintiff not only pursues the immediate objective of annulling the administrative act but also the objective of satisfying a certain substantive claim.[97] Since such a substantive claim is the object of an administrative dispute, the objective limits of *res iudicata* must be sufficiently broad to cover it. Therefore, they must not be exhausted with the annulment of the administrative act but should regulate the actions of the administration in repeated proceedings to achieve the substantive claim.[98] Since it is only from the reasons of the judgment that the administration can determine the correct way of exercising its power in a repeated proceeding, those reasons must also be covered by the effects of substantive *res iudicata.*[99]

Further space for development is seen in using the objective limits of *res iudicata* to ensure a definitive resolution of the administrative dispute. This could be achieved by establishing procedural preclusion, so the administrative authority would be required to plead all possible facts and grounds in defence of its administrative act during the administrative dispute, as it would be precluded from using them in repeated proceedings. The objective limits of *res iudicata* would thus extend from "what has been pleaded' to 'what could be pleaded."[100]

As shown, understanding the concept of (substantial) *res iudicata* can greatly impact the effectiveness of administrative dispute procedures in protecting fundamental rights and definitively resolving disputes. However, the broader the understanding of this concept, the more tools and skills are needed on the part of the administrative court to effectively adjudicate each (factual as well as legal) dimension of the dispute before referring the matter back to the administration. A broader understanding of *res iudicata* needs to consider possible discretionary powers on the part of the administration and other limitations in the procedural rules governing administrative disputes.[101]

96 ibid 235.
97 ibid 237.
98 ibid 238.
99 ibid.
100 ibid 254.
101 For example, prohibition to supplement justification for the administrative act with a new one, which is present in some legal systems.

4. *Power to Set the Temporal and Other Effects of the Judgment Annulling the Administrative Act*

Normally, the annulment of an administrative act restores the legal situation before the decision was taken. However, returning things to how they were may not always be easy or desirable, especially if it violates the principle of legal certainty. That is why legal systems have established several mechanisms to ensure that the annulment of unlawful administrative acts does not create further problems for the parties or the public interest.

In France, for example, the court may issue a more detailed ruling or limit the effects of its judgment to an annulment with only prospective effect. This is particularly necessary when the retroactive effect of the annulment would have manifestly excessive consequences for either private or public interests.[102] This option is most often used in cases of irregularities in appointments and promotions in the civil service. In such cases, the annulment of the administrative act does not automatically mean that the civil servant loses their job or promotion.[103]

When deciding on the modulation of the annulment's effects, the judge must balance the principle of legality with the principle of legal certainty.[104] The judge may also decide that the annulment will take effect later, giving the administration sufficient time to issue a new administrative act.[105]

Similarly, in both the Netherlands[106] and Belgium,[107] the court has the power to order that the legal effects of the annulled administrative act be maintained, even if the decision is annulled. This instrument can be used when a new administrative act is unlikely to help an interested party because the first one was annulled due to procedural irregularities.[108] Another reason for maintaining the effects of an annulled administrative act may be that it has created factual consequences that cannot be undone, such as permitting the construction of a building that has already been built. In such cases, awarding damages may be a more appropriate solution to the unlawful situation, especially if the unlawfulness is of minor importance.[109]

A final reason for maintaining the effects of an annulled decision may be to avoid *reformatio in peius*. This may be the case, for example, if the administrative authority grants too much aid due to an incorrect interpretation of the law, which is in no way the fault of the aid recipient.[110]

102 Vaccari (n 18) 126.
103 ibid. See for example: CE 12 déc 2007, Sire, no 296072 [2008] French Council of State.
104 Gjidara (n 2) 81.
105 ibid.
106 Jansen (n 37) 5.
107 Bortels (n 42) 3.
108 Albers, Kjellevold and Schlössels (n 18) 242.
109 ibid.
110 ibid.

In Slovenia, according to Article 64(3) of the ADA, as amended in 2023, if the administrative court annuls the contested administrative act, it may determine how its decision will be implemented. On the normative level, this provision is new and inspired by a similar power of the Slovenian Constitutional Court, which may specify in its decisions which authority must implement the decision and in what manner. In practice, the Constitutional Court uses this power to ensure the proper implementation of legislation or the effective enforcement of a human right or fundamental freedom during the period in which the legislator must remedy the unconstitutionality established by the Constitutional Court.[111]

The administrative court shall determine the manner of implementation in the operative part of the judgment *ex officio*. However, the plaintiff may nevertheless propose in the lawsuit how the implementation should be formulated if this would assist the court.[112] The law does not specify the measures that the administrative court may use to ensure the implementation of its judgment. Given the characteristics of this institution, it is expected that there will be many similarities with how the decision of the Constitutional Court is to be implemented, bearing in mind that the substantive scope will be tailored to the nature and importance of the administrative dispute. There is no doubt that, in substance, the determination of the manner of implementation of a court`s judgment may be an instruction to the administrative authority as to what act it should issue, how it should conduct the procedure, what substantive law it should apply, and how it should establish the facts. In this sense, determining the manner of implementation of a judgment may be regarded as an alternative to a dispute of full jurisdiction, which makes an important contribution to ensuring effective judicial protection.

It is also clear that the administrative court will not be able to exercise a legislative function in the institution's context of determining the manner of implementation. Still, it is possible that it could temporarily exercise a normative administrative function in individual justified cases. It is clear from the above that the administrative court will have a wide range of options in this institution's application, which means that the scope of its application will be determined by case law.

Finally, it should be noted that this may also be enforceable in case of non-compliance with the determined manner of implementing a court decision. Article 102(3) of the ADA provides that court judgments imposing an obligation on the State, a local authority, or their bodies or organisations shall be enforced under the rules of enforcement of civil claims. In this respect, case law also remains to be developed.

111 Case U-I-198/03 [2003] Slovenian Constitutional Court; Case U-I-7/07 [2007] Slovenian Constitutional Court; Case Up-1054/07 [2007] Slovenian Constitutional Court.

112 Erik Kerševan, *Zakon o Upravnem Sporu z Novelo ZUS-1C* (GV Založba 2023) 111.

C. Post-Judgment Phase

Historically, the phase after an administrative dispute ended received little attention. It was considered that the work of the administrative court was completed with the issuance of a judgment, regardless of how effectively the judgment resolved the dispute. However, this phase of an administrative dispute is now receiving increasing attention due to the development of the ECtHR's case law on the right to effective judicial protection.

In most cases, an administrative dispute will be successfully concluded with the issuance of a judgment. The administrative body will appropriately consider the positions expressed in the judgment when issuing a new administrative act, ensuring the realisation of the party's interests. However, if, for any reason, the administrative body cannot or does not adequately fulfil its obligations under the administrative court's judgment, mechanisms must be available to compel the administrative body to act and achieve a definitive resolution of the matter.

1. *Communication Between the Administrative Authority and the Administrative Courts after Annulment to Ensure the Correct Implementation of the Administrative Court Decision*

Quite often, the implementation of administrative court decisions is hampered not by a lack of will on the part of the administrative authorities but by their genuine inability to comply or by their lack of understanding of how to proceed with implementation. In such situations, it may be helpful for administrative authorities to have an advisory body available to advise them on how to properly implement decisions of the administrative courts.

In France, this type of body was established by a decree of 30 July 1963, which created the *Commission du Rapport* (the report commission). Its purpose was to assist in the enforcement of the judgments of the Conseil d'Etat.[113] Over time, however, it developed into the *Section du Rapport et des Etudes* (Reports and Studies Section) of the Conseil d'Etat, which has a wide range of tasks, including conducting studies on current issues in administrative law that often have a significant impact on legislation.[114] Over the years, the system of assistance in implementing judgments of the administrative courts has also been expanded and now covers all administrative courts, not just the Conseil d'Etat.

Thus, the administrative body can request clarification from any administrative court regarding the meaning of its judgment, both in terms of its scope and the practical details of its execution. Responses are handled by the Reports and Studies Section for judgments of Conseil d'Etat and, in the case of administrative courts, by the president of said court, who may also appoint a rapporteur or, if necessary, refer the matter to the Reports and Studies Section of the Conseil d'Etat.[115]

113 Gjidara (n 2) 83.
114 ibid.
115 ibid 84.

In practice, however, most questions concerning the execution of administrative court decisions are resolved informally; for example, only 14 such decisions were issued in 2018.[116]

Since this mechanism is consultative in nature, it is most appropriate for jurisdictions where the highest administrative court functions not only as a judicial body but also as an advisory body to the executive branch of government, as seen in the example of France above. Wherever such a mechanism exists, it is typically found within the advisory competence of these courts—particularly when their mandate includes not only drafting normative acts but also providing opinions on any matter concerning the administration.[117]

Italy also has a special procedure for requesting information from the administrative judge on executing a judgment. The Code of Administrative Trial has introduced the possibility of requesting the judge to clarify the execution of a judgment.[118] This may be the case for judgments that are not fully comprehensible or for changes in the factual situation that make the concrete execution of the judgment uncertain.[119] The public administration, the private party, or the *ad acta* commissioner may initiate this procedure. At the end of this procedure, the judge may define, clarify, or specify how the parties should execute the judgment.[120]

2. *Escalation of Sanctions in the Case of Non-execution of Administrative Court Decisions*

The binding nature of administrative court decisions ensures compliance and underscores the constitutional role of the administrative judiciary. However, this concept would lack practical impact without legal sanctions for non-compliance. To ensure effective legal protection, the court must have the authority to impose sanctions on an administrative body that, in repeated proceedings, refuses to comply with an administrative court judgment. One of the more coercive measures to ensure compliance with the administrative court decisions is the power, available in some countries, for courts to impose a penalty on administrative bodies for failure to comply with, or incorrect implementation of, their judgments.

116 Bell and Lichère (n 55) 127.

117 Another example of this is Spanish Council of State, which may submit formal motions/proposals to the government on any matter that the practice and experience of its functions suggest. See: Alicia Cebada Romero, 'A Challenged Council: The Spanish State Council between a Decentralized Advisory Function and the Publicity of Opinions' (2023) 43(1) Parliaments, Estates & Representation 53, doi:10.1080/02606755.2023.2169409.

118 See: Italian Code of Administrative Procedure (n 65) arts 115/5, 114/7. See also: Davide Palazzo, 'La c.d. ottemperanza di chiarimenti nel processo amministrativo' in Flaminia Aperio Bella, Andrea Carbone e Enrico Zampetti (eds), *Dialoghi di Diritto Amministrativo: Lavori del Laboratorio di Diritto Amministrativo 2019* (L'Unità del Diritto, Roma TrE-Press 2020) 189.

119 On this see: Case no 3569, s VI [2012] Italian Council of State.

120 See: Italian Code of Administrative Procedure (n 65) art 112/2. See also: Case no 1988, s V [2024] Italian Council of State.

In Hungary, for example, as of 2018, the courts have had several options to ensure their judgments are enforced. After requesting clarification from the administrative body regarding non-compliance, if the clarification is unsatisfactory or not provided, the court can impose a fine on the administration of up to HUF 10 million (approx. EUR 30,000). This fine is not the only means of enforcing compliance with the judgment: the court may also order another administrative body or, depending on the nature of the failure, the supervisory authority to carry out the obligation instead.[121] If these means are ineffective, the court can order provisional measures until the administrative body has fulfilled its obligations under the judgment.[122]

France is another country with a longstanding legal tradition of allowing courts to impose penalties on public authorities for failure to (properly) execute judgments of administrative courts. Since 1980, the Conseil d'Etat—and, since 1995, all administrative courts—have been authorised to attach a procedural fine (*astreinte*) to any enforcement order.[123] This penalty typically consists of a sum of money for each day the judgment remains unenforced. At the end of the process, the court determines a final sum of money due, allocating how much money is to be paid to the parties and how much to the state.[124] Penalties for non-compliance can be substantial, up to EUR 1 million per day.[125]

In practice, the use of *astreintes* is rare, as injunctions—often issued alongside judgment and serving to inform parties of the consequences of the decision—are generally respected by the authorities.[126] In 2018, all administrative courts in France ordered the enforcement of 100 *astreintes* out of 3,555 complaints of non-enforcement (about half of which involved appeals by the administration and therefore, did not constitute true cases of non-enforcement. Ultimately, only 15 *astreintes* were liquidated.[127]

Administrative courts in some countries employ different coercive measures that do not rely on financial penalties but involve a greater degree of interference with the administrative authority's functions, raising issues related to the principle of separation of powers.

In Slovenia, Article 65(1) of the ADA provides that the administrative court may rule on a party's right, obligation, or legal interest in a full jurisdiction dispute if, after the annulment of an administrative act, the administrative authority issues a new act that contradicts the legal opinion of the administrative court or its views regarding the procedure.

121 Krisztina F Rozsnyai, 'Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure' (2018) 17(1) Central European Public Administration Review 16.

122 ibid.

123 Bell and Lichère (n 55) 125.

124 ibid.

125 Conseil d'État, 'Rapport public 2019: activité juridictionnelle et consultative des juridictions administratives en 2018' (*Le Conseil d'État*, 5 juillet 2019) 141 <https://www.conseil-etat.fr/publications-colloques/rapports-d-activite/rapport-public-2018> accéder 16 janvier 2025.

126 Bell and Lichère (n 55) 125.

127 ibid.

To rule in a full jurisdiction dispute, certain conditions must be met. First, the plaintiff must expressly request it in the lawsuit. Second, the court must find that either the nature of the right or the protection of a constitutional right requires such a ruling.[128] Furthermore, the facts of the case must provide a reliable basis for the decision, or the court must conduct a fact-finding procedure at the oral hearing.[129]

However, if the legal nature of the matter prevents a decision in full jurisdiction dispute, the court can "only" annul the unlawful act (or declare it unlawful) and refer the case back to the administrative authority for reconsideration, even in cases where the legally decisive facts will be established at the oral hearing.[130] Two categories of cases are excluded from full jurisdiction decisions: (1) those in which the nature of the matter inherently does not allow the court to decide in a full jurisdiction dispute, and (2) those involving discretionary administrative powers. In such cases, the contested administrative act can only be annulled. Still, it is also reasonable to apply the statutory power, which allows the court to determine how its decision will be implemented. The statutory power of the administrative court to decide a case on its own in a full jurisdiction dispute for non-compliance with its views is, therefore, in some cases, a toothless tiger.

Allowing the administrative court to sanction non-compliance through full jurisdiction proceedings is arguably more effective than imposing fines, as it produces a conclusive resolution and avoids unnecessary delays. In case of imposition of a fine, the administrative authority might still resist implementing the judgment. However, in some situations, deciding in full jurisdiction proceedings is impossible due to the nature of the case. For this reason, a system that allows the court to decide on the type of sanction to use depending on the nature of the case might be the most optimal solution.

Such an option is available to the administrative courts in Poland. If an administrative authority fails to comply with a court judgment, the affected party may file a complaint, requesting that a decision be rendered in full jurisdiction proceedings. The court is then obliged to decide on this matter if the circumstances permit it.[131] If this is not possible, the court may state whether the failure to act constitutes a flagrant violation of the law. Moreover, the court may, either on its own authority or at the request of the party, impose a fine on the authority or order the authority to compensate the complainant with a sum of up to half the amount of the fine. In the latter case, the decision is taken at the complainant's or ex officio's request.[132]

128 Slovenian Administrative Dispute Act (n 58) art 7/1.

129 ibid, art 65/1.

130 Tatjana Steinman, 'Komentar k 65. členu ZUS-1' in Erik Kerševan (ur), *Zakon o Upravnem Sporu (ZUS-1) s Komentarjem* (Lexpera 2019) 371.

131 Siuciński (n 3) 145.

132 ibid.

5 CONCLUSIONS

Administrative dispute is today a key mechanism for ensuring judicial protection against administrative acts. Recent developments in this field have shifted the scope of administrative judicial decision-making from merely removing unlawful administrative acts from the legal order—which suffices from the perspective of protecting objective legality—towards actively contributing to the correct and comprehensive resolution of administrative disputes, thereby ensuring effective protection of human rights.

This shift in understanding has been driven primarily by the efforts of the European Court of Human Rights, as demonstrated by this research. The landmark *Hornsby* case broadened the understanding of the right to a fair trial to include the execution phase of administrative court judgments. This study also analysed different mechanisms for achieving speedy and correct resolution of administrative disputes. In some cases, such resolution can be achieved through full jurisdiction proceedings. However, even when annulment of the contested administrative act and referral of the matter back to the authority is the only possibility, courts can still prompt the quickest possible resolution through various mechanisms established for this purpose.

The primary focus of this study was a comparative legal analysis of such mechanisms. Findings show that, in Europe, due to the importance placed by the ECtHR and domestic legal orders on ensuring effective legal protection in administrative disputes, many countries are seeking innovative ways to equip administrative courts with the appropriate tools to achieve this objective. While such mechanisms are often similar from country to country, differences tend to emerge at a more detailed level. They target different phases of the administrative and judicial decision-making processes and address various challenges related to the effective resolution of administrative disputes.

The mechanisms for improving the effectiveness of legal protection in administrative disputes, as presented in this article, have led to a greater role of administrative courts in safeguarding the fundamental rights of the parties, especially the right to effective legal protection. Administrative courts minimise the risk of unnecessary procedural repetition by anticipating developments following the issuance of a judgment and by addressing potential complications that may arise in repeated administrative proceedings in a timely manner. This ensures that parties can expect their cases to be comprehensively resolved by the administrative court and that, even in the event of repeated proceedings, they can still expect a fast decision from the administrative authority due to clear and binding instructions derived from the administrative court's judgment. Such structuring of administrative disputes contributes to a higher level of rights protection and a more efficient and responsive administrative and judicial system.

As demonstrated, most progress in this field has been carried out by countries with longer-standing traditions of judicial control over administrative actions. However, recent reforms

in countries such as Slovenia, Hungary, and Poland indicate the growing importance of the principle of effective legal protection in the administrative judiciaries of countries in Central and Eastern Europe.

However, reforming administrative disputes must respect each state's constitutional order. This research found that certain measures to improve judicial effectiveness may risk violating fundamental principles such as the separation of powers or judicial impartiality. Therefore, any future reforms should carefully balance the need for efficiency with the preservation of core constitutional values.

This contribution aspires to serve as a foundation for further reform and the broader adoption of the measures presented and analysed herein. Such adoption, however, must be made with due consideration to the specifics of each legal system, recognising that not all measures discussed may be compatible.

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Keywords: *administrative dispute; administrative justice; execution of administrative court decisions; annulment of administrative acts; definitive dispute resolution; right to effective judicial protection.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ЗАБЕЗПЕЧЕННЯ ЕФЕКТИВНОГО СУДОВОГО ЗАХИСТУ В АДМІНІСТРАТИВНИХ СПОРАХ ШЛЯХОМ ЗДІЙСНЕННЯ ПОВНОВАЖЕНЬ АДМІНІСТРАТИВНОГО СУДОЧИНСТВА ЩОДО СКАСУВАННЯ АДМІНІСТРАТИВНИХ АКТІВ

Бруна Жубер* та Тілен Майнік

АНОТАЦІЯ

Вступ. *Судовий контроль за адміністративними діями традиційно зосереджувався на законності адміністративних актів, мало зважаючи на наслідки адміністративного спору. Цей підхід був змінений Європейським судом з прав людини (ЄСПЛ) внаслідок тлумачення права на доступ до суду відповідно до статті 6 Європейської конвенції з прав людини. ЄСПЛ розширив це право, передбачивши можливість виконання рішень адміністративного суду, що спонукало до зміни ролі адміністративного судочинства в бік забезпечення ефективного вирішення спорів. Це вплинуло на реформи в європейських країнах, багато з яких запровадили механізми підтримки адміністративних судів у забезпеченні більш ефективного судового захисту.*

Ця стаття має дві основні мети: по-перше, дослідити, як адміністративні спори еволюціонували від простої оцінки законності адміністративних актів до забезпечення ефективного судового захисту осіб за допомогою розширення права на справедливий суд, і по-друге, проаналізувати, як ця зміна вплинула на національне законодавство, зосередившись на механізмах, які надають судам повноваження виконувати свої рішення та остаточно вирішувати спори.

Методи. *За допомогою історичного методу було відстежено розвиток судового контролю в адміністративних спорах та вплив прецедентного права ЄСПЛ. Логічний метод підтримує аналіз ключових судових рішень, демонструючи еволюцію тлумачення права на справедливий суд. Порівняльний метод використовувався для оцінки того, як різні європейські правові системи адаптували свою нормативно-правову базу для посилення примусового виконання рішень адміністративних судів. Системний метод допоміг забезпечити внутрішню узгодженість висновків, а догматичний — тлумачення відповідних правових норм. Нарешті, аксіологічний метод застосовується для критичної оцінки реформ та їх узгодження з основними правовими цінностями.*

Результати та висновки. *Виконання рішень адміністративних судів набуло особливого значення у справі Хорнсбі, що розглядалась ЄСПЛ, у якій визнано, що право на справедливий судовий розгляд передбачає виконання рішень. Це розуміння призвело до*

суттєвих реформ у всій Європі для підвищення ефективності адміністративної юстиції. Хоча ці реформи покращили захист прав людини та вирішення спорів, вони повинні здійснюватись в межах конституційних принципів, зокрема поділу влади та неупередженості судів.

Ключові слова: *адміністративний спір; адміністративна юстиція; виконання рішень адміністративного суду; скасування адміністративних актів; остаточне вирішення спору; право на ефективний судовий захист.*