CONSEIL D'ÉTAT

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Answers to questionnaire: Germany

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Disputes concerning acts by regulatory authorities

- Statement on behalf of the German Federal Administrative Supreme Court -

Courts with competence to hear disputes concerning regulatory authorities

1. Does your supreme administrative court have competence to hear appeals against acts by regulatory authorities?

The Bundesverwaltungsgericht (= the German Supreme Federal Administrative Court in Leipzig) has to hear and decide appeals against the decisions taken by the courts below in only a few kinds of regulatory affairs: The regulation of electronic communication, post and railways.

In Germany, several agencies are responsible for market regulation and ensuring free competition:

- The Bundeskartellamt (= Federal Cartel Office) is an independent competition authority whose task is to protect free competition in general. This agency enforces the German Act against Restraints of Competition (Competition Act, Gesetz gegen Wettbewerbsbeschränkungen - GWB), providing the legal framework for the general competition control by the state. Its tasks include implementing the ban on cartels, merger control, control of abusive practices of dominant or powerful companies, review of procedures for the award of public contracts by the Federation and consumer protection. The federal legislature has assigned judicial disputes in connection with decisions taken by the Federal Cartel Office to the ordinary (civil) courts. The Oberlandesgerichte (= higher regional courts) decide on the complaint against decisions of the Federal Cartel Office (section 73(4) GWB) and the Bundesgerichtshof (= Federal Court of Justice) acts as the court of last resort (sections 77 GWB seqq.).

- The Bundesnetzagentur (= Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway) in Bonn is specifically responsible for establishing and ensuring competition in the network economy, since these former state monopolies have been privatized. The competences of the courts hearing legal disputes against its administrative acts is split depending on the subject matter of regulation: Cases concerning the regulation of electricity and gas are heard by the ordinary courts (civil courts) and as court of last instance the Bundesgerichtshof (= Federal Court of Justice). The other cases (regulation of telecommunications, post and railway) are heard by the administrative courts and by the Bundesverwaltungsgericht as the Supreme Court. The federal legislature has established this switch between administrative and civil courts in section 75(4) EnWG (Energy Industry Act, Energiewirtschaftsgesetz). This special regulation assigns the regulatory cases of electricity and gas to the Oberlandesgerichte (= higher regional courts as a higher instance of the ordinary [civil] courts).

The appeal stages of the administrative courts in regulatory proceedings are split: There are three instances in cases concerning the regulation of post and railway: Verwaltungsgericht (= Administrative Court) in Cologne, Oberverwaltungsgericht (= Higher Administrative Court) in Münster and Bundesverwaltungsgericht (= Supreme Federal Administrative Court). Regulatory acts concerning the market for electronic communications can be challenged before the Administrative Court in Cologne. The appeal on points of law against its judgment is heard by the Bundesverwaltungsgericht (omitting the instance of the court of appeal deciding on appeals on points of fact and law).

Compared to other states, the German administrative courts have little authority concerning regulatory law.

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2. In particular, can any of these authorities themselves impose sanctions (including fines)?

The Federal Cartel Office and the Federal Network Agency (section 149 TKG - German Telecommunications Act) can impose sanctions. The person concerned may file an objection. Then the regulatory fining notice will be reviewed by the ordinary courts (criminal courts). The court's procedure complies with the provisions of the Code of Criminal Procedure applicable following an admissible objection to a penal order (section 71 seqq. OWiG - Act on Administrative Offences, Ordnungswidrigkeitengesetz).

3. Are any of these regulatory authorities subject to judicial review by civil courts, for some or all of their acts?

See No. 1: Distinction between administrative and civil courts depending on the subject matter of regulation: cases concerning the regulation of electricity and gas are heard by the ordinary courts (civil courts).

4. Are the courts with competence to hear the acts of regulatory authorities specifically identified by the texts in force, by way of derogation from the normal rules of territorial or material competence or do they result from the application of the general rules on the distribution of competences?

According to section 40(1) of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung – VwGO), recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a statute. Therefore, the administrative courts in general would hear also lawsuits against regulatory acts. As stated above (→ No. 1), the German legislature has assigned most of the regulatory cases to the ordinary courts (civil courts), especially to the Oberlandesgerichte (= higher regional court) in section 73(4) GWB and section 75(4) EnWG. This shift of judicial competences is motivated by the view of politics that economic questions are better to be decided by civil courts.

5. Are the remedies available against the acts of these authorities of the same nature as those available against the equivalent or similar acts of other administrative authorities?

As far as the administrative courts have jurisdiction, the administrative court procedure is subject to the general rules laid down in the Code of Administrative Court Procedure. As far as the civil courts are competent, their procedural law is adapted to that (e.g. inquisitorial system).

Admissibility of appeals against regulatory acts

6. In your view, do disputes concerning "hard law" acts (regulatory acts, sanctions, individual authorisation decisions, etc.) of these authorities raise particular issues of admissibility?

No. Article 19(4) of the (Basic Law, Grundgesetz - GG) provides effective judicial protection by the courts in general. This fundamental right guarantees the admission to the (administrative) courts for any violation of individual rights. Access to the administrative courts does not depend on the legal form of the administrative activity but on the applicant's standing (more details → No.7)

7. Are "soft law" acts (opinions, recommendations, warnings, position papers) of these authorities and, more broadly, their various positions on the behaviour to be adopted by the actors in their field of intervention (whatever form they take: code of conduct, guidelines, etc.) liable to be the subject of a direct action for annulment?

As the access to the administrative courts does not depend on the legal form of the administrative activity, the applicant must always establish that his or her *individual rights* could have been infringed (standing; section 42(2) VwGO - Code of Administrative Court Procedure). An "*actio popularis*" or an action to enforce rights of third parties is not admissible before the administrative courts (with an exception under environmental law: actions of certain NGO's are permitted).

"Individual Right" in this context means a legal provision or at least a legally accepted interest, which also serves to protect the individual. The crucial issue is: *Does the regulation serve to protect the individual?* Therefore, judges have to interpret the particular provision. No action is admissible against the infringement of mere political or economic interests. There is a difference to the other continental system of administrative law in France, where a *factual* interest of acting (intérêt pour agir) is sufficient for the access to the administrative courts.

However, the freedom of occupation (article 12 of the Basic Law) does not fundamentally protect against mere changes in market data and framework conditions for entrepreneurial activity. Market participants do not have a fundamental right to have the conditions of competition remain the same for them. Regulations that only influence the competitive situation of companies by means of factual indirect effects do not in principle affect the scope of protection of the freedom of occupation. Accordingly, the Bundesverfassungsgericht (= Federal Constitutional Court) held that not every government activity relating to information affecting the competitive chances of companies in the market can be assessed as an encroachment upon fundamental rights.

Soft law acts are only equivalent to a formal intervention if the indirect consequences are not a mere reflex of a legal regulation. E.g. public warnings or other information by an agency that change the basic conditions of the exercise of the profession and which, in terms of their objective and their indirect factual effects, are equivalent to an interference as a functional equivalent, are treated like an encroachment upon fundamental rights. The issue is whether the indirect consequences are not a mere reflection of a legal regulation. Official information of the public with regard to its objective and its indirect factual effects can be tantamount to an intervention as a functional equivalent, if it directly targets the market conditions of specific individualized companies by intentionally influencing the basis of consumer decision-making, thus altering the market and competitive situation to the economic disadvantage of the affected companies (BVerfGE 148, 40 para 26 et seqq.).

8. Can positions taken by these authorities, possibly with little or no formality (press release, website section, FAQ, etc.) be challenged in court?

As the access to the administrative courts does not depend on the legal form of the administrative activity, the issue is, whether the applicant is able to establish that his or her *individual rights* could have been infringed. That is possible, if the authority's statement with regard to its objective and indirect factual effects is to be regarded as similar to a "hard law act". For this purpose, the statement of the authority must aim at a certain behaviour in a targeted manner comparable to a classic measure.

9. Who can challenge the acts of regulatory authorities? Specify the criteria for assessing the interest in bringing proceedings, making any useful distinction according to the type of act (soft law act; individual decisions of a non-repressive nature; sanction; etc.).

As already mentioned, the access to the administrative courts does not depend on the legal form of the administrative activity, but on the applicant's standing (section 42(2) VwGO): The addressee of a burdensome administrative act is always entitled to bring an action. For third parties (competitors) it depends on the issue: Does the provision, on which the claimant relies, serve to protect his individual interests?

Example 1: The provision on the obligation to grant other companies access to the telecommunications network (section 21 TKG - Telecommunications Act) grants third-party protection, especially if a competitor with his action is seeking the inclusion of further access obligations in the regulatory order issued to the regulated company (BVerwGE 163, 181 para 31).

Example 2: The national provisions on the consultation procedure and the consolidation procedure as well as their EU law bases in articles 6 to 8 of the Framework Directive (Directive 2002/21/EC in the version of the Amending Directive 2009/140/EC) do not have individual protective character (BVerwGE 151, 268 para 33).

Example 3: If the Federal Network Agency imposes regulatory obligations on a company that has considerable market power in a market that is subject to regulation, a competitor can bring an action with the aim of fighting for the imposition of further regulatory obligations. The obligations to grant access (section 21 TKG), to create transparency (section 20 TKG) and to keep separate accounts (section 24 TKG) in accordance with article 4(1) of Directive 2002/21/EG are also intended to protect competitors (BVerwGE 130, 39 para 14 seqq.).

10. Please indicate any other particularities that you consider relevant to the admissibility of appeals against the acts of these authorities (interest in bringing proceedings, time limits for appeal, specific means of appeal open to State authorities, etc.).

The conditions of access to the administrative court in regulatory affairs do not differ from any other case constellation. They are all subject to the regulations of the (federal) Code of Administrative Court Procedure. The time for bringing an action amounts to one month. If a chamber's decision of the Federal Network Agency is challenged, section 137(2) TKG provides in derogation from general administrative law, that there are no preliminary administrative proceedings self-control of the administration (Widerspruchsverfahren). Proceedings may be initiated directly before the administrative court.

Where decisions of the Federal Network Agency are subject to administrative jurisdiction, the general provisions of the Code of Administrative Court Procedure apply. The main legal recourse against a burdensome administrative act is the action for annulment (Anfechtungsklage). The counterpart, aiming at the judicial obligation of the authority to issue the requested administrative act, is the action for the issuance of an administrative act (Verpflichtungsklage) (section 42(1) VwGO). In addition, actions for performance and declaratory actions are conceivable, especially in the case of informal acts of the authority.

11. Can the general acts of a regulatory authority, whether "hard law" or "soft law", be challenged by way of exception in an appeal against an individual decision (sanction, follow-up to a complaint, etc.) taken by that same authority and applying that general act (for example, if a sanction imposed on an economic operator refers to previously issued guidelines or recommendations to set out the applicable legal rules and the authority's interpretation of the texts in force)?

The court will incidentally review the lawfulness of general legal acts that precede the challenged individual decision of the authority. For example, regulations in the context of contesting an individual decision can be reviewed incidentally for their lawfulness and effectiveness. The final and binding effect (Rechtskraft) of the judgment which incidentally establishes the ineffectiveness of a regulation is restricted to the relationship between the parties of the action. Besides that, it only has factual effects.

12. Where the actions of these authorities have harmful consequences, should liability claims be brought:

- against these authorities?

- or against the State on whose behalf they may have acted?

In Germany, public liability claims for unlawful administrative activities of the Federal Network Agency have to be directed against the Federal Republic as the legal entity of this authority. Public liability claims cannot be asserted before the administrative courts, but before the civil courts.

Internal organisation of the courts and hearing of appeals

13. Are cases concerning these authorities assigned, within the courts and more particularly within the supreme administrative court, to panels specifically dedicated (to the authority concerned, or more generally to regulatory litigation), in order to allow for an increase in the level of competence or a critical mass of cases?

All administrative courts work in fixed panels, the so-called chambers or "senates". Unlike in other countries, the constitutional right to the legally designated judge (article 101(1)(2) of the German Constitution) does not allow for a random system of assignment, variable panels depending on the complexity of the case or the assignment of cases by the president of the court. The number of panels, their competence (e.g. cases concerning regulation) and the allocation of judges to the panels are regulated for each court in its annual roster allocating court business (Geschäftsverteilungsplan). This plan is enacted by the "Präsidium", a board elected by the judges of the particular court (judicial self-government). As the personnel of a chamber will normally remain rather stable over the years, this interior organization leads to a specialization of the judges, who over the years become experts in their field of jurisdiction. Regulatory law in particular requires a considerable amount of time to familiarize with. In the Federal Administrative Supreme Court, the 6th Senate (chamber) has always been responsible for deciding regulatory disputes. Even in cases of personnel changes (retirement), this ensures the transfer of experience and the continuity of case law. Young judges benefit from the knowledge and experience of their older colleagues.

14. What investigative or examination techniques can you use in particular in the examination of particularly technical cases:

- oral inquiry hearing in the presence of the parties,

- expert's report,

- amicus curiae,

- solicitation of a reference expert administration,

- other?

Please explain, where applicable by giving some examples from your experience.

Do you feel that these regulatory cases require a particular method?

As a court of final instance, the Federal Supreme Administrative Court exercises purely review on points of law; it must not determine the facts of the case. The court is bound by the factual findings of the lower instances if these have not been challenged with well-founded procedural complaints (section 137(2) VwGO). This is a rule of general procedural law, not a peculiarity of regulatory law.

The administrative courts of the lower instances obtain the necessary factual knowledge in regulatory cases by taking evidence in the form of hearings of the parties involved, witnesses and expert reports. German procedural law does not know the amicus curiae. Experience has shown, however, that the authority has already obtained expert reports on controversial points during the administrative procedure. These expert reports can also be used by the court, if they are not challenged in a substantiated manner by the parties involved. Of course, courts can also commission experts to prepare an expert report. According to previous experience, the classic methods and means for taking evidence, which are available to every judge, seem to be sufficient.

15. What is the role of the traditional administrations (especially when the act of an independent administrative authority, distinct from the ministry concerned, is at issue) in the examination of appeals against regulatory authorities:

- are they invited to comment? No.

- or do they remain outside the case? Yes.

The ministries have the opportunity to transport their ideas into an ongoing legal dispute via the respective representative of the public interest - or at the Federal Administrative Court via the representative of the Interest of the Federation. These two institutions have the opportunity to participate in ongoing administrative court proceedings. If they make use of it, they are involved in the proceedings. These authorities are independent participants who cannot bring an action, but have all rights of participants in ongoing proceedings, if they decide to participate in it. They can also bring legal remedies. In practice, however, they rarely participate in regulatory proceedings, as the regulatory authorities, as factually competent units, know how to represent their point of view well.

16. More generally, when examining appeals against acts with a high socio-economic impact issued by these authorities, in particular those in charge of a field of economic regulation, does the court collect (on the initiative of the court or the interested organisations) observations from other stakeholders?

No.

17. What role does orality play, even before the hearing, in the investigation of complex cases, in particular those involving regulatory acts?

The administrative courts and the Federal Administrative Court are obliged to hear cases orally. However, the parties involved can agree to do without it. In complex cases, the reporting judge at the first instance (Verwaltungsgericht) has the option of holding a non-public hearing (Erörterungstermin) together with the parties before the proper oral hearing. In this more informal non-public hearing, controversial facts can be discussed, the need to take further evidence can be shown, evidence can be obtained and specific legal problems can be addressed. Sometimes the judge also succeeds in settling the case at this stage of the dispute. Anyway, with such an informal hearing the proper oral hearing of the chamber will be better prepared.

18. Do you have, in one form or another (specialisation of magistrates, continuing education, expert decision support unit to assist magistrates, etc.) internal resources in your courts enabling you, if necessary, to familiarise yourself with or master sectoral but also transversal expert subjects (technologies protecting privacy, communication technologies in the case of audiovisual or electronic communications regulators, role and architecture of social networks, etc.)?

No.

The extent of the judge's control, the court decision

19. What are the main categories of grounds that can be invoked and relied upon against the acts of regulatory authorities? Based on your experience and the case law of your country, do you find that appeals against acts of independent authorities raise particular problems (real independence in decision-making, impartiality, etc.) compared with disputes concerning acts taken by other administrative authorities? Please share any relevant analysis you may have.

The administrative courts review the decisions of authorities - and thus also the acts of regulatory authorities - only for their lawfulness. As a rule, the administrative courts fully review indefinite legal terms. This is the principle that results from the fundamental right to effective judicial protection of individual rights (article 19(4) of the German Constitution. Legal or judicial exceptions, which lead to a judicial self-restraint, are considered as a restriction of this fundamental right and require justification. According to the understanding of German legal doctrine, it is an issue of the respective *substantive* law and not of the procedural law, how intensively a substantive provision or a particular element of such a provision has to be reviewed by the judge. By interpreting the particular substantive provision the courts determine the intensity of their review. The courts decide, whether they exercise full review or accept a margin of appreciation of the authority.

If a legal provision empowers the authority to act in its discretion, the judicial review of the exercise of discretion is limited. According to section 114 VwGO, the court shall then 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 exercised in a manner not corresponding to the purpose of the empowerment.

With regard to regulatory decisions of the Federal Network Agency in the telecommunications sector, the Federal Administrative Supreme Court held that the Telecommunications Act confers a „regulatory discretion" („Regulierungsermessen") upon the Federal Network Agency. According to the established jurisprudence of the Court, the exercise of the regulatory discretion is defective if the authority has failed to conduct a balancing of interests, to consider all relevant interests, to recognize the significance of the affected interests or if the result of the balancing is disproportionate to the objective importance of individual interests.

Union law does not restrict the national rules of judicial review: According to the case-law of the Court of Justice of the European Union (CJEU), Art. 4(1) of Directive 2002/21/EC is a result of the principle of effective judicial protection guaranteed by article 47 CFR (Charter of Fundamental Rights of the European Union) to ensure the protection of the rights that arise for individuals under EU law. The standard applies to users or providers of electronic communication who can derive rights in particular from the guidelines issued by the Union and are affected by a decision of a national regulatory authority in these rights (CJEU, judgment of 21 February 2008 - C-426/05 [ECLI: EU: C: 2008: 103], Tele 2 Telecommunication - para 30 et seqq., judgment of 22 January 2015 - C-282/13 [ECLI: EU: C: 2015: 24], T-Mobile Austria - para 33 et seq.; judgment of 13 October 2016 - C-231/15 [ECLI: EU: C: 2016: 769], Prezes UKE and Petrotel / Polkomtel - para 20 et seq., 24). Art. 4(1) Directive 2002/21/EC does not prescribe any special procedural rules for the implementation of the obligation to ensure an effective legal remedy procedure, so that it is fundamentally a matter for the Member States, within the framework of their procedural autonomy and subject to compliance with the requirements arising from the principles of equivalence and effectiveness, to lay down the procedural rules for the legal remedies of those concerned (CJEU, judgment of 13 October 2016 - C-231/15, Prezes UKE and Petrotel / Polkomtel - para 22 et seq .; CJEU, judgment of 24 April 2008 - C-55/06, Arcor - para. 170) (BVerwGE 158, 301 para 21).

20. Does your court consider itself bound by the technical or economic assessments made by the regulator? Or does it feel entitled to control them? In the latter case, is this control complete or only limited to the manifest error of assessment?)

a) In regulatory law in particular, the Bundesverwaltungsgericht held that several provisions establish a wide margin of appreciation for the regulatory authorities, which leads to judicial self-restraint:

Market regulation: Regarding the market definition and analysis pursuant to sections 10 and 11 TKG, the Federal Network Agency has a wide margin of appreciation in identifying the relevant product and geographic telecommunications markets, in determining whether there is effective competition in the market being analysed and in designating the undertakings with significant market power in this market.

Access regulation: The regulatory authority has a wide scope for action as to the choice of means as well as to the specific design, which of the measures provided for in section 13 TKG it takes and combines. In addition to the fundamental rights positions of the regulated company and its competitors, which must always be observed, the reference point for exercising the margin of appreciation are

above all the regulatory objectives specified in section 2(2) TKG. (BVerwGE 130, 39 para 28 et seqq.; BVerwGE 131, 41 para 47).

Fee regulation: Rates charged by a public telecommunications network operator having significant market power for access services mandated under section 21 TKG are subject to an ex-ante approval by the regulatory authority in accordance with section 31 TKG. The Federal Network Agency has to approve rates either based on the cost of providing an efficient service for each type of service or based on the average price, set by that authority, for a basket of services (Price-Cap-procedure) (section 31(1) TKG). In specifically justified cases, however, charges can be approved based on other procedures (section 31(2) TKG).
If the authority approves the rates based on the cost of providing an efficient service, it cannot claim a *comprehensive* margin of appreciation. Following a ruling by the Court of Justice of the European Union (judgment of 24 April 2008 - C-55/06, Arcor AG & Co. KG - [2008] ECR I 2931), the Federal Administrative Supreme Court has recognized a selective margin of appreciation. With regard to the review of cost items for correctness and necessity, as it regularly characterizes the efficiency control, a margin of appreciation of the Federal Network Agency, which is only to a limited extend subject to judicial review, can be assumed with regard to delimitable partial aspects that are laid out in the statutory standards. Only elements of cost control that are particularly characterized by a weighing of opposing regulatory objectives as well as economic evaluations and forecasts establish a selective margin of appreciation (BVerwGE 156, 75 para 13). Therefore, the Federal Network Agency has a margin of appreciation for the definable sub-area of determining the appropriate return on the capital employed (BVerwGE 156, 75).

Generating a comparable market analysis for determining the costs of efficient service provision, the Federal Network Agency enjoys a margin of appreciation for the decision, which markets to use as a basis for comparison. The same applies for the decision whether and to what extent discounts of or surcharges to the comparison fee are to be granted, taking into account the particularities of the compared markets (BVerwG NVwZ 2015, 1143 para 26).

Allocation of frequencies: When preparing procedures for the allocation of frequencies, the Federal Network Agency can issue regulatory decisions with the content that certain frequencies will be made available for specific purposes. The Agency has a margin of appreciation for this regulatory provisioning. As the decision-makers have to determine, within the limits only vaguely outlined in the Frequency Ordinance and the Frequency Plan, as part of an extensive assessment of the regulatory objectives, the relevant parameters. The have to conserve resources, avoid fragmentation of related frequency spectra, enable technical innovations and resolve conflicts between different interests as well as provide for the satisfaction of future frequency requirements. The assessments, forecasts and planning decisions cannot be grasped through the categories of wrong and right alone (BVerwGE 169, 1 para 34).

b) If the court recognizes a margin of appreciation of the Federal Network Agency in a regulatory provision, it exercises its restrained review as follows:

The usage of a margin of appreciation is first of all reviewed as to whether the authority has adhered to the valid procedural provisions, has taken as a basis a correct understanding of the applicable legal term, has ascertained the relevant facts in full and correctly, and has adhered to generally-valid evaluation standards in the actual assessment, and in particular has not violated the prohibition of arbi-

trariness. If the Federal Network Agency has to weigh conflicting objectives and other regulatory concerns in its decision according to the legal term, for which a margin of appreciation exists, the following points have to be reviewed:
(1) whether there has been no weighing at all (failure to weigh),
(2) whether the weighing has not been based on concerns that should have been included in it under the respective circumstances (deficiency in weighing),
(3) whether the significance of the concerns in question has been neglected (false assessment in weighing) or
(4) whether the balancing between them is disproportionate to the objective weight of individual concerns (disproportionality of weighing).
Since it is solely the reasons for the decision by the authority, which are decisive to the judicial review, the court examines whether the Federal Network Agency has argued plausibly and exhaustively with regard to the legal criteria in the relevant legal provisions (BVerwGE 158, 301 para 32).

21. If you receive an application against an act of a regulatory authority or against a sanction imposed by it, is your court only competent to annul the act or sanction or can it also modify the sanction imposed?

As pointed out (→ No. 2), the review of administrative fines (administrative offences) falls into the competence of the ordinary courts (criminal courts). The criminal courts are competent to modify an official sanction, e.g. to reduce a fine.

The following applies to the powers of the administrative courts: If an burdensome regulatory decision is challenged, the administrative court can only annul it. If the decision is divisible, the court can also set aside it partially. If a favourable regulatory decision is contested, the administrative court can set aside the negative decision and order the regulatory authority to issue the requested decision. However, this rarely occurs in regulatory law, as many regulatory provisions authorize the authority to exercise discretion or enable the authority to use a margin of appreciation. For reasons of the separation of powers, the court cannot ignore this residuum of the administration. Then only the judicial annulment of the official rejection is possible combined with the obligation of the authority to decide on the application anew taking into account the legal opinion of the court.

22. Have you been confronted with the problem of an independent authority in your country taking into account a foreign element such as an opinion given by an authority in another country or a decision by a European authority (for example, in the context of the mechanisms set up by the GDPR between the European data protection authorities, which lead these authorities to submit some of their decisions to the European Data Protection Committee for approval)?

In accordance with article 288 (5) TFEU, Recommendations of EU institutions have no binding force. In accordance with the case-law of the Court of Justice of the European Union, Recommendations of the Commission are however subject to increased pressure for national authorities and courts to take them into consideration where they cast light on the interpretation of national measures adopted in order to implement EU law or where they are designed to supplement binding Community provisions (CJEU, judgment of 13 December 1989 - C-322/88, Grimaldi - para. 18). This indirect legal impact does not however rule out that the national authorities and courts may deviate from the Recommendations.

This even applies to the special case that secondary EU law explicitly requires that the Recommendations be complied with to the greatest possible extent. For instance, despite the increased obligation to take into account the Recommendation on relevant product and service markets (Markets Recommendation), the Federal Network Agency is obliged to carry out an "understanding evaluation", which on the one hand suitably takes into account the tendency emanating from the presumption, and on the other hand also and in particular accommodates national characteristics deviating from the European standard (BVerwGE 148, 48 para 47).

23. Are these cases a particular field of preliminary questions to the Court of Justice of the European Union? Yes/no

It seems to be conceivable that the question on the scope of a binding effect will become the subject of a preliminary ruling to the CJEU.

24. Does the drafting of court decisions raise particular issues related to the technical nature or media exposure of some of these cases?

No.

The judge in the regulatory ecosystem

25. Are judgments on such appeals subject to any particular publicity or accompanying measures (press release)?

At the Federal Administrative Court, all oral hearings are announced on the court's website with a brief report of the case. In important cases, the administrative courts in general issue press releases at the same time as the ruling is pronounced. The Federal Administrative Court e.g. has issued a press release on its ruling on the auction of 5G frequencies.

26. Are regulatory authorities entitled to challenge acts or decisions taken by other public persons on the grounds that they impinge on their competence?

The crucial question is whether the authority has been granted subjective rights. According to the German understanding, this is rather the exception when legal competences are granted to an authority.

27. Independently of a particular case, do your court or its members regularly participate in general exchanges bringing together professionals (regulatory authorities, operators, doctrine, ministries, etc.) from the regulatory sectors concerned?

The Federal Network Agency and other institutions organize public congresses concerning regulatory law and practice in which also judges can take part. Participation is left to each judge. The Federal Administrative Court tries to organize a dialogue between the judges of different bodies who are concerned with regulatory law. Such an exchange of experiences is certainly very productive.

28. Are the judges in your courts, or more generally the staff of your investigating and registry departments, sometimes led in their careers to take up activities in regulatory authorities, and are such careers encouraged where appropriate?

Unfortunately, the personnel turnover in German administrative courts is traditionally rather low. It is rare for a person to switch between administrative and judicial activities. Only a few federal states (Bundesländer) offer their young judges the opportunity to work on a temporary basis in an authority in order to gain practical administrative experience.

Quantitative data

29. What is the number of cases concerning regulatory authorities registered before your supreme administrative court in 2020?

15 cases.

30. What is the number of cases concerning regulatory authorities settled by your supreme administrative court in 2020?

12 cases.

31. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases registered before your supreme administrative court in 2020?

1,3 %.

32. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases settled by your supreme administrative court in 2020?

1 %.

33. What percentage of applications against the acts of regulatory authorities were annulled, in whole or in part, by your supreme administrative court in 2020?

None.

Prof. Dr. Ingo Kraft
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