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ACA EUROPE

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: Germany

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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

Answers from Germany

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.

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)

Answer:

Sec. 13 of the German General Administrative Procedure Act (APA – Verwaltungsverfahrensgesetz, VwVfG) defines as parties to the proceedings persons according to the categories mentioned in the first indent and partly in the second indent of Q. 1. a). Full status as parties is accorded to applicants, addressees, persons with whom the administration will conclude or has concluded a contract of public law, as well as those persons whose subjective rights will be concerned or whose legal interests may be affected by the outcome of the proceedings. A mere factual interest is generally not sufficient to participate fully in the proceedings. Individuals as members of the general public are not covered by this general definition of parties to administrative proceedings.

This general definition of parties in German administrative procedure law seems to be broader than in art. 4 (f) EP-Res. which requires a "legal position" rather than a mere legal interest. Art. III-2 (3) ReNEUAL might go further than the German law, depending on the interpretation of "persons who are adversely affected", which according to the explanation of the ReNEUAL Draft does not apply in the case of a mere interest.

However, by way of special statutory regulation, members of the general public may take part to a limited, legally defined extent in special proceedings regarding a planning ap-

proval. For a limited participation in a hearing regarding a project to be planned and approved, it is sufficient to be affected in mere factual interests. The mere statutory right to be heard, however, does not grant the full status as a party of the proceedings.

Associations and non-governmental organisations especially in the area of nature protection are – on the basis of specific pieces of legislation – entitled to participate in administrative proceedings which relate to a project within the range of affairs according to their own charter.

Other administrative bodies are not parties in the sense of general administrative law, but may participate in a wider sense e.g. by giving their opinion to a project or an application, delivering their required consent with respect to their area of competence etc. Those bodies may be authorities or public bodies of self-administration of certain professional groups in artisanry law or trade law. Municipalities may participate in proceedings concerning the planning e.g. of airports affected by the outcome of the proceedings.

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?

Answers:

a) Yes, sec. 73 APA provides for the category of contributors (Mitwirkende) and objectors (Einwender) for the proceedings of planning approval. So do various federal and single state laws of nature protection, especially for non-governmental organisations in the area of nature protection. They do not modify the general status of parties according to sec.13 APA, but rather complement it by granting special rights of participation for certain persons or associations who/which do not enjoy the general status as parties in the particular case.

b) The rationale of the additional rights to participate in proceedings not as parties, but as other participants with limited rights, is to integrate as many aspects as possible in the administrative proceedings in order to ensure its utmost balance and legal soundness. In areas of environmental law, obviously, the rationale is also to give interests of natural or environmental resources a voice in the proceedings and to integrate the technical expertise of associations or other persons participating in a hearing or handing in a written objection. In the case of participation of public bodies of a professional group (artisans, trade etc.), the participation is also intended to integrate professional expertise. In all cases, early participation well in advance of court proceedings may

foster a better acceptance of the outcome of administrative proceedings and reduce the risk of lengthy trials contesting a project.

As to the limitation of these special statutory regulations on participation of "non-parties" to certain stages of the proceedings and certain rights, the rationale is to protect the proceedings and the applicant / the authority against an excessive broadening.

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?

Answer:

A request is not a legal requirement. The administrative authority may ex officio involve persons as parties whose legal interests may be affected by the result of the proceedings. This is optional, but the option is to be handled within the legal limits of sound exercise of administrative discretion. The administrative authority may exercise its discretion to involve such a person even contrary to the latter's wishes. The involvement of such a person itself constitutes an administrative act which may be contended by the affected person in court.

The authority may admit such persons whose legal interests may be affected by the result of the proceedings also upon their request, if it has not involved them ex officio. It has discretion to follow the request or reject it.

However, if the outcome of a proceedings has a legal effect for a person in the sense that his or her subjective rights and not only legal interests are concerned, the authority must grant the status of a party to this person upon his or her request. In this case there is no administrative discretion. Obviously, in such a case the authority would also be bound by the principles of sound exercise of discretion to involve such a person ex officio ("reduction of marge of discretion to zero" when legal rights are affected).

I am not aware of any stipulation in German administrative law granting the full status of a party ex lege upon mere request, meaning that a request would be necessary and at the same time sufficient for this status. Rather, sec. 13 Abs. 1 APA grants the status of a party to those persons who have an obvious involvement in the procedure as applicants, opponents, potential addressees or partners of a contract of public law. No request is necessary in these cases.

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)?

Answers:

a) Since the German administrative procedure is governed by the principle of investigation, the administrative authority shall ex officio determine the facts of the case in question. This suggests that it also has to investigate whose legal rights or interests may be affected by the result of the proceedings. There is no special provision regarding an obligation to search for third parties. But the heavier a possible administrative decision will impact upon third person's rights, the more the authority in charge of the proceedings will have to identify them in order to exercise its discretion or even duty to involve such persons in the proceedings.

b) Sec. 13 APA states, however, a duty of the authority to announce the beginning of the proceedings to a third person whose legal rights may be affected by a decision, upon the condition that this person is "known" to the authority. Since this notification of the beginning of proceedings may be essential for third persons to guard their rights at this early stage, and the legislator expressly decided to formulate a strict duty to announce instead of any softer obligation, the authority will have to undergo some investigation as to the persons concerned.
In the special planning approval proceedings for larger projects (sec. 73 APA), the authority or the municipality in which the proposal for the plan is to be made public shall publicly announce the fact of publicizing the plan. This is meant to enable members of the public who see their interests affected to inform themselves on the proposal and decide upon their participation as objectors.

c) The status of being a party in the administrative proceedings or the admissibility of a subsequent court action is not precluded in German administrative law if a person has not made use of its legal right to participate in the administrative proceedings up to a certain point. In this sense, there is no preclusion regulation with respect to the right to participate. However, there are regulations providing for a preclusion of specific objections if they have not been made up to a certain point (material preclusion).

Those regulations and their further applicability in light of the judgement of the ECJ of 15 October 2015 (C-137/14; ECLI:EU:C:2015:683) seem to go beyond the scope of this questionnaire.

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?

   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?

Answers:

a) According to the jurisprudence of the German Federal Administrative Court, a non-admittance to participate in the proceedings may in general not be contested in court before the final administrative decision has been issued. The reason is – according to this jurisprudence – that procedural guarantees regularly do not constitute an end in itself, but shall serve the best possible implementation of a position of substantive law. There may, however, be exceptions if substantive (material) legislation recognizably provides for a separately enforceable legal position to participate in the proceedings or if the lack of participation would lead to irreparable harm.

b) As a consequence of the general indefeasibility of the non-admittance to participate (see Q. I. 5. a)), in general a non-participant must attack the final administrative decision in court. He or she is not limited to claiming a procedural fault of non-participation, but may – and regularly should in order to be successful – object to the compatibility of the final administrative decision with substantive law or with other procedural provisions which may render the decision unlawful or even void.

c) An omission to involve a third party in the proceedings may be healed by the administrative authority by granting the legal rights of participation in question and subsequently reviewing its own decision in light of the arguments submitted by this party. The procedure of healing must constitute a functional equivalent to the original proceedings; the authority must be open to change its previous decision.

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)

Answer:

The Administrative Procedure Act does in general not distinguish between the different categories of parties with full status with a view to their rights. So, the right to be heard, to be advised, to submit documents, to have access to the file, including documents submitted by other parties, to file a claim and to participate in the gathering of evidence is accorded to all those parties in the sense of sec. 13 APA. The access to documents submitted by other parties might be restricted, though, as far as company secrets (e.g. of a company applying for a permit for an industrial facility) are at stake. However, only parties to whom an administrative act is intended or who are affected thereby in their rights are to be provided with a copy by notification. Other parties whom the administrative authority has involved in the proceedings, for whom the administrative act does not have any legal effect, do not have a right to be notified with a copy, although it is certainly possible to provide a copy to them.

Participants in a wider sense, meaning the members of public who are to be heard with their objections to a special project in planning approval proceedings or other, specifically regulated proceedings, do not directly benefit from these procedural rights of parties codified in the general administrative procedure law. The relevant special regulations describe and limit their procedural rights. On the whole, however, their procedural position amounts to the same level. In the case of the planning approval procedure, persons whose interests are affected by the project have special rights in preparation of and during the hearing. The final decision has to be notified to them if it deals with the objections to the project which they have raised. It would lead beyond the scope of this questionnaire to go into details of the participants' rights according to all the special statutory

regulations in environmental law or with respect to other complex decisions in infrastructure law.

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?

Answer:

There is regular political and academic discussion concerning the improved participation of the interested public in planning procedures for infrastructure projects in Germany like railway infrastructure (e.g. the new railway station "Stuttgart 21"), other traffic projects like the planned tunnel in the Baltic sea between Germany and Denmark or the project of a final nuclear waste dumping site for Germany. This discussion does not focus on the rights of third parties who are concerned in legal rights, but aims at finding forms of participation of the public with the aim of improving the acceptance of such projects in the general public. In 2013, as a result of the discussion about Stuttgart 21, a provision was introduced in sec. 25 APA which obliges the authority to inform the public at a very early stage of a project and conduct a hearing even in advance of an application by the person responsible for the project. A similar discussion resulted in provisions about the early participation of members of the public in the search and selection of a final nuclear waste dumping site. We are not aware of any recent legislative proposals regarding the participation of third parties.

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!

Answer:

There is not much recent jurisprudence relating to the participation topic.

In a decision of 25 March 2011 (7 B 86.10; ECLI:DE:BVerwG:2011:250311B7B86.10.0), the Federal Administrative Court decided about the right of a neighbouring municipality to claim participation in the proceedings concerning a demolition/construction waste site. It confirmed that the municipality could not file an administrative action solely based on the claim to be involved in the administrative proceedings.

By judgement of 23 March 2002 (3 C 28.01), the court decided that a company marketing but not producing a food product which had been found in non-compliance with food regulations by the inspecting authority had no right to be heard in the proceedings of admin-

istrative inspection, since it did not enjoy the status of a party in the sense of sec. 13 APA.

By judgement of 16 May 2000 (3 C 2.00), the court held that a person who had been involved in the administrative proceedings ex officio, but against its own will, may claim the discontinuation of the involvement as a party and, solely to this end, file an action before the administrative court, if the conditions for the involvement are no longer given. In the underlying case, the owner of a company which previously had produced on a now contaminated site did not want to be involved in the proceedings determining the extent of the contamination of the abandoned hazardous site. In the course of the proceedings, a new federal soil protection law entered into force and the claimant did not belong to the group of persons anymore which could be held responsible for cleaning up the hazardous site.

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,…)?

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

Answer:

Sec. 24 par. 1 APA provides for the principle of investigation in administrative procedures of administrative authorities. As a general rule the administrative authorities are not bound by the facts presented by the parties. Sec. 24 par. 2 APA further elaborates the principle of investigation– obviously having in mind administrative procedures aiming at

an onerous decision – stating that the administrative authorities also have to investigate facts favourable for the parties. Nevertheless, the duty to investigate the facts ex officio is not unlimited. Sec. 26 par. 2 APA provides that the parties shall cooperate in the investigations, especially provide facts and evidence available to them. Although this general burden to cooperate is not a legally binding duty (n.b. in tax law there is a duty to cooperate), it limits the authority's duty insofar as the latter is not held to further investigate if there are no indications pointing on further aspects as long as these aspects are not evident. Specific legislation might provide for more intensive duties to participate, though (e.g. alien law, asylum law).

The general provisions do not differentiate between administrative procedures initiated ex officio or by application of an interested party, although the limits mentioned before to the duty of the administrative authority to investigate lead to a more intensive burden of the interested parties to present facts and possibly evidence in procedures initiated by their application as in these cases the required facts often are in their own sphere and cannot be known by the administrative authority without the party's cooperation.

A slightly different model exists with regard to administrative sanctions insofar as the principle nemo tenetur, as a constitutional guarantee, is also to be respected in proceedings aiming at administrative sanctions. A different model also exists in tax law which provides for a much more intensive duty to cooperate of the parties. Other specific rules modifying the general rules according to the APA might be provided for by specific legislation.

2. If your jurisdiction provides for the duty of the competent administrative authority to carefully 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)?

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

Answers:

a) The parties of administrative proceedings are supposed to cooperate in the investigations carried out by an administrative authority (cf. sec. 26 par. 2 APA; see Q. II. 1). But there is no general legally binding or even enforceable duty to cooperate (see Q.

II. 1). Nevertheless specific law might provide for binding duties to cooperate. This applies for example in alien law or in asylum law.

b) *Although there is no general obligation of the parties to cooperate they should – in many cases – do so in their own interest because the administrative authority is not obliged to investigate in aspects of a case it does not have any indications for (see Q. II. 1). This applies especially to proceedings initiated by application of the party. The consequence of neglected cooperation might be that the application is dismissed. But as a general rule a party not cooperating in the investigations of an administrative authority still can make up their cooperation in later proceedings, even in court proceedings initiated by this party's claim.*

Nevertheless, some specific procedural rules contain preclusion rules leading to the loss of the material legal position of the party. In these cases the party cannot found a later claim on grounds this party could have already brought up in an earlier step. It has to be added here, that in a number of subject matters the preclusion rules set by the German legislator in environmental rule were found violating European law by the EJC and therefore were repealed.

c) *As there is no legally binding duty to cooperate there are no (legal) differences.*

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?

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

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?

Answer:

The administration has broad discretion both in organising the fact finding and in evaluating the facts.

More complex investigations, e.g. in environmental law, which require contributions of several specialised administrative bodies, are carried out by a leading authority (which is

going to be the responsible authority for issuing the decision). This leading authority consults the other administrative bodies formally for their contributions. The APA provides for specific administrative procedure which is to be followed in bigger and more complex projects. Here, the law differentiates between a hearing authority which in these cases carries out a public hearing to consult the public and a deciding authority. But as the different competences are regulated in most cases by specific state law, this does not mean that these have to be different authorities in practice.

In general there are no general rules which provide for identity of the officer gathering the facts and another one taking the decision. This is rather a question of the inner organisation of the respective administrative body. As the question explicitly mentions asylum cases, it might be noteworthy that the Federal Office for Migration made wide use of specific hearing officers in the recent past which did not make the final decisions. This is considered legal, although there was much well-reasoned criticism pointing out that especially in asylum cases it is of paramount importance to judge the credibility of the applicant which is much more difficult for the deciding officer if he did not see the applicant himself.

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!

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

<u>*Answer:*</u>

Sec. 26 par. 1 APA provides for a specific regulation of evidence for administrative proceedings. This norm lists "among others" the classic types of evidence known from court proceedings. Thus, the administration is not limited to classic types of evidence. It has to investigate the facts of a case in a simple, reasonable and speedy way (cf. sec. 10 sent. 2 APA). In the general framework of the laws it can resort to any sources of information in doing so and then freely consider the evidence.

The rationale in not limiting the administration to specific types of evidence or to specific forms of gathering evidence is to enable the administration to investigate the facts in a simple, reasonable and speedy way.

Evidence might be inadmissible when there are preponderant interests arguing against their use. This might be the case when the evidence is protected by fundamental rights (as in case of personal data, intellectual property) or when the evidence has been gathered illegally and this violation implies an obstacle for making use of the evidence.

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!

Answers:

a) According to sec. 86 par. 1 Code of Administrative Court Procedure (CACP) the court shall investigate the facts ex officio. Nevertheless the court is supposed to consult the parties in doing so.

b) The legislation does not provide for structural differences with regard to the responsibilities of claimants and defendants. Specific means enabling the court to investigate the case exist, though, implying specific responsibilities of administrative authorities (as most common defendants in administrative court proceedings), as they can be ordered to present their files or documents or to give information to the court (sec. 99 par. 1 CACP). These rules are not only applicable to the administrative authorities which are (representing the state) parties to the proceedings. A court can make use of these provisions also to gather evidence from otherwise not involved administrative authorities.

c) As a general rule sec. 108 par. 1 CACP provides for the application of the principle of free consideration of evidence. Only a few exceptions from this principle are provided for by legislation. These refer to the evidential value of public documents or court protocols.

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?

Answers:

a) In general the courts have to fully control the facts underlying the administrative decision as the judges have to be convinced of the facts in order to found their decision on them (cf. sec. 108 par. 1 CACP). Also, the courts are obliged to investigate the facts by themselves (cf. sec. 86 par. 1 CACP).This means that in general the courts cannot limit themselves to checking the investigations carried out by the administration for procedurals errors or alike but have to carry out a new, independent and full investigation of the facts of the case on their own. In doing so the courts have a wide discretion how to proceed and to decide what evidence they deem necessary.

b) Although the German procedural law requires the courts in principle to investigate the case fully themselves and fully control the administrative decision, the jurisprudence has acknowledged certain limitations to this principle. Traditionally these apply to examinations, evaluations of officials or decisions of pluralistic committees. In these cases the courts only exercise a limited control concerning the factual basis of the examinations or evaluations, the prescribed procedure, logical faults or abuse of power, but not the result of the examinations or evaluations.

Additionally, a certain scientific prerogative is conceded to the administration in environmental law ("naturschutzfachliche Einschätzungsprärogative") insofar and as long as there are no generally accepted scientific standards for, for example, assessing the state of a natural space or a population of protected species as well as for the prognosis of effects of a project on the environment and insofar the administration has expert knowledge the court does not have itself. Considering the constitutional background of the guarantee of an effective remedy against all acts of a public authority these limitations of the judicial control have to be set out by statutory law or at least be deductible by interpretation of statutory law.

c) See b)

d) These cases are qualified as a specific category in which the executive branch has these specific prerogatives concerning the factual side of a traditional idea of a norm consisting of facts and legal consequence. The more traditional and more widespread cases of administrative discretion in German administrative law are considered structurally different from these. Here, the traditional approach of German doctrine regards the administrative discretion as an element of the legal consequences of a norm, not as facts ("Ermessen"). Both phenomena lead to a restricted control by the judiciary and both are (among others) justified by reference to the separation of powers, but both the dogmatic approach and the approach to their limits of control are different.

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?

Answers:

a) A strict observance of procedural standards is a prerequisite for substantive discretionary powers of the administration. This is especially true for the standards on administrative fact finding and the scientific prerogative described earlier (see Q. II. 6.) as the judiciary concedes these prerogatives only on the basis of well investigated facts on the basis of the current state of the relevant natural sciences. Only under these conditions the judiciary restrains its control and concedes discretion to the ad-

ministration to exercise the said prerogative. As far as this scientific discretion is concerned it seems to be possible to answer in the affirmative the question for the interdependence of procedural rules and discretion. In the classic dogmatic forms of discretionary powers of the administration ("Ermessen") there is no real interdependence from a strictly dogmatic point of view as in these cases discretion only applies as a result of applying the law on a given – and therefore investigated – case. This means that also in these cases the courts have to investigate the facts in the same way as in a situation of strict law to control whether the specific norm (granting the administration discretion) applies or not. Should the administration base its discretional decision on false facts, this would be a reason to quash such a decision.

b) *The rationale of the scientific prerogatives has already been pointed out (see Q. II. 6.). One strong reason is the separation of powers. In this context it is important to recall that the judges – as lawyers – in the field of developing natural sciences cannot have the same expertise in these sciences as the administration. As long as there are no clear und (largely) accepted criteria and methods of assessing the scientific parts of certain facts the courts see themselves hindered from interfering with the superior expertise of the administration in these fields. This is why they limit themselves on aspects of the case they can deal with from the point of view of law instead of preferring one scientific position in an open scientific discussion. At this point it is noteworthy to recall that the requirement of this scientific prerogative that there are no generally accepted scientific methods might be temporary. As soon as there is such a generally accepted method (or the legislator decides for a certain approach) there is no more room for this scientific prerogative because the courts then will be able (with the help of scientific opinions applying the generally accepted method) to assess the facts on its own.*

c) *Where there is a certain margin of discretion for the administration, administrative courts must observe this discretion in order to not interfere with the separation of powers which is a constitutional principle. The courts control the actions of the administration in the light of the law. If the law attributes a certain margin of discretion to the executive, it would be unconstitutional if the judiciary substitutes the decision of the first by its own decision.*

d) *Sometimes one might get the impression that courts prefer to focus on procedural aspects instead of touching the substantial aspects of a case. But this cannot be regarded as a preference. Procedural requirements are always legal requirements which in every case can be controlled by the courts. Also, procedural aspects are preliminary questions before it is possible to touch the results of a procedure. If a court identifies procedural faults which cannot be healed it would be pointless to deal with substantial aspects which are based on a faulty procedure. Finally, procedural requirements also have the purpose to improve the content of the substantial decision.*

e) German law does not know anticipated experts' opinions with superior validity. In court proceedings the court has to decide on the facts presented to it or investigated by itself. Nevertheless the German legislator makes reference to technical guidelines with the effect that there is a rebuttable presumption that accordance with these guidelines can be regarded as accordance with legal requirements.

f) The scientific prerogative conceded to the administration in a way can be seen as a consequence of different capacities of courts and administration in the field of science. Judges are (usually) not scientists. As one of the requirements of the scientific discretion as applied in Germany is that there is not yet a clearly better scientific knowledge (which could be assessed by the courts at least with the help of an expert's opinion), judges should respect the position of scientists in the administration in regard to a certain question as long as this opinion is not scientifically outdated.

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)?

Answer:

The German Constitution does not provide for any rules about the determination of facts or about the possibilities of the administration to enjoy discretion therein. But the Constitution provides, as a principle of the state, for the separation of powers. Although the main objective of the judiciary is to control the executive, this leaves room for margins of discretion for the administration which have to be respected by the courts as far as these margins are created by the legislator.

The German Constitution provides for a guarantee of effective judicial remedies against any acts of a public authority (possibly) violating subjective rights of individuals (art. 19 par. 4 Constitution). Both the executive and the judiciary are bound by law and justice (art. 20 par. 3 Constitution). These principles in sum provide usually for a full control of acts of the administration as far as subjective rights might be at stake. Exceptions are – following the jurisprudence and the majority doctrine – only possible, if the legislator determines specific margins of discretion to the executive branch.

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?

Answer:

As far as the editor of these answers is aware, there are no legislative proposals neither concerning the fact finding of courts and/or the administration nor concerning the margins of discretion conceded to the administration by the judiciary. The editor does not expect major reforms on this topic to come up in the nearer future. It has to be mentioned, though, that the Federal Constitutional Court is dealing with two cases in which the claimants challenge decisions of the Federal Administrative Court conceding a scientific prerogative to the administration on the ground that the Federal Administrative Court had violated the guarantee of an effective judicial remedy (art. 19 par. 4 Constitution) in not fully assessing the dangers to a protected species stemming from the project (wind energy generators) planned in the cases.

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!

Answer:

Regarding the administrative decision to allocate radio frequencies (channels) to private radio programmes, the Court has decided by judgement of 31 May 2017 (6 C 42.16; ECLI:DE:BVerwG:2017:310517U6C42.16.0) that the relevant single state media statute accords an administrative prerogative to the authority to decide upon the allocation in a situation of limited capacity. However, the administrative allocation decision must respect the limits of sound selection among several applications, so that the overall radio programme is adequately diverse and relates to all regions of the transmission area.

By judgement of 2 March 2017 the 2nd Senate of the Court has affirmed the long-standing jurisprudence that the decision of personnel review of a public officer's performance and aptitude ("dienstliche Beurteilung") depends on the assessment of his or her employer and is subject only to a limited judicial review (2 C 21.16; ECLI:DE:BVerwG:2017:020317U2C21.16.0). However, the public employer must present plausible facts to the administrative court which substantiate the decision of review.

Regarding administrative assessments of certain facts in the law of nature conservation and the protection of species, several recent decisions confirm the Court's jurisprudence which grants an administrative prerogative to the relevant (e.g. licensing) authority if the

assessment of the facts about e.g. the existing population of a species and the dangers resulting from a specific project gives rise to scientific questions which according to the present state of expert knowledge may be answered in different ways (“naturschutzfachliche Einschätzungsprärogative”). The administrative prerogative ends when scientific standards have evolved which allow only one methodically sound answer. (e.g. judgement of 10 November 2016, 9 A 18.15; ECLI:DE:BVerwG:2016:101116U9A18.15.0).

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?

Answers:

1. *The action of M most probably is going to be admissible. In general as a requirement for a rescissory action to be admissible the plaintiff has to claim that his or her rights have been violated by the administrative act he or she challenges. M can refer to its constitutionally guaranteed right to regulate all local affairs on its own responsibility (art. 28 par. 2 GG). It is not completely clear from the outset that the permit does not interfere with M's planning authority.*

   But most possibly the action of M is going to be dismissed because in the relevant moment (i.e. the moment of the last administrative decision) there was no adverse planning or (what would be possible) a development freeze. The mere fact that M has changed its (political) ideas after giving its consent towards S is legally not relevant.

   Whether the action of F is going to be admissible or not depends on state law which regulates the procedures of (normal) construction permits. Some state laws provide for a foreclosure with the effect that in this case the action of F most probably is going to be regarded as inadmissible because F clearly had the opportunity to raise all his objections when he was invited to do so. This has the effect that he cannot raise his points now in subsequent court proceedings. Other state laws do not provide for such a foreclosure regulation so that the action of F most probably is going to be admissible. F can claim that the permit might interfere with his constitutionally protected property rights (art. 14 GG). His property rights include the possibility to make use of his land. At the level of admissibility his fear for disadvantages in managing his soil

are likely to be sufficient, whereas his opinion concerning the commercial development of the village has clearly no connection whatsoever with F's subjective rights.

Most probably the action of F is going to be dismissed because a violation of his subjective rights cannot be stated. It is noteworthy that under German procedural law the action of F as a third person can only be successful as far as the challenged permit is both unlawful and violates F's subjective rights. At the level of the merits of the case the feared increase of traffic – on public roads – as a consequence of a permitted construction most probably is going to be regarded as a side effect within the laws which regulate how property can be used legally.

The action of P most probably is going to be regarded already as inadmissible as he cannot claim that the permit violated his (or the association's) subjective rights. Although environmental law is at stake and German law provides for exceptions in regard to the requirement of claiming a violation of subjective rights for non-governmental organisations which predominantly foster the protection of the environment, the association – whose aim is to preserve traditions – cannot benefit from these exceptions.

2. *The action of O in the initial case most probably is going to be regarded as admissible as O can rely on an exception from the general rule to claim a violation of subjective rights because the case is about a permit which has been issued after applying environmental law and O is a nature protection association and can claim that legislation protecting the red kite as an endangered species might have been wrongfully applied.*

   The mere fact that S did not involve O is not going to help the action of O to succeed on the merits. In the initial case, which is about a (normal) construction permit, the public or environmental organisations do not have the right to be involved as parties to the proceedings of the administrative authority.

   The court is going to assess the question of the risk for the red kite and is going to control the fact finding of the administrative authority. As far as the breeding areas in the concerned area are at stake it is highly probable that the action of O is not going to be successful because the administrative authority (supported by the environmental authority) has dealt with this issue and came to the scientifically justifiable conclusion that these breeding areas are sufficiently distant from the designated location. The assessment of this question falls under the scientific discretion of the administration as far as the relevant facts have been duly gathered by the administrative authority. This last aspect might help the action of O to succeed if the court finds that the designated area is in fact an important hunting ground for the red kite. This allegation made only in the court proceedings has not been considered by the administration. O can still bring forward this argument in the court proceedings because – as a consequence of not having been involved in the administrative proceedings – O did not

have a chance to bring it before. (Otherwise this argument maybe could be rejected, if O had not brought it in bad faith before.) If this turns out to be true – what the court has to find out by assessing the relevant facts – the action is going to be successful because on this basis the conclusion of the administration that there is no relevant risk for the red kite has to be reassessed by the administration. If the allegation turns out to be not true, the assessment of the administration most probably can be upheld and the action is going to be dismissed.

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?

Answer:

The modified case in German law does not fall under (normal) construction law, but under immission protection law which is federal law. The Federal Immission Protection Act provides for different kinds of procedures, among them a simplified procedure. Basically for a small wind farm (according to Annex II of the Environmental Impact Assessment Directive 2011/92/EU) the simplified procedure is available (unlike for larger ones). But the applicant can always opt for the standard procedure which – as a main difference – includes the participation of the public. Also, the project in the modified case falls under the Environmental Impact Assessment Act demanding a more or less extensive environmental impact assessment depending on the number of generators to be built.

It is noteworthy that there are specific rules for the assessment of the merits of certain permits under environmental law, among them permits for projects which fall under the Environmental Impact Assessment Act, which declare certain defects a reason for rescinding the permit irrespective of the violation of subjective rights of the plaintiff. But still on the level of admissibility the plaintiff has to claim the (possible) violation of subjective rights – as far as the plaintiff is not a recognised environmental protection organisation.

As a consequence M, F and P still have to claim a (possible) violation of their respective subjective rights for their actions to be admissible.

If the action of M is considered to be admissible as in the initial case, the action in the modified case most probably is (partly) successful. As the project falls under the Environmental Impact Assessment Act M can claim the defect of any environmental (pre-)assessment. Although for the small wind farm in this case the law does not require a full environmental impact assessment (only for bigger ones with 20 or more generators) a case-by-case examination (general pre-examination for 6 to 19 generators or a location-related pre-examination for 3 to 5 generators) is required to determine whether it requires a full environmental impact assessment. The defect of an environmental impact assessment or even of a pre-examination is considered to be an absolute procedural defect which – independently from its effect to the final decision – leads to the declaration of illegality of the permit impeding to make use of it, although it is not rescinded and the administration and the applicant get the chance to heal the defect (given that this is not considered impossible by the court).

The same is most probably true for the action of F because his action is – as in the initial case – most probably admissible in the grounds of a possible violation of his property rights. On the merits the defect of the environmental impact assessment lets his action succeed independently from a (actual) violation of his subjective rights, too.

The action of P is most probably considered inadmissible as in the initial case.

The action of O is most probably going to be (partly) successful, too. It is independently from a possible violation of subjective rights admissible because O is an environmental protection organisation and as the permit in the modified case is about a wind farm which is a project possibly requiring an environmental impact assessment.

On the merits the fact that S did not involve O is not going to help the action of O to succeed in the modified case, either, because the permit is about a small wind farm which requires only the simplified procedure under the Federal Immission Protection Act, which does not require the participation of the public. This would be different if the permit was about a large wind farm with 20 or more generators. In this case the standard procedure under the Federal Immission Protection Act would include a participation of the public. The defect of a required participation of the public constitutes an absolute procedural defect which leads to the declaration of illegality of the challenged permit independently from its effects on the decision.

But O can – as M can under the condition that M's action is admissible on other grounds – claim the defect of any environmental impact (pre-)assessment, what leads to the declaration of illegality of the permit impeding to make use of it, although it is not rescinded and the administration and the applicant get the chance to heal the defect.

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.

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

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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).

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.