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Vienna calling (Luxembourg) – About the admissibility of an Action for Annulment of the Nature Restoration Law

By Sophie Dukarm

This blogpost is dedicated to legal questions arising from the ongoing 'coalition crisis' in Austria, following Environment Minister Leonore Gewessler's decision to vote in favour of the Regulation on Nature Restoration despite the opposing will of Austria's Chancellor Karl Nehammer and 7 out of 9 Regional Governments (*Bundesländer*). While Nehammer is of the opinion that this violates Austrian constitutional law ('The constitution applies to climate activists as well.') and has filed an abuse of office complaint, the question arises if the announced action for annulment before the CJEU – if not supported by all members of the government – would be admissible and who else could challenge the law in Luxembourg.

A quick reminder on the facts of the case: The Council adopted the Nature Restoration Law on 17 June 2024, with Gewessler's (The Greens) vote being the decisive one as otherwise the required number of EU residents would not have been met (Article 16(4) Treaty on European Union, TEU). However, the second party in Austria's coalition, the Austrian People's Party ('ÖVP') and Chancellor Nehammer were not amused about Gewessler going rogue. When Gewessler announced her intention to support the law in the EU Council of Ministers one day before the vote, Nehammer sent a letter to the Belgium Presidency arguing that Gewessler was 'not entitled to commit the Republic of Austria according to Art 16 (2) TEU in this regard' due to a binding uniform opinion of the Regional Governments. Nevertheless, the Council confirmed that the vote would hold, and Brussels capital-regions Environment Minister Alain Maron, who chaired the talks, referred to an 'internal controversy in Austria'. Notwithstanding the law's passing, for now,

Gewessler attracted harsh criticism from her coalition partners, accusing her of having 'trampled federalism underfoot'. Even if the ÖVP is committed to maintaining the coalition (since legislative elections in September are approaching), this did not stop them from announcing their will to submit an action for annulment in addition to the criminal charges already filed.

Regarding the merits of the case, there are better arguments that an action for annulment would likely not succeed. This is also reflected by discussions in Austria and Germany together with a recently published Verfassungsblog. The contribution on Verfassungsblog convincingly demonstrates that even if Council members may be bound by additional national guidelines during votes (just as the ÖVP claimed that Gewessler was bound by national law to the uniform opinion of the provinces according to Article 23d Federal Constitutional Act (*Bundes-Verfassungsgesetz*, B-VG)) this does not affect the validity of votes on the EU-level since the CJEU is only bound to the (formal) requirements of Article 16(2) TEU, which are firstly a representative on ministerial level who is secondly able to commit the government in question. Within these limits, it is up to each Member State to determine how it is represented in the Council (see also Annex I Council's Rules of Procedure (2009/937/EU). Article 73(2) B-VG stipulates that Austria is represented in the Council by the competent Minister, who, considering the Federal Ministries Act is Leonore Gewessler in matters of the environment, leaving no doubt that she could commit her government (with no further authorization needed). According to the authors, the letter sent by Nehammer to Alexander De Croo, does not lead to a different legal assessment – even in the light of Article 4(3) TEU. One could also question the presence of a 'manifest' violation of a national provision of 'fundamental importance' in view of the ongoing discussion in Austria right now whether Article 23d has been violated as two *Länder* withdrew from the former uniform opinion that proves the controversy of the issue (see the comments by Prof. Hipold). Another unfavourable point could be the wording of Nehammer's letter ('in this regard'). Although it would be conceivable to withdraw a minister's power of representation – for example, by dismissing her – acting ministers have the power to speak for a country in the Council (see points raised by Prof. Ruffert).

However, another question implied by Austrian Prof. Bußjäger is whether one minister alone can submit an action for annulment (on behalf of the state). Against this background, the question arises of whether such an action would even pass the formal barriers of Article 263 Treaty on the Functioning of the European Union (TFEU).

According to Art. 263(2) TFUE the Court shall have jurisdiction in

> 'actions brought by a **Member State**, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential

procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.' (emphasis added)

Contrary to the non-privileged applicants in paragraph four of the same article, the standing of these so-called privileged applicants is not dependent on anything else, such as individual or direct concern. The Court argued in *Italy v Council* that even the fact that the act in question was voted for in the Council by the representative of a Member State does not hinder its application for annulment (see also: Lenaerts et al., EU Procedural Law (para. 7.77)). This being made clear, the question remains, who can fulfil the Member State notion.

The answer – according to settled case law – is that the term 'Member States' refers to 'government authorities of the Member States' (see, for example, *Région wallonne v Commission* (para. 6.)). Therefore, infra-State authorities – such would be in the current case of Austria one or more *Bundesländer* – do not satisfy this condition. The only way for them to apply for an action for annulment would be the 'hard way' by proofing that they are directly and individually concerned by the contested measure. In fact, this has already been the case in an action for annulment by the Austrian region *Oberösterreich* in *Land Oberösterreich v Commission*. In its judgment, the General Court had to assess whether the *Land Oberösterreich* was individually affected by a Commission decision addressed to the Republic of Austria, which concerned the denial of a request for derogation from a directive in favour of a draft law of the *Land Oberösterreich*. This led the Court to affirm its *locus standi* as the contested decision had the effect of preventing the exercise of its own powers conferred on it by the Austrian constitutional order.

It can be concluded that even if a *Bundesland* itself is unable to submit an action for annulment relying on Article 263(2) TFEU, the Court does indeed consider infra-state conferral of power when it comes to the fulfilment of the criteria of paragraph four, which can ultimately lead to an admissible application for annulment (see also Alves (p. 249 f.)). Nevertheless, it is doubtful that the CJEU will grant standing to one of the *Bundesländer* that were against the EU Nature Restoration Law since, in the present case, the reviewable act would be the regulation itself (and not as in the above-mentioned case, a decision of the Commission that affects the measure by the *Bundesland*) which expands the circle of potentially affected applicants and would most definitely contradict the assumption of individual concern under *Plaumann*. In addition, as made clear above, there is no consensus as to whether there has been a breach of national constitutional law that would affect the constitutional powers of the *Länder (*even if the regulation would, of course, limit the *Länder* in the exercise of their conferred powers that include nature conservation).

While the CJEU clarified that only the state government can submit an action for annulment, Article 263(2) TFEU does not state further criteria. One needs to have a closer

look at the Austrian constitution to understand the Government's internal decision-making process. According to Article 69(1) B-VG the Federal Government consists of the Federal Chancellor, the Vice-Chancellor and all the other Federal Ministers. Every one of them is considered a 'highest organ', which means there is no hierarchy between them. Until recently, the question of which majority requirements were necessary for a government resolution was unresolved – even if the prevailing opinion was that unanimity was required. However, this changed with the second COVID-19-law when a third paragraph was added stating that 'the Federal Government shall pass its resolutions unanimously' (see also: Muzak, B-VG, Art. 69). In other words, under Austrian constitutional law, a unanimous decision by all ministers is required for the collegial body of the Federal Government to adopt a decision. Hence, in the absence of a specific provision that, to the author's knowledge, applies to the present case, an action for annulment needs the approval of all the members of the government, which is impossible, as Minister Gewessler (and probably the other five Green coalition members) will not consent. Even if the Austrian Government is represented before the CJEU by the Constitutional Service, a solo effort by the responsible Minister for the EU and Constitution would go against Austrian constitutional law (for the effects on the EU level see below). Again, as with action brought by regional entities, one or several ministers can still submit an action through Article 263(4) TFEU (while, of course, needing to prove direct and individual concern).

However, two possible scenarios remain of how a 'privileged' action for annulment might succeed after all. The first possibility (and it is not really one): ÖVP could wait until parliament elections on 29 September 2024 and the renewed government. If the Greens go into opposition and a conservative coalition is formed, there is a good chance that unanimity will be found among the new members of the government. Nonetheless, there is a reason why this alternative is of a very theoretical nature. Even though the EU Nature Restoration Law has not yet been published in the OJ, it will soon be. Once published, an action for annulment can be brought within two months and ten days (Article 263(6) TFEU and Article 51 of the Rules of Procedure of the Court of Justice). Hence, it is hard to imagine that the deadline for bringing an action will not have expired by the time the new Government is formed. The second (and more likely) scenario would be that Austrian Chancellor Nehammer and/or his constitutional Minister decide to submit an action for annulment on behalf of the government (without the consent of the entire government), infringing Austrian constitutional law. In the case that the action is brought by the aforementioned Constitutional Service, it will still be considered admissible by the CJEU as the internal decision-making process is (again) a question of domestic constitutional law and not amongst the requirements of Article 263(2) that bind the Court. However, there is a certain irony as Nehammer's approach would fulfil precisely what he and his party are now accusing Gewessler of: An offence against national constitutional provisions.

Given the above, the case in question would undoubtedly represent a novelty before the CJEU, and many questions (both of a formal and substantive nature) still need to be conclusively clarified. However, one needs to await if and who of the Austrian Government (or, less likely, Regional Governments) submits an action for annulment in the two months following the publication of the Nature Restoration law. Suppose one fears similar *coups* during EU legislation procedures will soon occur in other Member States. In that case, one can confidently argue that the actors were presumably politically motivated in their respective actions and that the existence of all the necessary factors (national pre-election campaign mood, vote of a country that is decisive in a Council vote, etc.) will probably not be repeated so quickly. When it comes to climate activists, those who have in the past stood up for a reinterpretation of the individual concern criteria under *Plaumann* by the CJEU may feel a certain satisfaction if the Court – even if granting standing for the Member State – will most likely (albeit for different reasons) dismiss the action as unfounded.