



Co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the Academy of European Law. Neither the European Union nor the granting authority can be held responsible for them.

Edith Zeller, Judge, Administrative Court, Vienna
26 February 2024

Case-study application of EU law – PLUS CONSIDERATIONS/SOLUTIONS

By Directive 2003/87/EC the European Union established a scheme for greenhouse gas emission allowance trading for the cost-effective reduction of such emissions. Since January 2005, all installations carrying out any of the activities listed in Annex I to this Directive (activities in the energy sector, iron and steel production and processing, the mineral industry and the wood pulp, paper and board industry) and emitting the specific greenhouse gases associated with this activity must be in possession of an appropriate permit issued by the competent authorities.

The Directive was transferred into national law in Germany by the Law on Greenhouse Gas Emission Trading in 2004. According to art. 4 of the law any activity which evaporates greenhouse gas needs a permission which includes the necessary amount of permits.

An enterprise from the cement industry operated several production plants for which permissions were issued before the new law entered into force. During the production a big amount of carbon acid gas is emitted. Under the new law new permissions have to be issued including the acquisition of permits under the greenhouse gas regime.

The enterprise filed a case at the competent administrative court of first instance by which it wanted the court to establish that there is no obligation to apply for new permission under the new law. Due to the unavoidable high amount of greenhouse gas emissions during the production of cement the enterprise would be particularly affected by the new law, although the amount of emissions was permitted by the old and timely unlimited permissions already. The regime under the new law would have the effect of an expropriation. It therefore claimed a violation of the rights under art. 12 and 14 of the Basic Law.

National legal framework:

Basic Law

Art. 12 par. 1- Professional freedom

(1) All Germans have the right freely to choose their trade or profession, their place of work and their place of professional training. The practice of trades and professions may be regulated by law.

Art. 14 - Property, right of inheritance, expropriation

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

....

Art. 100 - Concrete judicial review

(1) If a court concludes that a law on the validity of which its decision depends, is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.

(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

(3) If the constitutional court of a Land, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court.

2. European:

Fundamental Rights Charter FRC

art. 17 – right to property

- (1) Everyone has the right to own, use, dispose and bequeath his or her lawfully acquired possessions.
- (2) No one may be deprived of his or her possession, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation paid in good time for their loss.
- (3) The use of property may be regulated by law insofar as is necessary for the general interest. (...)

art. 15 – freedom to choose an occupation and right to engage in work

- (1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

- (2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
- (3) Nationals of third countries are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Art. 52 – scope of guaranteed rights

- (1) Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.
- (2) Rights recognized by this Charter which are based on the Community Treaties or the Treaty on the European Union shall be exercised under the conditions and within the limits defined by those treaties.
- (3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This case raises the following questions:

- a) concerning a national legal act of parliament

Is a national court empowered or obliged to review a legal act of parliament in the light of national fundamental rights? Can a national court quash a national legal act of parliament?

This question must be answered differently, according to the respective national legal situation: in Austria the Constitutional Court has a monopoly and is THE centralized organ to review legal acts of the parliament.

It is also different in each of our states, which competences the judge has (quash a decision or to make a decision in the merits, taking new evidence, right to refer a question to the Constitutional Court.....).

=> we can ask the different national participants, if they have a constitutional court and powers of it.

=> Greece, France, UK, Sweden, Netherlands (?): no constitutional court exists, but principle of non-applicability of non-constitutional laws exists.

=> Austria, Germany, Italy, Romania, Slovenia: there exists a “negative legislator”: only the national constitutional court can review constitutionality of national legal acts.

Here the answer would be: the judge does not have the right to annul a legal act. Art. 100 Basic Law of Germany.

If so, is a national court empowered to such a review even if the law is implementing an EU directive?

Problem: The directive is binding on member States. Member States choose the form and the methods how to transpose a directive. So the scope of review of the Constitutional Court must be limited here?

Some thoughts: Given the case: the judge reviews the legal act, which implements EU directive => judge says that the legal act is unconstitutional => legal act is quashed/unapplied => problem might arise that then you have a solution which is not in conformity with EU law (no implementation any more of EU law because there is no national transposition).

Do you have such cases in your countries?

German answer: In this case the scope of review and control in the light of national fundamental rights is limited.

Pursuant to the jurisprudence of the German Constitutional Court (Solange-als-II - Rechtsprechung) it shall not exercise its jurisdiction as long as the CJEU guarantees an equivalent protection of fundamental rights on European level. => In the given case the legal rules, which are mere implementation of the directive 2003/87/EC are not revised in the light of national fundamental rights.

Rules which are a clear implementation of the directive are not reviewed by the Constitutional Court. Rules which are not clearly determined by the directive can be reviewed by the Constitutional Court.

If there is a national court empowered to review the national legal act in the light of national fundamental rights, how broad is the control in the light of national fundamental rights in this case?

See answer to first question: depends on the national situation. Because the directive is binding on Member States, but shall leave to the national authorities the choice of form and methods (TEU).

=> In the given case the review is limited to the legal rules, which are not determined by the directive.

Has a national court jurisdiction over the consistency of national legislation with EU legislation?

=>Yes it must because of the primacy of European law, when the act of EU law is applicable directly.

Primacy and direct effect and there is the obligation to interpret national law in line with the directive.

And on other hand: when unclear: then reference proceedings.

b) concerning EU law

Is a national court empowered or obliged to review a European legal act, e.g. a Directive? Can it be quashed? Because of violation of national law? Because of violation of EU-law?

A judge is at the same time a European judge and therefore the judge must check, if there are relevant concerns of this legal act (directive) with EU law of higher rank (primary EU law).

BUT: it cannot be quashed.

NO non-application in this case! In any case the judge must refer the question of validity of secondary EU law to the CJEU (see jurisprudence Foto Frost of CJEU).

As indicated: The rules of primary EC law are relevant, in the given case fundamental rights on European level.

Must a national court review the case in the light of EU law even if a violation of EU law is not invoked by the plaintiff (ex officio principle)?

This depends on the national legal procedural provisions and national legal situation.

When the national legislator gives the judge the power to review ex officio in the light of similar, pure national laws, then adequately also EU law must be reviewed in the same manner ex officio.

However, if not so, the same applies for EU law:

See C-430/93, van Schijndel and C-222/05, van de Weerd

In Germany: The German law of judicial procedure in administrative matters is ruled by the ex officio investigation, we have an investigating judge here.

To mention: in the real life case: this was appealed to the Federal Administrative Court which criticized that the Verwaltungsgericht did not cite European fundamental rights.