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JUDICIAL REVIEW AND REMEDIES IN A NUTSHELL

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1. CONSTITUTIONAL LAW

Judicial review and remedies in administrative law are profoundly influenced by constitutional law. The current German corpus of administrative court procedure is based on constitutional guarantees, especially the effective recourse to the courts as a means to protect individual freedom rights. In fact, constitutional demands growing in detail over the past 60 years have forged a coherent system of judicial remedies putting the administration under effective control..

1.1 Guarantee of Effective Judicial Review

Article 19 paragraph 4 of the German Constitution (*Grundgesetz* – Basic Law) guarantees any person whose rights are affected by public authorities a general recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The guaranteed recourse is, according to the established jurisdiction of the Federal Constitutional Court, more than a mere right to file a request. It is the guarantee of effective judicial review. The Federal Constitutional Court has moulded detailed aspects of effectiveness out of the abstract constitutional provision. As a result, the whole administrative court procedural law is interspersed with constitutional stuff.

Due to the guarantee of effective judicial review, the legal control of the administration is vested in ordinary and special courts. Administrative jurisdiction is exercised by independent courts separated from the administrative authorities. There are special administrative courts, but they are organized as an ordinary court. According to Article 97 of the Basic Law, judges shall be independent and subject only to the law. Judges are appointed for life.

1.2 Organization of Administrative Courts

According to Article 74 paragraph 1 No. 1 of the Basic Law, the Federation has legislative power extending to the court organization and procedure. Based on this power the federal legislation enacted the Code of Administrative Court Procedure.

Regarding Article 95 of the Basic Law, the Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction. In accordance with Article 92 of the Basic Law the remaining courts – the large body of the judicial branch – are courts of the constituent states (Länder). As a result of the special federal structure of Germany, judicial review of the administration rests with the administrative courts of the Länder, at least in principle. It is even within their jurisdiction to control the federal administration.

The organization of the courts remains within the legislative competence of the Federation (see the aforementioned Article 74 paragraph 1 No. 1 of the Basic Law). According to federal law, administrative courts of the Länder shall be the Administrative Courts (the first instance competent in most cases) and one Higher Administrative Court (primarily a court of appeal with power to review the relevant facts) in each state; in the Federation it is the Federal Administrative Court, which shall have its seat in Leipzig. The competences of the Federal Administrative Court primarily include the legal control of the Länder courts as a court of appeal regarding federal law. The Federal Administrative Court has only a very limited jurisdiction as a first instance.

In addition to the general administrative jurisdiction, there are special administrative courts. Fiscal Courts are competent to rule on matters of tax law. The jurisdiction of the Social Courts includes cases arising under the public social security system. Even ordinary courts have jurisdiction over specific administrative law cases. They act as functional administrative courts. The most important administrative law cases within the jurisdiction of ordinary courts are the review of administrative acts of the antitrust and competition authorities, energy regulation law, and public liability.

Judicial review of parliamentary statute law is monopolized in the Federal Constitutional Court and 16 constitutional courts of the constituent states with regard to Article 100 paragraph 1 of the Basic Law: If a court concludes that a law enacted by parliament on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Länder court with jurisdiction over constitutional disputes where the constitution of a constituent state is held to be violated, or from the Federal Constitutional Court where the Basic Law is held to be violated.

2. STATUTE LAW

2.1 The Code of Administrative Court Procedure

The rules of administrative court procedure and provisions on the organization of courts are laid down by federal statute law, the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*). There are special (but similarly structured) codes regarding fiscal courts and social courts: the Code of Fiscal Court Procedure (*Finanzgerichtsordnung*) and the Code of Social Court Procedure (*Sozialgerichtsgesetz*). In addition, there are complementary provisions on administrative court procedure in profusion, scattered on various administrative statutes, e. g. in the laws on energy and telecommunications regulation, the law on judicial review and remedies regarding environmental procedures, or in the German antitrust law.

2.2 General Principles of Administrative Court Procedure

Remedies to administrative courts are, at least in general, restricted to plaintiffs that can claim the impairment of an individual right. In accordance with Section 42 paragraph 2 Code of Administrative Court Procedure an action shall only be admissible if the plaintiff claims that his/her rights have been violated by the relevant administrative act

or its refusal or omission. As a consequence, neither a mere interest of the plaintiff nor public interests in the legality of administrative actions are sufficient to grant a standing.

Regarding the procedure at court, there are some general principles an administrative court has to apply. There is the fundamental right to be heard (Article 103 paragraph 1 of the Basic Law) demanding the court to consider every relevant aspect brought forth by the plaintiff or by another party during the procedure. In addition, German administrative court procedure is an inquisitorial system of administrative justice. Thus, the court has to examine the relevant facts ex officio. The court is not bound to the submissions or to the motions for the taking of evidence of the relevant parties (Section 86 paragraph 1 Code of Administrative Court Procedure).

2.3 Remedies

The Basic Law guarantees effective recourse to the courts, as far as any person can claim that his/her rights are violated by public authority (see above). Thus, the Constitution warrants an effective and coherent system of remedies against all acts of state that affect the citizens. The Code of Administrative Court Procedure offers an adequate set of remedies, at least if the code is interpreted in conformity with the Constitution. Nonetheless, remedies are divided into separate actions with different requirements for the admissibility of an action and with different competences of the courts to remedy a request.

The most important actions are the rescissory action (*Anfechtungsklage*) and the enforcement action (*Verpflichtungsklage*) according to Section 42 paragraph 1 Code of Administrative Court Procedure, as both actions are applicable to administrative acts, the common legal form of an administrative measure. An administrative act is a sovereign decision of a public authority on a specific case under public law. According to Section 42 paragraph 1 Code of Administrative Court Procedure, the plaintiff can request by means of an action the rescission of an administrative act or the sentencing to issue a rejected or omitted administrative act. If the dispute does not rest on the questioned legality of a valid administrative act the code offers an action for a declaratory judgement

(*Feststellungsklage*): The establishment of the existence or non-existence of a legal relationship or of the nullity of an administrative act, according to Section 43 Code of Administrative Court Procedure, may be requested by means of an action if the plaintiff has a justified interest in the establishment being made soon. In addition, there is an unwritten (but constitutionally demanded) residual action that, like an omnibus clause, covers every request that is not explicitly codified within the Code of Administrative Court Procedure, the so called general action for performance (*allgemeine Leistungsklage*). Thus, recourse to the courts is made independent from the legal form of administrative measures, and a comprehensive system of actions against every act of state that might impair individual rights is established.

A successful rescissory judgement rescinds the relevant administrative act and, thus, eliminates any of its effects that impair the plaintiff's rights (see Section 113 paragraph 1 Code of Administrative Court Procedure). If an enforcement action or a general action for performance proves to be well-founded, the administrative court puts the obligation incumbent on the administrative authority to effect the requested official act (see Section 113 paragraph 5 Code of Administrative Court Procedure). If the administrative authority does not comply with the relevant judgement, the final verdict can be enforced against the authority through the court (see Section 167 et sequ. Code of Administrative Court Procedure).

Prior to lodging a rescissory or enforcement action, according to Article 68 Code of Administrative Court Procedure the lawfulness and expedience of an administrative act shall be reviewed in preliminary proceedings by administrative authorities. The functions of preliminary proceedings are, on the one hand, to offer the public administration an instrument of self-regulation and, on the other hand, to grant the applicant an additional remedy to settle conflicts without involving the courts. Notwithstanding that, federal law enables both federal and state legislation to establish exceptions and exclude preliminary proceedings for certain subjects. A broad scope of statute provisions in federal and state administrative law has taken advantage of this facility. A couple of constituent states have generally abolished preliminary proceedings, recently, to reduce bureaucracy and to accelerate procedure.

2.4 Interim measures

According to Section 80 paragraph 1 Code of Administrative Court Procedure an objection raised by a plaintiff and a rescissory action automatically enfold suspensory effect, that means that the relevant administrative measure may not be enforced until the court hands down a decision. Thus, there is no need to provide additional interim measures as long as the suspensory effect lasts. Nonetheless, there are various legal exceptions and restrictions reducing the suspensive automatism. The administration can avoid the suspensory effect if the relevant administrative act is replenished with a special clause providing for immediate enforcement. In those cases, on request by the plaintiff, the court dealing with the main case may completely or partly order or restitute the suspensory effect in accordance with Section 80 paragraph 5 Code of Administrative Court Procedure.

In all other cases, Section 123 Code of Administrative Court Procedure empowers the administrative courts to provide interim measures with regard to a pending dispute. On request of the plaintiff, the court may, even prior to the lodging of an action, provide interim measures regarding the subject-matter of the dispute if the substantial danger exists that a right of the plaintiff might be considerably impeded. Interim orders are also admissible to settle an interim condition regarding a contentious legal relationship if a regulation by court appears necessary, above all in order to avert major disadvantages or prevent immanent force.

3. IMPACT OF EUROPEAN LAW

European Union law has a deep impact on the German system of administrative court procedure, as European Union law depends on national courts enforcing European law and improving its effectiveness in the decentralized European enforcement system. The general aim of effectiveness followed different paths to influence national law. From a European perspective a plaintiff that takes recourse to the courts to file a European law

based claim is an effective instrument to put the decentralized administrative enforcement of European Union law and the national administrations under effective judicial control. As a result, the narrow concept of standing under German administrative court procedure law has been widened step by step to fit the European demands regarding effective decentralized judicial review. Although European law does not demand a systematic shift from an individual rights based standing to a concept of 'objective' control, the effectiveness of European Union law depends on a broad access to national courts and is based on a more or less instrumental concept of individual rights. Therefore, a substantial interest in the enforcement of an EU directive or regulation may be sufficient to create an individual right and an appropriate standing before the national courts, even though German administrative law doctrine might have qualified the relevant provision as 'merely objective' (that means not granting individual rights). In effect, European Union law has opened the recourse to the courts, in particular in disputes concerning environmental standards.

A recent decision of the European Court of Justice shows obvious conflicts between, on the one hand, the European approach of a wide access to justice as a means of public control and, on the other hand, the narrow concept of standing of the German administrative court procedure law. Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment warrants that members of the "public concerned" have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the relevant Directive (Article 3 paragraph 7 and Article 4 paragraph 4). In contrast, the German law on judicial review and remedies regarding environmental disputes (*Umweltrechtsbehelfsgesetz*) grants standing only as far as an organization could claim an infringement of a provision granting individual rights (not necessarily to the organization itself but to any individual subject). This statute obviously proved to be unsuitable to translate the wide access to justice concept of Directive 2003/35/EC into adequate German court procedural law. Thus, the European Court of Justice, in a Judgement from 12 May 2011 (C-115/09), unsurprisingly (and rightly) quashed the German attempt to evade an effective transformation of the Directive.

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