



Celebration of 20 years of the Court of First Instance of the European Communities

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The Nature of Judicial Control - an Austrian Perspective

Mr. Chairman, distinguished Colleagues, Ladies and Gentlemen!

It is a great honour for me to have been invited to speak at such a splendid occasion. Therefore I shall not embark on my deliberations without congratulating the European Court of First Instance, its President and its members for their excellent jurisdiction.

The title of the of this afternoons main essay inspired me to focus on one aspect of judicial control, the relationship between the controlled administration and the controlling tribunal. For this purpose I will use the example of the court which I preside, the Austrian Administration Court, not to demonstrate this system as a "best practise model" but to concentrate on a structural element. Since the CFI is mainly a general administrative court, I assume at least some common features. There is certainly no ideal relationship between the administration and its judicial control. The Austrian system presents a quite distinctive way to construct this relationship, with all its positive and negative aspects.

So let me start with an obvious truth: We have to be aware that the English expression "to control" has a double connotation: "To control" the administration can be understood as "to reexamine" the administration as well as "to conduct" the administration. To my mind this ambiguity illustrates superficially but tangibly that the judicial control of the administration - not necessarily administrative jurisdiction in the sense of a special body - can be structured differently in various legal cultures.

The Austrian Administrative Court was established as early as 1876. The Foundation of the Court was the result of a change from absolutism to liberalism and the emergence of the "Rechtsstaat" in the Austrian part of the Monarchy. It was up to the Administrative Court to guarantee the legality of administration. It was this Court that eradicated pure arbitrary decisions and paved the way to the Austrian version of the rule of law. In spite of various constitutional breaks the courts basic structure including its spirit remained the same for now more than 133 years.

The Austrian system can be characterized by a series of principles:

- The entire administrative jurisdiction is centralized at the Administrative Court. The court is at the same time the first and the supreme administrative court; only recently a special court for asylum cases has been installed. Nevertheless the Administrative Court functions in several areas as a second level appeal above independent administrative review panels.
- The Administrative Court is specialized in the examination of the lawfulness of administrative decisions, not of their "expediency", and is limited to a formal legal-standard-control a posteriori. Complaints can only be brought before the Administrative Court if all available administrative appeals have been exhausted.
- In principle the Court's function is cassatory. In its main field of activity, the examination of administrative rulings alleged to be illegal, the Administrative Court annuls the illegal ruling and remands the case to the respective administrative authority, which in turn is obligated to implement the opinion of the Administrative Court. Only in the case of a complaint claiming the breach of the onus to decide, the Administrative Court decides the case on the merits.

The cassatory function of the Administrative Court requires that the cases themselves are not reopened. This is why the subject of the administrative judicial procedure is not the administrative case as such, but the examination of the lawfulness of the administrative proceedings. Thus the administrative proceedings are "petrified" in a way. On the one hand the petitioner cannot allege anything before the Administrative Court, that he has not already alleged during the administrative proceedings; on the other hand the responding authority cannot present new arguments in their statement to the Administrative Court. As a consequence only few oral hearings are held before the Administrative Court. Very often there is a pure "document procedure". The Administrative Court however is free to hold oral

hearings which may be useful for the discussion of legal questions. Within the scope of article 6 ECHR oral hearings must be held in any case.

- The Administrative Court's restraint to the facts of a case as ascertained by the administrative authority is another expression of this "reexamining-only" element. That is why there is no new procedure of taking evidence before the Administrative Court. If the Administrative Court decides that the administrative authority made an incorrect finding of facts and that a violation of the party's legal position is at least possible the Administrative Court annuls the illegal ruling because of a breach of procedural provisions.

Obviously a system like this is based on the idea of a certain balance between the administration and its judicial review. So the administrative jurisdiction does not only serve as an instrument to control the administration but also - in a certain sense - for protecting the administration. We should not forget that the idea of a separation of powers was - historically seen - not intended to protect the judiciary but the administration, especially in the French tradition.

In Austria this understanding of judicial control was expressed very clearly by the famous Austrian lawyer and member of parliament Joseph Unger in 1875: "The Administrative Court should administer justice - not administrate".

In a deeper sense the crucial point is how far administrative discretionary power is accepted and consequently judicial review restricted. The principles referred to above help maintaining at least some sort of discretionary power:

- a certain freedom of interpretation, when a legal norm allows more than a single understanding,
- a latitude concerning the appropriate administrative measures, when "discretionary power" is granted formally by law.
- an acceptance of a - small - uncontrolled sphere of the assessment of facts,
- the system of pure cassation, insofar as the administrative authority has to replace the annulled administrative act and is - contrary to the court - enabled to consider new legislation or new facts.

Keeping the balance between administration and judicial review demands of course a certain understanding of the administration. Underlying is a strong principle of legality: According to the Austrian Federal Constitution the "entire public administration" must be based on law including of course community law. That provides not only that the administration, when exercising compulsive authority, must not act against the law, but also that for each act a legal authorization is necessary.

Therefore "administration" is predominantly understood as a legal function and not as brute politics (not in the sense of "good administration or governance" and also not as "prosecution"). This means that the administrative authority has to abide by rules of procedures and legal forms. With the legality principle the thought of the "Hierarchy of Legal Norms" takes the shape of positive law. The rules of procedure of the administration are relatively strict and resemble the judicial procedural law. In return the administration is not subjected to control by civil courts, but is under the control of a particular administrative jurisdiction. Thus the independence of the administration gains importance - while keeping its character as legal function. So in this traditional scenery the administration and the administrative jurisdiction can be seen as communicating tubes. The relative detained jurisdiction is counterbalanced by a strictly regulated administration and vice versa.

However it is a common experience that in all systems the tendency goes in favor of more judicial control and of narrowing all spheres of discretionary power. The reason is that judges are always to be set on extending their spheres, even if this means more work.

A new legal situation emerges sometimes with community law: For instance in the field of regulation we are faced with guaranteed fields of discretionary power. This can lead to a tension between a given constitutional concept of judicial review and the European law like it is the case in Germany with a view to the Telecom regulation and a pendant procedure before the Bundesverfassungsgericht.

It would be incorrect to neglect the problem that the Austrian system is not in full harmony with the European Convention of Human Rights, esp. with its Art. 6: To say it frankly, the European Convention has no eye for the quality of the administrative procedure, there is no real legal life outside a tribunals gate. Therefore the reported

restrictions esp. the inability to examine the facts are a persistent factor of uncertainty, even though the European Court of Human rights has not as yet denied the competence of the court to reexamine the applicants allegations "point for point" in every single case.

The other problem is that a system in which the complainant reaches a tribunal rather late is under the constant stress of violating the obligation to "decide in a reasonable time", even excluding the fact that the Administrative Court is anyhow notoriously overburdened. The reported problems are the reason for a reform project which started several years ago aiming at the installation of a first instance of administrative court.

Let me finish with saying that it is perhaps not the worst tradition to include - as far as possible - the administration into the system of legal protection. To my opinion the quality of a legal administrative order depends not only on the wisdom of high and supreme instances but largely on the quality of the administrations everyday implementation of the law.

Thank you for your attention!