Seminar organized by the Federal Administrative Court of Germany and ACA-Europe

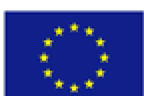
ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

Cologne, 2 – 4 December 2018

Answers to questionnaire: Bulgaria



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ACA-Seminar

ReNEUAL I – Administrative Law in the European Union

Single Case Decision-Making

2. - 4. December 2018

Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

Introduction:

National legal orders and European Union law are in many fields closely linked. Both underlie mutual influences. The jurisdiction of the European Court of Justice is not only relevant and binding as the interpretation and application of European Union law is concerned. Also, its jurisdiction partly affects the interpretation and application of national law. This phenomenon can be observed e.g. in the law of administrative procedure or of administrative court procedure.

On the other hand, European Union law is founded on the national jurisdictions of the member states. From an optimistic point of view it ought to be an essence of the best the national legal orders have to offer. In this line of thinking the European Court of Justice considers the national legal orders as source of inspiration in determining the general principles of European Union law which traditionally, i.e. before the Charter of Fundamental Rights came into force, were the sole source of fundamental rights within the jurisdiction of the European Court of Justice (cf. ECJ Case 4/73 (Nold), ECLI:EU:C:1974:51, p.507-508). Accordingly, the European Court of Justice has deducted many procedural rights in administrative procedure from the national legal orders.

It is in the interest of the member states that the relationship between European Union law and the national legal orders remains one of mutual interchange, better: a dialectic process. It would be contrary to the common European project, if it degenerated into a one-way-

street. Recently, there have been two proposals which try to implement this process by developing a European administrative law. These proposals are not directed at modifying the national laws of administrative procedure. Their purpose is to establish for a first time a general codification of administrative procedural law binding for the institutions of the European Union, particularly the Commission.

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed. The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book III (Single Case Decision-Making) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

The second draft is a resolution adopted by the European Parliament in 2016 on a proposal for a regulation for an open, efficient and independent European Union administration (EP-No. B8-0685/2016 / P8_TA-PROV(2016)0279). It was inspired by the ReNEUAL draft. Although the Commission reacted rather sceptically in October 2016, the proposal is still on the agenda of the European Parliament. The proposal is also attached as a file; more language versions are accessible through the European Parliament's website: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN#BKMD-8.

The seminar to be held in Cologne aims at further investigating into the national legal orders in order to assess their principles more profoundly and on a wider scale. The purpose is to achieve a better understanding of the specific approaches of the national legal orders, to discover similarities and/or differences in order to promote the dialectic process mentioned above and thus both contribute to a better understanding of the principles of the European legal order derived from the essence of the member states' legal orders and enable a mutual learning process as well between national legal orders among themselves as between the national legal orders and the European Union's legal order.

As the seminar cannot investigate the national administrative laws of the member states in their entireties the seminar has to limit its scope: first, to single case decision-making as the probably most typical form of action of the administration. Other forms of action, especially

administrative rulemaking, pose another variety of questions which could make it worthwhile dedicating another seminar to this topic. Second, the seminar focuses on two important areas of administrative procedure, which are covered by the first two parts of the following questionnaire. The first is dealing with the legal position of different categories of (potential) parties to administrative proceedings (I.), the second with the administrative determination of facts and discretionary powers (II.). The last part contains a small case study in which these areas of administrative procedural law play a decisive role (III.). This sequence is, of course, not meant to prejudice the order of answering.

The first part deals with the questions of who is or can become a party to administrative proceedings before an administrative authority (not before an administrative court!) and of what rights and/or obligations might follow from being a party to administrative proceedings. The second part centres on the question of how administrative authorities determine the facts on which to found their decisions. Although here, too, the main focus is on the proceedings before administrative authorities, this part also makes reference to proceedings before administrative courts. In this regard it deals with the administrative courts' review of administrative decisions having in mind that there might be different standards of review concerning the establishment of the facts and concerning the application of substantial law.

Wherever you consider it appropriate, it would be helpful if you not only described your national legal order, but also compared your national legal order with the relevant provisions of the two drafts mentioned before. For this purpose the questionnaire makes reference to single provisions of these two drafts in order to facilitate the links.

7. Is there a political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to administrative proceedings in your country? Are there recent legislative proposals concerning the participation rights of third parties to administrative proceedings?

I. Parties to Administrative Proceedings: Categories and Legal Positions

1. a) Are the following categories of parties to administrative proceedings for single case decision-making recognized in your legal order:

- addressees of onerous administrative acts / applicants of beneficial acts,
- other individuals (please differentiate, in its case, further, e.g. between individuals claiming subjective rights, concrete legal interests, factual interests, individuals as members of the general public),
- associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements),
- other administrative bodies?

The Bulgarian administrative procedure establishes the following categories of parties

- individuals or organizations calling upon the administrative authorities to request the issuance of favorable administrative acts and for which the administrative act creates rights.

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- Citizens or organizations for whom an administrative act creates obligations.
- Other citizens or organizations whose rights, freedoms or legitimate interests are affected by administrative acts or could be affected by administrative acts.
- Environmental organizations or associations acting in the interests of environmental law or professional organizations acting in the interests of their professional members when challenging regulatory administrative acts.
- Administrative bodies to which a special law, under a special clause, has recognized the right to request the issuance of administrative acts or the right to challenge it before a court.
- The prosecutor, when acting in the interest of protecting the legality.

b) Are the categories of parties to administrative proceedings defined

- in a general codification (i.e. Code of Administrative Procedure,…),
- by reference to other codifications (e.g. Code of Court Procedure,…),
- by custom(ary law),
- by jurisprudence,
- in another way (please explain)?

The Administrative Procedures Code generally defines the parties to the administrative process. According to Art. 15 APCs in the administrative process may be the administrative body, the prosecutor and any individual or organization whose rights, freedoms or legitimate interests are or would be affected by the administrative act or by the judicial decision or for which they would give rise to rights or obligations.

The prosecutor monitors the observance of lawfulness in the administrative process, by: undertaking actions for annulment of unlawful administrative acts, agreements, administrative contracts and judicial acts; in the cases provided for in this Code or in any other law, participate in administrative cases; commences or enters into proceedings already initiated and when it considers that this is imposed by an important state or public interest. The prosecutor exercises the rights granted to him by the law in accordance with the rules established for the parties to the case.

Although this is not mentioned in law, but according to the interpretative practice of the Supreme Administrative Court expressed in Interpretative Decision No. 2/2010 professional organizations and other non-profit-making legal entities may challenge secondary legislation in the presence of a legitimate interest justified by the subject matter and purpose for which they are created. In most special laws, the involvement of relevant branch organizations in the drafting of regulations is provided for by specific provisions of special laws.

The provision of Art. Article 186 of the Administrative Procedure Code confers the right to challenge the by-laws of citizens, organizations and bodies whose rights, freedoms or legitimate interests are or may be affected by, or for which he engages, obligations.

Associations of legal or natural persons which are which are separated on the basis of a law have the status of "organization" within the meaning of the Administrative Procedure Code as defined in the additional provision of § 1, item 2. As organizations within the meaning and in the hypothesis of Art. . 186 of the Administrative Procedure Code, which are created by law and statute to represent and protect the common interests of their members, the branch organizations and the other non-profit associations have the right to participate in

the administrative procedure for the issuance of the by-laws. They may challenge the issued by-law in cases where it affects or is likely to affect the general rights, freedoms or legitimate interests or creates obligations for the members of the association. The legal interest of professional organizations and other non-profit-making legal entities is conditioned by the violation of their personal rights or legitimate interests directly arising from their subject-matter and the purpose of their establishment.

(cf. Art. 4 (f) EP-Res.; Art. III-2 (3) and (4), III-25 ReNEUAL)

2. a) Do (sectorial) pieces of legislation establish additional categories of parties to administrative proceedings or do such pieces of legislation modify the general categories? In this case, please give examples!

   b) If such additional categories are established and/or such modifications are provided for, what is the rationale of such additions and/or modifications?

3. As far as the parties are not parties by law (e.g. addressees or applicants), how can the different categories of (potential) parties actually become parties to administrative proceedings?

   - Is a request of the party required?
   - Is a decision of the administrative authority admitting the party required?
   - Is the administration obliged to qualify potential parties ex officio?

By submitting the request for initiation or participation in the proceedings, the applicant, the involved and the interested citizens and organizations concerned shall become parties to the procedure for the issuance of the individual administrative act. The interested citizens and organizations other than the applicant are informed of the commencement of the proceedings. The constitution of the parties shall be carried out ex officio by the administrative body. In the case of an application to intervene as a party by another person or organization, the administrative body shall issue a decision.

4. a) Are administrative authorities obliged to identify third parties entitled to participate or potentially interested in administrative proceedings?

b) Is the administrative authority obliged to announce the beginning of administrative proceedings to (potential) third parties to enable their participation?

c) Are there any consequences, if the (potential) party does not make use of its right to participate in the administrative proceedings? Does your legal order provide for a foreclosure of the exercise of the party's rights (preclusion regulation), particularly with regard to later court proceedings (ability to challenge the final decision, legal standing in this regard)?

Where the address of one of the persons concerned is unknown or not found at the address specified by the person concerned, the message shall be placed on the notice board, on the website of the relevant authority or otherwise disclosed.

A person to whom the administrative act has force, although not a party to the proceedings, may request the reopening of the administrative proceedings.

5. If individuals / organisations / other public authorities are not admitted as parties to administrative proceedings by the competent authority on their request, what are the legal consequences?

Persons who are not admitted as parties to the administrative procedure may appeal against the refusal of the administrative body to be constituted as parties before the administrative court. This is done in a special procedure. The appeal is considered in camera. Within one month of the receipt of the appeal, the court shall issue a decision rejecting or revoke the refusal and send the file to the competent administrative authority for the decision on the substance of the case, the time limit for the authority to be heard shall run from the moment the file is received . The decision may be appealed by a private appeal by the parties involved in the administrative proceedings. Apart from this, a person or organization that is affected by an administrative act but has not been constituted as a party has the right to appeal against the administrative act both to the higher administrative authority and to the administrative court.

a) Are they entitled to direct court actions against the administrative decision to not admit them as parties to the administrative proceedings? Are (only) original parties (parties by law) to the administrative proceedings entitled to do so?

b) In contrast, do the parties not admitted to the administrative proceedings have to wait for and then challenge the final administrative decision claiming a procedural defect in not admitting them?

c) Can the competent authority remedy any omission to admit a party?

6. a) Do all categories of parties to administrative proceedings enjoy the same procedural rights:

- to be heard (orally or in writing),
- to be advised by the competent authority concerning the relevant procedural rights,
- to submit documents,
- to have access to the file, including documents submitted by other parties,
- to call witnesses or to initiate other gathering of evidence,
- to be provided with a copy of the final decision,
- to file a claim in the administrative proceedings?

All persons who are interested in the outcome of the proceedings have equal procedural opportunities to participate in them in order to protect their rights and legitimate interests. The Administrative Authority shall provide the parties with the opportunity to review the documents in the case file as well as to make notes and extracts or, as technically possible, copies on their behalf. All the above mentioned procedural actions are equally provided to each of the parties in the process.

b) Or do different categories of parties to the administrative proceedings have different rights? If so, please provide information about the most important differences!

(cf. Art. 9, 11, 14, 15 EP-Res.; Art. III-15, III-23, III-24 ReNEUAL)

8. What is the most important and most recent case law of your court relating to the status of third parties to administrative proceedings and their procedural rights therein? Please identify up to three cases and provide some information about the content and relevance of the judgements!

There is no political or academic discussion on limiting or extending the rights of a party in the administrative process. Legislation and case-law are stable and unambiguous.

II. Determination of Facts and Discretionary Powers

1. a) **In administrative proceedings**, do administrative authorities have a general duty to carefully and impartially investigate the facts of the case ex officio in your jurisdiction (principle of investigation)?

   b) Are, in contrast, the parties to administrative proceedings generally obliged to present facts or evidence of their own accord (principle of party presentation)?

   c) Do the rules for determining the facts distinguish between administrative proceedings initiated ex officio or by application?

   d) Do the rules for determining the facts distinguish between facts which are favourable to the individual and others which are unfavourable to him?

   e) Do different models of fact finding in administrative proceedings exist in your country with regard to different subject matters (e.g. ex officio administrative orders prohibiting or requiring specified actions of individuals, licensing of private projects on application, administrative sanctions, specific sectors of administrative law,…)?

The facts and circumstances are established by means of explanations, statements by the parties or their representatives, information, written and substantive evidence, expert findings and other means not prohibited by law unless a special law prescribes proof of certain facts and circumstances to be done by other means. Evidence shall not be admitted if it is not collected or prepared under the terms and conditions provided for in the APC or by the order provided by the special laws. Written evidence is admissible to establish all the facts and circumstances relevant to the proceedings. The force of the written evidence is determined in accordance with the normative acts which were in force at the time and place where they were drawn up, unless this is incompatible with provisions of Bulgarian law. Where a foreign law is applicable to the document, it shall be proven by the party providing it. The administrative authority shall assess the probative value of the document, which includes deletions, additions between rows and other external deficiencies, in the light of all the circumstances and facts gathered during the proceedings. In the event of pending proceedings, each of the parties may request, through the administrative body of another party to the proceedings, to submit, within three days of the request, certified copies of documents in that country which are relevant to the case. In the event of pending

proceedings, each party may request, through the administrative body of non-participating citizens and organizations, to submit within three days of requesting certified copies of documents owned by these citizens and organizations own or foreign relevant to the case. Any non-participating citizen or organization that fails to submit the requested document shall be liable to the party for damages caused to it. At the request of a party, the authority conducting the proceedings issues a certificate under which the state, municipal and judicial authorities are required, within the scope of their competence, to obtain it by another certificate or the necessary documents in connection with the determination of its rights and obligations. by the body conducting the proceedings is issued within three days from the date of the request and the certificate and the documents issued by the other authorities within 5 days from the date of the request. The administrative authority may not refuse to accept a written declaration establishing facts and circumstances for which a special law does not provide proof in a particular way or by certain means. It may also accept a written declaration establishing facts and circumstances for which a special law provides for proof by an official document where it has not been issued to the party within the time specified, unless a statutory instrument provides otherwise for certain types of documents. The administrative authority may request information from non-parties when it is necessary to clarify essential facts and circumstances of importance for the production and can not be otherwise established. The information is given in writing. They shall be signed by the persons who gave them, and shall be countersigned by the administrative body or an employee appointed by it. Where a person can not provide information in writing, he or she is invited to give them orally to the administrative authority or an employee appointed by him / her. The information shall be recorded and signed by the authority or the employee, stating his name and position and countersigned by the person. The administrative body shall explain to the persons that, when challenging the administrative act before the court, they may be questioned as witnesses. The parties to the proceedings have the right of access to those given by the order of information. The administrative authority may invite a party to the proceedings to provide clarification if this is necessary to clarify the case or to carry out the action taken, and where a special law so provides. In these cases, a hearing is scheduled to be invited to all parties to the proceedings. The parties to the proceedings may ask questions to the clarifying person through the body conducting the proceedings.

(cf. Art. 9 EP-Res.; Art. III-10, III-11 ReNEUAL)

2. If your jurisdiction provides for the duty of the competent administrative authority to care-
fully and impartially investigate the facts of a case:

a) Are the parties to administrative proceedings obliged to cooperate in the investigation (e.g. by providing documents or by answering questions)?

b) What are the consequences, if a party to administrative proceedings does not comply with its duty to cooperate?

c) Are there differences in the duty to cooperate among different categories of parties (applicants, potential addressees of the final decisions, third parties)?

If the party does not comply with its duty to cooperate, this can not affect its legal position. The main duty to clarify the facts of the case lies with the administrative body. There is no difference in the obligation to cooperate between different categories of parties. All persons who are interested in the outcome of proceedings under this Code have equal procedural opportunities to participate in them in order to protect their rights and legitimate interests. The administrative body shall collect all the necessary evidence and where there is no request from the persons concerned. The parties of the administrative process are obliged to exercise their rights and freedoms without harming the state and society and the rights, freedoms and legitimate interests of other persons.

(cf. Art. 10 EP-Res.; Art. III-13, III-14 ReNEUAL)

3. a) In the fact finding process, is the administrative authority in your legal order bound by strict procedural rules (e.g. demanding for a certain organisation) or is this process subject to discretion of the administrative authority?

The procedure for establishing the facts has been prescribed with strict procedural rules and is not subject to an independent assessment by the administrative body.

b) Has the administrative authority broad discretion in evaluating the facts found in the administrative proceedings?

The individual administrative act shall be issued after the facts and circumstances relevant to the case have been clarified and the explanations and objections of the citizens and organizations concerned, if any, are made accordingly.

c) Does your national legal order provide for rules concerning composite investigations, i.e. the collaboration of different administrative authorities (like establishing a responsible officer of one administrative authority) or the collaboration of different officers within one administrative authority, e.g. a hearing officer who may hold hearings with applicants (like asylum seekers)

while another officer takes the final decision based on written reports of such a hearing officer?

The request shall be addressed to the administrative authority competent to resolve the matter. Where the authority that instituted the proceedings finds that the individual administrative act has to be issued by another administrative authority, it shall immediately send it the file, informing the person on whose initiative the proceedings are commenced and the citizens and organizations involved. The request submitted on time to the incompetent authority shall be considered filed on time. Where the competent authority can not be determined on the basis of the data in the request or it is apparent that it is to be addressed to the court, the authority to which it is filed shall return it by short written or oral instructions to the applicant. If the request concerns a number of issues for consideration by different bodies, the administrative authority to which it is brought initiates proceedings to address the issues of its competence. At the same time, he shall notify the applicant that he or she should submit a separate request to the relevant authority on the other matters. Where a request concerns a complex administrative service, it may be submitted to any administrative authority that is involved in it. The administrative authority before which the request is made shall bring the proceedings. The interaction with other administrative bodies shall be carried out in accordance with the procedure established by the Administration Act.

4. a) Does your national legal order provide for specific rules of evidence for the fact finding in administrative proceedings?

b) If this is the case, what are the most important principles?

c) If this is not the case, what other (general) rules apply?

d) What is the rationale for the model applied in your jurisdiction?

e) Are there any rules in your national legal order providing for the inadmissibility of certain evidence? If so, please give some details!

The evidence shall be gathered ex officio by the administrative body, except in the cases provided for in a code or in a special law. The Parties shall assist the Authority in the taking of evidence. They are obliged to present evidence that is with them and they are not with the administrative body. In all cases where a special law defines exhaustively the evidence that the citizen or the organization has to present, the administrative body can not require

them to produce other evidence. All collected evidence shall be reviewed and evaluated by the administrative authority. The administrative authorities may not require the provision of information or documents that are available to them or to another body but provide them ex officio for the purposes of the production concerned. When a legal act introduces requirements related to the natural person's judgment, the necessary data for the Bulgarian citizens shall be established ex officio by the respective administrative body. Evidence in the procedure for issuing an individual administrative act may be data relating to facts and circumstances relevant to the rights or obligations or legitimate interests of the citizens or organizations concerned and established in accordance with the procedure laid down in a code. The well-known facts, the facts on which the law provides a presumption and the facts known to the authority ex officio are not to be proved Administrative authorities and persons for which the challenged administrative act is favorable, must establish the existence of the factual grounds specified therein, and the fulfillment of legal requirements at issue. When the refusal to issue an administrative act is appealed, the appellant must establish that there were conditions for granting it.

(cf. Art. 9 (2) and (3), Art. 11 EP-Res.; Art. III-10 (2), III-15 ReNEUAL)

5. **In court proceedings**, who is responsible for the presentation and investigation of facts and evidence?

a) The court or the parties?

b) Are there differences between the responsibilities of claimants and defendants or between individuals and administrative authorities?

c) Is the administrative court free in the consideration of evidence or are there certain rules of evidence? In the latter case, please give details!

6. a) What is the general standard of control applied by administrative courts in regard to the fact finding of the administrative authority? Are there limitations in the scope of judicial control?

b) Does your national legal order know standards of (limited) control in regard to complex factual evaluations comparable to the concept of technical discretion applied by the ECJ (see annex to this question below)?

c) If this is the case, what are typical cases in which such a standard of reduced control is applied?

d) Are these cases qualified as a specific category of administrative discretion or are they subject to the general principles concerning discretionary powers of administrative authorities?

The grounds for challenging administrative acts are:

1. lack of competence;
2. non-compliance with the established form;
3. material breach of administrative production rules;
4. Conflict with substantive provisions;
5. non-compliance with the purpose of the law.

The Court is not restricted to discussing the grounds set out by the challenger but is required, on the basis of the evidence provided by the parties, to verify the lawfulness of the contested administrative act on all the grounds. The court declares the nullity of the act, even if there is no request for it. When challenging an administrative act issued with discretion, the court checks whether the administrative body has operational discretion and has complied with the requirement of lawfulness of administrative acts. Evidence collected regularly in proceedings before the administrative authority shall have the force and the court. The court may question witnesses as to the evidence before the administrative body and the experts only if it finds it necessary to hear them directly. At the request of the parties, the court may also collect new evidence admissible under the Civil Procedure Code. Experts, inspection or certification he can appoint ex officio. Parties are obliged to assist in establishing the truth. The court is obliged to assist the parties in removing formal errors and ambiguities in their statements and to indicate to them that in some circumstances of relevance to the case there is no evidence. When the question was not granted at the discretion of the administrative body, after declaring null and void or revoke the administrative act, the court shall decide the case on its merits. when the act is void due to incompetence or its nature does not allow the resolution of the matter, the court sent the case to a competent administrative authority with mandatory guidance on the interpretation and application of the law. In the case of an unlawful refusal to issue a document, the court shall oblige the administrative authority to issue it without giving any indication of its content. Upon refusal by an incompetent authority to issue an administrative act, the court shall declare the refusal null and void and send the case as a file to the relevant competent authority.

7. a) In your national legal order, are the procedural standards to be observed by administrative authorities in their fact finding the more stricter the more the administrative authorities are conceded substantive discretionary powers?

b) What is, as far as applicable, the rationale of reduced (substantive) controls exercised by the administrative courts?

c) Are administrative courts reluctant to interfere with material decision-making of administrative authorities?

d) Do they prefer to focus on procedural aspects?

e) Does your national legal order know prepositioned or anticipated expert opinions (e.g. in environmental law) to which a superior validity is conceded?

f) As far as the concept of technical discretion applied by the ECJ in regard to administrative decisions (or similar) is applied in your national legal order (cf. II.6.b)), can the reduced standard of control be regarded as a consequence of different institutional capacities of courts and administrative authorities?

8. Are there any constitutional provisions and/or principles governing the questions

a) of the determination of facts of a case by the administration,

b) of the possibilities of the administration to enjoy discretion therein and

c) of the standards of control to be applied by the administrative courts (e.g. a constitutional guarantee of effective judicial remedy, a strict duty of administrative bodies to comply with legal requirements)?

9. Is there a political or academic discussion concerning any kind of reform with regard to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts in your country? Are there recent legislative proposals concerning the discretionary powers of the administration and the corresponding reduced judicial control?

10. What is the most important and most recent case law of your court relating to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts? Please

identify up to three cases and provide some information about the content and relevance of the judgements!

Annex to question II.6.b)

In recent case law concerning European Union state aid law and European Union competition law (anti-competitive practices, merger control) the European Court of Justice established – according to recent academic writings – a concept of three levels (stages) for the judicial control of administrative fact finding and legal qualification of facts[1]:

1. (abstract) interpretation of legal provisions;

2. determination (or establishment) of (simple) facts (the factual basis);

3. only in case of complex factual matters (interdependencies, causalities, uncertainty,…) evaluation (or appraisal) of complex facts (economic impact, complex prognosis, certain risks for health and safety);

4. (concrete) legal qualification (or characterisation) of simple facts or of the results of a complex evaluation with regard to a legal term – sometimes based on the interpretation of a legal provision.

Concerning levels 2 and 4 the European Court of Justice applies a strict scrutiny while the Court reduces its control on level 3 under the rubric of a so called technical discretion which must be differentiated from classic discretionary powers. For example the European Court of Justice takes the view that the finding that a state aid favours (!) a certain undertaking as prohibited by Art. 107 (1) TFEU requires in some cases (!) a complex (!) economic evaluation of the factual situation. Thus, in such specific factual situations the Commission has a technical discretion and the Court will apply a reduced standard of control ("manifest error") focussing on procedural requirements especially with regard to the duty to carefully and impartially investigate the case[2]. In contrast, articles 107 (3), 108 (3) TFEU provide for a classic discretionary power ("may be considered") of the Commission according to the Court.

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[1] ECJ case C-104/00 P (DKV/HABM); case C-449/99 P (EIB/Hautem); see also case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

[2] See ECJ case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

Many commentators compare this four-level-concept with concepts in French administrative law. Other jurisdictions tend to omit the 3rd level and to focus on levels 2 and 4. Nevertheless, some jurisdictions have established a broad understanding of discretionary powers probably comprising also categories like the technical discretion under European Union law. Also the German concept of "Beurteilungsspielräume" concerning the administrative concretisation of legal requirements (a form of discretion with a view to the facts rather than with a view to legal consequences) may share some parallels with the judicial control of technical discretion in European Union law. In both jurisdictions the judicial control focusses on:

1. compliance with procedural requirements,

2. especially concerning the careful and impartial investigation of the case/facts:

   a. strict scrutiny concerning the factual basis of the complex factual evaluation,

   b. relevance of different standards of proof in various fields of substantive law,

3. compliance with general standards of evaluation of complex factual matters (especially if these standards are set in legislation, statutory instruments, administrative guidelines or publically accepted (private) technical guidelines or norms),

4. avoidance of arbitrary considerations,

5. correct interpretation of the relevant legal terms.

Nevertheless, a major difference between the control by German and European Union courts exists as German administrative courts have a duty to investigate the facts of the case ex officio while the European Union courts tend towards assuming an obligation of the parties to present the facts or evidence.

ACA-Seminar

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Single Case Decision-Making

2. - 4. December 2018

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Questionnaire

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On the other hand, European Union law is founded on the national jurisdictions of the member states. From an optimistic point of view it ought to be an essence of the best the national legal orders have to offer. In this line of thinking the European Court of Justice considers the national legal orders as source of inspiration in determining the general principles of European Union law which traditionally, i.e. before the Charter of Fundamental Rights came into force, were the sole source of fundamental rights within the jurisdiction of the European Court of Justice (cf. ECJ Case 4/73 (Nold), ECLI:EU:C:1974:51, p.507-508). Accordingly, the European Court of Justice has deducted many procedural rights in administrative procedure from the national legal orders.

It is in the interest of the member states that the relationship between European Union law and the national legal orders remains one of mutual interchange, better: a dialectic process. It would be contrary to the common European project, if it degenerated into a one-way-

street. Recently, there have been two proposals which try to implement this process by developing a European administrative law. These proposals are not directed at modifying the national laws of administrative procedure. Their purpose is to establish for a first time a general codification of administrative procedural law binding for the institutions of the European Union, particularly the Commission.

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed. The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book III (Single Case Decision-Making) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

The second draft is a resolution adopted by the European Parliament in 2016 on a proposal for a regulation for an open, efficient and independent European Union administration (EP-No. B8-0685/2016 / P8_TA-PROV(2016)0279). It was inspired by the ReNEUAL draft. Although the Commission reacted rather sceptically in October 2016, the proposal is still on the agenda of the European Parliament. The proposal is also attached as a file; more language versions are accessible through the European Parliament's website: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN#BKMD-8.

The seminar to be held in Cologne aims at further investigating into the national legal orders in order to assess their principles more profoundly and on a wider scale. The purpose is to achieve a better understanding of the specific approaches of the national legal orders, to discover similarities and/or differences in order to promote the dialectic process mentioned above and thus both contribute to a better understanding of the principles of the European legal order derived from the essence of the member states' legal orders and enable a mutual learning process as well between national legal orders among themselves as between the national legal orders and the European Union's legal order.

As the seminar cannot investigate the national administrative laws of the member states in their entireties the seminar has to limit its scope: first, to single case decision-making as the probably most typical form of action of the administration. Other forms of action, especially

administrative rulemaking, pose another variety of questions which could make it worthwhile dedicating another seminar to this topic. Second, the seminar focuses on two important areas of administrative procedure, which are covered by the first two parts of the following questionnaire. The first is dealing with the legal position of different categories of (potential) parties to administrative proceedings (I.), the second with the administrative determination of facts and discretionary powers (II.). The last part contains a small case study in which these areas of administrative procedural law play a decisive role (III.). This sequence is, of course, not meant to prejudice the order of answering.

The first part deals with the questions of who is or can become a party to administrative proceedings before an administrative authority (not before an administrative court!) and of what rights and/or obligations might follow from being a party to administrative proceedings. The second part centres on the question of how administrative authorities determine the facts on which to found their decisions. Although here, too, the main focus is on the proceedings before administrative authorities, this part also makes reference to proceedings before administrative courts. In this regard it deals with the administrative courts' review of administrative decisions having in mind that there might be different standards of review concerning the establishment of the facts and concerning the application of substantial law.

Wherever you consider it appropriate, it would be helpful if you not only described your national legal order, but also compared your national legal order with the relevant provisions of the two drafts mentioned before. For this purpose the questionnaire makes reference to single provisions of these two drafts in order to facilitate the links.

7. Is there a political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to administrative proceedings in your country? Are there recent legislative proposals concerning the participation rights of third parties to administrative proceedings?

I. Parties to Administrative Proceedings: Categories and Legal Positions

1. a) Are the following categories of parties to administrative proceedings for single case decision-making recognized in your legal order:

   - addressees of onerous administrative acts / applicants of beneficial acts,
   - other individuals (please differentiate, in its case, further, e.g. between individuals claiming subjective rights, concrete legal interests, factual interests, individuals as members of the general public),
   - associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements),
   - other administrative bodies?

   b) Are the categories of parties to administrative proceedings defined

   - in a general codification (i.e. Code of Administrative Procedure,…),
   - by reference to other codifications (e.g. Code of Court Procedure,…),
   - by custom(ary law),
   - by jurisprudence,
   - in another way (please explain)?

(cf. Art. 4 (f) EP-Res.; Art. III-2 (3) and (4), III-25 ReNEUAL)

2. a) Do (sectorial) pieces of legislation establish additional categories of parties to administrative proceedings or do such pieces of legislation modify the general categories? In this case, please give examples!

b) If such additional categories are established and/or such modifications are provided for, what is the rationale of such additions and/or modifications?

3. As far as the parties are not parties by law (e.g. addressees or applicants), how can the different categories of (potential) parties actually become parties to administrative proceedings?

- Is a request of the party required?
- Is a decision of the administrative authority admitting the party required?
- Is the administration obliged to qualify potential parties ex officio?

4. a) Are administrative authorities obliged to identify third parties entitled to participate or potentially interested in administrative proceedings?

b) Is the administrative authority obliged to announce the beginning of administrative proceedings to (potential) third parties to enable their participation?

c) Are there any consequences, if the (potential) party does not make use of its right to participate in the administrative proceedings? Does your legal order provide for a foreclosure of the exercise of the party's rights (preclusion regulation), particularly with regard to later court proceedings (ability to challenge the final decision, legal standing in this regard)?

5. If individuals / organisations / other public authorities are not admitted as parties to administrative proceedings by the competent authority on their request, what are the legal consequences?

d) Are they entitled to direct court actions against the administrative decision to not admit them as parties to the administrative proceedings? Are (only) original parties (parties by law) to the administrative proceedings entitled to do so?

e) In contrast, do the parties not admitted to the administrative proceedings have to wait for and then challenge the final administrative decision claiming a procedural defect in not admitting them?

f) Can the competent authority remedy any omission to admit a party?

6. a) Do all categories of parties to administrative proceedings enjoy the same procedural rights:

- to be heard (orally or in writing),
- to be advised by the competent authority concerning the relevant procedural rights,
- to submit documents,
- to have access to the file, including documents submitted by other parties,
- to call witnesses or to initiate other gathering of evidence,
- to be provided with a copy of the final decision,
- to file a claim in the administrative proceedings?

b) Or do different categories of parties to the administrative proceedings have different rights? If so, please provide information about the most important differences!

(cf. Art. 9, 11, 14, 15 EP-Res.; Art. III-15, III-23, III-24 ReNEUAL)

8. What is the most important and most recent case law of your court relating to the status of third parties to administrative proceedings and their procedural rights therein? Please identify up to three cases and provide some information about the content and relevance of the judgements!

II. Determination of Facts and Discretionary Powers

1. a) **In administrative proceedings**, do administrative authorities have a general duty to carefully and impartially investigate the facts of the case ex officio in your jurisdiction (principle of investigation)?

f) Are, in contrast, the parties to administrative proceedings generally obliged to present facts or evidence of their own accord (principle of party presentation)?

g) Do the rules for determining the facts distinguish between administrative proceedings initiated ex officio or by application?

h) Do the rules for determining the facts distinguish between facts which are favourable to the individual and others which are unfavourable to him?

i) Do different models of fact finding in administrative proceedings exist in your country with regard to different subject matters (e.g. ex officio administrative orders prohibiting or requiring specified actions of individuals, licensing of private projects on application, administrative sanctions, specific sectors of administrative law,…)?

(cf. Art. 9 EP-Res.; Art. III-10, III-11 ReNEUAL)

2. If your jurisdiction provides for the duty of the competent administrative authority to care-
fully and impartially investigate the facts of a case:

d) Are the parties to administrative proceedings obliged to cooperate in the investigation (e.g. by providing documents or by answering questions)?

e) What are the consequences, if a party to administrative proceedings does not comply with its duty to cooperate?

f) Are there differences in the duty to cooperate among different categories of parties (applicants, potential addressees of the final decisions, third parties)?

(cf. Art. 10 EP-Res.; Art. III-13, III-14 ReNEUAL)

3. a) In the fact finding process, is the administrative authority in your legal order bound by strict procedural rules (e.g. demanding for a certain organisation) or is this process subject to discretion of the administrative authority?

   d) Has the administrative authority broad discretion in evaluating the facts found in the administrative proceedings?

   e) Does your national legal order provide for rules concerning composite investigations, i.e. the collaboration of different administrative authorities (like establishing a responsible officer of one administrative authority) or the collaboration of different officers within one administrative authority, e.g. a hearing officer who may hold hearings with applicants (like asylum seekers) while another officer takes the final decision based on written reports of such a hearing officer?

4. a) Does your national legal order provide for specific rules of evidence for the fact finding in administrative proceedings?

   f) If this is the case, what are the most important principles?

   g) If this is not the case, what other (general) rules apply?

   h) What is the rationale for the model applied in your jurisdiction?

   i) Are there any rules in your national legal order providing for the inadmissibility of certain evidence? If so, please give some details!

(cf. Art. 9 (2) and (3), Art. 11 EP-Res.; Art. III-10 (2), III-15 ReNEUAL)

5. **In court proceedings**, who is responsible for the presentation and investigation of facts and evidence?

d) The court or the parties?

e) Are there differences between the responsibilities of claimants and defendants or between individuals and administrative authorities?

f) Is the administrative court free in the consideration of evidence or are there certain rules of evidence? In the latter case, please give details!

6. a) What is the general standard of control applied by administrative courts in regard to the fact finding of the administrative authority? Are there limitations in the scope of judicial control?

e) Does your national legal order know standards of (limited) control in regard to complex factual evaluations comparable to the concept of technical discretion applied by the ECJ (see annex to this question below)?

f) If this is the case, what are typical cases in which such a standard of reduced control is applied?

g) Are these cases qualified as a specific category of administrative discretion or are they subject to the general principles concerning discretionary powers of administrative authorities?

7. a) In your national legal order, are the procedural standards to be observed by administrative authorities in their fact finding the more stricter the more the administrative authorities are conceded substantive discretionary powers?

g) What is, as far as applicable, the rationale of reduced (substantive) controls exercised by the administrative courts?

h) Are administrative courts reluctant to interfere with material decision-making of administrative authorities?

i) Do they prefer to focus on procedural aspects?

j) Does your national legal order know prepositioned or anticipated expert opinions (e.g. in environmental law) to which a superior validity is conceded?

k) As far as the concept of technical discretion applied by the ECJ in regard to administrative decisions (or similar) is applied in your national legal order (cf. II.6.b)), can the reduced standard of control be regarded as a consequence of different institutional capacities of courts and administrative authorities?

8. Are there any constitutional provisions and/or principles governing the questions

d) of the determination of facts of a case by the administration,

e) of the possibilities of the administration to enjoy discretion therein and

f) of the standards of control to be applied by the administrative courts (e.g. a constitutional guarantee of effective judicial remedy, a strict duty of administrative bodies to comply with legal requirements)?

9. Is there a political or academic discussion concerning any kind of reform with regard to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts in your country? Are there recent legislative proposals concerning the discretionary powers of the administration and the corresponding reduced judicial control?

10. What is the most important and most recent case law of your court relating to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts? Please identify up to three cases and provide some information about the content and relevance of the judgements!

III. Case Study

Initial Case:

Applicant A applies for a construction permit for the construction of a commercial building at a location on the edge of the built-up area of municipality M.

The competent administrative authority of the district (S – a state authority, not a municipal one) invites F, a farmer who owns the neighbouring piece of land, to express himself on A's application in a given time limit. S informs F that he will not be heard after the time limit has expired. F does not react.

S also consults M, which supports the project because it hopes for a better economic development.

O, a nature protection organisation, learns about the project from the local newspaper and asks S to be involved in the proceedings. O remarks that there have been sightings of red kites (*milvus milvus*, a species listed in Annex I of the Bird Protection Directive 2009/147/EC) at the designated location of the project. S does not reply to this, but internally consults the environment protection authority E (also a state authority). E explicates in its statement to the application, mostly relying on an expert opinion handed in by A as part of his application, that a population of red kites does existed in the concerned area, but from its scientific point of view of nature protection the project was scientifically justifiable because the known breeding areas were sufficiently distant from the designated location of the project and O had not brought forward anything concrete.

M changes its mind and decides to draw up a development plan for the area concerned which is supposed to provide for a residential area.

S issues the permit to A after a procedure without (other) defects and sends a copy to F and M, each containing an accurate instruction on the right to appeal to the administrative court within one month.

F is against the settlement of commercial companies in his vicinity. He thinks there are already enough commercial companies in the village and moreover he is afraid of facing disadvantages in managing his soil because of increasing traffic.

M, F and P, the president of the local “Association for Preserving the Traditions”, who wants to defend the beauty of the homeland and thinks that A’s project does not fit into the landscape, all bring actions before the competent administrative court against the permit. M also feels itself impaired in its exclusive municipal planning competence.

O learns only five months later, again from the local newspaper, that A received the permit and immediately refers to the competent administrative court. O argues that it should have been involved in the administrative proceedings. O points out that the risk for the red kite also was not justifiable because, very close to the designated location of the project, an eyrie had been found. The designated, up to now not built-up location constituted an important hunting ground for the red kite. If a construction was allowed here, the breeding success of the local population of red kites would be seriously endangered. O submits an expert opinion of an internationally respected ornithologist which supports its allegations.

Questions:

1. How is the court going to decide on the objections of M, F and P?

2. How is the court going to decide on the action brought by O? Is the mere fact that S did not involve O in the administrative proceedings going to help O’s action to succeed? Supposing that this is not the case, how is the court going to assess the question of the risk for the red kite?

Modification:

Case like the initial case, but A now applies for a permit under pollution control law for the construction of a small wind farm (project according to Annex II of the Environmental Impact Assessment Directive 2011/92/EU) in the outskirts of M. M initially supports the project as in the initial case, but then decides to plan a commercial area which is supposed to include the

designated location of A’s project. E additionally explicates, based on the opinion handed in by A, too, that the risk of collisions of the red kite with the blades of the wind generators was negligible because of the distance of the known breeding areas from the designated location, whereas the opinion brought by O sees an unjustifiable risk because the designated location of the project constituted an important hunting ground of the red kite.

How is the court going to decide on the actions now?

Annex to question II.6.b)

In recent case law concerning European Union state aid law and European Union competition law (anti-competitive practices, merger control) the European Court of Justice established – according to recent academic writings – a concept of three levels (stages) for the judicial control of administrative fact finding and legal qualification of facts[3]:

5. (abstract) interpretation of legal provisions;

6. determination (or establishment) of (simple) facts (the factual basis);

7. only in case of complex factual matters (interdependencies, causalities, uncertainty,…) evaluation (or appraisal) of complex facts (economic impact, complex prognosis, certain risks for health and safety);

8. (concrete) legal qualification (or characterisation) of simple facts or of the results of a complex evaluation with regard to a legal term – sometimes based on the interpretation of a legal provision.

Concerning levels 2 and 4 the European Court of Justice applies a strict scrutiny while the Court reduces its control on level 3 under the rubric of a so called technical discretion which must be differentiated from classic discretionary powers. For example the European Court of Justice takes the view that the finding that a state aid favours (!) a certain undertaking as prohibited by Art. 107 (1) TFEU requires in some cases (!) a complex (!) economic evaluation of the factual situation. Thus, in such specific factual situations the Commission has a technical discretion and the Court will apply a reduced standard of control ("manifest error") focussing on procedural requirements especially with regard to the duty to carefully and impartially investigate the case[4]. In contrast, articles 107 (3), 108 (3) TFEU provide for a classic discretionary power ("may be considered") of the Commission according to the Court.

[3] ECJ case C-104/00 P (DKV/HABM); case C-449/99 P (EIB/Hautem); see also case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

[4] See ECJ case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

Many commentators compare this four-level-concept with concepts in French administrative law. Other jurisdictions tend to omit the 3rd level and to focus on levels 2 and 4. Nevertheless, some jurisdictions have established a broad understanding of discretionary powers probably comprising also categories like the technical discretion under European Union law. Also the German concept of "Beurteilungsspielräume" concerning the administrative concretisation of legal requirements (a form of discretion with a view to the facts rather than with a view to legal consequences) may share some parallels with the judicial control of technical discretion in European Union law. In both jurisdictions the judicial control focusses on:

6. compliance with procedural requirements,
7. especially concerning the careful and impartial investigation of the case/facts:
    a. strict scrutiny concerning the factual basis of the complex factual evaluation,
    b. relevance of different standards of proof in various fields of substantive law,
8. compliance with general standards of evaluation of complex factual matters (especially if these standards are set in legislation, statutory instruments, administrative guidelines or publically accepted (private) technical guidelines or norms),
9. avoidance of arbitrary considerations,
10. correct interpretation of the relevant legal terms.

Nevertheless, a major difference between the control by German and European Union courts exists as German administrative courts have a duty to investigate the facts of the case ex officio while the European Union courts tend towards assuming an obligation of the parties to present the facts or evidence.