The Scope of Administrative Jurisdiction: Control of the Administration vs. Substitution

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Workshop 2: the Scope of Administrative Jurisdiction

Structure

1. Introduction
2. Requirements under Union law
3. Possible legal actions
4. Case studies

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1. Introduction

- Determination of the scope of jurisdiction: procedural law
- Is there a specific scope of jurisdiction required? By Union law? By national law?
- What are the limits?
- Possible scope of jurisdiction
- Practice, case studies on environmental and asylum law

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2. Requirements under Union law

Courts: CJEU, GC, specialized judicial panels, and national courts

Effective remedy (Art. 47 FRC, Art. 13 ECHR)

- effective legal protection (ECJ, C-362/06, Sahlstedt, par. 43; CJEU, C-64/16: Associação Sindical dos Juízes Portugueses, par. 34 f.)
- does not demand the provision of specific legal actions (CJEU, C-169/14, par. 31 and 34)
- as long as the principles of effectiveness and equivalence are observed when claiming rights under Union law (ECJ, C-106/77, Simmenthal, par. 21-23; C-222/84)

Procedural autonomy

- It is for the national legal order of each MS to establish procedural rules (…) however, that those rules are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (the principle of effectiveness) (judgment 9. September 2020 (JP), C-651/19, par. 34and the case-law cited).

Separation of powers (Art. 13 par. 2 TEU)

- principle guarantee (ECJ, C-9/56, Meroni, par. 44)
- observance of institutional balance (ECJ C-70/88 par.22; C-133/06, par. 57)

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3. Possible legal actions

Under Union law

- Art. 259 TFEU: treaty violation procedure
- Art. 263 TFEU: recissory action
- Art. 265 TFEU: writ of mandamus
- Art. 267 TFEU: preliminary reference or ruling
- Art. 268 TFEU: compensation for damages
- Art. 279 TFEU: interim relief

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Under national law

- However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation (ECJ, C-46/93 a.o. -, Brasserie du Pecheur, par. 74).

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German Code of Administrative Court Procedure, sec. 113 par. 5:

“(5) Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff’s rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication. Otherwise, it shall hand down the obligation to notify the plaintiff, taking the legal view of the court into consideration.”

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Case study 1: facts

Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (Air Quality Directive) imposes limit values and alert thresholds for the protection of human health by noxious substances such as nitrogen dioxide. The limits have to be met on 01.01.2010, but can be exceeded for 5 years. If not, Members States have to issue Air Quality Plans (AQP) on how and in which time the criteria will be met.

In the two cities Stuttgart and Düsseldorf the criteria for nitrogen dioxide were not met at specific sampling points in 2017. The competent authorities of Federal States (Länder) North Rhine -Westphalia and Baden-Württemberg issued AQP containing several measures (such as a traffic ban for cars with Euro 5 engines from 2020 on, an increase of public transport facilities, support for the use of cleaner busses etc.). The AQP were challenged by a registered environmental charity organization, claiming for stricter and timely measures to meet the criteria. As diesel driven cars are the main producers of nitrogen dioxide (beside fine dust/particulate matter) the organization called especially for a ban of such cars.

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Such measures were refused by the authorities because national road traffic and emission control legislation would not provide for a ban related to type of drive (diesel or gas). Especially they could not introduce blue badges for the indication of admissible diesel engines because this is exclusively under federal competence (and not under Länder competence).

The organization addressed the Administrative Court and asked to oblige the defendant to issue an AQP including inter alia a diesel ban in specific zones of the cities.

Question:

How would the sentence of your verdict look like in case you grant the application? Would you explicitly introduce a diesel ban?

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Case study 1: national decision

AC Düsseldorf on 13.09.2016 and AC Stuttgart on 26.07.2017:

"The defendant is obliged to adapt the AQP in a way that it contains all necessary measures which provide for the quickest possible abidance of the limits in the city area of the interested party."

Federal Administrative Court of Germany, judgments of 22.02.2018:

BVerwG 7 C 26.16 – Deutsche Umwelthilfe vs. Land Baden-Württemberg (Stuttgart) and BVerwG 7 C 30.17 – Deutsche Umwelthilfe vs. Land Nordrhein-Westfalen (Düsseldorf)

"The defendant is obliged to adapt the AQP under observance of the legal opinion of the court on the legitimacy and proportionality of traffic bans; the remaining revisions were dismissed."

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- In the reasoning the court established that current (national) road traffic and emission control legislation does not provide for a traffic ban specifically on diesel engines.
- Due to the primacy of EU-law and its effective implementation these rules have to be set aside, if a diesel ban is the only measure to keep the period of exceeding the limits as short as possible.
- When implementing such measure the principle of proportionality must be observed. Therefore a staggered implementation of a ban gradated by the age of cars and pollution produced as well as exceptions e.g. for residents and craftspeople must be taken into consideration.

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Case study 2: facts

The massive influx of refugees entering Germany in 2015 led to a significant delay in the decisions on applications for international protection by the competent national asylum authority.

The applicant, an Afghan national, entered Germany in autumn 2014 and applied for international protection. She was only heard on the determination of the Member State responsible for the examination of her application (Dublin), but no further interiew on her qualification for international protection took place.

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In August 2016 she filed an action for failure to act (special writ of mandamus) at the competent administrative court claiming to finalize her procedure because there was no reason for not deciding on her application. She did not claim for granting her refugee status or alternatively subsidiary protection.

Questions:

Is the court obliged to decide on the substance of her application (qualification for international or subsidiary protection) even if she would be interviewed at first by the court only and not by the competent authority?

Or can the court limit its decision to a pronouncement of an obligation of the authority to decide on the application?

Can the court give instructions to the authority for the decision?

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Case study 2: national decision

The Administrative Court rejected the action as inadmissible because the applicant could only claim for a grant of her application, but not (isolated) for an obligation of the authority to decide.

On the appeal of the applicant the Higher Administrative Court obliged the authority to decide on the application.

Federal Administrative Court of Germany, judgment of 11.07.2018 -

BVerwG 1 C 18.17 –: rejection of revision; subjective legal interest for an (isolated) obligation of the authority to decide on the application, if he or she has not been interviewed; question of obligation of the court to decide on the substance of the application remains open

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CJEU jurisprudence:

C-585/16, Alheto, par. 149:

… Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that it does not establish common procedural standards in respect of the power to adopt a new decision concerning an application for international protection following the annulment, by the court hearing the appeal, of the initial decision taken on that application. However, the need to ensure that Article 46(3) of that directive has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter requires that, in the event that the file is referred back to the quasi-judicial or administrative body referred to in Article 2(f) of that directive, a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision.

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CJEU C-556/17, Torubarov, par. 78:

> … in circumstances, … where a first-instance court or tribunal has found … that, under the criteria laid down by Directive 2011/95, that applicant must be granted such protection …, but after which the administrative or quasi-judicial body adopts a contrary decision without establishing that new elements have arisen .., that court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way.

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Is the court obliged to hold a personal hearing of the applicant (Art. 14 (1) Dir. 2013/32/EU) on the reasons for persecution for the first time?

Reference for a priliminary ruling by the FAC, decision of 27.06.2017 – 1 C 26.16 –

CJEU, judgment of 16.07.2020 – C-517/17 -, Addis, par. 74:

(…) Art. 14 and 34 of the Procedures Directive must be interpreted as precluding national legislation under which failure to comply with the obligation to give an applicant (…) the opportunity of a personal interview before the adoption of a decision on the basis of Art. 33(2)(a) of that directive declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority, unless that legislation allows the applicant, in the appeal procedure against that decision, to set out in person all of his or her arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Art. 15 of that directive, and those arguments are not capable of altering that decision.

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CJEU, judgment of 19.03.2020 – C-406/18 -, PG, par. 23:

(…) Art. 46(3) of Directive 2013/32, read in the light of Article 47 of the Charter, must be interpreted as not precluding national legislation which confers solely on courts or tribunals the power to annul decisions of the competent authorities in matters of international protection, to the exclusion of the power to amend those decisions.

However, if the file is referred back to the competent administrative authority, a new decision should be adopted within a short period of time and in compliance with the assessment contained in the judgment annulling the decision.

Moreover, where a national court has found (…) that, under the criteria laid down by Directive 2011/95, the applicant concerned must be granted such protection (…), but after which the administrative authority adopts a contrary decision (…), that court must, where national law does not provide it with any means of ensuring that its judgment is complied with, amend that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, by disapplying, if necessary, the national law that prohibits it from proceeding in that way.

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Thank you for your attention and participation !

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