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Administrative Law and Procedures

Session on the Scope of Administrative Jurisdiction: Control of Administration vs. Substitution

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This document serves as an introduction to the topic of the workshop and shall prepare the participants to discuss two case studies in the on-line training.

1. Introduction and overview

The scope of jurisdiction (in the sense of competence to decide on cases) allocated to courts is determined on the one hand by national court constitution of the respective Member State and the applicable national procedural law. On the other hand in the application of Union law some procedural requirements have to be fulfilled even if the national system might not expressively provide for. The question is to what extend Union law requires a competence for the courts and where are the limits in the exercise of jurisdiction. More specifically the discussion shall focus on the question whether courts, in cases where the illegality of a challenged administrative act is established, are empowered or even obliged to substitute the illegal act by issuing a decision, even in a (national) system that primarily empowers the court only for cassation.

In the following some of the principles of Union law affecting the competence of courts are described (2.). Legal actions under Union procedural law are used for a description of the possible scope of jurisdiction of the administrative courts. German administrative court procedure law serves as an example for the extension of competences of the courts in a national system (3.). Finally, two case studies are presented for a discussion in the online training on how a court can decide in specific procedural settings in an environmental and an asylum case (4.).

2. Requirements under Union law

When looking at the procedural requirements under Union law it is clear that they are primarily addressed to the Union courts, which are the Court of Justice (CJEU), the General Court (GC, former "court of first instance") and the specialized judicial panels (Art. 257 TFEU, attached to the GC). However, national courts apply Union law to cases which arise before them, either where the CJEU or GC have already decided the point of law in question, or where the matter is acte clair in the sense of CILFIT jurisprudence (CJEU,). Hence procedural requirements under Union law have to be obeyed by national courts too when adjudicating cases which fall in the scope of Union law.

A cornerstone of Union law under the procedural aspect is the right to an ***effective remedy*** as stipulated by Art. 47 FRC and Art. 13 ECHR. An effective legal protection is described in the jurisprudence of the CJEU for example as follows:

ECJ, judgment of 23.04.2009 - C-362/06 P – Sahlstedt, par. 43:

> Individuals are entitled to effective judicial protection of the rights they derive from the Community legal order. The judicial protection of natural or legal persons who are unable, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, to challenge directly Community measures of the same kind as the contested decision must be guaranteed effectively by a right of action before the national courts. Those courts are under a duty, in accordance with the principle of cooperation in good faith laid down by Article 10 EC, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables those persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act such as that at issue, by pleading the illegality of such an act and by asking those courts to make a reference to the Court of Justice for a preliminary ruling on legality.

So under Community law the national judge is entrusted with the protection of rights established under this law. The European Court rather early has established the legal principle of effective legal protection as a basic right of the individual in Community law (ECJ, judgment of 15.05.1986 – C 222/84 – ECJ-Rep. 1986, 1651 <1682>).

CJEU, judgment of 27.02.2018 - C-64/16: Associação Sindical dos Juízes Portugueses, par. 34 f.:

> (34) The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (see, to that effect, judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C‑583/11 P, EU:C:2013:625, paragraphs 100 and 101 and the case-law cited).
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> (35) The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, Unibet, C‑432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, DEB, C‑279/09, EU:C:2010:811, paragraphs 29 to 33).

However, the principle does not require the provision of specific legal actions by the national systems, as long as the ***principles of equivalence and effectiveness*** are observed:

CJEU, judgment of 17.07.2014 - C-169/14, par. 31 and 34 for enforcement procedures:

(31) In this respect, it must be noted that, in the absence of harmonisation of national enforcement procedures, the detailed rules establishing the right of appeal against a decision ruling on the legality of a contractual clause, arising in the course of mortgage enforcement proceedings, are matters falling within the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States. Nonetheless, the Court has emphasised that those detailed rules must meet the conditions that they should be no less favourable than those governing similar domestic situations (principle of equivalence) and that they should not in practice render impossible or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (see, to that effect, judgments in Mostaza Claro, C‑168/05, EU:C:2006:675, paragraph 24; Asturcom Telecomunicaciones, C‑40/08, EU:C:2009:615, paragraph 38; Aziz, EU:C:2013:164, paragraph 50; and Barclays Bank, EU:C:2014:279, paragraph 37).

(34) Second, as regards the principle of effectiveness, the Court has previously held that every case in which the question arises whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see, to that effect, judgments in Asociación de Consumidores Independientes de Castilla y León, C‑413/12, EU:C:2013:800, paragraph 34, and Pohotovosť, C‑470/12, EU:C:2014:101, paragraph 51 and case-law cited).

(35) Thus, the obligation for the Member States to ensure the effectiveness of the rights that the parties derive from Directive 93/13 against the use of unfair clauses implies a requirement of judicial protection, also guaranteed by Article 47 of the Charter, that is binding on the national court (see, to that effect, judgment in Banif Plus Bank, C‑472/11, EU:C:2013:88, paragraph 29). That protection must be assured both as regards the designation of courts having jurisdiction to hear and determine actions based on EU law and as regards the definition of detailed procedural rules relating to such actions (see, to that effect, the judgment in Alassini and Others, C‑317/08 to C‑320/08, EU:C:2010:146, paragraph 49).

It must be recalled that, in accordance with the CJEU's settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the ***principle of procedural autonomy***, on condition, 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. 34, with reference to the judgment of 19 March 2020, LH (Tompa), C-564/18, EU:C:2020:218, par. 63 and the case-law cited).

ECJ, judgment of 09.03.1978 - C-106/77, Simmenthal, par. 21-23; C-222/84)

> (21) It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it whether prior or subsequent to the Community rule.
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> (22) Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside the national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

When considering the power of a court not only to declare an illegal administrative act null and void but to substitute an illegal decision by a legal one, the ***principle guarantee*** (see ECJ, judgment of 13.06.1958 - C-9/56, Meroni, par. 44) ***of separation of powers*** under Art. 13 par. 2 TEU comes into play. The prescribed limitation of competences of the organs, respectively the limited empowerment between the organs, guarantees observance of institutional balance. The principle requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (ECJ, judgment of 04.10.1991 - C-70/88 par.22; judgment of 06.05.2008 - C-133/06, par. 57). Under Article 13 par. 2 TEU, each EU institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union (see judgment of 13.06.1958 - C-9/56, Meroni, p. 152). Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur (ECJ, judgment C-70/88, ECR 1990 I – 2041, par. 20 ff.). From this results in principle that the judicial power cannot exercise executive power, as long as it is provided otherwise by law.

3. Possible legal actions

As mentioned, the competence of the courts is defined by judicial actions and remedies as laid down in the procedural and or court constitution law. The scope of jurisdiction (in the sense of court competence) is also determined by the parties. When legal action is taken, the court can only decide as far as the parties, e.g. the applicant claims for. And it is bound when the defendant gives in.

The two principal remedies available against the Union are annulment and compensation, which are also the main remedial mechanisms for holding public bodies to account in domestic legal systems. Annulment embodies the fundamental precept that where the action that has been taken is invalid or illegal then it prima facie be held to be void and of no effect. Compensation is equally significant as a remedy for losses caused to those who have suffered financially as a result of public action that is unlawful.

Under Union law

Art. 259 TFEU: treaty violation procedure

Art. 263 TFEU: recissory action, review of the legality of legislative acts of the council, the COM, and the European Central bank, by MS, the parliament, council or COM and (par. 4) natural and legal persons against an act directed to it, him or her

Art. 263 par. 4: Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Scope of competence:
Art. 264 par. 1: If the action is well founded, the Court (...) shall declare the act to be void.

Art. 265 TFEU: writ of mandamus, action for failure to act, writ of mandamus or administrative inaction suit, by Union institutions and all natural and legal persons after par. 3

Scope of competence:
Art. 266: the institution whose act has been declared void or whose failure to act has been declared contrary to treaties shall be required to take the necessary measures to comply with the judgment

Art. 267 TFEU: preliminary reference or ruling, concerning the interpretation of the treaties and the validity and the interpretation of acts of the institutions, bodies, offices and agencies of the Union, the Union institutions. By preliminary references of the national courts

Art. 268 TFEU: compensation for damages, liability of Union instituions/authorities (Amtshaftungsklage)

Art. 279 TFEU: interim relief, prescription of interim measures by the court

Art. 278 TFEU: actions brought before the court do not have suspensory effect. If it considers that circumstances so require the court may order that application of the contested act be suspended

Grant of interim relief pending the final decision on the substance of the case and the way in which those principles are applied in relation to both direct and indirect actions.

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, judgment of 05.03.1996 - C-46/93 a.o. -, Brasserie du Pecheur, par. 74).

From the national point of view we have different legal systems which on the one hand must provide for the previously mentioned tools. On the other hand the national systems come from different historical and political background. There are systems with rather limited legal actions, e.g. only cassation and annulment of illegal administrative acts, and systems with rather wide range of possibilities foreseen by legislation to impose obligations to the parties and to establish the (il)legality of an act, may it be an act in an individual case or a general legislative act.

In Germany for example procedural and material law provide for a wide range of legal actions:

> revocatory or recissory action: cancelation or annulment of an act (Anfechtungsklage)
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> writ of mandamus, enforcement action: sentencing to issue a rejected or omitted act (Verpflichtungsklage)
>
> action for declaratory judgment (Feststellungsklage, subsidiary to the afore mentioned)
>
> claim for legislative control (Normenkontrollklage)
>
> Constitutional complaint

As for the question of power of a court to substitute an administrative decision, the *German Code of Administrative Court Procedure, sec. 113 par. 5,* provides for:

> *"(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."*

An administrative act is based on the exercise of discretion as provided by the applicable law. The court establishes a failure in the exercise of discretion. As the exercise of discretion is allocated to the administrative authority (separation of powers), the court can only establish the mistake(s) and return the case to the administration by ordering the issuance of a new administrative act obliging the administrative authority to take into consideration the way discretion has to be exercised as described by the court.

4. Case studies

Case study 1 "diesel ban": 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.

The authorities refused such measures because national road traffic and emission control legislation would not provide for a ban related to type of drive (diesel or gas engine). 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?

Case study 2 "asylum case": 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 interview on her qualification for international protection took place.

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 asylum 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?

CJEU jurisprudence for preparation (attached):

Judgment of 25.07.2018 - C-585/16, Alheto, par. 144 - 149
Judgment of 29.07.2019 - C-556/17, Torubarov, par. 77 f
Opinion of Advocate General Bobek in the Torubarov case

Judgment of 19.03.2020 - C-406/18, PG, par.23