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Intensity of Judicial Review in German Environmental Cases

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I. Introduction

Access to justice is a crucial issue in certain environmental cases in which a third party challenges a permit granted to an operator. The German doctrine in this matter is criticized in some comparative studies as being too restrictive[1]. But access to justice is only the first step to overcome the threshold for the admissibility of an action. The second question is: what happens afterwards? In what manner does judicial

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[1] See e.g. Nicolas de Sadeleer/Gerhard Roller/Miriam Dross, Access to Justice in Environmental Matters, p. 22 http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexHSadeleerReport.pdf

Milieu Ltd., Measures on access to justice in environmental matters, ‚Country report for Germany http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2011/11/d8.pdf

Jan Darpö, Effective Justice? *Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union,* p. 11 and 33 http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf

review go on? Is the scope of judicial review limited? Does the court control only whether the procedural rules are respected? Will the control on the merits focus on obvious errors only? To what extent is a discretionary power of the administration recognized and if so, what are the rules governing the judicial control of discretionary decisions?

I want to give firstly a short overview on the discretionary power of German administrative authorities and the rules for the judicial control in this field, secondly I will explain the German doctrine making a sharp difference between discretion (Ermessen) and interpretation of unspecific legal terms (unbestimmte Rechtsbegriffe) and finally I want to present the practice of German courts in environmental matters particularly.

II. The discretionary power

1. General considerations

"Discretionary power" in this context means: No strictly binding rules exist on the legal consequence, if the conditions of a rule are met. The administrative authority has the choice between different ways of action or between action and omission. In case of discretion in principle different solutions may be legal. But discretion is never unlimited. Article 114 of the German Code of Administrative Court Procedure[2] provides:

> "*Insofar as the administrative authority is empowered to act in its discretion, the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment…"*

[2] http://www.gesetze-im-internet.de/englisch_vwgo/index.html

In practice the most important limitation of discretion is caused by two principles on constitutional level, set out in EU law[3] too: Proportionality[4] and Equality[5].

It may happen in practice that discretion shrinks so much that only one way of solution of a conflict may be legal. Such a situation is stated sometimes in the German administrative jurisprudence.

The German *administrative courts* principally have **not any** discretion themselves when deciding on the merits of a case according to the constitutional principle of "separation of powers" and in consideration of the constitutional rule[6] that "*Judges shall be …subject only to the law".* In other terms, discretion is a matter of the executive only.

2. The field of administrative discretion

There are different areas of administrative discretion to be distinguished: The application of legislation and the field of planning.

a) Application of legislation in environmental matters

In the areas that are regulated by a statutory provision it is up to the legislator to grant discretion to the administration or not. But the legislator is not completely free, but is bound by the constitution.

Regarding a permit for any construction, fundamental rights of the operator are at stake, like the freedom to conduct a business[7] and the right to property[8] unless such

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[3] http://europa.eu/pol/pdf/qc3209190enc_002.pdf

[4] Article 5 (4) Treaty on European Union (EU)

[5] Article 20 Charter of Fundamental Rights oft he EU

[6] Basic Law, http://www.gesetze-im-internet.de/englisch_gg/index.html , Article 97 (1)

[7] See Article 12 Basic Law, Article 16 Charter of Fundamental Rights of the EU

[8] See Article 14 Basic Law, Article 17 Charter of Fundamental Rights of the EU

a project is generally prohibited and may be allowed exceptionally only. German law principally does not provide any administrative discretion in this area.

But a classical field of discretion is intervention by an administrative order e.g. to stop an illegal activity or to impose additional conditions for an operation which was already permitted, if the existing conditions are found to be not sufficient.

b) Planning

In the field of planning (e.g. city development, infrastructure projects) strategic discretion (Planungsermessen) is broadly recognized because planning without freedom to plan is regarded as contradictory. But in the case law of the German Federal Administrative Court the requirement of equitable balancing of opposing (public or private) interests (Abwägungsgebot)[9] was created, which must be respected. This restriction is in favor of a plaintiff who challenges a plan by a legal remedy.

III. Interpretation of unspecific legal terms

Legislation does not go without the use of undefined terms like “reasonable”, “unreliable” or “considerable nuisance” .Under the German doctrine a margin of interpretation in case of unspecific legal terms (Beurteilungsspielraum), which were to be respected by the judiciary, is principally excluded. Such a restriction is recognized only in narrow areas, mainly characterized by a situation in which an assessment by the court is not possible because of practical reasons, e.g. the assessment of the behavior of a civil servant in a recent period or the classification of wine quality

[9] According to this doctrine

- an evaluation has to be conducted, in which
- all public and private interests concerned are to be taken into consideration and
- must be assed correctly according to their importance and
- the balancing of opposing interests must comply with the principle of proportionality

according to the taste[10]. The restrictive practice of the German courts is based on the fundamental right on access to justice according to Article 19 (4) Basic Law[11] which requires not only access but an *effective* judicial control as well. Following this approach the Federal Constitutional Court (Bundesverfassungsgericht) had once overruled the settled case law of administrative courts which was limiting the judicial control of the assessment of an examination on the infringement of procedural rules or obvious errors of the examiner[12]. In a recent decision[13] the Federal Constitutional Court continued this jurisprudence and held, that *"the review carried out by the Federal Finance Court, restricted as it was to a review as to manifest error, is not compatible with the guarantee of legal protection provided by Article 19.4 sentence 1 of the Basic Law because there already is no required statutory basis for this."*[14] It must be added that each statutory basis in turn has to take into consideration the essence of the basic right on access to justice. The Constitutional Federal Court pointed out furthermore that "*the release of the application of the law from judicial review always requires sufficiently weighty factual grounds orientated in line with the principle of effective legal protection."*

IV. The power of the judge

The distinction between discretion and binding statutory rules seems to be clear in theory. But in practice the question may occur, whether a statutory provision grants discretion to the public administration or not. The result is to be found by means of interpretation. So finally the judiciary decides on the scope of its review, when

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[10] Judgment from 16 May 2007, BVerwG 3 C 8.06
http://www.bverwg.de/entscheidungen/entscheidung.php?ent=160507U3C8.06.0

[11] *"Should any person's rights be violated by public authority, he may have recourse to the courts. …"*

[12] Decision from 17 April 1991, 1 BvR 419/81 and 1 BvR 213/83

[13] From 31 May 2011, 1 BvR 857/07,
http://www.bverfg.de/entscheidungen/rs20110531_1bvr085707.html

[14] Press release in English: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-042en.html

clearing whether statutory rules give guidelines for the exercise of discretion only, or if they are strictly binding. The same principle applies to the question whether a margin of interpretation (out of judicial review) is go be granted to the administration.

V. Judicial review in environmental cases

There is a well-established case law on discretion of the administration in environmental matters. But the intensity of judicial control of the assessment of facts is all the more discussed the larger a project is. That is why I will focus on permits for public projects of infrastructure (e.g. highways, railroads, waterways, airports) and major private projects which may have an impact on the environment. In the first mentioned cases a planning approval procedure (Planfeststellungsverfahren) is provided[15] . In the latter cases a permit according to the Federal Immission Control Act [16] is needed. In such a case the preconditions for the permit are provided by binding rules, the interpretation of which by the public authority is submitted to full control by the judge. The same principle applies as to the environmental requirements for a planning approval for a public project of infrastructure. The interpretation of unspecific legal terms does usually not raise significant problems in the field of protection against immissions. Based on the Federal Immission Control Act meanwhile 36 federal ordinances and several administrative regulations were adopted in which unspecific legal terms like *"harmful effects on the environment"* are specified inter alia by a determination of immission levels limiting the pollution. Then the emphasis shifts to the question, whether the limit is not exceeded in the given case. For the solution sometimes expert witness is needed. More complicated is the situation in the field of nature protection in which scientifically based and generally recognized rules are difficult to determinate. Here national German law seems to be stricter than EU law. Thus the Federal Administrative Court [17] held e.g. that the subsumption under the terms "significant effect" (on a special area of conservation)

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[15] See Article 72 – 78 Administrative Procedure Act http://www.iuscomp.org/gla/statutes/VwVfG.htm

[16] http://www.iuscomp.org/gla/statutes/BImSchG.htm

[17] Judgment of 17 January 2007, BVerwG 9 A 20.05, paragraph 38 http://www.bverwg.de/entscheidungen/pdf/170107U9A20.05.0.pdf

and “favorable conservation status” is to review without according any margin of interpretation to the administrative authority. But there is case law[18] to be found which reduces the intensity of judicial control in specific situations. In this context a new term was created which may be translated as “prognosis privilege” of the administration (“Einschätzungsprärogative” der Verwaltung). Such a judicial self restraint applies in cases in which judicial review is not able to provide more convincing evidence.

VI. Concluding remark

In Germany access to justice in environmental matters is on the one hand limited by the “protective norm doctrine” (Schutznormtheorie) according to which the plaintiff can invoke only the infringement of legal rules which intend the protection of individual rights. On the other hand in case of admissibility of an appeal a judicial control of high intensity is guaranteed on the merits, and the ex officio investigation principle[19] applies. Such a judicial interference is called an obstacle for investments and for competitiveness by the operators. In the field of law making politics a kind of deal is proposed: wider access to justice in exchange for closer judicial review. Such a tendency is to be found in a recent amendment[20] of the German Environmental

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[18]Federal Constitutional Court, Decision from 10 December 2009, 1 BvR 3151/07, http://www.bundesverfassungsgericht.de/entscheidungen/rk20091210_1bvr315107.html (greenhouse gas emission trading system)

Federal Administrative Court, judgment from 9 July 2008, BVerwG 9 A4.07, http://www.bverwg.de/entscheidungen/pdf/090708U9A14.07.0.pdf (species protection) paragraph 65 and judgment from 13 October 2011, BVerwG 4 A 4001.10 http://www.bverwg.de/entscheidungen/pdf/131011U4A4001.10.0.pdf (prognosis on development of traffic) paragraph 59

[19] Article 86 (1) Code of Administrative Court Procedure (supra footnote 2)

“*The court shall investigate the facts ex officio; those concerned shall be consulted in doing so. It shall not be bound to the submissions and to the motions for the taking of evidence of those concerned.”*

[20] Gesetz vom 21. Januar 2013 (BGBl. I S.95) http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl&bk=Bundesanzeiger_BGBl&start=/

Appeals Act (Umweltrechtsbehelfsgesetz). The Court of Justice of the European Union had stated in the "*Trianel*" judgment from 12 May 2011[21] that the original version of this act[22] was not in compliance with EU legislation insofar as the scope of judicial review on an action brought by an NGO was restricted. Now the new act intends to introduce instead of restricting the scope of judicial review a less intensive control. The Association of German Administrative Judges (Bund Deutscher Verwaltungsrichter und Verwaltungsrichterinnen) had criticized in a parliamentary consultation this intention[23]. I think that the traditional intensity of review by German administrative courts, especially in environmental matters, has a high value which is worth being defended.

/*[@attr_id=%27bgbl113s0095.pdf%27] Draft with reasoning: http://dip21.bundestag.de/dip21/btd/17/109/1710957.pdf

[21] Case C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg http://curia.europa.eu/juris/document/document.jsf?text=&docid=82053&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1052991

[22] English version: http://www.bmu.de/fileadmin/bmu-import/files/english/pdf/application/pdf/umwelt_rechtsbehelfsgesetz_en_bf.pdf

[23] The statement is published in BDVR Rundschreiben 2/2012 http://www.bdvr.de/aaa_Dateien/bdvr-rs_2012-02.pdf p. 64