ADMINISTRATIVE LOOPS AND THE 'CORRECTION' OF CONTESTED DECISIONS PENDING JUDICIAL REVIEW: EFFICIENT TOOLS FOR THE FINAL SETTLEMENT OF DISPUTES?

Martina Condorelli[*]

Abstract

In recent years, in several EU Legal systems, remedies have been put in place to guarantee both a final dispute resolution and the safeguard of authorities' decisions and their effects from the disruption caused by annulment. These tools, encouraging or allowing the correction or substitution of the challenged decision during judicial proceedings, often stem from pragmatic case-law and seem to demonstrate a rising concern for legal certainty and efficiency. At the same time, they also raise serious concerns about fundamental principles such as due process, separation of powers and the right to a fair trial.

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Introduction

In countries of continental legal tradition, the action for annulment has long been the main remedy against the unlawful use of administrative powers. Annulment finds its justification in the need to eliminate administrative acts that do not conform to the

[*] Research Fellow, Università Cattolica del Sacro Cuore

normative paradigm, thus restoring the rule of law. In several European systems, the satisfaction of the interests of the applicant for judicial review is (in Belgium and France, specifically in reference to the *contentieux de l'excès de pouvoir*) or was (formerly, in the Netherlands and Italy) considered a mere by-product of the elimination of the administrative decision[1]. In recent years, however, critics have pointed out that in many cases, the annulment of an unlawful may not provide an effective legal protection for the applicant, while also posing a threat to other interests at stake. In short, annulment can often prove to be an ill-conceived remedy: "*Whether viewed from the perspective of the opposing party or the applicant, it can often mean too much or too little*"[2].

Too little, on the one hand, because, under certain conditions, an annulment does not prevent the administration from taking a substantially similar new decision. Thus, the remedy can either be entirely or at least partially useless to the applicant, while still imposing a significant burden on the administration, which is often forced to exercise its powers again in order to replace the annulled decision. At the same time, an abrupt and retroactive quashing of a decision can result in a disproportionate harm to the other interests involved, in that it creates a legal void that can hinder the execution of activities of major importance, such as infrastructural projects.

As a result, two trends in the recent development of administrative justice in Europe can be observed.

The first trend results from the evolution of the theory of the validity of administrative acts from a strictly legalistic approach to a more substantive approach that takes into account the substantive correctness of the decision[3]: in many jurisdictions the subject of judicial review has shifted from an assessment of the mere compliance of the decision to legal requirements to an assessment of its substantial correctness. This objective was mainly pursued by

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[1] In this context, the German system appears as an outlier, inasmuch as it has always been unequivocally aimed at the protection of individual rights. Ever since the adoption of the Administrative Courts Procedure Code, the judge was provided with a wide range of powers that go beyond annulment, allowing for a complete satisfaction of the applicant. See *infra*, section 3 of the paper.

[2] F. Pugliese, *Nozione di controinteressato e modelli di processo amministrativo* 122 (1989).

[3] The literature on this matter is extensive. See, for a comparative approach, D.U. Galetta, *Le traitement contentieux des irrégularités procédurales en droit comparé*, in J. B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative* 845 ff. (2016).

rendering some types of defects moot, either by specific legal provisions[4] or by the establishment of conditions under which an annulment cannot be declared by case-law[5]. These mechanisms do not allow for a rectification of the contested decision: the alleged inability of the acts' defects to influence the content of the decision or to deprive the person concerned of a guarantee simply precludes the annulment.

Despite its importance in many of the jurisdictions considered here, the *ex lege* mootness of "formal" defects in a challenged decision will not be discussed in this paper, because it merely implies a judgement of non-relevance of certain defects, without requiring any corrective intervention on the part of the judge or the concerned authority.

Instead, this paper examines another development in administrative law that has led to the emergence of judicial tools aimed at avoiding an annulment and its effects by allowing a correction or substitution of the contested decision.

This result can be achieved in various ways, the first being granting courts a power to modulate the temporal effects of the annulment judgement[6]. On top of preventing the disruption caused

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[4] See art. 46 of the German VwVfG, the scope of which was widened in 1996; art. 6:22 of the Dutch AwB; article 14, § 1, sect. 2, of the Belgian *lois coordonnées sur le Conseil d'État*; art. 21-octies, para. 2, of the Italian *Legge sul procedimento amministrativo*; Art. 48, para. 2, of the Spanish *Ley del procedimiento Administrativo Común de las Administraciones Públicas.*

[5] See, for example, Cons. État, December 23rd 2011, *Danthony*, in *R.F.D.A.* 284 (2012).

[6] In Belgium, Article *14b* of the *Lois coordonnées sur le Conseil d'État* provides that '*at the request of one of the parties, and if the litigation section considers it necessary, it will indicate the effects of the individual acts which have been annulled or, in general, the effects of the annulled regulatory acts which are to be regarded as definitive or which are to be maintained provisionally for a period of time to be determined by it. The measure in question may be taken only in exceptional circumstances, such as to justify breach of the principle of legality. The measure must be specifically reasoned and must be taken in an adversarial procedure between the parties. The measure may be adopted taking into account the interests of third parties*". On the use of the power to modulate the effects of annulments by the Belgian Conseil d'État, see S. Verstraelen, P. Popelier, S. Van Drooghenbroeck, *The Ability to Deviate from the Principle of Retroactivity: A Well-Established Practice Before the Constitutional Court and the Council of State in Belgium*, in E. Steiner (ed.), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* 81 ff. (2015).
In the Netherlands, art. 8:72, para. 3 of the AwB provides that "*the court may decide which of the effects of the annulled act are to be maintained*". Although art. 8:72, para. 3, AWB does not provide for specific conditions for the exercise of the power, the

by the retroactive effects of an annulment, when used to defer the effects of the annulment to the date of the issuance of the new decision, the power of modulation can indeed allow for a seamless replacement of the unlawful decision and avoid the creation of a legal vacuum[7].

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case-law of the Dutch Council of State on the matter has established that the modulation of the temporal effects of annulment can only be implemented after the exercise of an adversarial procedure, after a careful assessment of all the interests at stake.

In other countries, such as France and Italy, in the absence of a specific provision on this point, administrative courts have spontaneously assumed the power to modulate the effects of the judgment. In France, the power was recognized in Cons. État, Ass., May 11th, 2004, *Association AC! et autres*, 3 R.F.D.A. 454 (2004), commented by C. Landais e F. Lenica, *La modulation des effets dans le temps d'une annulation pour excès de pouvoir*. For an in-depth reconstruction of how power is exercised in case law, see A.C. Bezzina, *2004-2014: les dix ans de la jurisprudence AC!*, R.F.D.A. 735 (2014) and O. Mamoudy, *D'AC! à M6 en passant par Danthony*, A.J.D.A. 501 (2014).

In a similar effort to avoid disruptive annulments, in Cons. Stato, sez. VI, May 5th, 2011, n. 2755, 8 *Urb. App.* 927 (2011), commented by A. Travi, *Accoglimento dell'impugnazione di un provvedimento e «non annullamento» dell'atto illegittimo*, the Italian Council of State asserted its power to modulate the effects of the annulment judgment judicial power of modulation of the effects of the annulment judgment, drawing inspiration from EU procedural law. In Italy, although it is often used by administrative courts, this power remains controversial. The modulation may either take the form of a qualitative limitation of the effects of the judgement (i.e., all the ordinary effects of the annulment judgement are excluded except for its prescriptive effect on the subsequent activities carried out by the authority) or of a deferral of the temporal effects of the annulment to the date of the issuance of the new decision. In both cases, the modulation allows the authority to replace an unlawful decision seamlessly, without creating a legal vacuum in the time needed to conduct a new administrative procedure: see on this topic M. Condorelli, *La modulazione degli effetti della sentenza di annullamento* 166 ff. (2022).

[7] Art. 8:72, para. 3 of the AwB is often used to defer the effects of the decision, as pointed out in K. Albers, L. Kjellevold, R. Schlossels, *The principle of effective legal protection in administrative law in the Netherlands*, in Z. Szente, K. Lachmayer (eds.), *The principle of effective legal protection in administrative law. A European comparison* 242 (2017), in cases where, after the annulment, the administration can adopt a decision with the same content as the annulled one or if the unlawful decision has produced material consequences that it would be *disproportionate to* eliminate (for example, in the case where a building has already been built on the basis of a permit annulled for a "minor" defect). In these cases, at the request of one of the parties, the judge may order the administration to compensate the applicant for the damage caused if the conditions for liability are met.

In France, for example, administrative courts can postpone the effects of the annulment to allow the authority to issue a new decision, amended of defects,

A similar result has also been achieved either through the introduction of so-called administrative loops, which give the court the power to suspend the judicial proceedings and let (or even order) the administrative authority to exercise its powers again under its supervision, or by allowing a spontaneous reopening of the administrative proceedings pending court proceedings so that the authority can remedy the defects of the challenged decision.

Contrary to modulation techniques, which are specifically designed to protect public or general interests, *even against the interests of the applicant*[8] (who presumably sought the annulment in order to

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before the unlawful decision is quashed (*Ex multis*, see Cons. État, July 9, 2015, *Football Club des Girondins de Bordeaux et autres,* No. 375542; Cons. État, 11 April 2012, *GISTI*, No. 322326). In these cases, the annulment is not avoided, but its disruptive effects are greatly reduced by ensuring continuity between the effects of the unlawful decision and those of the new act: see on this topic J. Sirinelli, *Les annulations d'application différée*, 5 R.F.D.A. 797 (2019).

A similar effect is also achieved through conditional annulments, which give the administration a deadline to remedy the defects of the challenged act; at the expiration of said deadline, in the absence of a correction, the act is voided (see Cons. État, July 27, 2001, *Titran*, 2 R.R.J. 1513 *(*2003) commented by F. Blanco, *Le Conseil d'État, juge pédagogue*). Authorities are not bound to comply with the conditional request, so conditional annulments leave a choice on whether to validate the act and uphold its contents or not. According to L. Dutheillet de Lamotte, G. Odinet, *La régularisation, nouvelle frontière de l'excès du pouvoir*, 33 AJ.D.A. 1816 (2016), "*le vice qui entache l'acte initial (que l'on pense à un défaut de consultation ou d'information, ou même à une incompétence interne à l'autorité administrative) étant susceptible d'avoir une influence sur le dispositif de cet acte, il ne peut y avoir de régularisation sans réaffirmation de ce dispositif*".). This guarantees the absence of an interference on the administrative activity: see H. Bouillon, *La régularisation d'un acte administratif après annulation conditionnelle*: *une technique en gestation*, 3 A.J.D.A. 142 (2018).

The technique of deferred annulment is also commonly used in Italy, as mentioned in footnote n. 7, to avoid the creation of a harmful legal vacuum in the time needed to replace the unlawful decision: see M. Condorelli, *La modulazione degli effetti della sentenza di annullamento*, cit. at 6, 174 ff.

[8] In exceptional instances, the modulation can be used to namely better protect the applicant's interests. The Italian leading case on modulation was precisely founded on the need to better protect the interests of the applicant. The case concerned the legitimacy of the wildlife hunting plan adopted by the Apulia Region in 2009: the appellant, an environmental association, complained that the plan had been adopted without the prior carrying out of the strategic environmental assessment procedure required by Legislative Decree No. 152 of 3 April 2006. The Council of State found the appeal well-founded but, noting that an immediate annulment, with ex tunc effects, would have created a legal vacuum detrimental to the same constitutional values pursued by the appellant, ruled that the ruling should only produce the effect of binding the administration

get rid of the unlawful decision), administrative loops were developed to efficiently enforce the rights of the applicant and definitively solve the dispute with the authority. While both judicial tools require a 'cooperation' between the court and the authority, administrative loops appear particularly interesting as they alter the ordinary sequence in which jurisdictional redress takes place and uniquely intertwine judicial and administrative proceedings.

In this paper we will mainly look at administrative loops and spontaneous validations of contested decision by the authority, assessing both their effectiveness in reaching a final resolution of the dispute and examining the concerns they raised about fundamental principles such as due process, separation of powers and the right to a fair trial.

These did not have the same scope and impact in the jurisdictions considered. In France and the Netherlands, instruments such as administrative loops proved to be quite successful, while in Germany and Belgium similar measures were strongly criticized and eventually repealed or declared unconstitutional. In Italy, administrative loops were never incorporated into statutes and the correction and upholding of a contested decision by the authority (*convalida*) during court proceedings remains controversial.

An analysis of the specific characteristics of these remedies, carried out considering the legal context and the purposes for which they were developed, is essential to understand the strengths and limitations of these solutions and to draw some conclusions on the apparent decline of the remedy of annulment.

1. The reopening of administrative proceedings during judicial review: Dutch administrative loops

Originally, Dutch administrative courts were considered guarantors of objective legality, based on the French model of the *juge de l'excès de pouvoir*[9]: as in France, the traditional remedy for

to replace the contested act, within a given period of time. In particular, the Council of State stated that the "fundamental" rule of the retroactivity of annulment could be derogated from, or even annulment (that is to say, the eliminatory or restorative effects of annulment) excluded altogether where the 'ordinary' effects of the judgment granting the application could have produced results that were "incongruous, manifestly unjust or contrary to the principle of effectiveness of judicial protection".

[9] L. Van den Berge, *The Relational Turn in Dutch Administrative Law*, 13 Utrecht Law Review 99 (2017).

unlawful decisions consisted in their annulment with retroactive effects[10]. In 1994, with the entry into force of the general administrative law act (*Algemene Wet Bestuurecht*, hereinafter AWB), the model of objective jurisdiction was abandoned in favor of a subjective model, designed to protect the individual rights of the citizens[11]. Although the administrative courts were endowed with new powers[12], the action for annulment remained the main remedy available against unlawful activity of administrative authorities. In a context of widespread dissatisfaction with the Dutch administrative justice system, the centrality of the annulment remedy was the main source of discontent among both legal scholars and practitioners, in that it could result in Pyrrhus victory for the applicant while, at the same time, prove very detrimental to administrative efficiency and legal certainty[13].

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[10] S. Jansen, *The Dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, 3 Maastricht Faculty of Law working paper (2017).

[11] An action for annulment is now granted only to those who are 'directly affected by an administrative act' (art. 1:2 AWB), whereas art. 8:2 AWB prohibits the possibility of acting for the annulment of regulatory or general acts altogether. The evolution in a subjective sense of the Dutch administrative process culminated in the introduction in 2013 of Art. 8:69a AWB, which introduced the principle of *schutznorm* into the Dutch administrative procedural law.

[12] Primarily the power to uphold the legal effects of the annulled act, regulated by art. 8:72, para. 3 AWB.

[13] See S. Jansen, *The Dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, cit. at 10, 4, who remarks "*The disadvantages of* [...] *the annulment mechanism* [...] *are obvious. They bring about legal uncertainty and may have a negative societal impact. This mechanism often severely delays the commencement of important economic and societal infrastructure projects. Moreover, interested (legal) persons who are opposed to the project can (mis)use the aforementioned mechanism to bar or at least delay decision-making and hence the actual execution of the project.* " See also the *Parliamentary Papers II* 2007/08, 31352, *https://zoek.officielebekendmakingen.nl/kst-31352-6.html*, where it is observed that « *usually, the administrative court is forced to quash a defective decision, with the result that the administrative body has to go through an extensive decision-making procedure in order to properly remedy the identified defect. This consequence leads to the delay of projects with a public interest, to considerable additional costs, and thus to social irritation. Incidentally, not only among administrators, but also among local residents who benefit from the rapid realization of the project, about which an appeal procedure has arisen. However, the problem of inefficient judicial appeal procedures and the associated 'sluggishness' of administrative decision-making is not limited to major infrastructure projects* […] *Even relatively small building plans are regularly confronted with serious delays, because it is only after the full course of an appeal procedure or reading of the final judgment of the administrative court that clarity arises about the need to rectify a defect.*

These arguments gave rise to a debate on how to improve the effectiveness of administrative justice. Following the 2010 reform of the general administrative law act, Dutch administrative judges were endowed with additional powers aimed at resolving the dispute "*as definitively as possible*", as the new art. 8:41a AWB now specifically requires the courts to do. Dutch courts were given the power to ascertain with a non-final judgement the unlawfulness of the challenged decision and give the administration the possibility to correctly re-exercise its powers within a specific timeframe[14]: this new tool was called "*bestuurlijke lus*" or administrative loop[15].

This reform was inspired by the jurisprudential custom of suspending the judgement to give the authority time to remedy the defects of the challenged measure based on directions given by the judge[16]. By strengthening the 'pedagogical' role of administrative courts, this jurisprudential technique allows a new exercise of administrative powers in order to definitively solve the dispute while promoting both administrative efficiency and the restoration of legality[17].

This may be beneficial for the local resident who has applied to the administrative court against a (building, demolition or construction) permit, but it is burdensome and frustrating for those who have been granted a permit at the time. A recent and controversial example is the decision to widen the busy A4 at Leiderdorp, which was annulled by the Administrative Jurisdiction Division due to shortcomings in the investigation into the air quality near Leiderdorp (ABRvS 25 July 2007, BR 2007, 867). As a result, the road widening can only take shape much later than is desired by many – including a large number of local residents, since their living situation will improve considerably as a result of the planned intervention – even though all parties involved agree that repair of the identified defect is necessary. In addition, disputes involving only two parties – an administrative body and one citizen – can lead to long-term legal uncertainty, with imminent financial problems for stakeholders, due to a defect that, in hindsight, could have been resolved quickly and easily. This includes decisions on benefits (such as a benefit under the Work and Income according to Labor Capacity Act) and other entitlements (such as a disabled parking card) that require a medical examination, decisions on benefits under the Work and Social Assistance Act, and decisions on the legal status of civil servants.»

[14] For example, by modifying the statement of reasons or by allowing the applicant to have a hearing.

[15] Art. 8:51a-d and 8:80a-b AWB.

[16] This « informal » loop, which was already widespread before the 2010 reform, continues to be used in simpler cases: see W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking* 10 ff. (2014).

[17] See in this regard M. Boone, P. Langbroek, *Problem-Solving Initiatives in Administrative and Criminal Law in the Netherlands*, in 14 Utrecht Law Review 64

To effectively guide the authority, the measure by which the *bestuurlijke lus* is activated must specify, as precisely as possible, the procedures required for remedying the decisions' defects[18]: Dutch administrative loops are essentially remand orders with specific indications on how to re-exercise power.

Once the instructions contained in the interlocutory judgement have been carried out, the administrative authority is required to inform the judge[19]. The parties are then allowed to debate the new decision through the presentation of written briefs[20]. If the *bestuurlijke lus* is successful, the contested decision is either voided and replaced by the new decision or merely amended and upheld[21]. In both cases, the original appeal against the contested decision is declared well-founded, which entitles the applicant to damages and the reimbursement of court fees[22].

In order to provide effective protection in case of validation or unsatisfactory replacement of the contested decision, art. 6:19 AWB establishes that the scope of the appeal is automatically extended to the new decision or the amended decision[23]. This provision makes the application of the loop less costly for the applicant than the ordinary path of annulment and issuing of a new decision, which could warrant the need to apply again for judicial review.

Compared to the provisions limiting the possibility of obtaining the annulment of decisions tainted by certain types of defects and leaving it to the court to make a counterfactual assessment on the outcome of a lawful procedure[24], by allowing the re-opening the administrative procedure, administrative loops seem to better ensure the protection of the applicants' rights. Indeed, the correction of the contested decision remains the sole responsibility of the

(2018); A. Verburg, B. Schueler, *Procedural justice in Dutch administrative court proceedings*, 10 Utrecht Law Review 60 (2014).

[18] Art. 8:80a, para. 2, AWB.

[19] Art. 8:51b, para. 2, AWB.

[20] Art. 8:51b, para. 3, AWB.

[21] See *Parliamentary Papers II* 2007/08, 31352, section 7.

[22] See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 43 ff. The question of not leaving the applicant 'empty-handed' as a result of the application of the loop is especially tackled in *Parliamentary Papers II* 2007/08, 31352, section 7.

[23] Art. 6:19, para. 1 AWB prescribe that by law, the application for review shall also relate to a decision to revoke, amend, or replace the contested decision, unless the parties have an insufficient interest in doing so.

[24] See, *supra*, footnote n. 5.

authority, which is free to disregard the instructions of the judge and face the annulment of the decision: this system thus guarantees the absence of interference of the judicial power in the administrative activity.

The Dutch general administrative law act does not establish the types of defects that can be remedied through the application of the administrative loop. Bearing in mind that art. 6:22 AWB provides that the defects of the decision are to be disregarded if they have not prejudiced the applicant [25], the scope of art. 8:51a appears to be limited to those defects the remedying of which *could* alter the substance of the contested decision. The only specific limitation to the application of the loop is established by art. 8:51b, pursuant to which the loop cannot be used if third parties risk being damaged "*in a disproportionate manner*" by a correction of the challenged act. Said limitation is, however, interpreted in a restrictive manner by case-law, which tends to make extensive use of the instrument[26].

Versatile as they may be administrative loops are not suited to resolve any dispute. It seems that in cases where the intervention required by the authority appears excessively lengthy or complex, the courts tend to refrain from applying the loop and resort instead to voiding the contested decision[27]. The courts also tend to resort to annulment when the need for a speedy resolution of the dispute is not paramount[28]: in these cases, the courts seem to avoid interfering

[25] Before 2013, the provision allowed the court to reject the application for judicial review only if the defect was procedural or formal in nature. The provision was modified through law n. 162 of December 20th 2012.

[26] See in this regard the paper of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, *Increasing the efficiency of Supreme Courts' powers. The Netherlands*, presented at the Seminar organized in Brussels on 1 and 2 March 2012, available at http://aca-europe.eu/seminars/Brussels2012/Netherlands.pdf.

[27] S. Jansen, *The dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, cit. at 10, 3, A. Verburg, B. Schueler, *Procedural justice in Dutch administrative court proceedings*, cit. at 17, 60. This could be due to the increase of the judges' workload entailed by the application of the loop in complex cases (See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 11).

[28] See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 10 ff. Indeed, the order to remedy a defect is often carried out by administrative bodies more quickly and with greater priority than the order to adopt a new decision after the annulment, so

in administrative activity, rather than taking on the pedagogical role associated with activating the loop.

The cases in which the courts tend to waive the loop show the shortcomings of this tool, which are probably exacerbated by the self-restraint of administrative judges in interfering and guiding the administration, both in cases where it can be avoided and in complex cases, where much more investigation and assessment of interests is required on the part of the authority to correctly decide.

2. Belgian 'close-ended' administrative loops

Upon its creation, the Belgian Council of State's purview, also based upon the French model of the *juge de l'excès de pouvoir*, was strictly limited to an objective control of the legality of administrative decisions and its powers essentially consisted in the annulment of unlawful decisions with *ex tunc* and *erga omnes* effects[29]. Following an ongoing debate on the limits of judicial review in terms of adequate protection of applicants, a reform of the procedure was carried out in 2014 and several new powers were conferred on the Council of State[30]. Amid the new tools in the administrative judge's toolbox, the 2014 reform introduced administrative loops[31], which were already in use before Flemish administrative courts since 2012[32]. Like their Dutch counterparts, Belgian administrative loops

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the application of the administrative loop can be also aimed at a faster resolution of the dispute.

[29] B. Lombaert, *Le Conseil d'État est-il toujours un juge du contentieux objectif de l'excès de pouvoir ? Réflexions sur la place et le rôle du Conseil d'État dans le système belge de protection juridictionnelle contre l'administration*, in F. Belleflamme (ed.), *La justice administrative* 301 ff. (2015).

[30] Other than introducing administrative loops, the 2014 reform also gave the Council of State the power to limit or defer the effects of annulments, to reform administrative decisions in specific cases, and to order the administration to issue a decision. The judicial review procedure had been previously reformed in 1990, when interim relief measures (*référés*) and the power to sanction the administration for the inexecution of an annulment decision (*pouvoir d'astreinte*) were introduced.

[31] Through an amendment of Article 38 of the Rules on the Council of State (*Lois coordonnées sur le Conseil d'État*, in short LCCE) by Art. 13 law of January 20th 2014.

[32] This tool was first introduced in the context of building permits and urban planning disputes by Article 4.8.4. of the Flemish Urban Planning Code ("VCRO"), as amended by art. 5 the Decree of 6 July 2012, published in the *Moniteur belge* of August 23rd 2012. It gave the Council for permit disputes the power to allow the authority to purge the contested building permit from its

were developed to curb 'unnecessary' or 'useless' annulments and to resolve disputes more efficiently and definitively[33].

The conditions under which the loop could be activated were also similar, both for the Flemish Courts and for the Federal Council of State: it could be used only if the defect could be corrected within a short period of time (three months or a different 'reasonable time limit'), without altering the substance of the act[34]. The provisions on administrative loops did not specifically indicate which defects could be corrected; however, parliamentary works preliminary to the introduction of the Flemish loop cited as examples of the correction of a statement of reasons the compulsory holding of a hearing or the acquisition of a mandatory opinion from another authority[35]. Concerning proceedings before the Council of State, the only procedural condition for the application of the loop was the need to hold a hearing beforehand and to allow the presentation of briefs on the subject; the Flemish rules did not even provide for such obligation[36].

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irregularities within a set deadline and uphold the contested decision. It was subsequently extended to other Flemish administrative courts (the environmental Court and Council for electoral disputes) by the Decree of April 4th 2014, published in the *Moniteur belge* of October 1rst 2014, which harmonized the organization and proceedings of certain Flemish Administrative Courts.

[33] See B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, in F. Belleflamme (ed.), *La Justice administrative* cit. at 29, 236 ff.

[34] Art. 38, para. 1 and 2, LCCE ; Art. 4.8.4. VCRO ; art. 34 of the Decree of April 4th 2014 on the Flemish Administrative Courts procedure.

Thus, for example, the administrative loop could not have been applied if the authority had failed to carry out an environmental impact assessment or to obtain a necessary opinion, since compliance with those obligations could have led to a modification of the substance of the contested act, as H. Bortels, *The Belgian constitutional court and the administrative loop: a difficult understanding*, published on June 15th 2016, *www.ius-publicum.com*, 7.

[35] Concerning Flemish loops provided by the Decree of April 4th 2014, see Doc. parl., Parlement flamand, 2013-2014, n° 2383/1, in *https://docs.vlaamsparlement.be/pfile?id=1038648*, 39, where it is specified that « *An administrative act will no longer be considered unlawful if e.g. the application necessary to issue the administrative act was submitted later, the necessary statement of reasons was provided later, the necessary consultation of an interested party was held later, the duty to be heard was fulfilled later, a necessary opinion was subsequently obtained. Citizens are rightly increasingly given the opportunity to complete an incomplete file. Similarly, administrative authorities must be given the opportunity to correct procedural and formal errors in time.* »

[36] This omission was specifically criticized by the Belgian Constitutional Court, which held that it constituted a violation of the parties' right to be heard. See Cour

Although the Belgian loops shared the same name and a similar *rationale* to their Dutch counterparts, they presented several problematic differences from the latter. The required upholding of the content of the decision narrowed the scope of administrative loops to purely formal or procedural errors [37], which also fell under the purview of a provision of irrelevance due to their inability to influence the content of the decision[38]. Moreover, the use of the loop could only result in the rejection of the appeal, which could entail the loss of court fees, absent a specific provision guaranteeing charge of legal expenses to the authority subject to the loop[39]. Finally, no specific provision was made to allow the applicant to challenge the correction decision issued following the loop.

In 2014[40] and 2015[41], the Belgian Constitutional Court deemed both the Flemish and the federal loops unconstitutional, based on various arguments.

The Court held that administrative loops infringed the principles of independence and impartiality of the judge, given the foregone outcome of the proceedings following their application: by

constitutionnelle 8 May 2014, no. 74/2014, cit. (section B.8.5); 29 October 2015, no. 152/2015, cit. (section B.13.5)

[37] Although the text of the regulations did not expressly refer to it, this fact clearly emerges from the *Rapport fait au nom de la Commission de l'Intérieur et des affaires administratives* (Document Parlementaire n. 5-277/3, in www.senate.be) It should be noted that the aforementioned report included defects of the statement of reasons among procedural errors susceptible to be amended through an administrative loop, contrary to the opinion of legal scholars, who rejected the idea of a correction or implementation of the statement of reasons through the use of the loop: see B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, cit. at 33, 243 ff.

[38] Art. 14, para. 1, sect. 2, LCCE, which provides that the decision's irregularities or defects "*shall give rise to annulment only if they were likely to influence the meaning of the decision taken, deprived the interested parties of a guarantee or affected the competence of the author of the act.*». It has been accurately noted that administrative loops serve a similar purpose and a similar scope to the aforementioned rule: B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, cit. at 33, 249 ff.

[39] Although the issue of legal fees was discussed during parliamentary debates but ultimately was not regulated. Art. 30/1 LCCE, which provides that, as a rule, legal expenses should be charged to the losing party, although exceptions can apply (see Senate Document n. 5.2277/1, in www.senate.be).

[40] Cour constitutionnelle, 8 May 2014, No 74/2014, available at *https://www.const-court.be/*, concerning art. 4.8.4. VCRO.

[41] Cour constitutionnelle, 16 July 2015, no. 103/2015, concerning Art. 38, para. 1 and 2, LCCE ; Cour constitutionnelle 29 October 2015, no. 152/2015, concerning art. 34 of the Decree of April 4th 2014, available at https://www.const-court.be/.

ordering the administration to rectify the decision, the judge would implicitly express its conviction as to the appropriateness of upholding the act before the conclusion of judicial proceedings[42]. The Court also criticized the obligation imposed on the administration to leave the contents of the challenged act unchanged, which was qualified as an undue interference in its sphere, given that following an 'ordinary' annulment, the authority is free to issue a decision with a different content from the annulled one[43].

The Court also held that the Flemish administrative loop infringed the right to judicial protection in omitting to specifically provide that the legal costs should be charged to the authority, whenever the successful application of the loop determined the rejection of the application for judicial review[44]. Furthermore, in the absence of a provision allowing the applicant to challenge the decision resulting from the application of the loop curtailed the right to judicial protection for third parties who could be negatively affected by the new decision issued within the administrative loop[45].

Finally, the inclusion of defects pertaining to the statement of reasons among those susceptible to be corrected was found to be a violation of the fundamental right to a reasoned administrative decision, enshrined in the law of July 29th 1991[46] and in art. 6, para. 9 of the Aarhus Convention[47]. The Court held that the right to a statement of reasons is intertwined with the right to a jurisdictional control over administrative decisions and allows for the respect of the principle of equality of arms in judicial proceedings: allowing the administration to supplement a defective statement of reasons with

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[42] Cour constitutionnelle, 8 May 2014, No 74/2014, section (B.7.4); Cour constitutionnelle, 16 July 2015, no. 103/2015 (B.11.4); Cour constitutionnelle 29 October 2015, no. 152/2015 (B.12.4).

[43] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (B.7.1 to B.7.3), 16 July 2015, no. 103/2015 cit. (B. 11.1 to B.11.3); 29 October 2015, no. 152/2015, cit. (B.12.1 to B.12.3).

[44] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (B.12.4), 29 October 2015, no. 152/2015, cit. (B. 18.4).

[45] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (section B.8.4), 16 July 2015, no. 103/2015 cit. (B.12.4); 29 October 2015, no. 152/2015, cit. (sections B.13.4).

[46] See Cour constitutionnelle 29 October 2015, no. 152/2015, section B.14.5; Cour constitutionnelle, 8 May 2014, no. 74/2014, section B.9.5.; Cour constitutionnelle 6 July 2015, no. 103/2015 cit. (B. 13.4).

[47] Cour constitutionnelle, 8 May 2014, no. 74/2014, section (B.9.5); Cour constitutionnelle 6 July 2015, no. 103/2015 cit. (B. 13.4)

virtually no consequences on the legality of the decision would obliterate these rights.

Following the 2014 judgement, a reformed administrative loop was introduced in the Flemish legal system, with a more limited scope[48]. This new tool featured a specific provision to guarantee an adversarial debate both on the use of the loop[49] and on the contents of the decision resulting from it[50]; moreover, the scope of the appeal is automatically extended to the new decision[51] and a right to challenge the resulting decision following the end of the trial was also granted to third parties[52]. The necessary upholding of the corrected decision after the application of the loop was also eliminated, making the tool more similar to its Dutch counterpart. Today, a successful application of the loop always results in the annulment of the contested decision and the issuance of a new decision (that can have new contents). If the court finds that the new decision is lawful, the appeal is rejected[53]; however, legal fees are to be entirely or partially charged to the authority[54].

This version of the loop was upheld by the Constitutional Court[55], which maintained that its new features complied with the principles of impartiality of the judge, of adversarial proceedings, and the right to a reasoned decision.

3. The principle of *Reparatur geht vor Kassation* in German law and the partial failure of German 'administrative loops'

The German fundamental law of 1949 establishes that "*Should any person's rights be violated by public authority, they may have recourse*

[48] Art. 5 of the Decree of July 3rd 2015 published in the *Moniteur Belge* of July 16th 2015, which amended the Decree of April 4th 2014, concerning in particular the procedure before the Council for permit disputes and the Flemish Environmental Court. The loop can thus be essentially applied in disputes concerning building permits and environmental sanctions. It is worth noting that the federal legislator did not introduce, as its Flemish counterpart, a new version of the administrative loop in the LCCE.

[49] Art. 34, para. 2, of the Decree of April 4th 2014.

[50] Art. 34, para. 5, of the Decree of April 4th 2014.

[51] Art. 34, para. 4, of the Decree of April 4th 2014

[52] Art. 34, para. 9, of the Decree of April 4th 2014.

[53] Art. 34, para. 6, of the Decree of April 4th 2014.

[54] Art. 33, para. 2, of the Decree of April 4th 2014, as amended by art. 4 of the Decree of July 3rd 2015.

[55] Cour Constitutionnelle, December 1rst 2016, n. 153.

to the Courts" (art. 19, para. 4, GG), thus aligning German administrative justice to a model of review aimed to protect the subjective rights of citizens[56]. Ever since its introduction, in 1960, the Administrative Courts Procedure Code (VwGO) provided for an ample and comprehensive set of remedies beyond the action for annulment[57]. The variety of these remedies, which are carefully tailored to the fulfil the needs for judicial protection of the applicant, makes Germany an exception among all the countries analyzed in this paper.

The original version of § 45 of the Federal Administrative Procedure Act (VwVfG) granted the authority the power to validate the challenged decision with *ex tunc* effects by rectifying a number of its defects[58] up until the decision of the administrative appeal: the application for judicial review marked the deadline for the validation of the administrative decision. In 1996, in the context of a reform of the Administrative Courts Procedure Code, this deadline was extended after the application for judicial review[59] and some measures akin to administrative loops were introduced.

The courts were given the power to both order the authority to correct the decision's formal or procedural errors within a period not exceeding three months, should it not delay the resolution of the case (§ 87, para. 7 VwGO)[60] and to suspend the trial to allow the validation of the challenged decision (§ 94 VwGO). In the

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[56] See on this legislative choice, M.C. Romano, *Il processo amministrativo in Germania : pluralità delle azioni ed effettività della tutela*, in V. Cerulli Irelli (ed.), *La giustizia amministrativa in Italia e in Germania* 183 (2017).

[57] Which included the action for annulment (*Anfechtungsklage*), the action for injunction, which can be brought to obtain a judgement condemning the authority to issue a decision (*Verpflichtungsklage*), the action for a declaratory judgement, which can be brought to establish the existence or non-existence of a legal relationship or the nullity of an administrative act (*Feststellungsklage*) and the general action for condemnation (*allgemeine Leistungsklage*).

[58] § 45 VwVfG allows for the validation of the decision in the following cases: 1) if the application necessary for the issuance of the act is submitted posthumously by the private individual; 2) if the statement of reasons is completed posthumously; 3) if the hearing of the private individual is held posthumously; 4) if the mandatory opinion of a commission provided for by the procedure is issued posthumously; 5) if the mandatory opinion of another administration is obtained posthumously.

[59] In 2002, the deadline was again anticipated to the last judicial ruling on the facts. On the evolution of this provision, see D. U. Galetta, *Violazione di norme sul procedimento e annullabilità del provvedimento* 33 (2003).

[60] The power could only be exercised whenever it would not result in undue delays in resolving the dispute.

parliamentary debate that preceded the adoption of the mentioned reforms, a provision allowing the judge to pronounce annulments only if the administrative authorities had previously been given the opportunity to correct decisions was also discussed, but it was not included in the final draft of the reform[61].

§ 87, para. 7, and § 94, para. 2 VwGO proved to be highly controversial. Criticisms mainly focused on the possible violation of the principle of separation of powers, neutrality of the judge and equality of arms they entailed[62]. German scholars pointed out that the provisions could lead to an inappropriate and unconstitutional shift of the relationship between the judge and the administration, since they would systematically benefit the latter and make the former an 'assistant' to the authority, endangering its neutrality: ordering the administration to rectify the act would have been likely to tarnish the parties' perception of the judge's impartiality[63]. Criticism was also levelled at the possibility of completing the statement of reasons during judicial review, which was seen as a hurdle to obtain an effective judicial protection for the applicant[64]. Conversely, advocates of the reform highlighted the wording of § 87 and 94 VwGO, which explicitly subjected the issue of their use to the discretion of the judge, implying that he should primarily consider economy and procedural efficiency rather than the interests of authority[65].

§ 87, para. 7 and § 94, para. 2 VwGO were ultimately repealed in 2002 due to their ineffectiveness in speedily solving disputes[66].

As of today, administrative courts can no longer order the administration to correct the challenged decision. However, a special regulation concerning infrastructural projects provides that defects in the assessment of public and private interests shall result in the annulment of the decision of project approval only whenever such

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61 F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, 4 Maastricht Faculty of Law Working Paper 6 (2017).

62 F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, cit. at 61, 11 ff; See also D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, cit. at 59, 34 ff.

63 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 13.

64 D. U. Galetta, *Violazione di norme sul procedimento e annullabilità del provvedimento*, cit. at 60, 36.

65 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 13.

66 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 7.

flaws cannot be rectified by means of modifications to the plan or by a supplementary procedure[67]. In such cases, the courts must dismiss the request for annulment and merely declare the unlawfulness and non-enforceability of the decision, leaving to the authority the choice on whether to remedy the defect through a limited reopening of the procedure[68] or start over the proceedings for the approval of the project[69]. Case-law has held that, even though the requested annulment is denied, the declaration of non-enforceability of the project guarantees the right to an effective judicial protection of the applicant provided by art. 19, para. 4 GG and European law[70].

The German environmental code also provides that in proceedings concerning certain types of planning or project approval decisions[71], the court has the power to suspend the judicial proceedings in order to allow the planning authority to correct the decision by posthumously carrying out an Environmental Impact Assessment (EIA) or EIA screening, by holding a public participation hearing or by correcting other procedural errors "*of comparable severity*" which have deprived the concerned public of the opportunity to participate in the decision- making process, as provided by the law[72].

The authority can also spontaneously initiate the correction of the contested decision under § 45 VwVfG and § 114, para. 2, VwGO [73]. The former provision allows to remedy a certain number of violations, including holding a compulsory hearing or acquiring the

[67] § 75, para. 1a, second sentence, VwVfG, as modified in 2013.

[68] As specified by BVerwG 9 A 16.16, decision of April 25th, 2018, in https://www.bverwg.de/, with this regulation, the German legislator aimed to ensure that in such cases the entire, time-consuming administrative procedure does not have to be repeated; instead, it wanted to give the planning approval authority the opportunity to remedy the error in a supplementary procedure limited to the correction of the defects.

[69] See P. Schuetz, *Das ergänzende Verfahren nach § 75 Abs. 1a S. 2, erster Halbsatz, VwVfG*, 11 *Online-Zeitschrift für Umwelt- und Planungsrecht* 418 (2021).

[70] See BVerwG 9 A 31.10, judgment of December 20th, 2011, in *https://www.bverwg.de/*.

[71] See the decisions listed in § 1, para. 1, n. 1 to 2b and n. 5 of Legal remedies in environmental matters Act (UmwRG), mainly pertaining to the approval of industrial or infrastructural installations.

[72] § 4, para. 1b, last sentence, UmwRG.

[73] On the scope of art. 45 VwVfG and 114 VwGO, see D.U. Galetta, *Violazione* cit. at 61, 34 ff.; J. Becker, *La sanatoria dei vizi formali nel procedimento amministrativo tedesco*, in V. Parisio (ed.), *Vizi formali, procedimento e processo amministrativo* 20 ff (2004).

mandatory opinion of other administrations or committees posthumously and uphold the contested decision pending judicial review, up until the last instance on the merits.

§ 114, para. 2, VwGO allows the authorities to expand on an incomplete statement of reasons of discretionary acts (*Nachschieben von Gründen*) during judicial proceedings. German administrative law provides that discretionary decisions must indicate not only to the legal and factual basis of the decision, but also the 'point of view' taken by the administration in the exercise of its discretionary powers (*Gesichtpunkte*): this component of the statement of reasons can be supplemented under § 114, para. 2 VwGO, ultimately allowing for a posthumous exercise of the authorities' discretionary powers, up until the end of judicial proceedings[74].

Despite the broad formulation of § 114, para. 2 VwGO[75], German case-law narrowed its scope by specifying that a posthumous supplement of the statement of reasons is admissible: a) whenever the reasons stated by the authority already existed at the time the decision was issued: only documented substantive 'selection considerations' which were decisive for the decision and were not or not sufficiently reflected in the statement of reasons may be supplemented posthumously[76]; b) the nature and substance of the administrative act is not changed by the completion of the statement of reasons[77]; c) the posthumous supplementation of the statement of reasons does not disrupt the legal defense of the applicant, forcing them to completely rethink their defensive arguments[78].

§ 45, § 75, para. 1a, second sentence, VwVfG and § 114, para. 2, VwGO reflect the adoption on the part of the German legislator

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[74] M. Delsignore, M. Ramajoli, *The 'weakening' of the duty to give reasons in Italy: an isolated case or a European trend?*, 27 European Public Law 23 (2021).

[75] According to part of the German doctrine, the provision would have allowed the authority to radically change the statement of reasons: see D.U. Galetta, *Violazione* cit. at 59, 37.
This interpretation was nonetheless rejected by the Federal Tribunal case-law: see, for example, BVerwG 9 B 30.13, decision of July 15th 2013, which held that the provision does not allow for an "unrestricted" extension of discretionary considerations or their complete replacement, but only for the completion of a defective statement of reasons.

[76] See, for example, BVerwG 1 WB 40.21, decision of February 24th 2022, in https://www.bverwg.de/.

[77] See BVerwG 5 C 12.10, judgment of November 11th 2010, in *https://www.bverwg.de/*.

[78] See, for example, VGH Munich, judgment of January 30th 2018 – 22 B 16.2099.

of the jurisprudential principle of "*Reparatur geht vor Kassation*"[79], according to which a correction of the decision is always preferable to its annulment, even when the defect is substantial rather than procedural. This approach was questioned by German scholars, who observed, with reference to § 45 VwVfG, that it provides the authorities with a recovery session, allowing them to proceed to a merely 'formal' correction of the decisions' defects, all while leaving the contents of the decision unchanged[80]. Legal scholars therefore devised a constitutionally oriented interpretation of art. 45 VwVfG: according to the doctrine of the *realen Fehlerheilung* ("*effective correction of errors*"), a validation must always allow the applicant to be put in the same position as he would have been in, in the absence of the defect[81]. As a result, the validation process should entail an actual and effective redress of the violation[82].

4. The remedial function of administrative courts in French law and the principle of *sécurité juridique*

Until recently, in the *contentieux de l'excès de pouvoir*, administrative courts were merely able to void a contested administrative decision should they find it unlawful[83]. However, despite their

[79] On this principle, see D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, cit. at 59, 38. It is based on the idea that annulling an administrative act can cause significant disruptions. In practice, it entails that administrative authorities should consider avoiding annulment, by correcting or modifying the defective act and upholding it.

[80] For example, the omission of a hearing could be redressed by holding it posthumously, without really considering the observation raised by the concerned party.

[81] F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, cit. at 61, 13; E. Schmidt-Aßmann, *L'illegittimità degli atti amministrativi per vizi di forma e del procedimento e la tutela del cittadino*, 3 Dir. Amm. 471 (2011).

[82] This view seems to be also shared by the Federal Tribunal. Concerning the posthumous holding of a hearing, the Tribunal held that the arguments raised by the party in the hearing are to be subsequently included in the decision in order to avoid its annulment: see BVerwG decision of October 14th 1982, 3 C 46.81, cited by H. Punder, *German administrative procedure in a comparative perspective : observations on a path to ius commune proceduralis in administrative law*, 11 International Journal of Constitutional Law 94 (2013) (see footnote n. 84 in particular).

[83] The law of February 8th, 1995 allowed administrative courts to either order a measure of execution, or instruct the administration to carry out a new

legalist tradition and the conception of the *contentieux de l'excès de pouvoir* as a *procès fait à l'acte*[84], in the last two decades, French administrative courts devised several tools aimed at avoiding the annulment of unlawful decisions[85]. In addition to validations carried out either directly by the court or by the authority during judicial proceedings[86], French case-law developed several other methods

assessment of the applicant's request. These provisions are now incorporated in articles L-911-1 and L-911-2 of the *Code de la justice administrative*.

[84] This expression, coined by E. De Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. 2 (1896) 561, can be roughly translated as « trial of the administrative decision ».

[85] See, on this topic, B. Seiller, *L'illegalité sans annulation*, 18 A.J.D.A. 963 (2004); F. Blanco, *Du juge censeur au juge correcteur*, 30 A.J.D.A. 1722 (2014) ; A. Frank, *Le justiciable et les politiques jurisprudentielles. Les illégalités neutralisées*, 5 R.F.D.A. 785, (2019); C. Lantero, *Sécurité juridique et mutation des annulations platoniques*, 19 A.J.D.A. 1100 (2019) ; B. Seiller, *Les décisions régularisées*, 5 R.F.D.A. 791 (2019) ; L. Janicot, *Réflexions sur une nouvelle voie l'annulation sèche et l'annulation différée : la définition de règles provisoires par le juge de l'excès de pouvoir*, 1 R.F.D.A. 41 (2021).

[86] The Council of State case-law has long recognized the administrative judge the power to correct *ex officio* some formal defects of the decision, such as the indication of the provisions on which the exercise of administrative powers is based (*substitution de base légale*) whenever a decision with identical content could have been issued on the basis of a different provision, thus upholding the challenged act (Cons. État, 8 March 1957, *Sieur Rosé et autres*, *Lebon,* 147). This procedure can only be carried out if the same decision could have been adopted within the framework of an identical power of appreciation, based on rules of equivalent scope, with the same procedural guarantees that had been afforded to the applicant (Cons. État, 3 December 2003, *El Bahi*, *Lebon*, 479): in other words, it is only admissible whenever it appears clear that the authority could immediately take a decision with identical content, basing it on a different legal provision. A similar logic underlies the case-law on the correction of the statement of reasons (*substitution de motifs*). Initially, it was only admitted for bound decisions, based on the idea that a decision with identical contents should in any event have been adopted (see Cons. État, June 8, 1934, *Augier*, *D.*, 1934, III, 31; Cons. État, July 23rd 1976, *Ministre du Travail v. URSSAF du Jura*, *Lebon*, 362). In cases of bound powers (*compétence liée*), the judge may also consider as "neutralised" both defects of *illégalité interne* (Cons. État, 30 September 1998, *Ministre de l'Intérieur v. M. Mansouri*, *Lebon*, 346) and defects of *illégalité externe* (Cons. État, 14 May 2003, *Syndicat des sylviculteurs*, in www.conseil-etat.fr), where it appears that an act with identical content should in any case have been issued by the Administration. In 2004, the possibility of the substitution of grounds was extended to discretionary acts, for reasons of efficiency and procedural economy: see Cons. État, February 6th 2004, *Hallal*, Lebon, 48, which extended to the *contentieux de l'excès de pouvoir* a guideline developed in the context of *plein contentieux objectif* (Cons. État, 23 November 2001, *Compagnie nationale Air France*, *Lebon*, 230), by virtue of which the *substitution des motifs* may be ordered by the court even if the contested act was issued in the exercise of discretionary powers.

aimed at preventing *ex tunc* annulments or at least at diminishing their impact. Their introduction was justified above all by the desire to improve the efficiency of administrative justice[87] and to prevent possible disruptions caused by the annulment of administrative decisions, out of concern for the proportionality of the ruling[88] and the need to protect legal certainty (*sécurité juridique*[89]), i.e., the stability of administrative acts and the rules contained therein[90]. Today, in the context of the *contentieux de l'excès de pouvoir*, the consequences of challenging an unlawful decision (which traditionally could only

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However, scholars acknowledged that the *substitution de motifs* entails an intervention of the judge that far surpasses that needed for the *substitution de base légale*, at least when a discretionary power is concerned: see F. Donnat, D. Casas, *L'administration doit-elle pouvoir invoquer devant le juge de l'excès de pouvoir de nouveaux motifs à ses décisions ?*, 8 A.J.D.A. 436 (2004). The substitution of reasons forces the court to fictitiously put itself in the position of the administration to examine whether an identical decision could also have been taken on different grounds. The technique of the substitution of grounds is consequently used with greater caution and, unlike the substitution of the legal basis, it requires the administration to specifically request it, indicating the new reasons on which the decision is founded. This avoids the risk of encroachments on the discretionary power of the administration: only the latter has the power to ascertain the circumstances of the case and to state the additional reasons of the decision. To request a substitution of reasons, the administration has to consider the appropriateness of maintaining the challenged decision. The substitution of grounds allows the administration to choose whether and how to uphold the content of the act, while the judge merely assesses the lawfulness of the decision in light of the new statement of reasons given by the administration.
Recently, the Conseil d'État specified that the new statement of reasons can be gathered by the administration's defense briefs, even in the absence of a formal request of substitution of the grounds on the part of the administration: Cons. État, 19 May 2021, *Commune de Rémire-Montjoli*, *A.J.D.A.*, 2021, 1070. Obviously, the new grounds for the decision should be formulated precisely enough, in order to allow the applicant to respond.

[87] This topic was widely studied in French literature. *Ex multis*, see C. Leclerc, *Le renouvellement de l'office du juge administratif* (2015); Blanco F., *Pouvoirs du juge et contentieux administratif de la légalité* (2010).

[88] B. Seiller, *L'illégalité sans annulation*, cit. at 85, noted the all-or-nothing nature of the remedy, which can, in certain circumstances, be *too effective*: «*l'annulation, si elle garantit l'apurement de l'ordonnancement juridique par la disparition de l'acte illégal, présente parfois les inconvénients des procédés radicaux.*»

[89] Enshrined as a *principe général du droit* by the French Conseil d'État in Cons. État, 24 March 2006, *Société KPMG et autres*, *www.conseil-etat.fr*. On the impact of the principle of legal certainty in the evolution of the *contentieux de l'excès de pouvoir*, see the Dossier *Légalité et sécurité juridique: un équilibre rompu?*, published in 19 A.J.D.A. 1086 (2019).

[90] W. Gremaud, *La régularisation en droit administratif* 17 ff. (2021).

lead to its annulment *ex tunc*) may vary depending on the area of law considered, the nature of the error identified by the judge, the factual circumstances of the dispute and the substantive interests behind it[91].

The French legislator also introduced some measures akin to administrative loops in specific sectors affected by a high level of litigation[92], often of "triangular" nature (i.e., concerning the applicant for judicial reviews, the authority and a third party which is usually the beneficiary of the contested act[93]).

These measures must be framed within the context of *recours pour excès de pouvoir*, where *locus standi* is traditionally very broad, in accordance with the objective nature of jurisdiction, which aims *primarily* at restoring legality: to be able to bring an action, the applicant must merely prove an interest in the annulment of the challenged decision[94]. In some areas of litigation, such as those pertaining to construction rights, this broad access to the judge has led to a very high volume of litigation, resulting in delays or indefinite interruptions of projects, slowing down both economic activity and the construction of housing[95].

In order to find solutions to deal with these issues, in 2013, a research group was tasked with formulating proposals to reform the judicial review of several acts pertaining to the *contentieux de*

[91] See on this topic O. Mamoudy, *Sécurité juridique et hiérarchisation des illégalités dans le contentieux de l'excès de pouvoir*, in A.J.D.A. 1108 (2019). The increasing consideration of the material interests of the parties has led legal scholars to signal a process of subjectivization of the *recours pour excès de pouvoir*: see cf. J. Sirinelli, *La subjectivisation du recours pour excès de pouvoir*, 6 R.F.D.A. 529, (2016).

[92] In both sectors of construction and environmental law disputes, the legislator has also intervened to limit the access to the judge, through a restriction of *locus standi:* See L 600-1-2 Code de l'urbanisme (as modified by the law n° 2018-1021) and L-142 Code de l'environnement.

[93] Like construction permits disputes, urban planning disputes and environmental litigation.

[94] Which can also be understood in a broad sense: it can consist in a merely "moral" or abstract interest. On this matter, see C. Broyelle, *Le recours pour excès de pouvoir est-il destiné à protéger la situation juridique du requérant?*, in A. Travi (ed.), *Colloquio sull'interesse legittimo* 23 (2014).

[95] The constitutional status of the right to housing is particularly highlighted: see the Labetoulle report, p. 4).

l'urbanisme[96]. One of the seven solutions[97] identified in the group's final report consisted in giving the judge of the power to order the administration to correct a contested building permit (and other permits addressed to individuals, such as demolition permits) within a certain deadline[98].

This proposal was implemented by Order No. 2013-638 of 18 July 2013, which amended art. L 600-5 and introduced art. L 600-5-1 of the *Code de l'urbanisme.* Art. L 600-5 of the *Code de l'Urbanisme* allows the court, whenever the defect only affects part of the decision and appears easily rectifiable, to pronounce a partial annulment and give the interested party a deadline to request the correction and upholding of the decision to the administration, even after the completion of the building project. Art. L 600-5-1 allows the judge, in cases where the defect in the building permit can be corrected, to suspend proceedings and establish a deadline for the correction of the decision. The correction measure is discussed by the parties of the judicial proceeding; only after these formalities have been carried out can the judge decide on the merits of the case. The correction of the contested decision is strongly encouraged, as art. L 600-5-1 establishes that the judge must give a full justification for his refusal to suspend the proceedings and give the administration a deadline to regularize the measure.

In 2015[99] and 2017[100] the loop provided for under art. 600-5-1 *Code de l'urbanisme* was also extended to disputes regarding urban

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[96] This task force issued the Report titled *Construction et droit au recours: pour un meilleur équilibre* (often called Labetoulle Report, from the name of the chair of the research group), available at *https://www.viepublique.fr/sites/default/files/rapport/pdf/134000300.pdf.*

[97] The main other solution was the restriction of *locus standi*, as enforced by art. L-600-1-2 and L-600-1-3 of the Urban Planning code, which stipulate that a challenge to a construction permit is admissible («*recevable*») under two conditions: first, that the building and/or the activities necessary for construction must directly affect the conditions of occupation, exploitation, or enjoyment of the property which the applicant regularly holds or occupies or which is the subject of a promise of sale, lease, or preliminary contract referred to in Article L-261-1 of the *Code de la construction et de l'habitation*. This rule does not apply to application for judicial review brought by the state, local authorities, or associations.
Interest in the appeal must exist from the time the permit application is published in the municipal house.

[98] Labetoulle Report, 12 ff.

[99] See order No. 2015-1174 of September 23, 2015.

[100] See order No. 2017-80 of January 26, 2017.

development plans[101] and, like in Germany, to environmental disputes[102], thus expanding what scholars called the «corrective function» (*office correcteur*) of French administrative courts[103].

These reforms did not provoke the backlash that was seen when similar measures were introduced in Germany: on the contrary, they are globally thought to improve both legal certainty and the efficiency of the administration, while also avoiding an encroachment on the prerogatives of the authorities, precisely because they give the administrative authority some leeway in deciding whether to uphold the challenged decision, ensuring that no interference is carried out in the exercise of administrative discretion[104].

At the same time, several critical issues, pertaining both to the respect of the procedural rules and to the repercussions on the right to a fair trial and an effective jurisdictional protection, were pointed out by legal scholars.

These reservations mainly relate to the remedying of deficiencies in the investigation of the matter or the posthumous obtaining of opinions from other administrations. In these cases, critics feared that validations could be instrumentalized for the sole purpose of upholding the contested decision, as such use of the remedy would have called into question the usefulness and relevance of the procedural rules the violation of which is deemed correctable[105].

Secondly, scholars pointed out that the correction of an illegal decision could rarely benefit the applicant, who often seeks the elimination of the act rather than the mere restoration of the rule of law[106]. The correction of the contested decision could contribute to a feeling of injustice and perception of bias on the part of the judge[107], especially when, following the correction of the contested decision and the dismissal of the application for judicial review, the applicant is charged with the legal fees[108].

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101 Article L 600-9 of the *Code de l'urbanisme.*

102 Article 181-18 of the *Code de l'environnement.*

103 See W. Gremaud, *La régularisation en droit administratif*, cit. at 90, 21.

104 W. Gremaud, *La régularisation en droit administratif*, cit. at 90, 320.

105 B. Seiller, *Les décisions régularisées*, cit. at 85.

106 See F. Martin, *La légende de l'annulation*, 1 R.F.D.A. 134 (2021).

107 B. Seiller, *Les décisions régularisées*, cit. at 85, noted that the correction of administrative acts is, from the point of view of the litigant, eminently questionable. It is tolerable only if one takes another point of view, that of the beneficiary of the contested act, whose situation is secured.

108 The problem of which party should bear the costs of the litigation in the event that the contested decision is corrected has not been solved either by the law or

However, the latter criticism failed to reverse the trend described here, probably because in the traditional conception of the *contentieux de l'excès de pouvoir*, the question of the material satisfaction of the applicant is not yet so central[109].

5. 'Informal' loops and the administrative review of the challenged decisions during judicial proceedings in Italian law

In Italy too, until recently, the only remedy available for the protection of legitimate interests (*interessi legittimi*) infringed on by an unlawful administrative decision was the action for annulment. Today, although actions for damages[110] or for injunction[111] can also be brought against an authority, annulment and remand to the authority remains the main remedy against the unlawful exercise of administrative powers[112].

Italian law does not provide for a tool comparable to administrative loops. A similar result, however, has been achieved

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by case-law. On the contrary, Art. L. 761-1 of *the Code de justice administrative* provides that in all proceedings the court shall order the party liable to pay the costs or the unsuccessful party to pay the other party the amount it fixes for the costs incurred.

[109] Professor Jean Rivéro, who advocated for an increased consideration of the effectiveness of judicial remedies, famously reported the surprise of administrative judges for his concern: "*But Mr. Professor, why are you interested in the applicant? The applicant is the "token" that is introduced into the apparatus and that triggers the litigation mechanism*". See J. Rivero, *Une crise sous la Ve République : de l'arrêt Canal à l'affaire Canal in Le Conseil d'État de l'an VIII à nos jours. Livre jubilaire du deuxième centenaire* 36 (1999).

[110] Art. 30 of the italian code of administrative judicial proceedings (*Codice del processo amministrativo* or c.p.a.).

[111] Art. 30, para. 1 and 34 para. 1, c) c.p.a.

[112] See, *ex multis*, M. Clarich, *Commento all'art. 29 del Codice del processo amministrativo*, published in *www.giustizia-amministrativa.it* on July 15th 2010; M. Clarich, *Le azioni nel processo amministrativo tra reticenze del codice e apertura a nuove tutele*, published in *www.giustizia-amministrativa.it* on November 11th 2010. The action for injunction, introduced by d.lgs. 14 settembre 2012 n. 160, can only be brought in conjunction with the action for annulment (art. 34, para. 1, c), c.p.a.) and a judicial injuction to issue a decision favorable to the applicant can only be obtained in case of bound powers or when no further margins for the exercise of discretion remain and no further investigations need to be carried out by the administration (art. 31, para. 3, c.p.a.). Outside of these limited hypotheses, the applicant can only obtain the annulment of the unlawful decision and/or the reparation of the damages incurred.

through the use of atypical interim relief measures to stay the contested decision and order the administration to reconsider the case based on the judge's instructions, not unlike the Dutch administrative courts did before the introduction of administrative loops[113]. This technique, known as 'remand', was originally developed to provide an interim relief to citizens damaged by decisions rejecting applications, who could not avail themselves of the typical interim relief measure of the suspension of the effects of a challenged decision[114]. More recently, however, the technique of *remand* was explicitly referred to as a way of reopening the administrative procedure pending judicial review in order to allow the administration to correct its previous assessment and possibly settle the dispute[115]. By ordering the administration to reconsider the matter, courts encourage an out-of-court settlement of the dispute[116] through the issuance of a new decision bound to replace the contested one with *ex nunc* effects. As it is the case for administrative loops, the remand technique places the authority under the tutelage of administrative courts: an assessment of the compliance to the interim measure before the same judge who issued it is possible in the context of an executory judgement (*giudizio di ottemperanza*), which can be carried out to obtain the enforcement of a court-issued measure, be it a sentence or an interim relief measure[117].

A spontaneous review of the affair can also be carried out by the authority, using the power to amend unlawful decisions and uphold their effects (*potere di convalida in autotutela*) provided by 21 *nonies*, sect. 2 of the Italian general law on administrative procedure[118]. This validation remedy presents some similarities to the

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113 *Cf. supra*, footnote n. 17.

114 See A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A.*, 3 Dir. Proc. Amm. 331 (1990).

115 See Cons. Stato, sect. V, August 5th, 2022, n. 6939; sect. IV, April 29th, 2022, n. 3397; sect. VI, March 17th, 2020, n. 1903, in *www.giustizia-amministrativa.it.*

116 As recognized, for example, by T.A.R. Marche, sect. I, November 11th, 2009, n. 1443, in *www.giustizia-amministrativa.it*, which admitted that "*very often the function of propulsive* [or 'remand'] *orders is to allow the applicant further interlocution with the authority, for the commendable purpose of reaching an extrajudicial resolution of the matter.*"

117 See art. 112, para. 2, b) and art. 113 c.p.a. Unlike Dutch administrative loops, the review of the administration's activity is not automatic, since it is carried out in the context of an enforcement judgement (*giudizio di ottemperanza*) that can be requested by the beneficiary of the measure.

118 Law no. 241/1990, as modified by law n. 15/2005.

one provided for by § 45 VwVfG[119], in that it allows the authority to 'cure' an otherwise voidable decision and uphold it. However, while § 45 VwVfG specifically allows for a correction of the decision's defect pending judicial proceedings, art. 21 *nonies*, para. 2, does not specifically indicate whether a contested decision can be corrected. In fact, it merely states that it is possible to validate a voidable decision within a reasonable time after its adoption if there are public interest reasons for doing so. The vagueness of this provision has given rise to a debate both on the possibility of validating a contested decision and on the scope of the errors that can be remedied. The only very clear feature of this power of correction is it is explicitly aimed at protecting the public interest[120]. This aspect differentiates this remedy from the most of the other included in this study, which are more aimed at offering a more effective remedy to the party affected by the unlawful decision or at reopening administrative proceedings in order to redress the errors made.

In this section of the article, we will discuss both the power of validation and the technique of 'remand', evaluating their effectiveness in providing a fair and final solution to the dispute.

The 'remand' technique, as previously mentioned, was devised as an atypical interim relief measure; however, its potential for dispute resolution did not go unnoticed, and the pragmatic use of interim measures to reach a final dispute settlement under the judge's tutelage was praised by some scholars[121].

Critics pointed out that the 'remand' technique entails an improper use of interim judgements, which are not designed to settle a dispute but rather to grant an interim relief during judicial proceedings[122], based on a summary analysis of the legal and factual

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[119] Discussed in section 3 of this paper.

[120] In line with this specific function, the validation can only be carried out if there is a public interest (different from the mere restoration of legality) in doing so: see art. 21 *nonies*, para. 2, of the administrative procedure act (law n. 241/1990).

[121] G. Sorrentino, *Ordinanza cautelare e jus superveniens*, 3 Dir. Proc. Amm. 451 (1995) (especially 458 ff.); R. Garofoli, L*a tutela cautelare degli interessi negativi. Le tecniche del remand e dell'ordinanza a contenuto positivo alla luce del rinnovato quadro normativo*, 4 Dir. Proc. Amm. 857 (2002); M. Andreis, *Tutela sommaria e tutela cautelare nel processo amministrativo* 176 ff. (1996); F. Pugliese, *Nozione di controinteressato e modelli di processo amministrativo*, cit. at 2, 126 ff.

[122] E.F. Ricci, *Profili della nuova tutela cautelare amministrativa del privato nei confronti della pubblica amministrazione*, 2 Dir. proc. amm. 276 (2002); A. Travi, *Misure cautelari di contenuto positivo e rapporti fra giudice amministrativo e pubblica amministrazione*, 1 Dir. proc. amm. 174 (1997) ; R. Villata, *La Corte costituzionale frena bruscamente la tendenza ad ampliare la tutela cautelare nei confronti dei*

bases of the appeal: the use of 'remand' to settle the dispute thus runs the risk of amounting to a summary judgement[123]. A dissenting case-law also cautioned against the use of 'remand' as a means of settling the dispute, arguing that the enforcement of an interim order (whose scope, by definition, is only limited to granting interim relief pending trial) cannot cause the definitive replacement of the contested decision, settling the dispute before the delivery of the final judgement[124].

Furthermore, the Council of State has argued in the past that the replacement of the contested decision through 'remand' could harm the positions of both parties: the applicant because if the appeal is well founded, he or she would be entitled to the annulment of the contested measure in addition to a compensation for the damage resulting from the annulled measure; the authority, because it is also entitled by law to a judgment on the lawfulness of the contested measure[125].

This strict jurisprudential orientation did not prevail, and the use of remand measures in the context of interim relief proceedings remains common. Administrative case-law usually distinguishes the situations in which a new decision is issued by the authority as a mere execution of the interim relief measure and those in which the remand order leads to an actual review of the case and spontaneous decision of the authority to self-annul the contested decision (*annullamento in autotutela*)[126] and subsequently issue a new decision[127].

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provvedimenti negativi, 4 Dir. Proc. Amm. 619 (1991); A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A.*, 3 Dir. Proc. Amm. 331 (1990); E.M. Barbieri, *I limiti al processo cautelare amministrativo*, 2 Dir. Proc. Amm. 220 (1986).

[123] See A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A*, cit. at 122; M. Andreis, *Tutela sommaria e tutela cautelare nel processo amministrativo*, cit. at 121, 299.

[124] On this issue, see G. Sigismondi, *La tutela cautelare con effetti irreversibili*, in P. Cerbo, G. D'Angelo, S. Spuntarelli (eds.), *Amministrare e giudicare. Trasformazioni ordinamentali* (2022) 159 (see in particular p. 193 ff.).

[125] See Cons. Stato, sect. VI, January 20th 2011, n. 396, in *www.giustizia-amministrativa.it*.

[126] Provided by art. 21 *nonies*, para. 1, law. n. 241/1990, introduced by law n. 15 of February 11th, 2005.

[127] For this distinction, see for example Cons. Stato, sect. V, August 5th 2022, n. 6939; sect. IV, April 29th 2022, n. 3397; sect. VI, March 17th 2020, n. 1903, in *www.giustizia-amministrativa.it.*

In the latter cases, the dispute is settled: the applicant's interest is fulfilled, and the judge can declare the discontinuation of the matter (*cessazione della materia del contendere*)[128]. In the former cases, on the other hand, the decision issued in direct enforcement of the interim relief measure is bound to lose its effects if the application for judicial review is rejected on the merits[129].

The importance of this distinction lies in the nature and effects of the decision issued by administrative authorities: only the spontaneous issuance of a different decision following a review of the affair cannot be impacted by the outcome of the judgement[130] since the it stems from the exercise of administrative powers and not merely from the execution of the interim measure.

The judge's decision to allow the administration to reopen the administrative procedure and re-examine the case, rather than merely ordering the adoption of a particular decision, may be influenced by several factors. For example, the time needed to conduct a re-examination of the case and the urgency of providing the applicant with immediate protection of the interest may prevent the court from ordering a re-opening of the procedure (e.g., where the protection of an instrumental interest in participating in a competitive procedure is so imminent that the competent administration cannot review the exclusion decision). In cases where such questions do not arise, an efficient use of the precautionary measure, which leaves the administration sufficient room to conduct a

[128] See art. 34, para. 5, c.p.a. The declaration of the discontinuation of the matter is considered a judgement on the *merits* of the case, and specifically on the satisfaction of the applicant's claim: see Cons. Stato, sect. V, August 30th 2022, n. 7571 in *www.giustizia-amministrativa.it.*

[129] However, in certain areas of litigation, such as those related to examinations for professional qualifications (*i.e.*, the bar examination), the law (art. 4, para. 2 *bis*, d.l. June 30th 2005, n. 115 (conv. l. August 17th 2005, n. 168) itself provides for the possibility of an interim injunction to definitely settle the dispute by stipulating that candidates possessing the prescribed qualifications who passed the written and oral examinations are entitled to obtain the professional qualification, even if admission to the examination by the board was the result of an interim relief measure. This provision is broadly applied especially by first-instance administrative case-law, which extended its scope to other examinations and recruitment procedures, such as admission tests to medical schools: see, *ex multis*, T.A.R. Lazio, sect. III, August 17th 2020, n. 9226; April 15th 2020, n. 3936; February 18th 2020, n. 2162; sect. I, January 8th 2020, n. 136, in www.giustizia-amministrativa.it.

[130] Which cannot proceed, as the judge will be bound to declare a discontinuation of the matter, as stated before.

complete re-examination of the matter in the light of the judge's indications, appears as a good remedy to settle the dispute definitively out of court.

While the review, self-annulment and subsequent replacement of the challenged decision on the part of the administration is possible at the initiative of the court, through a 'remand' measure[131], as mentioned before, the spontaneous validation and upholding (*convalida*) of a contested act during judicial proceedings remains somewhat controversial.

Now enshrined by art. 21 *nonies*, sect. 2 of law no. 241/1990[132], the power of validation allows the issuing authority to correct the defects of the decision in order to uphold it, with *ex tunc* effects, provided that the defect can be corrected and – as previously discussed - the validation can be justified in light of public interest[133].

Unlike § 45 VwVfG and § 114, para. 2, VwGO, art. 21 *nonies*, sect. 2, l. 241/1990 does not list the errors that can be corrected; however, traditionally, legal scholars have held that only procedural or formal defects without any bearing on the contents of the decision can be subject to validation[134].

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[131] Or at the initiative of the authority itself, pursuant to art. 21 *nonies*, l. 241/1990.

[132] Introduced by law n. 15/2005.

[133] Even before its codification, this power was traditionally recognized by legal scholars and administrative case-law in the context of the broader power of '*autotutela*', which literally means 'self-protection'.
The provision does not specify whether this general power of validation (*convalida*) can be exercised pending judicial review, nor the scope of the defects susceptible of being corrected. Legal scholars and administrative case-law (see, for example, Cons. Stato, sect. VI, April 27th 2021, n. 3385, cit.) consider that only a correction of formal or procedural errors that do not affect the substance of the decision is allowed: see M. Ramajoli, R. Villata, *Il provvedimento amministrativo* (2017) 692 ff. On the topic of the effects of validation after the introduction of art. 21 *nonies*, sect. 2, see G. Mannucci, *Della convalida del provvedimento amministrativo*, 1 Dir. Pubbl. 201 (2011) (see particularly 210 ff.), in which different theories concerning the temporal effects of validations are discussed. More recently, the topic was also discussed in N. Berti, *La modifica dei provvedimenti amministrativi* (2022).

[134] The broad formulation of art. 21 *nonies*, para. 2, l. 241/1990 gave way to multiple interpretations regarding its scope. Some authors argued that the power of validation's scope was extended to substantial defects of the decision : see V. Antonelli, *La convalida del provvedimento annullabile e la riforma del procedimento amministrativo*, 7-8 Foro amm. C.d.S. 2220 (2005) ; N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, 1 Dir. Proc. Amm. 190 (2022).

After the introduction of art. 21-*octies*, sect. 2 l. 241/1990[135] the residual scope of the power of validation was reduced[136], but it surely still applies to the correction of formal or procedural errors in discretionary decisions[137].

The validation requires carrying out administrative proceedings - with the participation of the concerned parties - to determine whether the upholding of the decision is in the public interest and whether its errors can be remedied pursuant to art. 21 *nonies*, para 2, l. 241/1990[138]. Unlike § 45 VwVfG, art. 21 *nonies*, para 2, l.

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[135] The provision, mentioned in footnote n. 4, stipulates that a decision made in violation of procedural or formal rules is not voidable if, due to its bound nature, it is evident that its content could not have been different in the absence of the violations. A decision is also not voidable if the authority failed to notify the person concerned of the initiation of the proceedings (as prescribed by art. 7 l. 241/1990) if the authority proves in court that the content of the decision could not have been different if the person concerned had been made aware of the proceedings.

[136] See in particular V. Cerulli Irelli, *Osservazioni generali sulla legge di modifica della l. 241/1990*, published in February 2005 in *www.giustamm.it*; G. Mannucci, *Della convalida del provvedimento amministrativo*, cit. at 133 (especially 213 ff.); M. Ramajoli, R. Villata, *Il provvedimento amministrativo*, cit. at 133, 696, who tend to exclude from the scope of art. 21 *nonies*, sect. 2, l. 241/1990 all formal errors bearing no impact on the content of a bound decision, due to their inability to cause the annulment of the contested decision under art. 21 *octies*, sect. 2, l. 241/1990 : the conditions for validation cannot be met, since the exercise of the power presupposes the voidability of the decision. However, Cons. Stato, sect. VI, April 27th 2021, n. 3385, III Foro it. 377 (2021), commented by A. Travi; in Dir. Proc. Amm. 190 (2022), commented by N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*; and in *www.giustiziainsieme.it*, commented by F. Aperio Bella, *Limiti alla convalida in corso di giudizio (nota a Cons. Stato, sez. VI, n. 3385/2021)*, recently stated that "*There is no doubt about the possibility of amending formal and procedural errors, including that of (relative) lack of jurisdiction. It must be considered possible for the public administration also to proceed with the validation of a measure that cannot be annulled pursuant to the aforementioned paragraph 2 of Article 21-octies (considered to be a rule applicable to judicial proceedings), although in this case the legal utility consists at most only in greater certainty and stability of the administrative relationship*". However, this opinion does not seem to take into account the prohibition of self-annulment of a decision when the conditions for the application of Article 21 octies, para. 2 are met, thus negating the purely procedural relevance of the rule. Moreover, greater stability of the decision could not be achieved, since it already is not voidable under both art. 21-octies para. 2 and art. 21-nonies para. 1 l. 241/1990.

[137] Except the defect deriving from the omission of the notice of initiation of proceedings (art. 7 l. 241/1990), which falls under the scope of art. 21-octies, sect. 2, l. 241/1990.

[138] M. Ramajoli, R. Villata, *Il provvedimento amministrativo*, cit. at 133, 693.

241/1990 does not define the procedural steps necessary to 'cure' a voidable decision; according to the prevailing doctrine, the assessment on the 'curability' of the decision is carried out through a mere re-evaluation of the documents acquired in the course of the investigation in the original proceedings[139], which makes it difficult to remedy certain types of procedural errors such as those pertaining to the participation of interested parties[140].

Concerning the question of the validation of contested decisions, art. 6, law of March 18th, 1968, n. 249 only explicitly allows for the validation of a decision issued by an authority without jurisdiction (*ratifica*) pending judicial review.

It has been debated whether the authority can similarly correct any other defect and confirm the contested decision, absent a specific rule allowing[141] (or banning[142]) it to do so. For a long time, under the prevailing legal doctrine[143] and case-law, validation was prohibited pending judicial review. The main reason for this prohibition was based on the idea that the subject of judicial review is the contested decision, the content of which cannot change during the court proceedings: according to the prevailing opinion, the validation of the contested decision would unjustly prevent the applicant from obtaining an annulment to which he was entitled by virtue of the decision's unlawfulness[144].

In the past twenty years, the case-law position on the issue evolved[145], due to multiple factors, such as the renewed conception

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139 G. Mannucci, *Della convalida del provvedimento amministrativo*, cit. at 133, 239. This opinion is not shared by N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, cit. at 136, 209, who argues that, given the broad formulation of art. 21 nonies, para. 2, l. 241/1990, the validation procedure could entail a reopening of the administrative proceedings and a further investigation.

140 G. Napolitano, *La logica del diritto amministrativo* (2014) 150.

141 See L. Mazzarolli, *Convalida* (dir. Amm.), *Enc. giur.*, IX (1988) 3.

142 See P. Virga, *Diritto amministrativo. Atti e ricorsi* 143 (1987) who held that "*nothing prevents validation from taking place pending judicial review*".

143 See G. Santaniello, *Convalida* (dir. amm.), in *Enc. dir.*, X, 503 (1962) (see p. 505 in particular); L. Mazzarolli, *Convalida*, cit. at 142, 3; P. Ravà, *La convalida degli atti amministrativi* 214 ff. (1937).

144 See G. Santaniello, *Convalida* (dir. amm.), cit. at. 505.

145 The first decisions to allow a validation pending judicial proceedings (outside of the specific hypothesis of a correction of a defect of incompetence, explicitely allowed by law) can be traced back to the end of the nineties: see Cons. Stato, sect. IV, July 26th 1998, n. 991, *Foro it.*, Rep. 1998, entry *Atto amministrativo*, n. 525;

of the true subject of judicial review, now considered by some legal scholars and case-law to have shifted beyond the contested decision and encompassing the whole relationship between the applicant and the authority[146]. The growing concern for the efficiency of justice and the subsequent wariness towards "useless annulments" also gave way for the described shift in the position held by case-law[147].

The introduction, in 2000, of a tool allowing the applicant to challenge a new decision issued by the authority and related to the matter sub judice (*motivi aggiunti*)[148], was fundamental in the definitive lifting of the jurisprudential ban on validations pending judicial review, as it allowed for the challenge of the subsequent validation decision, thus granting a remedy to the applicant in case of validation of the contested act[149].

C.G.A.R.S., December 28th 1998, n. 682, *id.*, Rep. 1999, entry *Atto amministrativo*, n. 464.

146 See V. Cerulli Irelli, *Convalida in corso di giudizio e tutela della pretesa sostanziale*, in 6 Giorn. Dir. Amm. 641 (2002) and in case-law, explicitely, C.G.A.R.S. April 20th 1993, n. 149, III *Foro it*. 616, (1993); in 3 Dir. proc. amm. 577 (1994), commented by A. Zito, *L'integrazione in giudizio della motivazione del provvedimento: una questione ancora aperta*.

147 Cons Stato Sez. IV, June 26th 1998, n. 991, *Foro it.*, Rep. 1998, entry *Atto amministrativo*, n. 525.

148 See art. 1, law of July 21rst 2000, n. 205.

149 V. Antonelli, *La convalida del provvedimento annullabile e la riforma del procedimento amministrativo*, cit. at. 134. In administrative case-law, see T.A.R. Molise, January 29th 2003, n. 41, Foro it., Rep. 2003, entry *Giustizia amministrativa* n. 891.

The validation through a correction of the statement of reasons[150] pending judicial proceedings[151], however, remains widely debated in legal scholarship[152] and administrative case-law.

As a rule, posthumous interventions on the statement of reasons were traditionally deemed inadmissible by case-law. The main reason provided for this was the same given to ban validations after the application for judicial review, and proceeded from the idea that the object of the judicial review is the challenged decision and its motivation, whose content cannot shapeshift during the judgement[153]. Furthermore, it was maintained that allowing an *ex-post* validation of a decision lacking a complete statement of reasons

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[150] It should be noted that this is a multifaceted phenomenon: it may consist in completing the statement of reasons based on elements acquired during the administrative procedure or in adding new elements to the statement of reasons; moreover, it may take place either during the court proceedings, through pleadings drafted by the defense or through a procedure of validation. For these distinctions, see G. Taccogna, *Giusto processo amministrativo e integrazione della motivazione dell'atto impugnato*, 3 Dir. proc. Amm. 696 (2005) ; G. Tropea, *La c.d. « motivazione successiva » tra attività di sanatoria e giudizio amministrativo*, 3 Dir. amm. 531(2003).

[151] Which started to be admitted by a growing case-law from the early 2000s. However, the leading case for this new case-law can be traced back to the early nineties : see C.G.A.R.S., April 20th 1993, n. 149, III Foro it. 616 (1993) which argued that while the inadmissibility of a posthumous integration of the statement of reasons may seem to offer greater procedural protection to the applicant, this greater protection is only apparent: an annulment for the mere lack of motivation too often constitutes a procedural victory, since it cannot prevent the administration from adopting a new similar harmful measure with an adequate motivation.

[152] The literature on the topic is extensive: see G. Virga, *Integrazione della motivazione nel corso del giudizio e tutela dell'interesse alla legittimità sostanziale del provvedimento impugnato*, 3 Dir. proc. amm. 529 (1993); G. Tropea, *La c.d. motivazione successiva tra attività di sanatoria e giudizio amministrativo*, cit. at 150; M. Occhiena, *Il divieto di integrazione in giudizio della motivazione e il dovere di comunicazione dell'avvio dei procedimenti ad iniziativa di parte: argine e contenimento del sostanzialismo*, 2 Foro amm. T.A.R. 524 (2003); G. Taccogna, *Giusto processo amministrativo e integrazione della motivazione dell'atto impugnato*, cit. at 150; V. Parisio, *Motivazione postuma, qualità dell'azione amministrativa e vizi formali*, 9 Foro amm. T.A.R. 3087 (2006); M. Ramajoli, *Il declino della decisione motivata*, 3 Dir. proc. Amm. 894 (2017); G. Tropea, *Motivazione del provvedimento e giudizio sul rapporto*, 4 Dir. proc. amm. 1235 (2017); R. Musone, *Gli sviluppi del divieto di motivazione postuma del provvedimento amministrativo*, 3 Giorn. Dir. Amm. 316 (2018); E. Senatore, *L'integrazione postuma della motivazione del provvedimento amministrativo fra ordinamento interno e comunitario*, 4 Federalismi.it 20 (2018).

[153] G. Cocozza, *Contributo ad uno studio della motivazione del provvedimento come essenza della funzione amministrativa* 217 (2020).

would imply that the authorities could emit such decisions, and that citizens could be forced to challenge them without proper knowledge of their motivation[154], rendering the right to defense against the unlawful acts of the administration[155] impossible to fully exercise.

In the early 2000s, case-law started admitting a correction of the statement of reasons arguing that some errors pertaining to it could be considered merely formal. It was argued, for example, that the annulment can be avoided whenever the full reasoning followed by the authority can be inferred from previously issued sub-procedural measures, allowing for a completion of an insufficient reasoning[156]. Concerning bound decisions, some case-law allowed a decision that is not fully reasoned to be upheld, equating the absence of a statement of reasons with a formal defect that cannot lead to the annulment of the act[157].

More recently, however, administrative courts seem to have returned to a stricter attitude[158] regarding the defects of the statement of reasons[159], based both on the right to a fair trial, which entails the equality of the parties and the right to an effective judicial protection[160], and a rethinking of the status of the statement of reasons as a fundamental component of administrative decision-

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154 A. Pubusa, *Il giudizio: "officina per la riparazione" degli atti amministrativi? Note sull'art. 21-octies, comma 2*, l. n. 241 del 1990, 5 Foro Amm. T.A.R. 1750 (2005).

155 Enshrined in art. 113 of the Italian Constitution.

156 Cons. Stato, Sect. V, April 18th 2001, n. 2330, in Foro amm. 872 (2001).

157 No need for a validation could technically arise in such case since the decision would not be voidable. See, for example, Cons. Stato, sect. V, August 20th 2013, n. 4194, *Foro it.*, Rep. 2013, entry « *Atto amministrativo* », n. 360; sect. IV, June 7th 2012, n. 3376, *ibid.*, entry « *Atto amministrativo* », n. 36; Cons. Stato, sect. VI, August 18th 2009, n. 4948, *Foro amm. C.d.S.*, 2009, 1881; August 25th 2009, n. 5065, *Foro amm. C.d.S.*, 2009, 1909.

158 The introduction of new elements by way of the defense briefs is now widely considered inadmissible: see Cons. Stato, sect. VI, March 9th 2021, n. 2001, in www.giustizia-amministrativa.it; October 19th 2018, n. 5984, *Foro it.*, Rep. 2019, entry *Atto amministrativo*, n. 1998. The indiscriminate disregard of defects pertaining to the statement of reasons of decisions resulting from the exercise of bound powers has also been put into question: see Cons. Stato, sect. III, April 30th 2014, n. 2247, in www.giustizia-amministrativa.it.

159 On this evolution, which seems to have taken place after the introduction of art. 21 *octies*, para. 2, l. 241/1990, see R. Musone, *Gli sviluppi del divieto di motivazione postuma del provvedimento amministrativo*, cit. at 152, 321 ff.

160 Cons. Stato, Sect. IV, March 4th 2014, n. 1018; Cons. Stato, Sect. V, August 20th 2013, n. 4194, in www.giustizia-amministrativa.it.

making, which could not be merely corrected posthumously[161]. This change in case-law falls in line with the position taken by the Italian Constitutional Court on the issue, which held that defects pertaining to the statement of reasons cannot be considered merely formal[162]. The renewed importance attached to the statement of reasons makes it necessary to reconsider the scope of the validation power under art. 21 *nonies*, para. 2, l. 241/1990, since not all defects of the statement of reasons can be regarded as purely formal.

This issue was addressed in a recent decision of the Council of State, which deemed that the validation of the contested decision is allowed in cases where the flaws of the statement of reasons do not reflect substantial breaches in the carrying out of administrative functions, but only the inadequacy of the justifying formal discourse, resulting in a purely formal defect in its expression. The decision endorsed the use of validation powers during judicial proceedings, arguing that the challenge of the validation (which may occur spontaneously or after a remand to the authority) through *motivi aggiunti* determines a shift of the judgement scope to the entire matter, which can facilitate both sides of the judgement, as it gives the plaintiff a quicker and more effective judgement on the possibility of a favorable outcome while allowing the authority to avoid a 'disproportionate' annulment[163].

However, this judgement left several questions unanswered, regarding in particular the right to an effective judicial protection against the original unlawfulness of the decision and the related issue of the consequences in terms of liability for any damage

[161] Cons. Stato, sect. VI, March 9th 2021, n. 2001; Cons. Stato, sect. V, March 27th 2013, n. 1808, in *www.giustizia-amministrativa.it.* This idea is developed in G. Cocozza, *Contributo a uno studio sulla motivazione del provvedimento come essenza della funzione amministrativa*, cit. at 152.

[162] Corte cost., ord. March 17th 2017, n. 58 and ord. May 26th 2015, n. 92, in *www.cortecostituzionale.it*) declared the inadmissibility of the preliminary question on the constitutionality of art. 21 *octies,* para. 2, l. 241/1990 as applied to defects of the statement of reasons because the referring judge failed to attempt to find a constitutionally oriented interpretation of the provision. The Court then cited administrative case-law that holds that the lack of the statement of reasons can in no way be equated with a breach of procedural rules or a formal defect, since it constitutes the precondition, the basis, the focus and the essence of the lawful exercise of administrative powers (Art. 3 of Law No. 241/1990) and therefore an irreplaceable safeguard of substantive legality (see, for example, Cons. Stato, Sect. III, April 7th 2014, n. 1629; Cons. Stato, Sect. VI, June 8th 2010, n. 3642, in www.giustizia-amministrativa.it).

[163] Cons. Stato, sect. VI, April 27th 2021, n. 3385, cit.

suffered by the applicant prior to the correction of the decision[164]. Ultimately, the judgement only specifically recognized the right to a complete reimbursement of litigation costs borne by the applicant[165].

Conclusions

This research has attempted to shed light on some elements of convergence in the systems studied, where either the legislator or case-law have sought to limit annulments by encouraging or allowing a correction of the decision pending judicial review.

This trend signals a skepticism about the effectiveness of the remedy of annulment that can be detected both in legal systems that feature an administrative jurisdiction aimed at the protection of rights[166] and systems of objective law, in which the decision unequivocally remains the lone subject of the judicial review[167].

Concerning the former, this development is also understandable in the context of the shift of the object of judicial review from the contested decision to the relationship between the applicant and the authority: under certain conditions, judicial proceedings may provide a suitable occasion for a re-examination of the affair under the guidance of the court, and the subsequent definitive settlement of the dispute - which the annulment of the contested act does not always provide. It is interesting to note, however, that a similar approach has also been followed in the systems of objective law.

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164 Due to the retroactive effects of the validation decision, which 'erases' the original unlawfulness of the validated decision, damages could not be requested by the applicant pursuant to art. 34, para. 3, c.p.a. that provides « *when, in the course of the trial, the annulment of the challenged measure is no longer useful to the plaintiff, the court shall ascertain the unlawfulness of the act if there is an interest for compensation purposes* ». However, a compensation could be still claimed based on the conduct of the authority : see N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, cit. 134, 205; see also G. Mannucci, *Della convalida*, cit. at 133, 244, on the need to limit the retroactivity of the validating effects in order to allow for the recognition of the original unlawfulness of the contested decision and the subsequent award of damages.

165 Although, confusingly, in the same judgement the Council of State did not condemn the authority to reimburse these costs to the applicant, as observed by F. Aperio Bella, *Limiti alla convalida in corso di giudizio (nota a Cons. Stato, sez. VI, n. 3385/2021*, cit. at 136.

166 The Netherlands, Germany, Italy.

167 France, Belgium.

The reasons for the development of these remedies are manifold but can mainly be traced back to the perceived 'disproportionate' effects of the annulment, when comparing the merits of the claimant's substantive claim and the effects of the annulment (i.e., the restriction or slowing down of administrative action or the harm of general interests protected by the unlawful decision). This is particularly clear in certain sectors of litigation, such as environmental or urban planning disputes, where the safeguard of the contested decision through its amendment or correction is particularly encouraged by statutes[168].

The design of these remedies also probably stems from a fundamental lack of confidence in the administration's ability to promptly and correctly re-exercise its powers after the annulment. In this respect, placing the administration under the guidance of a judge is thought to ensure a faster resolution of the dispute and a more certain outcome of the affair.

Overall, administrative loops can ultimately be linked to the growing importance of legal certainty and efficiency - which are especially crucial to economic actors - in the statutory or jurisprudential design of judicial remedies[169], and it is no coincidence that, in all the countries considered, they were introduced in the context of legislative reforms aimed at improving the efficiency of administrative justice (in a specific sector, or as a whole).

Despite the expectations placed in the ability of administrative loops carried out by the authority to solve the dispute efficiently and definitively, this research has shown that they are not without critical issues, which scope varies on account of the constitutional context in which these tools were adopted.

One of the common issues observed pertains to the possible overstepping of the boundaries between judicial and administrative activity and the related question of the applicant's right to judicial protection. In relation to these two aspects, two different

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[168] See the Flemish Decree of April 4th 2014, as amended by art. 4 of the Decree of July 3rd 2015, § 75, para. 1a, second sentence, VwVfG, as modified in 2013; § 4, para. 1b, last sentence, UmwRG, Art. L 600-9 and 600-5-1 of the *Code de l'urbanisme* and art. 181-18 of the *Code de l'environnement*, discussed respectively in section 2, 3 and 4 of this paper.

[169] G. Napolitano, «*Judicial review of administrative power*». *The legal design of judicial review systems : a comparative overview*, 1 *Riv. Trim. Dir. pubbl.* 86 (2018), noted that «*the financial crisis made evident that even the administration of justice is a scarce resource and that the protection of public decisions from excessive or specious legal challenges before courts can be useful to foster economic growth*».

models of remedies can be outlined: we will refer to them as 'close-ended' loops and 'open-ended' loops.

Rather than providing an efficient resolution of the dispute *sub judice*, 'close-ended' administrative loops are designed to systematically prevent the annulment of the unlawful act, through a merely formal correction of its defects. As the Belgian Constitutional Court pointed out regarding the now repealed federal loops and the previous version of Flemish loops[170], their "predetermined" outcome hinders the separation of powers, curtailing the authority's ability to alter the contents of the contested act based on a new and different appraisal of the relevant circumstances as a consequence of the requested 'correction'. Moreover, 'close-ended' loops expose themselves to the same criticisms that have been levelled at provisions stipulating the irrelevance of certain defects of the administrative decision: they can signal the *de facto* irrelevance of the violated provisions. While they formally restore the rule of law, they can only result in the upholding the challenged decision, rarely benefitting the applicant.

In contrast, under 'open-ended' loops, the judge assumes a pedagogical role vis-à-vis the authority, which is given specific instructions on how to remedy the defects of the contested decision. The execution of these instructions is supervised by the judge and the resulting decision is then assessed in an adversarial procedure between the parties. Even more importantly, the outcome of the authority's intervention is not predetermined. This offers three important advantages. First, 'open-ended' loops avoid the appearance of a bias in favor of the authority and the risk of undue interference of the courts in administrative matters since they imply a genuine reopening of the administrative procedure. Second, by allowing a modification of the decision (with *ex nunc* effects), instead of its mere upholding as it is, the 'open' outcome of the loop does not negate *a priori* the impact of the breach in the shaping of the decision's content; on the contrary, it allows for the same re-exercise of the administrative power that would occur after the annulment of the decision. Finally, 'open-ended' loops can result in the issuing of a decision that may well be satisfactory to the applicant, as the authority is not bound to uphold its previous decision.

The question of the abstract 'open-endedness' of the remedy is also crucial in assessing the effectiveness of spontaneous

[170] See *supra*, section 2 of the paper.

validations carried out by the authority during judicial proceedings as an alternative dispute resolution tool.

One of the problems that were identified in Italy and Germany concerns whether the validation procedure allows for an actual and effective redress of the violation. As German and Italian scholars have argued, a validation under § 45 VwVfG, § 114 VwGO or art. 21 *nonies*, para. 2, l. 241/1990 must entail the opening of an *ad hoc* administrative procedure to ensure that a genuine and effective correction of the defect is carried out and that no other reason prevents the upholding of the contested decision. In short, in order to be considered an efficient tool for the final settlement of a dispute, validations should not be carried out for mere 'defensive' purposes; instead, they should require a good faith effort on the part of the defendant authority in redressing the errors of the contested decision.

This particularly applies to validations pertaining to the statement of reasons, which appear as a particularly sensitive issue considering the crucial function of this part of the administrative decision in allowing a full exercise of the right to legal protection, as the duty to state reasons is intended to enable individuals to assess whether there are sound grounds for an appeal[171]. Indeed, the risk of the authority 'blindsiding' the applicant through a substantial and unforeseeable alteration of the contents of the contested act, thus disrupting the applicant's defensive strategy and frustrating the effort put in the judicial challenge, is at the root of the strict limits established by Italian and German case-law to the possibility of amending the statement of reasons[172].

Another fundamental issue raised in the systems considered concerns the ability of these remedies to effectively protect the rights of the citizen affected by the unlawful act and, more broadly, the question of the consequences of original unlawfulness of the decision. Allowing or even encouraging the validation and subsequent upholding of the challenged decision pending judicial review without consequences for the authority may unjustifiably disregard the investment made by the applicant in the judicial challenge and

[171] This aspect was particularly underlined by the Belgian Constitutional Court in declaring the unconstitutionality of the Federal administrative loop and the first version of the Flemish administrative loop : see *supra*, section 2 of this paper.
[172] See, in particular, the conditions set forth by German and Italian case-law to allow a correction of the statement of reasons respectively under § 114, para. 2 VwGO (detailed in section 3 of this paper) and art. 21 *nonies,* para. 2, l. 241/1990 (detailed in section 5).

violate the principle of equality of arms. Indeed, it must be borne in mind that after the correction of the decision, the applicant ends up with the decision they have been entitled to under the law, but only after bearing the effort and costs of the court proceedings.

If these costs are imposed on the applicant irrespective of the original unlawfulness of the contested decision, his right to legal protection could indeed be infringed and the validation of the contested decision should then be considered as an unjustified procedural privilege granted to the authority, which would only benefit from the applicant's action to correct its errors (without suffering any consequence). The merits of the original appeal should therefore be examined in order to order the authority to pay the costs of the proceedings.

Finally, it is crucial that the new decision or the validation decision issued by the authority can be challenged by the applicant[173], possibly without additional costs, by extending the subject matter of the judgement. This should be considered as the necessary counterpart to the authority's power to amend or replace the contested decision during the court proceedings, either on its own initiative or by order of the court.

[173] See, for decisions issued after an administrative loop, Art. 6:19 AWB, Art. 34, para. 4, of the Decree of April 4th 2014 on the organization and jurisprudence of certain Flemish administrative courts, respectively discussed in sections 1 and 2 of the paper) or through a specific remedy allowing the applicant to challenge the subsequent validation decision (Art. 43 c.p.a., as discussed in section 5 of the paper).