

## Italy, Supreme Court of Cassation, civil section, united sections, no. 9042/2019, supreme instance, 1/4/2019

### Member State

 Italy

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### Topic

Impartiality (conflict of interest);  
Independence (appearance of independence)

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### Deciding Court Original Language

Corte Suprema di Cassazione

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### Deciding Court English translation

Supreme Court of Cassation

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### Registration N

9042/2019

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### Date Decision

1/04/2019

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### ECLI (if available)

ECLI:IT:CASS:2019:9042CIV

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### National Follow Up Of (when relevant)

Not a direct follow-up

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### EU legal sources and CJEU jurisprudence

- Art. 267 TFUE
  - Art. 47 CFR
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### ECtHR Jurisprudence

Art. 6 ECHR

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### Subject Matter

Application before the Supreme Court of Cassation for the accumulation, by a member of the Consiglio di Giustizia Amministrativa (CGA – Supreme Administrative Court), of regulatory and jurisdictional functions. The applicant claimed a breach of EU law, in particular the principles of impartiality and independence of the judiciary (Article 47 CFR and Article 6(1) ECHR) and also in several provisions of the Italian Constitution, as well as the principle of separation of powers. The Court of Cassation rejected the application as inadmissible.

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### Legal issue(s)

Independence and impartiality of the Consiglio di Giustizia amministrativa

The Consiglio di Giustizia amministrativa for the Sicily Region cumulate both jurisdictional and regulatory functions. Indeed, it has jurisdiction for appeals against decisions of the Sicilian Regional Administrative Court (TAR) but also a consultative role, as it is the legal-administrative advisory body of the Sicily Region. According to the applicant, the fact that one judge who assessed his case was also representing the Sicily region (the counterpart) in a joint committee (Commissione paritetica) was as such to be in contrast with the principles of impartiality (conflict of interest) and independence (appearance of independence) of the judiciary.

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### Request for expedited/PPU procedures

No

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### Interim Relief

No

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### National Law Sources

- Articles 24, 101, 104, 108, 111, 117 of the Italian Constitution
  - Articles 1, 2 and 110 of the Code of Administrative Procedure (cod. proc. amm.)
  - Article 362 of the Code of Civil Procedure (cod. proc. civ.)
  - Article 8 of Decree of the President of the Republic no. 361 of 1957, (norms for the election of the Camera dei Deputati)
  - Article 5 of Legislative Decree no. 533 of the 20 December 1992, (norms for the election of the Senato della Repubblica)
  - Article 43 of the Special Statute for Regione Siciliana;
  - Article 7 of the Decree no. 373 of the 24 December 2003, implementing rules of the Special Statute for Regione Siciliana concerning the exercise of the functioning of the Consiglio di Stato;
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### Facts of the case

The applicant, an association, claimed cassation of a ruling of the Consiglio di Giustizia amministrativa that upheld the judgement of Tribunale della Giustizia amministrativa (TAR - Regional Administrative Court) for Sicily that had dismissed an action for annulment of regional financing decrees on vocational training projects. The applicant claimed the violation of Article 111, last comma, of the Italian Constitution and Article 360 of the Italian code of civil procedure for the irregular constitution of the panel of judges of the Consiglio di Giustizia amministrativa (also violation of Articles 24, 101, 108 co.2, 111 co.1- 2, 117 co.1 of the Italian Constitution and Article 6(1) ECHR, Article 47 CFR and Articles 1 and 2, co.1, Code of administrative procedure).

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court of Cassation declared inadmissible the ground for appeal. Judgments of the CGA are appealable in front of that Court only for lack of jurisdiction. This includes cases of defect of composition of the bench but, according to the case-law of the Court of Cassation itself, only insofar as they are of particular gravity. This was deemed not to be the case since the concerned judge enjoyed the status of magistrate and did not have a structural link with the regional administration. Moreover, the Commissione paritetica does not exercise legislative functions as it simply acts as an instrument of cooperation between the State and the Sicily Region.

That said, the Court of Cassation engaged in an assessment of whether judicial independence and impartiality were compromised in such a way to determine a serious defect of composition of the bench such as to constitute a lack of jurisdiction.

Firstly, it highlighted the importance of the principles of judicial independence and impartiality as they “constitute a guarantee of legality, justice and equality for the citizens” and thus “represent an essential condition for the exercise of the judicial function.” It stressed that such a model is not only the one outlined by the Italian Constitution but also “the European model of judge, as independence and impartiality are guaranteed by the ECHR (Article 6) and the EU CFR (Article 47)”.

Then, it held that such a model was not seriously compromised in the present case. Although the participation of the judge in the Commissione paritetica is theoretically capable of compromising the appearance of independence and the impartiality (possible conflict of interest), this is not such as to determine the abnormality of the composition of the bench.

Finally, the Court of Cassation deemed not admissible the requests for a preliminary ruling made by the applicant and concerning the interpretation of Article 47 of the Charter (see below – section on judicial interaction techniques), as well as the questions of constitutional legitimacy.

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### Relation of the case to the EU Charter

The EU Charter was invoked by the Court of Cassation only to stress that the model of an independent and impartial judge outlined in the Italian constitution matches the one included in Article 47 of the Charter as well as Article 6 ECHR.

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### Relation between the EU Charter and ECHR

Not applicable

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### Use of Judicial Interaction technique(s)

#### Denial of Preliminary references.

As a consequence of the inadmissibility of the case, the Court of Cassation declared inadmissible, for lack of relevance, the request for a preliminary ruling concerning whether Article 47 of the Charter allowed a member of the Consiglio di Giustizia amministrativa to be part at the same time of institutions exercising regulatory functions.

Moreover, the Court of Cassation also declared inadmissible a second request for a preliminary ruling concerning the interpretation of 47 of the Charter. According to the applicant that provision, in conjunction with Article 267 TFEU, was not compatible with Article 111 of the Italian Constitution and Article 110 of the Code of administrative trial insofar as they exclude an appeal before the Court of Cassation against a decision of an administrative court because of the lack of impartiality of one member of the bench.

In light of the case law of the Court of Cassation (Cass. Sez. U., 17 December 2018, n. 32622), the denial to assess the judgements of ‘Special Judges’ (“Magistrature speciali”, which include the administrative judges) that may violate EU law is compatible with EU law itself, as interpreted by the Italian and CJEU case law. According to the Court, in light of the fact that each Member State

determines the procedural instruments to ensure the respect of the rights enshrined in EU law, such a system is rightly inspired by the need for 'limitation of appeals' and it complies with the principles of fair trial and effective judicial protection.

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Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable

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Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Denial of requests for a preliminary ruling before the CJEU and for a constitutional review before the Italian Constitutional Court.

The United session of the Court of Cassation did not engage in an assessment of the CJEU case law. Yet, it engaged in an analysis of its own case-law concerning the legitimate composition of judicial bodies and the principles of right to a fair trial before an independent and impartial judge. It also referred to the case-law of the Italian Constitutional Court on that subject-matter. In particular, the Court of Cassation concluded that the applicant's request to assess the composition of the Consiglio di giustizia amministrativa is outside its competence. In support of this lack of relevance, it recalled that "each Member State determines the procedural instruments to ensure the respect of the rights recognised in the EU law". However, the Court of Cassation did not make an express mention to the principle of procedural autonomy as defined in the CJEU case-law.

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Strategic use of judicial interaction technique (purpose aimed by the national court)

The United Session of the Court of Cassation declared inadmissible the ground for appeal. Therefore, a strategic use of judicial interaction technique cannot be assessed.

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Impact on Legislation / Policy

No impact on the legislation/policy

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Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

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Impact on national case law from the same Member State or other Member States

Not applicable

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Connected national caselaw / templates

Not applicable

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(Link to) full text

<http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=../20190401/snciv@sT>

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History of the case: (please note the chronological order of the summarised/referred national

judgments.)

1. Judgment of the Regional Administrative Court (TAR) of Sicily of 1 April 2015 – appealed before the Consiglio di Giustizia amministrativa
  2. Decision of the Consiglio di Giustizia amministrativa per la Regione Siciliana n.287/2017, 9 June 2017 - appealed before the Supreme Court of Cassation
  3. Decision of the Supreme Court of Cassation, Civil section, united sections, sent. 9042/2019, supreme instance, 1/4/2019.
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