

Ius Commune Conference 2019

Workshop: Judicial Scrutiny in Administrative Law

Friday, 29 November (09.00 - 12.00)

Building: Nieuwe Valk

Room: Aula

Participants

Judicial Scrutiny in Administrative Law: Full, Sufficient, Limited or Unlimited?

The intensity of judicial scrutiny of governmental acts is an evergreen in administrative law. As regards the issue the European Court for Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) provide for some guidance. Although their case law certainly shows similarities, their approach is not the same in detail and terminology and as yet explicit coordination exemplified by mutual references is lacking.

According to the ECtHR national courts should have *full jurisdiction* in order to qualify as a tribunal/court within the meaning of Article 6(1) ECHR. Full jurisdiction implies that the court must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (Albert & Le Compte, 7496/76). Thereto the court must have the power to examine each of the litigant's grounds on the merits and must give clear reasons for their rejection. As to the facts, the court must be able to re-examine those that are 'central' to the litigant's case. Moreover, judicial control cannot be limited by any 'irrebutable presumption as to the legality of the reasons' of the decision contested (Terra Woningen, 20641/92, Chevrol, 49636/99). However, as regards the precise level of judicial scrutiny of the facts required by Article 6 ECHR, the ECtHR's case law is less clear. As to administrative law cases qualified as civil, the ECtHR seems to allow a rather deferential approach ('sufficient jurisdiction'), insofar factual findings concern discretionary matters in a specialized area of law, such as town- and country planning (Bryan, 19178/91) and telecommunication (Sigma, 32181/04 and 35122/05), and taking into account the level of procedural safeguards available to the applicant in the proceedings before the administrative authority. In administrative law cases qualified as criminal, f.i. concerning administrative fines, full jurisdiction implies that national courts have the power to assess whether a penalty was proportionate to the alleged misconduct, and to both lower and annul the penalty (Menarini, 43509/08, Grande Stevens, 18640/10).

The CJEU increasingly assesses the intensity of judicial scrutiny by the EU and national courts in the light of Article 47 CFR. The CJEU does not apply a concept of full (or sufficient) jurisdiction, possibly because Article 47 CFR does not lay down one single standard for review, as the level required depends on the EU rules in question. Before the Union courts, the most intense level of judicial scrutiny applies to EU competition fines, in respect of which Article 47 CFR requires the EU courts to exercise unlimited jurisdiction (KME, C-389/10). They should substitute their own appraisal for that of the Commission and consequently cancel, reduce or increase the fine imposed. In other situations, in particular in cases of discretion or margins of appreciation for reasons of technical, economic or otherwise factual complexity, the review by the EU courts is a

deferential one, namely whether the act at issue is 'not vitiated by a manifest error or a misuse of power'. However, deference in review of substance is compensated to some extent by a strict process review, in particular of whether the EU authority respected the duty to examine carefully and impartially all the relevant aspects of the individual case, the rights of defense of the person concerned and the duty to provide for an adequately reasoned decision (Technische Universität München, C-269/90). As regards the national courts, Article 47 CFR requires a thorough review of asylum decisions, more in particular of the merits of the reasons on which they are based, there being no irrebuttable presumption as to the legality of those reasons (Samba Diouf, C-69/10). However, where national authorities enjoy a wide margin of discretion or appreciation in applying EU law, the CJEU prescribes a review rather similar to its own approach, namely restrained as regards substance, but rather strict on compliance with procedural guarantees (Fahimian, C-544/15).

This overview, which obviously is not exhaustive, raises the question whether there is or should be a European concept of judicial scrutiny. In this regards it is of importance to take into account national developments and discussions regarding the level of judicial scrutiny as well. Are these national discussions guided by the European courts case law or do they have their own dynamic? And, to what extent may developments at the national level provide inspiration for the European courts (bottom-up Europeanisation)? Moreover, the concept of judicial scrutiny as developed by the European courts level raises questions as well. Is the level of scrutiny as allowed by the ECtHR and applied/prescribed by the CJEU not too deferential? And, to what extent is deference as regards substance indeed compensated by a strict process review? Finally, one may wonder whether the strict approach as currently applied/prescribed by both Courts to administrative fines should be extended to other administrative penalties and/or to other decisions that may affect the exercise of fundamental rights.

These and related questions will be discussed in the seminar. Some contributions will mainly focus on the European perspective, others mainly on the perspective of national law.

Chair:	Steven Lierman (KU Leuven)
09.00 – 09.05	Steven Lierman (KU Leuven) <i>Opening and Introduction</i>
09.05 – 09.20	Sander Jansen (Maastricht University) <i>Full Jurisdiction, Sufficient Jurisdiction, Unlimited Jurisdiction: What's in a Name?</i>
09.20 – 09.35	Rob Widdershoven (Utrecht University) <i>Judicial Scrutiny in EU Law and Article 47 CFR</i>
09.35 – 09.55	Discussion
09.55 – 10.10	Coffee break
10.10 – 10.30	Annalisa Volpato (Maastricht University) <i>Judicial Review of EU Agencies' Powers: Discretion Escaping Scrutiny?</i>
10.30 – 10.50	Melanie van Zanten (Utrecht University) <i>Process-Oriented Review of General Applicable Acts in the EU and Netherlands</i>
10.50 – 11.10	Pieter-Jan Van de Weyer (KU Leuven) <i>Full Jurisdiction in Belgium Administrative Law</i>

11.10 - 11.25 **Coffee break**

11.25 - 11.50 **Discussion**

11.50 - 12.00 **Steven Lierman** (KU Leuven) and **Rob Widdershoven** (Utrecht University)
Winding Up