On the Dispensation of Justice by Public Authorities

*Jan Henrik Klement**

Case C–205/08 Umweltanwalt von Kärnten[1] *v. Alpe Adria Energia SpA*

The Austrian Umweltsenat is a court or tribunal for the purposes of Article 234 EC. The Environmental Impact Assessment (EIA) Directive** is to be interpreted as meaning that a Member State has to subject a transboundary project to environmental impact assessment (EIA) even if the size of the project on its own territory does not reach the threshold for an assessment as defined in Annex I of the EIA Directive but the threshold is exceeded when parts of the project that are located in another State are taken into account (author's headnote).

I. Facts

The judgment was delivered on the basis of a reference for a preliminary ruling made in the context of a dispute between the "Umweltanwalt" (Environment Ombudsman) and the Government of the Province of Carinthia in regard to Alpe Adria Energia SpA. Alpe Adria is an Italian undertaking which was seeking to construct a 220 kV power line with a power rating of 300 MVA to link an Italian and an Austrian network together. The project was to cover a total length of approximately 49 km, of which 41 km would be on Italian territory and around seven km in Austria.

Alpe Adria applied to the Government of the Province of Carinthia, the competent Austrian environmental authority, for a declaration under § 3(7) of the Austrian Law on environmental impact assessment (*Umweltverträglichkeitsprüfungsgesetz*, UVP-G), the Austrian transposition of the EIA Directive. The provincial Government decided that no EIA was required because the length of the project on Austrian territory did not reach the threshold of 15 km laid down in the UVP-G. The Umweltanwalt appealed against that decision to the "Umweltsenat" (Austria's Environment tribunal). He argued that the reference measurement for a project should not be limited to the territory of a single Member State. The Umweltsenat was reluctant to follow this argumentation on the basis of Austrian national law. For this reason it referred to the European Court of Justice for a preliminary ruling on the interpretation of the EIA Directive.

II. Judgment

In its judgment the ECJ considered the Umweltsenat to be a court or tribunal for the purposes of former Article 234 EC:

"[...] it must be pointed out, first, that it is indisputably clear from the provisions of Articles 11(7), 20(2) and 133(4) of the B-VG and of Paragraphs 1, 2, 4 and 5 of the USG 2000 that the Umweltsenat meets the criteria that it be established by law, be permanent and have compulsory jurisdiction, apply rules of law and be independent." (paragraph 36)

In respect to the question referred the ECJ held that "Articles 2(1) and 4(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead

* Dr. Jan Henrik Klement is Akademischer Rat, Institute for German and European Administrative Law (Prof. Dr. Wolfgang Kahl), University of Heidelberg, Germany.

1 Judgment of 10 December 2009.

** Editorial Hint: Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

https://doi.org/10.1017/S1867299X00000350 Published online by Cambridge University Press

electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State." (paragraph 59)

III. Comment

1. Admissibility of the question referred

a. The Umweltsenat as a court under Austrian law

From an Austrian perspective, the question whether the Umweltsenat is a court or tribunal within the meaning of Article 234 EC (now Article 267 TFEU) is raised by the wording of the constitution itself. According to the *Bundes-Verfassungsgesetz* (B-VG), the Umweltsenat is a board set up at the Federal Ministry of the Environment (Article 11(7)). It is called an "Oberbehörde" (higher public authority), hence under Austrian Law the Umweltsenat is part of the Executive and not a court in the meaning of Article 94 B-VG. Notwithstanding the Umweltsenat rules on appeals brought against the decision adopted by the "Landesregierungen" (provincial governments) in matters set out in the UVP-G (Article 11(7) B-VG, § 40(1) UVP-G). With regard to the staffing, the procedural rules and the position of the Umweltsenat within the legal system, it comes close to being a court. It consists of ten judges and a further 32 legally qualified members (§ 1(2) *Bundesgesetz über den Umweltsenat* – USG). All members are appointed upon proposal of the Federal government. However, they carry out their functions independently and are not bound by any directions (Article 11(7) B-VG, § 4 USG). It is not within the Executive's discretion to dismiss the members of the Umweltsenat. Their membership expires solely if certain clearly defined conditions are met (§ 2(3) USG). Furthermore, decisions handed down by the Umweltsenat may not be annulled by administrative action (Article 11(7) B-VG, § 6 USG).

Despite these peculiarities, the Umweltsenat is not a singular phenomenon. The Austrian Executive contains a series of similar boards that are not bound by any directions ("weisungsfreie Behörden").[2] In addition to the Umweltsenat there are "Kollegialbehörden mit richterlichem Einschlag" (quasi-judicial tribunals), whose basis is to be found in the provisions of Articles 20(2), 133 No. 4 B-VG, e.g., in the areas of agricultural, intellectual property and telecommunications law. Finally, the "Unabhängige Verwaltungssenate of the Länder" (§ 129 a B-VG),[3] that were established in order to fill in the gaps of the fragmentary competence of the "Verwaltungsgerichtshof", are to be considered as part of the Executive.

On several occasions the "Verfassungsgerichtshof" held that quasi-judicial tribunals are compatible with constitutional law,[4] although in one special case it criticised an infringement of the democratic principle and the rule of law.[5] The amendment of the B-VG in 2008 even extended the power of the Legislative to establish quasi-judicial tribunals. Henceforth the creation of a public authority that relies on one of the categories as defined in Article 20(2) B-VG is automatically permissible and does not require any further justification under constitutional law.[6] The same applies to the Umweltsenat, which was established on the legal basis of Article 11(7) B-VG. Only from the view of democratic theory could one raise the objection that weisungsfreie Behörden, like the Umweltsenat, are not subject to any ministerial control and therefore constitute an exception to the principle of parliamentary accountability. This causes particular concern where the public authority not only reviews decisions of other administrative bodies but is also authorised to hand down its own decisions.

Irrespective of the incorporation of the Umweltsenat into the Executive, it works as an obligatory court of first instance in matters concerning the EIA. Against its decisions an application to the Verwaltungsgerichtshof is admissible (Article 11(7) B-VG). The Umweltsenat compensates for the absence of a general sequence of courts, as the Austrian administrative jurisdiction is single-tiered.

2 An overview is provided by Christoph Grabenwarter, in Karl Korinek/Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht* (Vienna: Springer), Article 133 Annex A.

3 Cf. Theo Öhlinger, *Verfassungsrecht,* 8nd. ed. (Vienna: facultas. wuv University Press 2009), paras. 631 et sqq.

4 I. a. Case B 1625/98, Telekom-Control-Kommission, and Case B 110/02, Bundeskommunikationssenat.

5 Case G 175/99, Privatrundfunkbehörde.

6 On former Article 20 B-VG Bernhard Raschauer, in Korinek/Holoubek (eds), "Österreichisches Bundesverfassungsrecht", *supra* note 2, Article 20(1) para. 79; Christoph Grabenwarter and Michael Holoubek, "Demokratie, Rechtsstaat und Kollegialbehörden mit richterlichem Einschlag", *ZfV* (2000), pp. 520 et sqq.

https://doi.org/10.1017/S1867299X00000350 Published online by Cambridge University Press

While there is recourse to the Verwaltungsgerichtshof against its decisions, the idea of a separation of powers cannot be invoked as an argument for the dissolution of the Umweltsenat. The Legislative cannot be denied the ability to establish additional administrative tribunals solely on the grounds that scrutiny of the legality of the Executive's actions lies traditionally in the realm of the judiciary. Where the prevalence of the law is at stake, the separation of powers does not preclude procedural redundancies.

b. The considerations of the ECJ

When deciding whether a body has the power to make a reference the Court justifiably pays attention only to the national institutional setting but not to the national terminology. Obviously, it is up to the Member States to arrange a public authority as to fall within the scope of "court or tribunal" as understood in Article 234 EC. They cannot, however, determine the substance of the term "court" in the context of European law.

Basically, the criteria of the definition of a "court or tribunal" were set up in the Vaassen-Goebbels decision.[7] Since then, the Court continuously has taken into account factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and is independent. Obviously the power of persuasion that such criteria can develop depends mainly on the way they are used in the specific case. In the present case, the ECJ did so only half-heartedly. Without any elucidation, it enumerated the requirements of "court or tribunal" and confined itself to naming the national provisions which in its opinion fulfilled these requirements. In order to do so, the ECJ needed just one sentence and the mere reference to some particular procedural aspects set forth in national law.

c. Critique

Not only in Austria has the law developed over decades a variety of institutions that cannot be regarded as either part of the Executive or the Judiciary exclusively. In the German context, one can name the "Vergabekammern" (independent bodies in the sense of Article 81(2) Directive 2004/18/EC on Procurement Law), the "freiwillige Gerichtsbarkeit" (Non-contentious proceedings) and in some German Länder the "Widerspruchsausschüsse" which are competent for decisions in administrative proceedings reviewing an administrative decision.

Admittedly, it would be a misunderstanding to consider the mere existence of ambiguous institutions as incompatible with the separation of powers. Even in the modern state the branches of the Legislative, the Executive and the Judicative have always overlapped. According to the idea of "checks and balances", any rigorous division and a mutual exclusivity of Legislative, Executive and Judiciary would even be dysfunctional.[8] However, it is for the jurisprudence to develop certain criteria to cope with the demarcation in a comprehensive manner when applying the principle of separation of powers and its legal specifications. With regard to the provision of Article 234 EC, comparative law can help to develop the meaning of the term "court", but one has to bear in mind that this term may not be used the same way in every legislative act. The term "court" is relative in nature. It can vary not only between the national level and the level of the EU, but also between the latter and Article 6 ECHR.

The European meaning of "court" determines how the regulative idea of the European institutional balance is implemented in practice. With regard to the right to an effective remedy and to a fair trial as set forth in Article 47 CFREU the matter is relevant beyond the preliminary ruling procedure. Unfortunately, the ECJ decision in the present case does not clarify the ambiguities. It is highly likely that, because of the importance of the preliminary ruling procedure for the enforcement of Community Law, the ECJ tends to interpret the term "court" in a wide rather than in a narrow sense. In doing so its jurisdiction harbours the danger that other comparably significant concerns might be overshadowed. Considering a reference issued by a public authority as admissible may lead to the consequence that the decision on the question referred is in the hands of the judges in a stage where the administrative decision-making process has not ended yet. To that effect, the reference to the ECJ may lead to a premature judicial decision which does not respect the intrinsic value of the administrative procedure, hence the separa-

7 Case 61/65, Vaassen-Goebbels [1966] ECR 261 at 273.

8 Cf. Christoph Möllers, *Gewaltengliederung* (Tübingen: Mohr Siebeck 2005), pp. 76 et sqq.

https://doi.org/10.1017/S1867299X00000350 Published online by Cambridge University Press

tion of powers. Furthermore, the independent contributions of the national public authorities to the emergence and finding of European law are called into question. On the other hand, the preliminary ruling procedure may be misused as an instrument of political interest or in order to circumvent parliamentary accountability. The peril of a self-infantilization of the national public authorities comes to the fore in the present case. It is hardly conceivable that the Umweltsenat was in any doubt about how the ECJ was going to decide on the interpretation of the EIA Directive. It would have been rather astonishing if the ECJ had held that when deciding whether the thresholds of the EIA directive are exceeded, a Member State is allowed to disregard the parts of the project that are located on the territory of another State, in particular of the territory of another Member State of the European Union. Therefore one may assume that the Umweltsenat had referred the question with an ulterior motive: It is easier to justify a decision if its essence is outlined by the Luxembourg judges.

The ECJ should be cautious about considering all Austrian weisungsfreie Behörden as "courts" within the meaning of Article 234 EC without further elaboration. The pivotal criterion for the required differentiation may be found with the "application of rules of law", an element of the definition as developed in the Vaassen-Goebbels decision that appears to be superfluous at first sight. Indeed, public authorities apply rules of law as well as courts. Yet the exceptional position of the courts relates to the fact that they usually have to base their decisions on *nothing else* but the law. Even if the process of deriving norms from the text of the law involves legal methodology, prior understanding, individual creativity, empirical knowledge and, in some cases, extraneous valuations to which the law refers, in the end it is only the norm that can legitimately determine the judges' decisions. The exclusion of a discretionary element is one of the typical features of the judiciary,[9] whereas the Executive is competent to fill the gap left by legal provisions. These differences have an impact on the substance of the judicial decision. When scrutinising an administrative act the court is, as a rule, confined to quashing the act.[10]

The Unabhängigen Verwaltungssenate in Austria are limited to quashing decisions and therefore can be regarded as courts within the meaning of Article 234 EC. In contrast, there are other boards with more far-reaching competences, for instance the "Regulierungsbehörden" (regulatory agencies) that not only scrutinise administrative acts but also take decisions using their own discretion.[11] Despite their independence, they are part of the Executive, from the European point of view. The Umweltsenat is not confined to scrutinise the legality of administrative acts and the compliance with procedural rules as well. It replaces the decision of the public authority of first instance with its own (§ 12(1) USG in connection with § 66(4) *Allgemeines Verwaltungsverfahrensgesetz*). It is rather an instrument of surveillance within the system of public authorities that enables the Federal State to replace the decision of the Länder with its own considerations[12] than part of the judiciary. Especially with regard to the case-by-case examination in Article 4(2) EIA Directive, § 3(2) UVP-G requires technical expertise, judicial review would be restricted to manifest infringements of law (cf. in Germany § 3a UVPG). As a result, the reference for a preliminary ruling by the Umweltsenat could have prompted ECJ to declare the question inadmissible.

2. On the interpretation of the EIA Directive

The EIA Directive introduced in 1985 was one of the first bodies of rules concerning the environment that went beyond a selective regulation related to specific natural resources or hazards. The Directive pursues an approach to risk regulation that has become typical for European Environmental Law. It purports to identify, predict and evaluate significant effects on the environment prior to major decisions being taken. Risk regulation takes place within the administrative procedure and is not postponed to judicial proceedings.

In this regard, the ECJ's judgment is not surprising. For assessing whether a project has significant effects on the environment, one has to take into account the nature, size and location of the project as a whole, irrespective of national borders. An assess-

9 Möllers, "Gewaltengliederung", *supra* note 8, p. 95.

10 Cf. Grabenwarter, *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit* (Vienna, New York: Springer 1997), p. 370 et sqq. with reference to the legal systems of the Member States.

11 Cf. Grabenwarter/Holoubek, "Demokratie, Rechtsstaat und Kollegialbehörden mit richterlichem Einschlag", *supra* note 6, at pp. 199 et sqq.

12 Öhlinger, "Verfassungsrecht", *supra* note 3, para. 643.

https://doi.org/10.1017/S1867299X00000350 Published online by Cambridge University Press

ment of the environmental effects of transboundary projects (such as lines for long distance railways, pipelines and electrical power lines) has to be carried out with regard to the total length of the project and not only to its length on the territory of that Member State. This approach is supported by the fact that the thresholds in Annex I of the Directive have been enacted in order to ensure the economic proportionality of the assessment for the developers of projects. Since, from an economic point of view, a transboundary project is to be regarded as a whole, it would not be reasonable for environmental law to adopt another view. The overall perspective even applies to parts of projects that are realised on the territory of a Non-Member State. However, each Member State has to identify, describe and assess just the effects that emanate from the part of the project that is located on its own territory. If this part of the project is likely to have significant effects on the environment in another Member State, then compliance with Article 7 of the EIA Directive is required.

Irrespective of the finding that the Directive goes beyond national borders, there is still room for doubt whether it is necessary to carry out separated EIA in every single Member State affected by a project. Parallel procedures lead to administrative inefficiencies and put an additional strain on the investor. Hence the accumulation of EIA procedures may become relevant with regard to the developer's individual rights.[13] The European legislator should therefore think about providing a framework for the coordination of the national procedures in cases of transboundary projects. The law on the Environmental Impact Assessment may serve as an example for the emergence of a European composite administration which has already developed various forms of horizontal cooperation between the public bodies of the Member States.[14]

13 On this topic Jan Henrik Klement, "Die Kumulation von Grundrechtseingriffen im Umweltrecht", 134 *AöR* (2009), pp. 35 et sqq., at p. 68.

14 Cf. Oswald Jansen/Bettina Schöndorf-Haubold (eds), *European composite administration* (Antwerpen: Intersentia 2010, forthcoming); Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Berlin, Heidelberg: Springer 2008), pp. 609 et sqq.

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