BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Spring Semester 2010

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 5

(facts of the case)

The European Union has adopted a directive that provides limit values for the concentration of certain harmful substances in the air. Only one day short of the transposition deadline, member state A-land transposes the directive into domestic law, issuing an administrative provision of specific nature, a so-called "normkonkretisierende Verwaltungsvorschrift". This very particular legal institution has been imported from the legal tradition of member state B-land. There it has resulted from many years' administrative practice, jurisprudence and contributions of legal science and is regarded as a great achievement of administrative law. "Normkonkretisierende Verwaltungsvorschriften" concretize the general terms and provisions of statutes (here: the national environmental code), establishing detailed technical requirements for the implementation of the law. They are adopted in a special procedure, involving expert groups of scientists. They are binding the administration without leaving room for discretion, but it is disputed to what extent they are binding the courts. The dominant opinion says that the courts are not allowed to replace the expert group's concretisation by their own, unless it is faulty or does not correspond any more to the scientific state of the art.

The European Commission does not show much sympathy for this "gimmickry" and addresses a letter of formal notice to A-land. Submitting its observations, A-land argues that the "normkonkretisierende Verwaltungsvorschrift" is equivalent to a statute and therefore a proper modern instrument for an easy transposition of directives. After that, the Commission issues a reasoned opinion and calls on A-land to transpose the directive by means of a statute within three months. It holds that directives are to be transposed by legal norms that are unquestionably legally binding for the administrative authorities and beyond. Four months later, A-land has not taken any steps to comply with this request and the Commission brings the matter before the European Court of Justice.

1. Will the legal action of the Commission be successful?
2. (Variation of facts:) Four months after the commission has issued its reasoned opinion and two days before it takes legal action, A-land complies with the request of the Commission but maintains its legal view. Will the legal action be successful?
3. Member state B-land has also transposed the directive by a "normkonkretisierende Verwaltungsvorschrift". In response to the Commission's formal notice, it contends that this institution is a great achievement of national administrative law, reflecting the development of the national legal tradition. Therefore, the Union would have to respect it as an essential element of the national identity of its member state. B-land is confident that an action of the Commission would not have any chance of success. Do you share this confidence?
4. Before the European Commission has noticed the problem, the issue arises in a court proceeding in A-land. A company has been denied permission for a new industrial plant with regard to the new limit values laid down in the "normkonkretisierende Verwaltungsvorschrift". It has appealed to the administrative court, holding that such administrative provisions do not fulfil the requirements of Union law and, therefore, must not be applied in respect of the primacy of Union law over national law. When the case is brought to the court of last instance, the judges want to know how to proceed.

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(discussion of the case)

SUBJECTS: proceedings for failure to fulfil obligations [= infringement proceedings] (here: enforcement action of the Commission); preliminary ruling proceedings; transposition of directives; primacy of Union law; mutual loyalty within the Union ["Unionstreue"] (here: respect for national identity).

OUTLINE OF THE CASE SOLUTION:

Question 1: Prospects of success of the legal action of the European Commission against member state A-land

The legal action of the Commission against member state A-land will be successful if it is admissible and well-founded.[1]

I. Admissibility of the action

The action must be admissible. It is admissible if it meets all requirements of admissibility for the relevant form of action. In the case under consideration, the Commission, bringing the matter before the European Court of Justice, has taken an enforcement action under art. 258 FEU Treaty[2], which has initiated proceedings for failure to fulfil obligations (infringement proceedings). Therefore the requirements originating in Art. 258 FEU Treaty must be met.

1) Jurisdiction of the European Court of Justice

There are no doubts that the case under consideration falls into the jurisdiction of the European Court of Justice. Art. 258 FEU Treaty establishes the jurisdiction of the courts of the European Union. As the jurisdiction for actions for failure to fulfil obligations is not conferred to the General Court [formerly the Court of First Instance], it remains with the Court of Justice.

2) Capacity to sue and to be sued

In every legal proceeding, the applicant and the defendant must have the capacity to sue respectively to be sued. In the case under consideration, this requirement is met, since art. 258 subsect. 2 FEU Treaty expressly entitles the Commission to take legal action (to act as applicant party) against any member state, including A-land (which is entitled to act as defendant party).

3) Preliminary proceedings

The action for failing to fulfil obligation is only admissible if the Commission has fully and duly carried out the preliminary proceedings prescribed in art. 258 sub-sect. 1 FEU Treaty. A letter of formal notice issued by the Commission, which invites the concerned member state to submit observations, initiates these proceedings. This exchange of positions is followed by a formal, reasoned opinion of the Commission, in which it specifies the alleged failure and calls on the member state to fulfil its obligations under the FEU Treaty. Only if the concerned state does not comply with the opinion within the period laid down by the Commission, the latter can file an application before the Court of Justice.

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[1] Note: The introductory sentence should preferably refer literally to the case question. This is the most reliable way to avoid any divergence between the case question and the case solution.

[2] Formerly (until the Treaty of Lisbon came into force) art. 226 EC Treaty.

In the case under consideration, the Commission has addressed a letter of formal notice to A-land. Only when not satisfied by the observations submitted by the defendant, has it issued a reasoned opinion and laid down a period of three months to take the necessary steps. The Commission has waited until this period expired without results. So the preliminary proceedings have been carried out fully and duly.

4) Suitable subject-matter for an application

An enforcement action of the Commission is only admissible if it is directed against a member state's failure to fulfil an obligation "under the Treaties" (cf. art. 258 sub-sect. 1 FEU Treaty). Such failures include all violations of primary or secondary law. In the present case, the Commission alleges the defendant has failed to fulfil its obligation to duly transpose the directives of the European Union into domestic law (art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty[3]). This is a suitable subject-matter for an action under art. 258. As required by this provision, it also correlates exactly with the subject-matter of the preliminary proceeding. Therefore, this requirement is met.[4]

5) Legal interest in bringing proceedings

For an enforcement action under art. 258 FEU Treaty, a *specific legal interest* in bringing the proceedings is *not required*. However, the Commission is only entitled to bring the matter before the Court if it is actually *convinced that the criticised acting* of the member state *represents a violation of the Treaty*; mere doubts are not sufficient. Following the Commission's reasoning as reported in the facts of the case, it is evident that the Commission regards the transposition of the directive by a "normkonkretisierende Verwaltungsvorschrift" as a violation of the FEU Treaty.

As for every legal remedy, there must be a *general legal interest* in bringing the proceedings. In the present case, there are no doubts about it: Since A-land has not complied with the Commission's request, the alleged violation of Union law is still virulent and needs to be adjudicated.

Thus, all requirements of admissibility are met. The enforcement action of the European Commission against the member state A-land is admissible.

II. Well-foundedness of the action (substance/merits of the case)

The action must also be well-founded. This is the case if the defendant, member state A-land, actually has *failed to "fulfil an obligation under the Treaties"*, here the obligation deriving from art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty to transpose directives in due form and course into domestic law. In the case under consideration, member state A-land adapted its domestic provisions by enacting a "normkonkretisierende Verwaltungsvorschrift" on the last day of - and hence within - the time limit set out by the directive. Apparently, this is not the classical example of a blatant neglection of the member state's obligation to transpose directives into domestic law. However, there are doubts whether A-land has transposed the directive *duly*, choosing appropriate means of transposition. The transposition was not achieved by means of legislation or enacting other legal provisions but only by issuing a "normkonkretisierende Verwaltungsvorschrift", that means by issuing administrative provisions. Hence, the action is well-founded if the use of this legal institution does not meet the requirements for the transposition of directives as set by Art. 4(3) EU Treaty read together with Art. 288 sub-sect. 3 FEU Treaty.

According to Art. 288 sub-sect. 3 FEU Treaty, a directive is binding upon the member states as to the result to be achieved, but leaves the national authorities the choice of form and methods. Thus, the member states have discretion to decide upon the right form of the provisions necessary in domestic law (statutes, ordinances, regulations of the government, constitutional provisions etc.). They may follow their own perspectives and considerations as to which means would be most effective and convenient and would pay most regard to the existing national legal system, in particular to the constitutional framework. They may also choose specific legal institutions, which originate in their own legal tradition or have been imported from foreign law. Furthermore, they are not obliged to incorporate the directive's provisions formally or verbatim into domestic law. Depending on the content of the directive, a general legal context into which the directive's contents

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3 Formerly art. 10 read together with art. 249(3) EC Treaty.

4 Note: The Commission may not extend or modify its allegation in the application to the Court of Justice, since in any case the member state must be given the opportunity to submit its observations (and later to comply with the request of the Commission). Therefore, in the case solution, the suitability of the subject-matter must be discussed after and not before the examination of the requirements of the preliminary proceedings.

are integrated may be sufficient in many cases.[5] In respect to art. 288 sub-sect. 3 FEU Treaty it is only decisive that full application of the directive is guaranteed, that is to say that the European legislator's intentions and its regulating concept come into effect.

In the case under consideration, this requirement is met to the extent that the limit values for the concentration of certain harmful substances in the air, as provided in the directive, have, according to the "normkonkretiserende Verwaltungsvorschrift" that concretizes A-lands Environmental Code, mandatory force towards the administration. National authorities are bound to respect the limit values as formulated in the administrative provisions and have no discretion for divergent interpretation of national law, in particular when interpreting generic terms of the Environmental Code. After all, the directive does have practical effect in the member state A-land.

However, due transposition of the directive requires that its provisions come into effect fully, invariably and reliably. A general legal context is only adequate if it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive intends to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. In cases where the directive imposes on the member states obligation to prescribe limit values in order to protect the environment and human health in particular, it is clear that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on rules that are mandatory in nature. The *binding nature of the transposing provision* within its legal context *must*, in order to assert the rights protected by the directive, *be unquestionable under any conditions*.[6] In particular, apart from being binding for the administration, it must be certain that it has *also* direct binding force *towards the courts as well as to every third party* whose activities could possibly endanger human health and who have to be adequately informed of the extent of their obligations.[7]

The legal institution of the "normkonkretisierende Verwaltungsvorschrift" chosen by A-land does not meet these requirements. Notwithstanding their specific features, they are definitely not legal provisions but administrative provisions. According to the facts of the case, it is disputed to what extent the "normkonkretisierende Verwaltungsvorschrift" is binding in nature beyond the sphere of administration. Especially, with regard to judicial review, the dominant opinion denies a full binding effect alleging that the courts are only bound to respect the value limits unless they are faulty or do not any more correspond to the scientific state of the art. Courts of member state A-land might rule that under certain conditions the provisions of the "normkonkretisierende Verwaltungsvorschrift" have no binding force upon them, and concretize the terms of A-land's Environment Code in a divergent manner, thus bringing different limit values into effect. Hence, there is no guarantee of the full, invariable and reliable application of the directive.

This leads to the conclusion that the legal institution of the "normkonkretisierende Verwaltungsvorschrift" is not an appropriate and sufficient measure for the transposition of directives into domestic law. The principles of legal certainty and clarity require transposing directives by legal acts with undeniable binding force. Therefore, member state A-land has not duly transposed the directive into domestic law and failed to fulfil its obligation under art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty.

The legal action of the Commission against member state A-land is well-founded.

Conclusion: The legal action will be successful.

Question 2: Prospects of success of the legal action of the European Commission against member state A-land after its late compliance with the reasoned opinion

Also in this case variation, the enforcement action of the Commission against member state A-land under art. 258 FEU Treaty for failure to fulfil obligations will be successful if it is admissible and well-founded. Since A-land has eventually transposed the directive by means of a statute, it has undeniably met all requirements regarding the right form for the transposition of the directive. Consequently, the action might be *inadmissible* because there is no sufficient *general legal interest in bringing proceedings* anymore. Since A-land has fulfilled in the end its "obligation under the Treaties", the action might *also* be *unfounded*.

There are divergent opinions among legal scholars as to whether the general legal interest in bringing proceedings vanishes after the accused member state decides to comply with the Commission's request immediately

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5 Cf. ECJ, case C-361/88, TA-Luft, no. 15.

6 ECJ, case C-361/88, TA-Luft, no. 15 ff.

7 Cf. ECJ, case C-361/88, TA-Luft, no. 20.

before submission of the action.[8] According to the jurisprudence of European Court of Justice, the interest in bringing proceedings continues to exist if in the particular case special reasons closely linked to the rule of law require the adjudication of the case. It might continue to exist, for example, if there is risk of repeated breaches of the FEU Treaty, if the subject-matter of the case is relevant for possible state liability or if the issues are especially significant for the functioning of the EC.[9]

This opinion is to be followed.[10] The legal institution of the action for failure to fulfil obligations does not only aim to discipline member states that have not yet fulfilled their obligations under the FEU Treaty. It may also serve the purpose to prepare for the assertion of a possible state liability of the defendant member state.[11] Furthermore, the defendant member state itself has given cause to the action. In the case under consideration, the late compliance to the Commission's call for a legislative act cannot fully eliminate the accusation of failure to fulfil obligation. As domestic law is to be adapted to the demands of the directive within the given time limit, the belated transposition - or, in this case, the *belated correct transposition* - in itself is to be regarded as a failure to fulfil the obligations imposed by art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty. Furthermore, there is a certain *danger of repetition*, since A-land has complied with the Commission's request but maintained its legal view. One can assume that it will use again "normkonkretisierende Verwaltungsvorschriften" to transpose directives into domestic law. Therefore, it is necessary to adjudicate the legal question raised by the case. So there still is a sufficient general legal interest in bringing proceedings. The action of the Commission is admissible even after the compliance with the Commission's reasoned opinion. As member state A-land has failed to fulfil his obligation to transpose the directive duly in time, the action is also well-founded.

Conclusion: Also in the case variation, the legal action of the Commission will be successful.

Question 3: Prospects of success of a possible legal action of the European Commission against member state B-land

The optimism of member state B-land is justified if a possible enforcement action of the Commission would be inadmissible or unfounded [without merit].

I. Admissibility of a possible action

There are no doubts concerning the admissibility of a possible action. Again, it would be an action for failure to fulfil obligations. The jurisdiction of the European Court of Justice and the capacity of the Commission and member state B-land to sue respectively to be sued would follow from art. 258 FEU Treaty. The alleged failure of the defendant to fulfil its obligation to duly transpose directives into domestic law would form a suitable subject-matter for infringement proceedings. There would be no doubts concerning the necessary general legal interest of the Commission in bringing proceedings, since the defendant continues to refuse compliance with the Commission's request. However, before taking action, the Commission would have to complete the preliminary proceedings prescribed in art. 258 sub-sect. 1 FEU Treaty that started with its formal notice. The Commission would have to issue a reasoned opinion, calling on B-land to transpose the directive by means of a statute within a certain period of time. In case that B-land did not comply with the request within the time limit, an enforcement action of the Commission would be admissible.

II. Well-foundedness of a possible action

A possible enforcement action of the Commission would be well-founded if, also in the case of B-land, the transposition of the directive on limit values for harmful substances in the air by means of a "normkonkretisierende Verwaltungsvorschrift" represents a failure to fulfil the obligation to

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8 Cf. *Streinz*, Europarecht, 8th edition 2008, no. 581; *Gaitanides*, in: von der Groeben/Schwarze (editors), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, 6th edition 2004, art. 226 EC Treaty, no. 47; *Craig/de Búrca*, EU Law, 4th edition 2008, p. 442.

9 Cf. *Haratsch/Koenig/Pechstein*, Europarecht, 6th edition 2009 no. 434, 440 with further references; *Bieber/Epiney/Haag*, Die Europäische Union, 8th edition 2009, p. 238 with further references; see in particular ECJ, case C-353/89, Commission v. Netherlands, no. 28.

10 Note that in legal science it is not admissible just to refer to the opinion of important scholars or institutions. A lawyer must present his own, independent reasoning, even if he follows others. In European Union law, as in any continental legal order, the position of a Court of Justice represents *just one opinion among others* (an important one, however). It does not constitute any genuine case-*law*. Therefore, the reference to a decision of the ECJ can guide or support but not replace a lawyer's own reasoning.

11 Cf. *Streinz* (note 8), no. 581.

transpose directives in due form and course under art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty. Generally, the legal institution of the "normkonkretisierende Verwaltungsvorschrift" is not suitable to transpose directives duly (see above, question 1, II.). Member states employing this instrument do not do enough to fulfil their obligations. However, the case of B-land might be judged differently, considering that this legal institution evolved from B-land's legal order and is regarded as a great achievement of B-land's administrative law that reflects the development of its national legal tradition. The question is if such an important achievement of national law can constitute an essential element of the national identity of a member state in terms of art. 4(2) EU Treaty[12] that the Union must respect and if this means that it has to accept that the concerned member state makes use of this achievement for the transposition of directives.

Art. 4(2) EU Treaty imposes on the Union the legal obligation to "respect ... their national identities". This obligation is an explicit concretisation of the general principle of mutual loyalty within the Union ["Unionstreue"] that governs the relationship between the Union and the member states. Similar to the principle of federal loyalty ["Bundestreue"] within the federal state, the principle of mutual loyalty within the union impregnates the relations within the federal supranational union, encompassing various duties of loyalty (to act in good faith) and of solidarity; with the Treaty of Lisbon. An essential part of this principle, the "principle of sincere cooperation" (art. 4(3) EU Treaty), has now been anchored in primary law. "Respecting" the national identities of the member states, as meant by art. 4(2) EU Treaty, means taking it into consideration, being considerate. This does not exclude interferences. They must, however, be justified by the needs of the Union and must not be disproportionate. In particular, greatest consideration possible must be given to the federal or unitarian structure and to the fundamental constitutional principles of the member states.

There are serious doubts whether a mere technical legal institution like the "normkonkretisierende Verwaltungsvorschrift" can be regarded as an essential element of national identity - even if one agrees that it is a great achievement of national law. *Legal institutions do not represent a value in and by themselves.* They are *intellectual tools* that legal science and legal practice use in order to achieve certain effects and results when structuring and systematising the law. Not bearing relation to philosophical or political ideas, they can be substituted without substantive loss by other legal institutions and mechanisms that serve the same or a similar purpose; thus, they are not particularly valuable. At any rate, they do not constitute important or "essential" elements of national identity, which call for specific consideration, like the federal or unitarian structure of the state or the constitutional values of democracy, rule of law, solidarity (social rights), human dignity and human rights. For this reason, unlike the "fundamental structures, political and constitutional", they are not mentioned in art. 4(2) EU Treaty as an expression of the member states' national identities. On the other hand, the *reliable effective transposition of directives, respecting the unity of Union law,* represents a vital condition for the functioning and thus for the existence of the Union, allowing exceptions under rare conditions, within narrow bounds and for commanding reasons only. Therefore, one cannot deduce from the Union's obligation to respect the national identities that the member states have the right to use national legal institutions like the "normkonkretisierende Verwaltungsvorschrift", even if they have no generally acknowledged binding force beyond the administration and hence do not provide for the necessary certainty and clarity.

So even in the case of B-land the "normkonkretisierende Verwaltungsvorschrift" is not an appropriate and sufficient measure for the transposition of directives into domestic law. This member state too has failed to fulfil its obligation under art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty. A possible enforcement action would be well-founded.

Conclusion: A possible action of the Commission would be neither inadmissible neither unfounded. The optimism of member state B-land is not justified. I do not share its confidence.

Question 4: The right proceeding of the judges of the administrative court

Theoretically, the judges of the administrative court of last instance may proceed in three possible ways: They can adjudicate on the action, holding that the "normkonkretisierende Verwaltungsvorschrift" is applicable. They can adjudicate on the action, holding that the "normkonkretisierende Verwaltungsvorschrift" is inapplicable. They can also suspend [interrupt] the proceedings and refer to the European Court of Justice for a preliminary ruling under art. 267 FEU Treaty[13] on the question concerning Union law. A closer look

[12] Formerly art. 6(3) EU Treaty.

[13] Formerly art. 234 EC Treaty.

reveals that the second alternative is to be discarded: The only reason not to apply the "normkonkretisierende Verwaltungsvorschrift" would be that it does not comply with the requirements of Union law. In order to decide on this issue, the judges will have to elucidate the requirements of Union law.[14] This task, however, falls into the exclusive jurisdiction of the European Court of Justice, answering to referred questions in preliminary rulings. Therefore, only the first and the third alternative come into consideration.

I. Suspension of the proceedings before the administrative court and reference to the European Court of Justice for a preliminary ruling (art. 267 FEU Treaty)

The judges of the administrative court may have to suspend the proceedings before their court and to refer to the European Court of Justice the question if a legal institution such as the "normkonkretisierende Verwaltungsvorschrift" is an appropriate and sufficient means for the due transposition of directives into domestic law.

1) Jurisdiction of the European Court of Justice

There are no doubts concerning the jurisdiction of the European Court of Justice. Art. 267 FEU Treaty explicitly establishes the jurisdiction of the courts of the European Union. Within the Union, the Court of Justice has exclusive jurisdiction for preliminary rulings, since the option to attribute jurisdiction to the General Court [formerly the Court of First Instance] under art. 256(3) FEU Treaty[15] has not been used.

2) Right respectively obligation to refer

The administrative court must be among the institutions that have the right respectively the obligation to make reference for preliminary ruling. According to art. 267 sub-sect. 2 FEU Treaty, this right is reserved to "courts and tribunals" (= "juridictions" / "Gerichte") of the member states. Administrative courts are such "courts" and therefore entitled to refer to the European Court of Justice. Furthermore, the court under consideration is acting as court of last instance, against whose decisions there is no judicial remedy under national law. Therefore, under art. 267 sub-sect. 3 FEU Treaty this court is not only entitled but also *obliged* to refer questions of the validity or interpretation of Union law that are decisive for the outcome of proceedings before the court to the European Court of Justice.

3) Suitable subject-matter for a reference

The question to be clarified must constitute a suitable subject-matter for a reference for preliminary ruling. Art. 267 sub-sect. 1 FEU Treaty determines, which kinds of questions can be brought before the European Court of Justice. In the case under consideration, the administrative court seeks authoritative decision about the requirements of due transposition of directives, thus demanding the interpretation of art. 4(3) EU Treaty read together with art. 288 sub-sect. 3 FEU Treaty. This is a suitable subject-matter for a reference under art. 267 sub-sect. 1 lit. a FEU Treaty.

4) Relevance of the referred question to the case before the referring court

Finally, the answer to the question that is to be referred must be decisive for the outcome of the proceedings before the referring court. The decision on the question must be necessary to enable the referring court to give judgement (art. 267 sub-sect. 2 FEU Treaty). In the case under consideration, the applicant in the proceedings before the administrative court, a company in A-land, has been denied permission for a new industrial plant with regard to the new limit values laid down in the "normkonkretisierende Verwaltungsvorschrift". It holds that such administrative provisions do not fulfil the requirements of Union law regarding the due transposition of directives

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[14] Note: When this case happened, in the year of 2010, the requirements of Union law had already been elucidated, since the European Court of Justice had already answered in 1991 to an identical question in a similar case (see ECJ, case C-361/88, TA-Luft). Such cases constitute an exception to the obligation to refer under art. 267 sub-sect. 3 FEU Treaty (see ECJ, joint cases, 28-30/63, da Costa; case 283/81, CILFIT). The courts of last instance may but do not need to refer to the ECJ in such cases. Generally, it is not advisable to refer, because the waiting for the preliminary ruling of the ECJ would unnecessarily prolongate the proceedings before the referring court. The same applies if the correct interpretation of the Union law is evident to such a degree that there is no scope for any reasonable doubt (cf. ECJ, case 283/81, CILFIT, so-called acte clair doctrine). However, *in exercises of practical case-solving at university, this aspect is irrelevant*, because inevitably most practical cases are modelled on important decisions of the ECJ. Otherwise, there would not be many interesting cases concerning the preliminary ruling proceedings. Therefore, *do not draw on this exception in a case solution!* However, if you want your case solution to be as accurate as possible, you may point to this problem in a special footnote.

[15] Formerly art. 225(3) EC Treaty.

and, therefore, must not be applied in respect of the primacy of Union law over national law. There are no objections against the administrative provisions with regard to their substance.

If the legal reasoning of the applicant was correct, the question about the requirements of Union law regarding the due transposition of directives would be relevant to the case. The reasoning is based, however, on an essential misunderstanding: If the legal institution of the "normkonkretisierende Verwaltungsvorschrift" is not an appropriate and sufficient means for the transposition of directives, this does not mean that the issuing of such provisions is illegitimate. It is, at least, a *step into the right direction*, aiming to implement the new limit values for the concentration of harmful substances in the air provided in the directive. The issuing of such administrative provisions is *just not enough*. The failure of the member state A-land to fulfil its obligations under the Treaty does not consist in the issuing of the "normkonkretisierende Verwaltungsvorschrift" but in the fact that it has not done more. The *provisions themselves, however, do not violate Union law*. Therefore, they are not inapplicable with regard to the primacy of Union law over national law. From this follows that the judges of the administrative court must apply them anyway - without regard to the question if they are an appropriate and sufficient means of due transposition of the directive or not. Consequently, this question is not decisive for the outcome of the proceedings before their court. The decision on it is not necessary to enable them to give judgement. The *question is not relevant to their case.*

For this reason, a reference for a preliminary ruling of the European Court of Justice under art. 267 FEU Treaty is not admissible. This alternative has to be discarded too.

II. Continuation of the proceedings before the administrative court and application of the disputed provisions

Thus, the judges of the administrative court of last instance must continue the proceedings before their court and decide on the case, applying the disputed "normkonkretisierende Verwaltungsvorschrift." The administrative provisions will serve them as auxiliary means for the interpretation of the relevant provisions in the national environmental code. The administrative judges may and, if necessary, must have recourse to these provisions in order to ensure an interpretation of the provisions of the national environmental code in the light of the directive.

NOTE / FURTHER READING:

I. Concerning question 1, this case has been modelled on the decision ECJ, case C-361/88, *TA-Luft* from 1991. The "normkonkretisierende Verwaltungsvorschrift" does indeed exist. It is a special legal institution of German administrative law. At the time, this and other decisions of the European Court of Justice demanding corrections of German administrative law (concerning in particular the interim relief and the protection of legitimate expectations[16]) have provoked a passionate debate on the Europeanisation of administrative law.[17] British scholars were less excited, despite the fact that the impact on their administrative law was stronger (with the decision in the case C-213/89, *Factortame,* the ECJ even forced Britain to introduce interim relief against the application of Acts of Parliament). Meanwhile, the excitement about the required conformation has vanished. The decisions of the European Court of Justice have contributed to a readjustment of national administrative law that corrected undesirable developments that had not been noticed before.

Concerning the Europeanisation of administrative law, see in particular *Eliantonio*, Europeanisation of Administrative Justice. The Influence of the ECJ's Case Law in Italy, Germany and England, 2008; *von Jans/Prechal/Lange/Widdershoven,* Europeanisation of Public Law, 2007.

II. The infringement proceedings have turned out to be little effective to enforce the obligation of the member states to transpose directives. Along with the preliminary proceedings, they last for years. Therefore, the member states again and again succeed to uphold a status of domestic law disregarding a directive for years. This is incompatible with the rule of law in the European Union. The obligation of the domestic courts and

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[16] Cf. ECJ, joint cases 205-215/82, Deutscher Milchkontor.

[17] See in particular *Schmidt-Aßmann*, Zur Europäisierung des Allgemeinen Verwaltungsrechts, in: Badura/Scholz (editor), Festschrift für Peter Lerche, 1993, p. 513 ff.; *Schoch*, Die Europäisierung des Allgemeinen Verwaltungsrechts, Juristenzeitung 1995, 109; *Schoch*, Die Europäisierung des verwaltungsgerichtlichen vorläufigen Rechtsschutzes, Deutsches Verwaltungsblatt 1997, 289; *Claassen*, Die Europäisierung der Verwaltungsgerichtsbarkeit, 1996; *von Danwitz*, Verwaltungsrechtliches System und Europäische Integration, 1996; *Schwarze (editor.)*, Das Verwaltungsrecht unter europäischem Einfluss, 1996.

authorities to apply directives directly after the expiration of the transposition period[18] does not provide for a solution, since it does not apply to horizontal relations (between citizens) and presupposes that the directive is unconditional and sufficiently precise. Finally, understanding their own unreliableness, the member states as the "masters of the Treaties" have reacted with the Treaty of Lisbon, creating a new sanction. According to *art. 260(3) FEU Treaty*, the Commission may propose *already during the proceedings under art. 258* to impose a *lump sum or penalty payment* to the defaulting member state. According to art. 260(3) phrase 2, the payment obligation shall take effect on the date set by the Court in its judgement. Interpreting this clause teleologically, this means that in case of an obvious and severe default of the member state this date may lie in the period preceding the pronouncement of the judgement.

More informations on this course at www.lanet.lv./~tschmit1. For any questions, suggestions and criticism please contact me via e-mail at tschmit1@gwdg.de.

(Datei: Case4 (Cases-EULaw))

[18] See ECJ, case 148/78, Ratti; case 41/74, van Duyn.

Question 1: Prospects of success of the legal action of the European Commission against member state A-land

I. Admissibility of the action

- **form of action: enforcement action (for failure to fulfil obligations) under art. 258 FEU Treaty)**

1) Jurisdiction of the European Court of Justice

2) Capacity to sue and to be sued

3) Preliminary proceedings

4) Suitable subject-matter for an application

5) Legal interest in bringing proceedings

II. Well-foundedness of the action (substance/merits of the case)

- **<u>problem</u>: requirements regarding the binding nature of the transposing provisions**

Question 2: Prospects of success of the legal action of the European Commission against member state A-land after its late compliance with the reasoned opinion

- **<u>problem</u>: general legal interest in bringing proceedings / well-foundedness in case of belated correct transposition**

Question 3: Prospects of success of a possible legal action of the European Commission against member state B-land

I. Admissibility of a possible action

II. Well-foundedness of a possible action

- **<u>problem</u>: the "normkonkretisierende Verwaltungsvorschrift" as an essential element of the national identity in terms of art. 4(2) EU Treaty?**

Question 4: The right proceeding of the judges of the adm. court

I. Suspension of the proceedings before the administrative court and reference to the ECJ for a preliminary ruling (art. 267 FEU Treaty)

1) Jurisdiction of the European Court of Justice

2) Right respectively obligation to refer

3) Suitable subject-matter for a reference

4) Relevance of the referred question to the case before the referring court

II. Continuation of the proceedings before the administrative court and application of the disputed provisions