Evaluation of the case study

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(A.) Introduction

In the run-up to this seminar, I was given the opportunity to fulfill what at first glance appeared to be two separate tasks: evaluating the responses to the case study, and solving the case based on the ReNEUAL Model Rules (MR).\(^1\)

While I weighed potential approaches to both tasks, I ultimately decided to merge them. This meant attempting to both solve the case using the ReNEUAL MR and (where possible) drawing upon a comparison of national solutions, reinforced by certain findings of the General Report (GR).\(^2\)

In practice, the ReNEUAL MR should be applied mainly during the implementation of EU law by EU authorities. The best way to visualise how the ReNEUAL MR and Member States’ administrative procedure regulations influence each other is to imagine tiered dynamic processes (taking into account both temporal and systemic issues, and looking at both the functional and operational levels).\(^3\) Such processes can only be demonstrated to a very limited extent in a single case exercise – even at the theoretical level.

One possible approach is comparing the Member States’ solutions to the case questions and then viewing Member State approaches through the lens of the ReNEUAL MR. This would enable us to examine whether and to what extent Member State regulations could be brought closer together\(^4\) via the ReNEUAL MR’s orientation guide. This approach is justified as, within

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\(^1\) This paper is an adapted version of the presentation given at the ACA-Europe seminar on the 4th December 2018 in Cologne, hence the ‘presentation style’. Nevertheless, it is still a work in progress and comments are most welcome. I am truly grateful to Prof. Dr. Dr. h.c. Klaus Rennert, President of ACA-Europe, for making my participation in the seminar possible. Particular thanks also goes to Dr. Carsten Günther, Judge at the Federal Administrative Court, for his careful guidance prior to the seminar itself. I owe very special thanks to Lisa Kaldowski and Adam Dampc for supporting the drafting of this document at all times. I am also grateful to Prof. Dr. Jens-Peter Schneider for valuable insights to a previous version of this text regarding the ReNEUAL MR’s regulations, particularly on the application procedure, on the duty to provide information and on the principle of transparency.

\(^2\) This, however, should in no way be seen as attempting to tackle the ambitious goal of evaluating the ReNEUAL MR themselves. Although ReNEUAL 2.0 is meant to be standalone, it might occasionally refer to the MR: http://www.reneual.eu/index.php/projects-and-publications/reneual-2-0. In order to keep the task as practicable as possible, the comparison does not draw on the EU administrative procedural rules proposed by the European Parliament: Proposal for a Regulation of the European Parliament and the Council on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies, PE573.120v01-00.

\(^3\) On characterising the influences in this interrelationship as “convergence” and a “source of inspiration”: Guckelberger, Gibt es bald ein unionsrechtliches Verwaltungsverfahrensgesetz?, NVwZ 2013, 601, 607. Ladeur discusses the fact that Community law “irritates” the relatively closed administrative law of the Member States in certain respects: id., Supra und transnationale Tendenzen in der Europäisierung des Verwaltungsrechts – Eine Skizze, EuR 1995, 227, 228 et seq.

\(^4\) Legal approximation is by no means intended to mean the establishment of identical standards or an identical application, but rather that both processes are based on a common (European) standard. The term approximation can be used to describe any application or implementation by Member States and its consequences, as it comes closest to the notion of convergence that is established in Anglophone sources, compare for example Timmermans, Developing administrative law in Europe: natural convergence or imposed uniformity, Review of European
the scope of application and “influence” based on Art. III-1 (2) in conjunction with Art. I-1 (2) and Art. I-3, the ReNEUAL MR can also be seen as supplementary regulation or an aspirational model.5

In order to do so, one would first have to deal with the question of whether the ReNEUAL MR could (and should) influence Member State administrative procedure regulations at all, and, if so, to what extent and how. Whether the ReNEUAL MR themselves (as a best practice yardstick6) could be an orientation aid in the evaluation of various Member State administrative procedural rules in order to initiate an approximation of laws or legal reform compatible with Union law in Member States7 is a question that bears cautious consideration.8

When developing an evaluation standard for the subsidiary application or sovereign implementation of the ReNEUAL MR by Member States,9 it would be imperative to examine the possibility of drawing on ReNEUAL in a Member State-specific way. This stems from the fact that the ReNEUAL MR cannot be considered in isolation, but only in connection with Member State law.

The administrative procedure is essentially characterised by three factors: the legislative optimisation competence (or ultimate rulemaking competence), the discretion of the authorities


5 Explanatory notes (further on: Erl.), in: Schneider/Hofmann/Ziller (Eds), ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht, C.H. Beck 2015, p. 4, recital 16, p. 16, recital 57. Applications by Member States can be made possible by a sector-specific provision within the meaning of Art. III-1 (2) ReNEUAL. In addition, the scope of application of the ReNEUAL MR may be extended to national issues pursuant to Article III-1 (2) ReNEUAL via Member-State declaration. Recently, the second option has been classified as the only realistic one: Kahl, Kodifizierung des Verwaltungsverfahrensrechts in Deutschland und in der EU, JuS 2018, 1025, 1033, with further references.


7 Erl., p. 25, recital 11.

8 For questions on the legal basis and competence for this see von Danwitz, Der ReNEUAL-Musterentwurf: Die weiteren Perspektiven, in: Schneider/Rennert/Marsch (Eds), ReNEUAL, Musterentwurf für ein EU-Verwaltungsverfahrensrecht, Tagungsband, C.H. Beck 2015, 247, 249 et seq., 251 et seq.

and the level of judicial review.\textsuperscript{10} Using the information provided by the case solutions, the influence of these factors could be indirectly determined by looking for correlations between the findings of the General Report and the specific case questions.\textsuperscript{11} It is necessary to note that the identification of these correlations could be in \textit{sensu stricto} arbitrary, primarily due to assumptions about the regulatory density of the administrative procedure in the Member States and the (regulatory) power of case law. If the Member States were to draw on the ReNEUAL MR, the question would also arise as to what extent the MR should be conceived as a complete and self-contained administrative procedure regulation in different scopes of application.

However, the main scope of application of the ReNEUAL MR is supposed to be the application of EU law by EU authorities. This suggests that, when working towards a model for this scope of application, it is precisely the Member States’ administrative procedural regulations which could be made fruitful for the ReNEUAL MR as best practice benchmarks. Hereby, the particularities of the application of EU law should be considered, and no single Member State solution should be adopted alone or in its entirety.\textsuperscript{12}

So, first of all, I tried to clarify the administrative procedure in the case according to the ReNEUAL MR as if they were existing law. Although one needs to be aware of the (at least current) fictitious assumptions on which this procedure must be based,\textsuperscript{13} the ReNEUAL MR are nevertheless ultimately about concretising the constitutional and legal principles of the EU, which should be realised in administrative procedures in order to better implement EU law. I then compared the Member States’ solutions in order to determine whether they could through

\textsuperscript{10} Also defined as extracting coherence from vague concepts: Gärditz, Funktionswandel der Verwaltungsgerichtsbarkeit unter dem Einfluss des Unionsrechts? Umfang des Verwaltungsrechtsschutzes auf dem Prüfstand, NJW, 2016, 41, 43.

\textsuperscript{11} And could, in order to also linguistically satisfy the comparative perspective, also take up the role of indefinite legal concepts. Although not every vague concept gives rise to discretion, for a brief description of the relationship between indefinite legal concepts and discretion in the German legal system, also on the tense relationship between “knowledge” and “will” (cognition-volition) in this context, see for example: Mendes, Administrative discretion in the EU: comparative perspectives, in: Rose-Ackerman/Lindseth/Emerson (Eds), Comparative Administrative Law, Elgar 2017, 632, 638 et seq., with references to parallels in other legal systems such as Spain, Italy and Portugal, 639 et seq. On the role of indefinite legal concepts in relation to static discretion (as opposed to dynamic) in continental legal systems, see Szot, Discretionary powers of the public administration in law application processes and its judicial control, in: Leszczyński/Szot (Eds), Discretionary Power of Public Administration. Its Scope and Control, Peter Lang 2017, 89, 91. Whether those concepts are classified as undetermined, imprecise, undefined, or vague is not just a question of language, obvious in: Künecke, Tradition and Change in Administrative Law. An Anglo-German Comparison, Springer 2007, 74.


\textsuperscript{13} And this can be stated even more extensively than Bercea states for the legal comparison “Toute comparaison des droits est une fiction.” Legrand (Ed) Comparer les droits résolument, Presses Universitaires de France 2009, 41.
comparison inspire, build up or complete\textsuperscript{14} the aforementioned solution according to the ReNEUAL rules. The ReNEUAL MR’s declared aim is also to supplement existing legal rules and principles with new ones in order to achieve “innovative codification”.\textsuperscript{15} Subsequently, the Member States’ solutions re judicial review of the administrative procedure still remained to be compared.\textsuperscript{16}

In order to make this approach actually fruitful for the ReNEUAL MR’s main scope of application, it would be necessary to examine the specific case questions for their relevance to procedures before an EU authority. Only then could the question of whether the ReNEUAL MR themselves should be strengthened on the basis of the Member State solutions and, if so, how, be addressed. The evaluation yardstick for completing the ReNEUAL MR would have to be examined more closely. The Member State solution models should be drawn on as best practice for ReNEUAL. There would then be a need for further clarification as to how minimum standards could be precisely delimited from best practice. To this end, an examination of how the ReNEUAL MR could be applied in cross-border situations would be necessary. The exact connections and relationship between Union secondary law as sector-specific law (which is very pronounced in the field of environmental law) and its implementation and application in the Member States also bears diligent examination. Here, the ReNEUAL MR’s position relative to sector-specific law becomes relevant: on the one hand, the MR partly incorporate sector-specific law, but on the other sector-specific law also supersedes them.\textsuperscript{17}

\textsuperscript{14} On Member States’ administrative legal systems as a source of inspiration for the Union and their plurality as a source of tension: Ludwigs, Die Verfahrensaufonomie der Mitgliedstaaten. Euphemismus oder Identitätsfaktor?, NVwZ 2018, 1417, 1418.

\textsuperscript{15} Erl., p. 5, recital 17.

\textsuperscript{16} This approach is strongly influenced by language and interpretation method, which may vary from jurisdiction to jurisdiction. While solving the case, I was only able to use the English and Spanish versions of the ReNEUAL MR alongside the German. I did at least try to quote about the same amount of German and non-German sources. However, the extensive claims by a legal comparison regarding an understanding of law as a cultural phenomenon must still be upheld, compare instructively: Legrand, The Return of the Repressed: Moving Comparative Studies Beyond Pleasure, Tulane Law Review, 75 (2000-2001) 1033, 1048.

\textsuperscript{17} In relation to the ReNEUAL MR sector-specific Union law as \textit{lex specialis}: Art. I-2 (1) Art. III-1 (2) ReNEUAL. Distinct sector-specific law is presented as a problem of approximation in the context of the ReNEUAL MR because it can cause fragmentation, Erl., p. 6, recital 20. It can be assumed that sector-specific rules of administrative procedure which can be generalised have already been taken into account in the ReNEUAL MR project within the framework of best-practice analysis (Erl., p. 17, recital 62-63). In solving the case based on the ReNEUAL MR, I decided not to draw on sector-specific law \textit{per se}.

The dynamic influences between substantive law, administrative procedural law and procedural law are mirrored in the solutions of the Member States, but their (comprehensive) consideration would go beyond the scope of this contribution, especially since this would involve an extensive investigation of the regulatory measures. (Member State solutions can therefore only be drawn on with reservations. Given this circumstance, the GR can also only be drawn on with reservation within the framework of our task.)

On the impact of sector-specific secondary legislation on national administrative procedural regulations under the perspective of the extent to which differences in enforcement between Member States are justified by the fact that Community law does not provide otherwise: Stelkens, Fn. 9, 524, on “respectful” enforcement, id., 525. On the impulses for change and functional extensions emanating from Union law (and public international law) and national administrative jurisdictions – beyond the effective implementation of Union law – see, as demonstrated using the example of the Aarhus Convention, here particularly relevant: Eliantonio/Backes/van Rheee/Spronken/Berlee (Eds), Standing up for Your Right(s) in Europe, A Comparative Study on Legal Standing (\textit{Locus Standi}) before the EU and Member States’ Courts, Cambridge University Press 2013, 80 et seq.; Sommermann, Transformative Effects of the Aarhus Convention in Europe, ZStR 77 (2017) 321. On the impulses beyond the Aarhus Convention: Sommermann, § 55 EntwicklungsPerspektiven der Verwaltungsgerichtsbarkeit, in: Sommermann/Schaffarzik (Eds), Handbuch der Geschichte der
Altogether, however, the whole exercise seemed to be less about solving the case conclusively, if at all, and more about showing ways of thinking generally about mechanisms related to the case-by-case application of the ReNEUAL MR against the background of Member States’ approaches. This approach might best reflect the task at hand and that instead of, or at least alongside, a trial-and-error process it could also contribute to highlighting the added value of legal comparison for a Union administrative procedural law – fully in the etymological sense of the process of adding value. The analysis of a design of administrative enforcement on the basis of concrete case questions can thus first provide insight on the application of law in the Member States. The practical condensation of all Member States’ procedural regulations at the level of legal norms for a model for EU administrative procedural law can take additional inspiration from the findings on the practice of the application of law. As a result, in the long term, the door to approximation of laws (both at the level of norms and at the level of application) in the Member States could possibly be opened a little further. This dynamic is guided and framed by the desired balance between the effective fulfilment of public tasks and the protection of individual rights at all times.

(B.) Administrative procedure

As the focus of consideration is on questions of administrative procedural law and the application of the ReNEUAL MR, one can seek a solution of the case before us at the administrative level exclusively on the basis of these sets of rules. The resulting solutions can then be compared with those of the Member States.


18 As regards comparison of laws in the context of misuse of discretion, see only Opinion of Mr Advocate General Lagrange on 2 June 1955, Case 2/54, ECLI:EU:C:1955:6, p. 149. On the recognition of legal comparison see, Judgment of the Court of 12 July 1957, Joined Cases 7/56, 3/57 to 7/57, ECLI:EU:C:1957:7, p. 118. With regard to the ReNEUAL MR, Rennert speaks about a hermeneutic methodology: id., ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht aus der Sicht des BVerwG, DVBl 2016, 69, 70. Schmidt-Aßmann describes comparative law in the field of administrative procedural law as joint learning: id., Zum Standort der Rechtsvergleichung im Verwaltungsrecht, ZaöRV 2018, 814, 861. Örücü propagates the notion of critical comparative law: The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century, Brill 2004, 215. With regard to a comprehensive, evaluative legal comparison, see, however, the restrictions in Fn. 17, 18. In addition, an abstraction of a certain Member State approach from the legal system of origin and its situation in Union law would have to be achieved from various perspectives in order to avoid the following: “they took fields of living law, scalded off their flesh, drained off their blood, and reduced them to bones”, Friedman, A History of American Law, Touchstone, 3rd ed. 2005, 676. Or more pragmatically Breidenstein, who generally requires an action model as a forecasting instrument in the event of the adoption of regulations between legal systems: id., Zur Methodik der Verfahrensrechtsvergleichung, Mohr Siebeck 2012, 234. On the role of comparative law as an objective method for courts in reviewing the decisions of public authorities, see the partly concurring and partly dissenting opinion of Judge Sajó in: Murat Vural v Turkey, App No 9540/07 (ECHR, 21 October 2014).

First of all, one can state that this is not a procedure under Art. III-1 (1) ReNEUAL, since no EU authority is competent. I-4 (1), (7) ReNEUAL provide nothing to challenge this conclusion. According to Art. III-1 (2) ReNEUAL, the applicability of the ReNEUAL MR for a purely national situation and national authorities is assumed: The substantive law is not directly exercised by an EU authority, but by a Member State authority. The competence of S is assumed on the basis of final decision-making competence.\footnote{Compare Art. III-2 (2) in conjunction with Art. I-1 (1); I-4 (3, 7) ReNEUAL. For more details, see the explanations under M.}

According to Art. III-5 (1) ReNEUAL there exists an application procedure. It can be stated in advance that the parties in the sense of Art. III-2 (3) ReNEUAL have to be heard according to Art. III-23 ReNEUAL, while the participation of the interested public within the meaning of Art. III-2 (4) ReNEUAL pursuant to Art. III-25 ReNEUAL is optional.

With regard to the administrative procedure, the solution focuses on the participation of M, F, P and O respectively and the authority’s investigation according to the ReNEUAL MR.\footnote{For a methodology of comparison that does not wish to cover the whole procedure, compare Breidenstein, Fn. 19, 26.}

(I.) Participation: M, F, P and O

**M’s Participation:** At first glance, M could be qualified as an authority within the meaning of Art. III-2 (2) ReNEUAL. Although the term “authority” as it relates to Member States in Art. III-2 (2) and Art. I-4 (7) ReNEUAL is defined rather indirectly\footnote{See, however, the positive term of EU authority in Art. I-4 (5) ReNEUAL.}, due to the wording of Art. III-1 (2) and Art. III-2 (1) ReNEUAL, according to which the decision is of central importance, it would seem obvious that final decision-making competence in the concrete administrative procedure is necessary for the status of authority within the meaning of Art. I-4 (3, 7), Art. III-5 (4) ReNEUAL. Thus, M would not be an authority.

Since M is not itself the addressee,\footnote{Since M itself is not the competent authority, the authorisation could have such legal effect vis-à-vis M that M would be the addressee of the authorisation. The addressee is, according to Art. III-2 (3) ReNEUAL, automatically a party to the administrative procedure without an application for participation being required. However, the natural literal sense of the addressee would have to be observed, according to which the addressee is the person to whom the decision is addressed. In the present case, this is A and not M, even if M’s planning is indirectly affected by the decision. On the problem of the “literal sense”, see Fn. 18; on the role of substantive law, here with regard to party status, see Fn. 17.} M could only be involved as a party under Art. III-2 (3) ReNEUAL to the proceedings on the basis of being adversely affected, and their corresponding application. In order to be able to assess “adversely affected” more precisely, the relationship between M and S described in national law would – necessarily – have to be clarified. Three different models can be identified in the Member State solutions.\footnote{The planning authority and the authorising authority may be different (and thus there exists a right of instruction between them), or the two authorities may be bound by the instruction of a higher authority which coordinates the actions and powers of both authorities, or there exists an authority identity between the planning authority and the authorising authority or no distinction is made in national law, such that only one authority acts.} In principle, Member States tend to treat M as another party to the administrative procedure. In many Member States authorities are legally involved in the administrative procedure on the basis of substantive legal requirements. Prerequisites for this are, among other things, one’s own subjective rights or the public interest being affected, the protection of which falls within the authority’s competence.
An impairment of the national authority’s subjective rights exists, for example, if S overrides the planning freedom of M (CS, DE\textsuperscript{25}). Another approach to participation requires that the authority is entrusted with the protection of a special public or private interest (see also GR I.1.6).

M did not make a written application but was informed by S and invited to comment. The question therefore arises as to whether the application for participation can be replaced by actual participation, since the authority itself went along with M’s participation.\textsuperscript{26} To this end, it would be necessary to find out what obligations the authority has in investigating and involving (potential) parties, what discretion it has in terms of participation and how the requirements for an application for participation could be specified, in particular whether the application can also be made orally.

The principle of investigation according to Art. III-10 (1) ReNEUAL is to be interpreted broadly. When it comes to participation, a concession by the authority could therefore be assumed. The preamble to Book I of the ReNEUAL MR also advocates openness of procedure. The ReNEUAL MR also tie Arts. III-6 (3), III-5 (2) and III-23 (3) to the issue of participation.\textsuperscript{27} The comparison between the Member States also shows that the obligation of the authorities to involve potential parties takes various forms. They would only have an obligation to investigate potential parties \textit{ex officio} in roughly one third of the states (GR I.3/I.4.2); instead of an obligation to investigate many define an obligation to provide information or integrate the investigation \textit{ex officio} into the authority’s discretion. How the involvement must take place varies considerably, ranging from direct notification to public notification (e.g. via the Internet or public display of a construction project).

Where an application by an affected party is necessary for their participation, there exist various prerequisites. In some Member States admission as a party requires an appeal (CS, ES, IT, SK). Some Member States require such an appeal to be made in writing (IT), which can serve as evidence or facilitate integration into the respective workflows of the national authorities. In other Member States, participation depends on a decision by the authority (including BU, DE, LV, SL), although the basis for this decision may vary (GR I.3/I.4.a). In summary, calling upon application procedure rules and Member-State authority participation, one can roughly sketch an argument that the requirement of a written application for M essentially constitutes an

\textsuperscript{25} In the interest of brevity, these references are not intended to be exhaustive, and merely list those Member States whose decisions best illustrate the accompanying point.

\textsuperscript{26} In this respect, the statement upon request could eliminate the need to make an application if the request coincides with the first-time information, since the person concerned expresses in the subsequent statement that they wish to participate in the procedure.

\textsuperscript{27} The circumstances of the case do indeed provide indications that M is treated as if M were a party within the meaning of Art. III-2 (3) ReNEUAL, but the question arises to what extent the conduct of the authority has legal effect; with regard to a potential written form requirement, the question has also arisen as to whether Art. III-6 (1) ReNEUAL can be considered here, according to which no unnecessary formalities may be demanded. Art. III-6 (1) ReNEUAL questions the written form requirement as a whole by the wording “and may be submitted in writing to the competent authority in-person, by mail or by electronic means”. The “may”, however, does not refer to the written form as such, but only to the different means of submission. One should also distinguish between an application in the sense of Art. III-6 ReNEUAL for the initiation of the procedure under Art. III-5 (1) ReNEUAL and a request for participation as a party within the meaning of Art. III-2 (3) ReNEUAL. Therefore, the standards of Art. III-6 (1) ReNEUAL cannot automatically be applied to M’s application for participation.
increased requirement which, however, could be justified by legal certainty and by the evidentiary function in proceedings.

In the discussion as to whether the application requirement for authorities makes any sense at all, it would not only be necessary to consider the different concepts of “authority” in the ReNEUAL MR and in the Member States, but also to take into account the fact that authorities, unlike citizens, can be presumed to have the necessary legal and technical knowledge to apply. That is why Art. III-10 (1) ReNEUAL as well as the valuation of the preamble of Book I in the concrete case speak in favour of modest requirements for an application, since this allows the authority’s behaviour to also be taken into account.

The question of F’s participation as a party necessitates a tighter focus on being adversely affected as a differentiation criterion between third parties and the “interested public” within the meaning of Art. III-2 (4) ReNEUAL. With regard to F, the Member States actually make use of many different terms as constituent elements of third-party participation, such as subjective rights, legitimate interest, legal interest or simple impairment. In this respect, it seems sensible here to express the semantic commonality of these constituent elements with the term “adverse” in the ReNEUAL MR, which Art. 41 CFREU helps clarify. In the ReNEUAL MR, “adversely affected” is an objective criterion which is subject to judicial control. Objective criteria covering the interests of third parties, whose impairment can lead to the capacity to become a party in administrative proceedings, are expressed in the Member States with the terms legal, legitimate, immediate, concrete & sufficient, but also personal, direct, secure and present (GR I.1.2). In view of the increased volume of traffic and the concerns over soil pollution, and also in view of Art. 41 CFREU, a de facto impairment could be assumed.

In addition to being “adversely affected”, F must, according to Art. III-2 (3) ReNEUAL, request to participate in the procedure. In connection with the present situation of third-party participation, the problem here obviously could be that third parties must first become informed in order to be able to file an application for participation as a party. Based on the case facts, F was invited to comment. He was thus definitely given the opportunity to comment according to Art. III-23 (4) ReNEUAL. Art. III-25 ReNEUAL’s requirement that those adversely affected be given sufficient information to assert their position as a party can thus be regarded as fulfilled.

The answers to question I.4.c of the questionnaire provide information on the consequences of F’s time-barred statement for the administrative procedure in the Member States. Member States which clearly argued that F’s statement did not need to be taken into account because of delays in the administrative procedure stated that the authority needed a certain planning certainty and that therefore the authority had a legitimate expectation of a reasonable deadline

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28 Erl., p. 70, recital 7.
29 Compare the elaborations by M, particularly regarding the authority’s conduct. However, critically overall on the regulations on information to be provided to the adversely affected, compare: Fehling, Buch III des ReNEUAL-Musterentwurfs aus der Perspektive der europäischen Verwaltungsrechtswissenschaft, in: Schneider/Rennert/Marsch, Fn. 8, 143, 146 et seq. Cf. the remarks by M; however, it should also be borne in mind that most Member States involve F by law, which is why one should question whether the application requirement is too high a hurdle overall (GR I.1.2).
(DE, HU, IT, MT, SL). Others expressed the view that F still had to be considered in the administrative procedure despite the late statement (FR, LV, NL, SR).

If it is assumed that F’s missing application denies them party status, Art. III-25 ReNEUAL provides that F could be consulted by S as a member of the interested public within the meaning of Art. III-2 (4) ReNEUAL. To what extent the information provided to F and the request for comments comply with the procedure under Art. III-25 ReNEUAL is questionable. S has in particular not guaranteed an inspection according to Art. III-25 (2) ReNEUAL. S could have, however, (e.g. by informing F) initiated a procedure according to Art. III-25 ReNEUAL which would fulfil the requirements for a public consultation. This article provides that, if the authority has decided to consult, it can carry out a public hearing under Art. III-25 (2) ReNEUAL or online consultation in accordance with Art. III-25 (4) ReNEUAL. The authority is therefore only free to decide whether or not it will consult the public; if it chooses to do so, it would have to follow the prescribed procedures. This suggests that only a violation of these procedural rules could have an effect. Since the “whether or not” decision is incumbent on the authority, but the “how” is then determined by the ReNEUAL MR, the authority is at least given a certain margin of discretion. Such leeway should be welcomed precisely because of the different Member State solutions, since the option to decide against consulting the public means no comprehensive standardisation occurs.30

It should also be noted which objective manifestations of the “whether or not” decision are necessary, since without objective criteria it would be possible for the authority to completely circumvent the “how” by claiming it never intended to carry out a consultation under Art. III-25 ReNEUAL in the first place. The fact that the broad interpretation of the relevant circumstances could be drawn on (which according to Art. III-10 ReNEUAL the authority must investigate), speaks in favour of applying limited requirements to the objective manifestation of the “whether or not” question. In this case, it would be likely that the authority would wish to use a consultation procedure to determine information anyway (see below on p. 10 et seq.).

**P’s Participation:** P could only be involved as a third party, which would make it a party under Art. III-2 (3) ReNEUAL. No clear adverse effect can be observed in P’s case, meaning this objective criterion is not fulfilled. Member State responses suggest that associations and NGOs have a right to participation if their subjective rights are impaired (GR I.1.4). In many countries, consideration was given to classifying P as a nature protection organisation, which could once again influence the consequences for its participation (e.g. in the SK, see comments under O). Participation despite lack of legal capacity and in the case of representation of certain groups of persons would only come into question in certain states (GR I.1.4). However, P did not make a request, and would therefore be classified as part of the “interested public” according to the ReNEUAL MR, therefore, according to Art. III-25 (1) ReNEUAL, P’s participation is optional and therefore did not need to be heard.31

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30 In addition, this regulation is *lex generalis* and sector-specific environmental law has more specific regulations which are also reflected in Member State solutions: Erl., p. 89 et seq., recital 89. See, however, Fn. 17.

31 Compare the elaborations on M.
O’s Participation: According to the ReNEUAL MR, O could either be a party in the sense of Art. III-2 (3) ReNEUAL or a member of the “interested public” according to Art. III-2 (4) ReNEUAL. Since O requested to be involved in the administrative procedure, its position in the procedure is decided according to whether or not O is adversely affected according to Art. III-2 (3) ReNEUAL. Therefore, it would need to be demonstrated that O had suffered a financial or factual disadvantage. No financial disadvantage is apparent, but a factual disadvantage could exist. A de facto disadvantage would be given if O as an association would be impaired in its association activities by the construction. Such an impairment is indicated in any case if O is recognised as a nature protection organisation.\(^{32}\)

If O is so recognised, O has a disadvantage if matters of nature protection are affected. In line with this, some Member States generally proceed on the basis that the result of the administrative procedure presents a direct impairment of the interests O represents, thus justifying its party status (SR).

If one affirms O’s party status in the administrative procedure, O would need to be heard according to Art. III-23 ReNEUAL. According to Art. III-23 (5) ReNEUAL the authority has discretion over the course of the hearing. Nevertheless, it would be questionable whether O’s comment that there are red kites in the area is sufficient to represent a complete hearing. In addition, S itself did not comment on this. Since the case facts do not contain any specific information, it could be assumed that O was informed according to Art. III-23 (3), Art. III-8 ReNEUAL about the course of the proceedings. In any case, according to Art. III-23 (3) ReNEUAL, only sufficient information for a substantial hearing must be guaranteed.

If not recognised as a party, O could only be considered as part of the “interested public” according to Art. III-2 (4) ReNEUAL. Here the question arises again whether a procedure according to Art. III-25 ReNEUAL has been initiated. See the previous remarks on participation under Art. III-25 ReNEUAL (cf. p. 8 et seq.).

(II.) The scope of the authority’s investigation obligations according to Art. III-10 ReNEUAL in conjunction with Art. III-13 (1 and 2) ReNEUAL

On the way to the adoption of a decision the authority according to Art. III-10 (1) ReNEUAL must examine the facts carefully and impartially, taking into account all relevant circumstances and weighting them appropriately in its final decision-making. The interpretation of “relevant circumstances”, “careful” investigation and “appropriately weighted” according to the ReNEUAL MR is therefore important.

Given the principle of investigation under Art. III-10 ReNEUAL, one should first ask which relevant circumstances are to be gathered, considered and weighted in a “careful” investigation.

The relevant circumstances are primarily set out in sector-specific law and are beyond the scope and aim of the ReNEUAL MR.

As a rule, there is a broad concept of “relevant circumstances” across the Member States, although there are some differences in detail, particularly in the application procedure (GR II.1.1). For example, the collection and consideration of circumstances is interpreted

\(^{32}\) GR I.1.5. Compare Fn. 17.
particularly broadly in HR, PL, PT and the NL. This means that there are hardly any circumstances that the authority does not have to consider. LV might mark the other side of the spectrum here, as only directly necessary information or that provided by law may be gathered. Most Member States do not regulate the fact-finding process of the authority via strict procedural rules (GR I.3.1).

Art. III-10 ReNEUAL is complemented by Art. III-13, such that the duty to establish the facts of the case is not incumbent solely on the authority, but also on the parties that in accordance with Art. III-13 should actively contribute to the investigation of the facts. The parties involved are the primary bearers of knowledge in the process, which is why the authority’s investigation is also guided by the intensity of their cooperation. Since Art. III-13 ReNEUAL is only to be understood as complementary, it remains the responsibility of the authority to carefully check the information provided by the parties. How far the obligation to cooperate goes depends on whether it is an application procedure under Art. III-6 ReNEUAL or an administrative procedure *ex officio* according to Art. III-5 (2). In the application procedure, according to Art. III-13 (2) ReNEUAL the applicant has a more extensive duty than in the procedure *ex officio*. For the other parties, on the other hand, it does not make any difference whether it is an application procedure or a procedure *ex officio*, since they are equally affected as third parties in both cases and, as a rule, will not have an increased interest in a particular decision due to the type of procedure. Therefore, only A is required to provide the specified information under Art. III-13 (2) ReNEUAL; F, M, P and O are only obliged to support the investigation of the facts in so far as they are parties. This corresponds with Member-State regulations, according to which the party requesting the procedure is subject to considerably higher obligations than parties in procedures *ex officio* (GR II.1.1 and II.2.2).

One cannot establish support of the investigation by M in line with the cooperation obligation, as M did not communicate directly with S, but only changed the plan. According to the ReNEUAL MR, P is not a party in the sense of Art. III-2 (3), but only part of the interested public, therefore its duty to cooperate is also waived. O is not asked by S to make a statement, but O expresses themselves unsolicited, thus no violation of the duty of cooperation under Art. III-13 (1) ReNEUAL has occurred. Here, the extent of the obligation to cooperate under Art. III-13 (1) ReNEUAL is decisive. Member States’ answers could be used as an approximation (the different scope of the cooperation obligation in the Member States is described in GR II.2.1).

F and M spoke up only belatedly. Whether this still satisfies the cooperation obligation is questionable.\[^{33}\] However, independently of the cooperation between F and M, the authority would have had to carry out additional investigations into the expected traffic volume and the impact on the soil, provided that these objects of investigation intruded in accordance with Art. III-13 (1) s. 4 ReNEUAL. This does not affect the duty to examine recognisable circumstances (Art. III-10 (1) ReNEUAL), such as, in the case of F, the increased traffic volume and the prices.

\[^{33}\] M & F’s opinions can still be taken into account at S’s discretion, at least under Art. III-35 ReNEUAL this could be suggested, according to which the authority can revoke its decision. However, the circumstances of the case do not contain any reference to a withdrawal of authorisation. Whether the “can” provision in Art. III-35 ReNEUAL could be reinterpreted as an obligation depends on the consequences of the errors to be applied, which are not (yet) defined by the ReNEUAL MR, and on the discretion of the authority.
resulting environmental pollution. Recognisable circumstances by M would be, among other things, M’s own planning responsibility and how this could be affected by the construction. O’s statements, on the other hand, must be examined by S, which would also involve its own investigations, such as consulting E.

The regulation of fact-finding in the ReNEUAL MR in summary from Art. III-10 and Art. III-13 is supplemented by the provisions on hearings and consultations as instruments of joint fact-finding pursuant to Art. III-23 and Art. III-25. In the first place, Art. III-23 ReNEUAL can be drawn on as an instrument of joint fact-finding as it grants the parties the right to a hearing which can make a decisive contribution to clarification. In the present case, consulting the parties and experts will be sufficient to establish the relevant facts.

But how can an appropriate weighting of circumstances be ensured?
Art. III-28, Art. III-29 ReNEUAL can be drawn on for the interpretation. These articles set out the requirements for “appropriate weighting” thusly: an objective standard is applied for “appropriateness”, the subjective understanding of the parties is not decisive, and the authority’s decision must be clear, simple and comprehensible. Whether the decision meets these requirements must be verifiable either by a court or by another authority.
Art. III-23 (3) ReNEUAL is linked to the transparency requirement anchored in Art. III-28, Art. III-29 ReNEUAL (which is also realised through the coming-together of various requirements, such as Art. III-25, Art. III-33 ReNEUAL). Therefore, these regulations seek to ensure that the participants will be informed, not only in order for them to be able to exercise their rights and duties based on the content of the authority’s decision, but also in order to understand the reasons for that decision.

(C.) Court proceedings

First of all, it should be noted that the ReNEUAL MR do not regulate the court proceedings or the level of judicial control. When reviewing the completed administrative procedure at the

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34 This connection results in each case from the sense and purpose of Art. III-28 ReNEUAL and Art. III-23 (3) ReNEUAL. Art. III-23 (3) is based on the idea that “it is an essential condition for the person to be able to exercise his or her rights of defence, while the obligation does not cause excessive burden for the authority”. (Erl., p. 88, recital 80). Art. III-29 ReNEUAL is intended to ensure formal reasoning which meets certain substantive requirements. Good and appropriate reasons must therefore be given. Here, the second obligation is also of a procedural nature, since it implies that reference should be made to all legally relevant documents which were significant to the final measure (Erl., p. 91 et seq., recital 102).
35 For the particularities of this provision in comparison with national administrative procedural laws, see Erl., p. 93 et seq., recital 104.
judicial level, though differing in their level of detail, the structure of the Member-State solutions is comparable. In the vast majority, the question is first of admissibility and then of merits. If, for example, the administration rejects the capacity of one of the parties for a legal action or to bring an action, some solutions at court level clarify whether there nevertheless exists a right to bring an action, or whether a capacity to participate can be obtained during court proceedings, wherein substantive requirements and administrative procedural reasons can play a role. If the admissibility is affirmed, in some solutions this leads to an examination of the merits, which involves addressing the question of the legality of the authorities’ prior actions, from a formal and/or substantive point of view.

(I.) Admissibility

The comparison between the solutions adopted by the Member States (regarding the admissibility of the actions of M, F, P and O and the reasons given for the granting or refusal of admissibility) shows the following:

In the states where F’s action was not admissible, the main reason given was that he did not react in time during the administrative procedure (despite an invitation); thus, in these countries, the expiry of the time limit for comment seems to have an effect not only on F’s position in the administrative procedure but also on F’s position in the court proceedings (FI, SL, MT, DE: if state law provides for preclusion).

Few Member States drew attention to the appeal procedure with regard to F, according to which administrative remedies must first be used before an action can be brought before a court. This means F can lodge an initial complaint with the higher authority (LV, SK, SR (more or less), CS (also regarding M), NO (regarding all parties)).

Only one state has denied any direct infringement of the rights of F and therefore F’s admissibility.

In the States where F’s action would be admissible, this was justified in a few cases by the fact that he was already involved in the administrative procedure, often without further information on the meaning of F’s failure to observe the time limit (FI, FR, PL, SR and ES: no preclusion). Where information was provided, it was noted that the mere fact that F did not reply to S does not exclude the possibility of presenting his arguments in court (ES, FI) because S already knew about the possible impact on F’s land (ES). Where there could be specific procedural rules for F’s participation, states denied that these were respected with regard to his invitation, thus making his silence irrelevant. Most of the Member States which upheld the admissibility of F’s action based their decision on the impairment of his rights or his direct and legitimate interests (ES), but emphasised different bases overall: property rights (DE: if no preclusion in state law); or well-being, whose impairment can often be justified by neighbourhood status (CY, FR, NL, NO); or by reference to the impairment of the use of his land (DE, ES) or of the soil due to increased traffic (IT). F’s opinion regarding the commercial development of the

36 In the case of a proper procedure, however, it would be, since he would have had to comment on the draft decision within a certain time limit according to this procedure, NL.

37 Compare for environmental law: Eliantonio et al., Fn. 17, 72.
village does not play a role in admissibility (where it was considered at all), since this argument has no connection with his subjective rights (DE). In ET a reference to a non-intensive impairment of his rights would be sufficient; in LV – irrespective of a violation of his rights or legal interests – a reference to a threat of harm or damage to the environment would suffice. Against this background, the overall question (which is also relevant for the other actors) is to what extent the administrative rules and the law of court procedure are intertwined such that party capacity in the administrative procedure is reflected by participation in court proceedings and, in particular, whether there is a reflection in court procedure of the adverse impairment in administrative procedure. It is also interesting to see whether such a reflection appears as early as the admission requirement, i.e. at the admissibility stage, or only in the context of the review of merits.

The admissibility of P’s claim was largely denied (CS) on the grounds that they were neither a party to the administrative procedure nor a third party (SL, SR), there was no subjective infringement of rights (DE, ES), or that, as a natural person, P could neither assert any infringement of collective interests (ES, NL) nor, by reference to the standard applied by individuals, did P have any legitimate interest in bringing an action (CY). Also, since they were not a nature protection organisation (DE) because they only protected traditions (ES), they could not therefore make use of the legal exception (ES).

Where their claim might be admissible, this was related to the fact that the type of procedure before S might require public participation and thus the participation of organisations such as the one they lead (PL), or (probably also to be interpreted against this background) that they could be a nature protection organisation (PL, SK) or NGO (FI), or because of their organisation’s statutory goal or purpose (LV, NL, PL, FR: moral and material interest, precisely formulated), representativeness (LV), activities (NL: thematically specified) and geographical focus (NL). Generally, standards diverge. P could have legal standing as president of the respective organisation (ES, IT), or without being a legal person (but still a non-governmental nature protection organisation) due to the organisation’s objective of protecting the local landscape (ES). P could also be granted jurisdiction for reasons of “landscape aesthetics” (LV: within the notion of the right to live in a favourable environment). Considering these remarks in particular, there is an interesting question as to which pattern of separation between rights-based and interest-based locus standi could be discerned as the rationale for locus standi in general.38

The admissibility of M’s action was denied by roughly a third of all Member States, normally related to competence problems between M and S (FR, ES, LU, SK, FI: where admissibility is finally affirmed), often because M itself could have the sovereignty to decide, M could not be assigned its own legal interests39 or no authorisation could be determined by law to bring an action (LV, SL). There has been much discussion about whether the farm building falls under the interest of appropriate land-use planning and what the status of the area is (LU). Where the

38 On the separation between rights-based and interest-based standing as rationales for standing see, however, dated back to 2013: Eliantonio et al., Fn. 17, 67 et seq.
39 Against this background, too, see the remarks on self-interest as an objective legal control: Gärditz, Fn. 10, 41.
basis for granting standing was that M as a legal person should be in a similar situation to a natural person, this ultimately failed because it is a public corporation (LV).

Where admissibility was affirmed, this was justified linguistically in different ways but mainly by the fact that M has a legitimate interest in protecting the natural environment and the general interests of the inhabitants (CY), where the legitimacy of this interest was justified by the connection with its tasks (NL), or by the fact that it can defend its rights (ES). In rare cases, this was argued with reference to property rights (ES, SK), though more often its exclusive planning competence was cited (DE), which should not only be protected in the abstract – some jurisdictions required that fulfilment of its functions must be impaired to grant admissibility (ES). The condition must be similarly read to mean that M’s standing must be seen as a manifestation of a genuine need to clarify its claim, so that the claim’s relevance and M’s connection to it prove decisive (NO) and raising the question of whether grounds for appeal have to correspond with what has been stated in the administrative procedure – see this question already in relation to F. As a yardstick for assessing its standing to bring an action, it was also stated that M had already been involved in the administrative procedure (PL).

The admissibility of O’s claim was rarely denied, if at all, on the grounds that it had no legitimate interest in the claim (CY), that O did not give any legitimate reasons for participation in the administrative procedure (SL), or that it did not participate in the administrative procedure and S was not obliged to bring it in to participate (CS, NL: public preparatory procedure).

Primarily, the admissibility of O’s complaint was affirmed due to its legal interest (NO: statutory purpose, representativeness), or because it is a nature protection organisation (DE, FR, PL, SK, LV: in this category as public concerned, see below) or NGO (FI). In some states, O would only be admitted as a nature protection organisation if the type of procedure before S requires the participation of such organisations on the basis of public participation (PL: O would then not have to claim any impairment of interests). O could also be entitled to bring an action because it should have been recognised as a party to the administrative procedure, as the outcome of the procedure directly affects the interests that O represents (SR).

Insofar as the information provided by Member States on environmental organisations can be related to the court proceedings and specifically to the question of standing, the issue of the conditions, linked to their characteristics, under which environmental organisations are admitted as parties in corresponding court proceedings has been solved – at least when following the approaches of Member States that explicitly require registration, e.g. FI. In HU, environmental organisations may be designated by statutory order or by law for the enforcement of rights (registered activity aimed at protecting a fundamental right or enforcing a public interest in a geographical territory affected by the administrative activity; pursued for at least one year; affects its registered activity). The NL includes the statutory objectives and current activities. An admission on the basis of the main purpose in the organisation’s statutes takes place in ES. In LT, on the other hand, the broad concept of environmental protection, according to which aesthetic reasons count as environmental reasons, gives rise to a very broad concept
of “environmental organisations” (cf. explanations under P). There are restrictions regarding the existence of the organisation (ES: 2 years, HU: 1 year), its (current) activities per se (ES, NL), and the territorial focus of its activities (ES, HU). These factors can also be combined, e.g. in PL, CY and FR where it is necessary that environmental protection must be part of the statutes, that the organisation has been in existence for two years and that it is also active in the respective area. In the UK, the question when assessing O’s standing is whether it has a (procedural or substantive) legitimate expectation in the sense of a promise or practice to do more than that which is required by statute. However, what O was entitled to expect is a question of fact.\footnote{On the legal standing of environmental organisations in connection with the implementation of the Aarhus Convention compare: Eliantonio, Fn. 17, 73 et seq., 80 et seq.}

Overall, in the context of the admissibility of the actions of all actors, the question finally also arises as to whether there is a correlation between the design of the right to bring actions, and the level of review wielded during the judicial review.

(II.) Merits

Concerning the states that commented on F’s prospects of success (e.g. DE, ES, FI, FR, IT, LU, NO, PL), roughly half rated the claim as promising.

In the solutions in which the court’s hypothetical standard of review is focused on the authority’s decision-making process, several criteria played a role: whether S had a legal basis for the decision, whether errors in the factual basis or procedural errors could be identified, and whether the authority's decision was arbitrary or highly inappropriate (NO). However, most solutions do not detect any procedural errors (ES, IT) and confirm compliance with the official investigation principle on the basis of the information in the case (sufficiently investigated, sufficiently weighed (ES)).

Where there was a substantive legal focus, the affirmation was made with partly different arguments (protection of one’s own subjective rights, direct recourse to property rights (PL), reference to increased traffic (FI, FR: not provable), which adversely affects the management of one’s land (ES, LV: because of the environmental perspective). F’s desire to avoid commercial firms, provided that it is dealt with under the merits of the case, does not constitute a protected interest (ES, FI, IT) and is only relevant if it coincides with a higher-ranking spatial plan, which undercuts the use of the land for commercial purposes (ES, similar to LU). In some solutions, F’s lawsuit could only be successful if the contested permit is both illegal and violates F’s subjective rights (DE).

In those Member States where the courts have also carried out a substantive-legal examination of the administrative decision, most solutions do not find any error in the administrative procedure (ES) in relation to F, so the action is thus dismissed.

In order to decide on the merits of P’s action, the substantive-legal assessment by the court in some Member States is based on whether the area in question enjoys landscape or nature
protection (PL), whether its commercial use complies with planning regulation (LU) or whether harmony with the landscape is a condition of a building permit. Some states point out that the conditions laid down by law may be accompanied by a margin of discretion as regards their interpretation (FI: can be fully reviewed by the court, interpretation of conditions allows a margin of appreciation). In IT, reduced standard of control applies because the assessment of the risks and arguments presented by P is at the technical discretion of the authority.

Member States assessing the potential merits of M’s claim (e.g. CY, ES, FI, IT, PL) refer either to a violation of subjective rights (planning autonomy, violation of the statutory legal provision constituting such competences: PL, property rights) or to procedural errors, where M had the possibility to appeal in the administrative procedure (ES, IT, MT). Member States which are more reserved as regards the assessment of the procedural regulations ultimately reject M’s complaint because, for example, there was no detrimental planning at the decisive point in time (DE) or the new development plan was not accepted (IT).

With the formal legality of the administrative procedure at the forefront of the court’s assessment, attention is drawn to a reduced standard of control, according to which the court first examines the reasoning of the administration regarding the evaluation of the project (PT: the reasoning must be clear, sufficient and without contradictions) in order to then (in a second stage, PT) examine whether the reasons reveal a manifest error in the recording of the facts or whether the decision violates general principles.

O: The non-inclusion of O by S was assessed differently in various Member States. Conclusions as to the importance of formal aspects and thus of the administrative procedure in general can only be drawn with great caution as to where (and whether) this question is examined in detail. Some states have answered the question of the impact on O of not having been involved in the administrative procedure by saying that this will help O’s claim to succeed. They argued that O’s rights and interests were restricted by the administrative act and yet it was not invited (LV). Others pointed to the implementation of sector-specific EU law (EU Directive on Public Participation, Birds Directive – special protection area, subject to public discussion, PT).

Other states argued that O’s claim for non-participation in administrative proceedings would be denied (DE, FR, IT, MT, NO). They noted that parties to the administrative procedure must exercise their rights or participate on their own initiative (IT) and that public or environmental organisations do not have the right to participate as parties in administrative proceedings (DE: simple building permit).

In the context of O’s action, in some Member States the court cannot itself decide on the risk posed to the red kites, but only whether procedural errors had occurred in its assessment (PL: limited competence to decide on the merits of the case, instead assesses whether the procedure leading to issuing the EIA was legally correct). However, there is limited review of facts in the form of the court taking evidence from documents (This was not mentioned related to O’s opinion, though). In SL, the court cannot ex officio assess the risk for the red kite.
In ES and PT, the principle of investigation appears to have such a prominent position that even a substantively lawful administrative act can be declared null and void by the court due to errors in the administrative procedure. PT revokes A’s authorisation because relevant circumstances were only incompletely taken into account, such as those set out in the expert opinion of the ornithologist. This constitutes a procedural error, since in this case not all relevant and necessary facts have been examined (ES, PT), which, at least according to the solution, may lead to revocation irrespective of material legality (PT) (a similar rule exists with regard to F in ET). O’s expert opinion given during the court proceedings, as well as the observation of the nest, could indicate errors in the fact-finding (ES, IT) and thus lead to the nullification of the permit (ES).

The UK and NO also grant the procedure a lofty status. In the UK, the court only checks compliance with the procedure, i.e. the manner in which the decision was made. As indicated in the questionnaire, the court will look into errors of law and will only review facts in instances of misdirection or mistake as to a material fact, or where the decision is unsupported by substantial evidence.41 In NO the court may only investigate the circumstances with regard to whether there is an error in the factual basis for the decision or whether there were procedural errors. This means that the case was sufficiently clarified before decision, showing NO’s focus as being more on review of validity and (formal) legality.

In some Member States, procedural errors lead to the nullity of the authorisation only if these errors affect the resolution of the matter (ES, FI, where only a lawful, efficient and fair administrative procedure can lead to a substantively lawful decision with a wide margin of discretion for the authority, ES). In the NL, an action would be successful if the plaintiff – in this case O – were able to raise legitimate doubts about the assessment of the authority. In this respect, it is sufficient that the authority’s decision was ‘unreliable’ (somehow defective, incomplete, inconsistent, based on incorrect or implausible premises or flawed for any other reason to such an extent that it is unreliable), and O is explicitly not required to provide evidence which contradicts the decision.42 Should this be the case, the court would judge that the administrative authority had not met its burden of proof and had breached its general duty of care to investigate, and perhaps even its duty to evaluate the facts (note: inconsistent or flawed by any other reason).

Against the background of the authority’s broad scope for judgements, the weighting of facts can be substantively reviewed by courts in DE43 on the basis of the facts collected by the

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41 Compare Craig, Großbritannien (England und Wales), in: von Bogdandy/Cassese/Huber (Eds), IPE vol V, 315 (§ 77 recital 97 et seq.) – judicial control as “control of rationality”. For the decision to be lawful, the authority would have to exercise its discretion. Stelkens even speaks of a discretionary duty: Pan-European general principles of good administration to discretion and their importance for the Georgian administration, preprint Mar 14, 2018. On the density of controls as a substantive legal problem, depending on the specific nature of the sectoral-specific features: Gärditz, Fn. 10, 43, 44.
42 For shifting the burden of proof, compare also the case solutions from France and Estonia.
43 In technical matters, the court can rely on the authority’s feasible assessment of the technical issue, BVerfG, 23. Oktober 2018 - 1 BvR 2523/13, 1 BvR 595/14.
authority and the facts subsequently introduced by other parties. The legality of the authority’s assessment is then examined in the proceedings.

In MT, too, substantive-legal control is so important that administrative acts are not only examined according to procedural rules but also have to be reviewed as to whether they are (reasonable and) just. The court will “seriously” consider the risk for the red kite, either by taking into account the ornithologist’s opinion or appointing an ex parte expert.

In IT, on the other hand, the involvement of external experts or clarification from the administration is only possible if E’s statements are manifestly wrong or illogical.

In FI, though only via appeals under the Environmental Protection Act, the bench can be extended with expert judges with scientific and technical expertise. In contrast to other countries, FI only takes into account the facts presented in the court proceedings; the court itself does not establish any facts.

(D.) Summary

Despite different approaches to the solution taken by the Member States, various aspects of the links between the different procedural levels can be confirmed (also with regard to the individual answers to I.4.c, I.5, and II.5, II.6, II.7 of the questionnaire) using the following broad outlines:

The vast majority of solutions draw attention to certain conditions for standing. It should be noted that if F, M or O had to be included in the administrative procedure, their actions were at least admissible (if not necessarily successful when it came to the merits). F, M and O are also adversely affected within the meaning of Art. III-2 (3) ReNEUAL. Drawing on the ReNEUAL MR would probably not result in any differences for this concrete legal position. This could lead to the assumption that the ReNEUAL MR fit into the legal system of the Member States, in particular into the overall structure of administrative proceeding and administrative procedural law. However, there is currently insufficient evidence to confirm this assumption.

Frequently, the solutions also confirm a correlation between the rationale for standing and the scope of judicial review: where the locus standi to bring actions were broader, the scope was rather limited.\(^\text{44}\) Member State solutions focusing on the review of the administrative procedure suggest at the same time that opening access to the court may allow for more extensive review of the procedure.\(^\text{45}\)

\(^{44}\) Chayes describes the right to bring an action in such a form as “sprawling and amorphous”; id., The role of the judge in public litigation, Hrv L Rev 89 (1976) 1281, 1302. However, on the far-reaching agreement between the action by the interested party on the one hand and the action by the injured party on the other hand with regard to the assertion of an infringement of rights and that of an intérêt à agir: see Sommermann, Fn. 17, § 48, 1747. On the separation, however, Lord Denning: “The court would not listen to a mere busybody who was interfering in things which did not concern him.” R v Paddington Valuation Officer, ex p Peachey Property Corporation [1966] 1 QB 380, 401.

\(^{45}\) In Member States where the error must have had an impact on the outcome in order to establish standing, this serves as an interim solution as it reduces the difference between the subjective and objective control model. It depends on what one expects from the jurisdiction: Miles, Standing under the Human Rights Act 1988: theories of rights enforcement and the nature of public law adjudication, Cambridge Law Journal 59 (2000) 133, 152. Chayes, Fn. 44, 1281 et seq.
The design of courts’ standard of review and their own assessment of the relevant circumstances, as described in the solutions, is also of interest for comparative legal analysis of the administrative procedure beyond a connection to standing.

In principle, the correlation between the extent of judicial review of the decision of the administration and the courts’ own assessment of the relevant circumstances does not seem proportional. The solutions make it clear that an intensive examination of the authority’s fact-finding and an examination of whether the established facts correspond to the truth are not entirely opposed review concepts.\textsuperscript{46}

Irrespective of their review model, the Member States almost without exception demand a high degree of transparency of the facts drawn upon in the decision, a detailed documentation of the evaluation of the facts collected including a comprehensive assessment of the significance and value of evidence, and a detailed reasoning for the decision reached during the administrative procedure.

Drawing conclusions from the extent of procedural content review about the density of the regulation of administrative procedures and their judicial review would need further investigation. Comparative case exercises in fields of law that are particularly influenced by technology, such as this environmental law exercise, are however particularly suitable for obtaining valuable insights for the ReNEUAL MR. For even if the general design of the judicial standard of review differs from country to country, in these areas, administration can primarily be guided procedurally.

The ReNEUAL MR can be most successful in areas outside their typical scope of application if they function as a platform whose structure ensures a discursive coming-together of different Member State models against the backdrop of Union legal principles. Legal comparison between the Member States can therefore be conducted in an evaluative, critical manner. Above all, however, such comparisons must be dynamic and open-ended in order to enable the development of best practice given the sheer variety of different (regulatory) models.

The comparison of the Member State solutions as a basis for the completion of the ReNEUAL MR in general should therefore be understood as a general drawing-upon of a best practice implementation of Union law. Herein, best practice is guaranteed precisely by the fact that the solutions also consider the implementation and enforcement of sector-specific Union law by the Member States. If the essential sectors were covered closely enough with case studies similar to this exercise, this best practice could be further elaborated for the ReNEUAL MR across those sectors.

\textsuperscript{46} The comparison by Kaminski also shows this nicely: id., Intensity of judicial control of discretionary administrative power. Theoretical remarks from a comparative law perspective, in: Leszczyński/Szot, Fn. 11, 123, 129 et seq. The procedural control can also be so strict that the criticism arises that courts actually interfere in the tasks of the administration, although the courts do not directly carry out any substantive control: De Waard, Rechtsbescherming in bescherming (1997) NTB 6, 6-12.