



Bundesverwaltungsgericht



**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: Netherlands



Seminar co-funded by the «Justice » program of the European Union

ACA-Seminar
ReNEUAL I – Administrative Law in the European Union
Single Case Decision-Making
2. - 4. December 2018
Verwaltungsgericht Köln (Administrative Court Cologne)

Answers to questionnaire: The Netherlands

I. Parties to Administrative Proceedings: Categories and Legal Positions

Preliminary remarks

In The Netherlands the process of administrative proceedings and decision-making is generally regulated by the General Administrative Law Act (hereafter: GALA). Most rules in the GALA relate to specific acts, namely orders (*besluiten*), made by administrative authorities (*bestuursorganen*). Orders come in different forms: (a) orders with general effects and (b) orders addressed to an individual party or parties and pertaining to a specific subject. The latter are called administrative decisions (*beschikkingen*) and are what the answers in this questionnaire will focus on.

The GALA differentiates between two types of administrative preparatory procedures, (1) the regular preparatory procedure and (2) the public preparatory procedure¹:

Regular preparatory procedure

The regular preparatory procedure is most often applied in cases with a limited number of interested parties (e.g. decisions concerning social security law or immigration law). This procedure can be considered a two-phased decision-making process. In the regular preparatory procedure the administrative authority prepares and makes a primary decision, during the so-called primary phase of the decision-making process. Subsequently interested parties can lodge a notice of objection (*bezwaar*) within a period of six weeks, wherein they state their objections against the primary decision, during the so-called administrative review procedure or *bezwaarfase*. In the *bezwaarfase* the administrative authority is obliged to review the primary decision on the basis of the notice(s) of objection. This process of reviewing the primary decision results in a decision on the objection (*beslissing op bezwaar*), in which the primary decision is either affirmed, modified or revoked. It is the decision on the objection and not the primary decision against which an appeal before a court can be lodged and it is therefore that decision that is subject to judicial control.

Public preparatory procedure

The public preparatory procedure is most often applied in cases with a larger, unknown, number of interested parties (e.g. decisions concerning environmental law). In this procedure the administrative authority prepares a draft decision (*ontwerpbesluit*) and publicly deposits this draft for public inspection, combined with a notification in a local newspaper, so interested parties can inspect the draft and state their views (*zienswijzen*) on it within a period of six weeks. Taking into account these views the administrative authority makes its definite decision, which can be appealed in an administrative court procedure.

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),**

¹ A third type of procedure, that of the 'administrative appeal' (*administratief beroep*; division 7.3 of the GALA), by which a primary decision can be challenged before another administrative body than the one that made that decision, has become a rarity and will be left aside in this questionnaire.

- **associations or non-governmental organizations (e.g. environmental, consumer,...) (please indicate, in its case, details and/or specific requirements),**
- **other administrative bodies?**

A key concept in the GALA is that of the 'interested party'. In general, only interested parties can participate in administrative proceedings and only interested parties can lodge an appeal against an administrative decision, although it must be noted that in many cases in environmental law the involvement of parties is not limited to interested parties only and *anyone* can become involved in the administrative proceedings (see 2a and b hereafter).

The term 'interested party' is defined in article 1:2, subsection one, of the GALA as being a person *whose interest is directly affected by an order*.

The addressee of an administrative decision as well as the applicant are always considered interested parties, regardless of whether the decision is onerous or beneficial.

With regard to other parties than addressees or applicants a number of criteria have been developed in case law:

1. Objectively determinable interest: the party should have more than just a subjective interest.
2. Personal interest: the party's interests must be sufficiently distinguishable from the interests of random others.
3. Own interest: the party must stand up for its own interests and not those of another.
4. Direct interest: there cannot be a derived interest (for example when the interests of a third party are derived from a contractual relationship with the addressee).
5. Current interest: the party's interest may not be based solely on future or uncertain events.

If all of these criteria are met, a party will qualify as interested party.

With regard to other administrative bodies article 1:2, subsection 2, of the GALA applies, which states that concerning administrative authorities, the interests entrusted to them are deemed to be their interests. An interest is entrusted to an administrative body if a statutory provision confers on this administrative body a power to act on behalf of this interest. However, specific administrative legislation can hold that an administrative authority does not have the right to appeal in a certain instance.

For non-governmental organizations article 1:2, subsection 3, of the GALA states that, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objectives and as evidenced by their actual activities. The interests represented by the legal entity are derived from its articles of association and the statutory objective therein. If however, the statutory objective is so overly broad that no direct link between the objective and the decision can be made, the organization will generally not be considered an interest party, unless the actual activities show that it is nevertheless particularly concerned with an interest directly involved in the decision.

Article 1:2, subsection 3, only applies to legal entities. From that it follows that natural persons representing general or collective interests are not considered interested parties.

As a consequence of the above mentioned criteria, the Dutch legal order also recognizes *competitors* as interested parties to decisions that allow another party to enter the market (e.g. a building permit for a supermarket), provided that the competitor operates in the same market segment and service area.

It must be noted that the right to participate in the administrative proceedings is not granted to all interested parties in the primary phase of the regular preparatory procedure. In this phase the involvement of parties in the administrative proceedings boils down to the opportunity to be heard² before the decision is made, which, according to articles 4:7 and 4:8 of the GALA, only has to be granted to certain interested parties and when certain conditions are met.

It follows from article 4:7 that the administrative authority must hear the applicant in those cases wherein only the administrative authority intends to reject the application *and* the rejection is based on information about facts and interests relating to the applicant.

As follows from article 4:8, the administrative authority must hear interested parties other than the applicant in two situations, namely (a) the addressees of the intended decision in the case of an ex officio onerous decision, and (b) those third parties that may be adversely affected by a decision (ex officio or following an application) that is beneficial to the addressee or applicant. Furthermore, the decision must be based on information about facts and interests relating to these interested parties which information it not supplied by them.

Non-governmental organizations representing general or collective interests will generally not have to be heard by the administrative authority. A duty to hear those organizations exists only if they are sufficiently involved in the interests which are relevant to the proposed decision and they could bring forward relevant information on facts and interests relating to that decision. This will not often be the case.

It must be noted furthermore that the administrative authority is not obliged to hear parties if the decision concerns financial obligations or whenever the proceedings need to be expedited.

The above mentioned limitations do not apply to the administrative review procedure (*bezwaarfase*) of the regular preparatory procedure, in which all interested parties can participate.

Furthermore, there are no limitations to the involvement of interested parties in the public preparatory procedure, so all interested parties can participate. As mentioned before, in many cases in environmental law where the public preparatory procedure is applied, anyone can participate in administrative proceedings.

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)?**

² The phrasings 'hearing' and 'to hear' in this context are not limited to hearing somebody orally, but also encompass asking somebody for written documents to state one's view.

The categories of parties to administrative proceedings follow from article 1:2 of the GALA and its interpretation in case law. Concerning the involvement of interested parties in the primary phase of the regular preparatory procedure further limits are set in the articles 4:7 and 4:8 of the GALA. The Spatial Planning Act (Wet ruimtelijke ordening) and Environmental Permitting Act (Wet algemene bepalingen omgevingsrecht) include provisions enabling anyone to participate in administrative proceedings in certain environmental cases.

Comparison to articles 4(f) EP-Res, III-2(3) and (4) and III-25 ReNEUAL

Compared to the definition in article 4, section f, of the EP Resolution, which defines 'party' as *'any natural or legal person whose legal position may be affected by the outcome of an administrative procedure'*, the term 'interested party' in the GALA and as interpreted in case law, has a broader scope, mainly because in the Dutch legal order not only persons whose *legal* position may be affected qualify as an interested party, but also persons whose *factual* interests are in some way related to the decision. For example, local residents that could in some way experience noise from new developments in their area, such as a factory, can be interested parties, regardless of whether legal rights or norms (e.g. sound standards) on that matter are possibly violated.

Contrary to article III-2 (3) of ReNEUAL, which defines 'party' as *'the addressee of the intended decision and other persons who are adversely affected by it and who request to be involved in the procedure'*, the GALA does not impose formal requirements to third parties in order to be deemed an interested party. The status of interested party is given on substantive grounds. That does not mean, however, that formal requirements are not imposed to interested parties in order to be involved in the proceedings. In other words, the concept of 'interested party' within the Dutch legal order tends to be of a factual, rather than a normative nature.

The GALA does not include a term comparable to the term 'interested public' in article III-2 (4) of ReNEUAL, defined as *'every natural or legal person and other associations, organizations or groups expressing an interest in an administrative procedure'*. In the Dutch legal order, persons who would express a general interest in the administrative proceedings and decisionmaking, but whose factual interests or legal position would in no way be affected by the intended decision, will generally not be deemed an interested party and will therefore also not have the right to participate in administrative proceedings regarding single case decisions. In some cases however, not just interested parties are able to participate in administrative proceedings, but others are allowed to participate as well (see question 2 below).

Consultation of the interested public as described in article III-25 of ReNEUAL does take place in The Netherlands, but more often in relation to orders with general effect, such as extensive development plans, and generally not in single case decision-making. Administrative authorities will sometimes allow participation of the public in drawing up a preliminary draft order, but this is done so by administrative authorities of their own accord and is not regulated in the GALA.

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!

As mentioned above the categories of parties able to participate in administrative proceedings are limited in the primary phase of the regular preparatory procedure.

The GALA however also allows for a broadening of the number of parties allowed to participate in some proceedings. Article 3:15, subsection 2, of the GALA states with regard to the public preparatory procedure, that it may be provided by statutory regulation or by the administrative authority that other persons (than interested parties) are also to be given the opportunity to state their views on the draft.

An example of this can be found in article 3.8, subsection 1(d), of the Spatial Planning Act, which states that concerning the preparation of a development or zoning plan, anyone, regardless of whether their interests may be affected by the intended decision, can state their views on the draft decision. In that regard, the general rule that only interested parties are allowed to participate in administrative proceedings is modified. The Environmental Permitting Act includes a similar provision for permits (article 3.12). It must be noted that the right to lodge an appeal with an administrative court still only falls to interested parties in both examples given above.

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

-Many of the restrictions on the right to be heard in the primary phase of the regular preparatory procedure can be explained by the view the legislator holds, notably that the hearing of parties should be meaningful and should contribute to the quality of the decision-making. As is evident from the explanatory memorandum of the GALA, the legislator wanted to prevent the needless hearing of parties as much as possible. Contrary to the administrative review (*bezwaarfase*), the function of the primary phase of the regular preparatory procedure is not to limit participation to interested parties and to allow them to state their opinion on the intended decision. The duty to hear parties in the primary phase arises from the general duty of care of the administrative authority to gather the necessary information concerning the relevant facts and the interests to be weighed (article 3:2 of the GALA). In sum, the preparatory procedure focuses on the quality of decision-making, whilst the administrative review and administrative court procedures focus on safeguarding legal rights (although the administrative review procedure has got some traits of decision-making as well, but not primarily).

-The rationale of allowing anyone to state their views on a draft order in certain cases where the public preparatory is applied, is to promote and ensure a careful decision-making process even more so than when only allowing interested parties to state their views. Seeing as some decisions – generally in the field of environmental law – can affect the interests of many, sometimes unknown parties, providing the opportunity to state views on the draft to anyone, allows parties to put forward facts and interests that the administrative authority might otherwise overlook.

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?**

In the primary phase of the regular preparatory procedure third parties can participate in proceedings when the administrative authority gives them the opportunity to be heard pursuant to article 4:8 of the GALA. A request to be heard nor an explicit decision of the administrative authority admitting the party is required. The administrative authority is obliged to qualify ex officio only those third parties that meet the conditions in article 4:8 of the GALA in the primary phase and a duty to hear those parties exists (financial obligations being excluded). As has been said, the hearing of parties in this phase is only mandatory in a limited number of cases.

In the administrative review (*bezwaarfase*) of the regular preparatory procedure third parties become party to the proceedings by lodging a notice of objection. Interested parties are expected to do so of their own accord. A decision from the administrative authority allowing the party to lodge an objection is not required. If the party lodging the objection cannot be considered an interested party, the objected will be declared inadmissible. Obvious interested parties that did not lodge a notice of objection themselves, should be invited to participate in the administrative review procedure by the administrative authority. So, when somebody obtains a building permit and his neighbour lodges a notice of objection, the person who got the permit should be invited to participate (see also 4.b below).

In the public preparatory procedure, interested parties can become involved in the proceedings from the moment the draft decision is deposited. They become parties by stating their views on the draft. A request to state views is not required, nor is a decision of the administrative authority allowing a party to state its views. The administrative authority is not obliged to qualify potential third parties ex officio. Third parties are expected to get involved of their own accord. As is mentioned in the preliminary remarks and 2.b., the public preparatory procedure is oftentimes applied when the interests of many parties that are sometimes unknown to the administrative authority are involved. It would therefore not make sense to rely on the ex officio qualification of third parties by the administrative authority.

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

See 3 above.

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

As a rule, the GALA does not define the moment administrative proceedings begin. In the regular preparatory procedure, the beginning of the primary phase is not defined precisely. When proceedings are initiated by an application, one could safely say proceedings begin when the administrative authority receives the application. The administrative authority is not generally obliged to notify the public when it receives an application, however specific administration legislation (e.g. decisions in urban development cases) in some instance requires this.

The administrative review (*bezwaarfase*) in the regular preparatory procedure commences after the primary decision has been made, at the start of the six week period during which interested parties can lodge their notice of objection. The notification of the primary decision can be considered the announcement that the proceedings in this phase have begun, however this notification as a rule is not made public (i.e. no publication in a newspaper but simply sending the decision to the identified parties (see above).

For the public preparatory procedure one could say that administrative proceedings begin with the depositing of the draft. It's notification can be considered to be the announcement of the administrative proceedings, by which potential third parties are put in a position to participate. In the administrative proceedings prior to the depositing of the draft (when the draft is drawn up), the administrative authority is not obliged to involve third parties and that stage in the preparation is not regulated in the GALA at all.

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)?

Consequences like those described in the question are certainly part of the Dutch legal order. According to article 6:13 of the GALA no appeal against an order in the administrative court can be lodged by an interested party who can reasonably be blamed for not having stated his or her views as referred to in article 3:15 (public preparatory procedure) or for not having raised objections (regular preparatory procedure).

It should be noted that not making use of the opportunity to be heard in the primary phase of the regular preparatory procedure does not result in a party losing the right to be heard in the administrative review (*bezwaarfase*).

5. If individuals / organizations / 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?

In the Dutch legal order the administrative authority does not make a separate legal administrative decision (*beschikking*) whereby it decides to admit a party to the administrative proceedings. In those cases in which the administrative authority decides *not* to admit somebody to the administrative review procedure (i.e. stating that somebody, according to the administrative authority, is not an interested party), it holds the notice of objection inadmissible. That person (or organization or enterprise) can lodge an appeal. The question to be determined by the court then is limited to the question whether the decision to judge the notice of objection inadmissible is right. The underlying questions whether the primary (material) decision is right, as a rule, is out of

scope for the administrative court in those cases.

In the public preparatory procedure the decision to hold the views stated by a party inadmissible, will be explicated in the final administrative (material) decision against which an appeal can be lodged and where the inadmissibility of the stated views can be addressed.

One could also say that denying a party the opportunity to make use of its procedural rights (see 6.a) constitutes a 'decision' to not (fully) admit a party to the proceedings. For those cases article 6:3 of the GALA applies, which states that no objection or appeal can be lodged against a decision regarding the procedure for preparing an order unless this decision directly affects the interests of the interested party independently of the order being prepared. In other words, 'decisions' that are made during the administrative proceedings that relate to a party's procedural rights (e.g. a party is denied its right to be heard) can generally not be directly appealed. The party in question would have to wait for and challenge the actual administrative decision. If this is a primary decision in the regular preparatory procedure, the party can address the procedural defects by lodging a notice of objection in the administrative review procedure (*bezwaarfase*). If the decision is a decision on the notice of objection or a final decision to which the public preparatory procedure was applied, the party can lodge an appeal to that decision in an administrative court and address the procedural defect.

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?

See a.

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

In the regular preparatory procedure, procedural defects or omissions in the primary phase can be remedied in the administrative review procedure (*bezwaarfase*). Procedural defects in the administrative review procedure or in the public preparatory procedure need to be addressed in an administrative court.

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?

To be heard

As mentioned before, the right to be heard in the primary phase of the regular preparatory procedure is limited (see 1.a.). The right to be heard in the administrative review procedure (*bezwaarfase*) however applies to all interested parties.

In the public preparatory procedure the right to be heard, i.e. state views either orally or in writing, is given to all interested parties and to anyone in certain environmental cases. Additionally, the applicant can be given the opportunity to respond to the views stated if deemed necessary (article 3:15, subsection 3, of the GALA). The same goes for the addressee of an intended decision to modify or alter a previous decision addressed to that party (subsection 4). In that regard the applicant and addressee can be given an additional opportunity to be heard during the proceedings that does not have to be given to other parties.

Submit documents, have access to the file and call witnesses

With regard to the regular preparatory procedure, it follows directly from provisions in the GALA, that in de administrative review phase (*bezwaarfase*) the following procedural rights, in addition to the right to be heard, apply:

- Interested parties can submit documents up until ten days before the hearing (article 7:4, subsection 1);
- Interested parties have the right to inspection of the notice of objection(s) and all other documents relating to the case for at least one week prior to the hearing (article 7:4, subsection 2);
- At the request of the interested party witnesses and experts whom he has brought with him may be heard (article 7:8), although the administrative authority is not obliged to go along with this in all cases (e.g. when the hearing of witnesses cannot contribute to a proper handling of the case);
- If, after the hearing, the administrative authority gets information on facts or circumstances which may be of substantial importance to the decision to be made on the objection, the interested parties should be informed and be given the opportunity to be heard on the subject for a second time (article 7:9).

The same procedural rights are not codified for the primary phase of the regular preparatory procedure. In the public preparatory procedure the above mentioned procedural rights are not codified either (apart from the right to access to the file, i.e. inspection of the draft decision when deposited). But that does not go to say, however, that some or more of these rights would not apply at all. Article 3:2 of the GALA provides a general duty of care for the administrative authority when preparing a decision to gather the necessary information concerning the relevant facts and the interests to be weighed. It can be considered a violation of this provision when an interested party is denied some of these provisional rights, for instance when an interested party is not allowed to submit certain documents, such as expert opinions, along with their written views.

Advice on relevant procedural rights

The administrative authority is obliged to include provisions in the primary decision (regular preparatory procedure) and in the draft decision (public preparatory procedure) stating who can lodge an objection or state views, where or how this can be done and within which period of time. Apart from that, the GALA does not include a provision stating that parties to administrative proceedings have the right to be advised or informed by the administrative authority concerning the relevant procedural rights. Nevertheless, general principles of proper administration (*algemene beginselen van behoorlijk bestuur*) can require that the administrative authority provides parties with information about the proceedings on request.

Copy of the final decision

The right to receive a copy of the final decision is not codified as such in the GALA. However, it follows from division 3.6 of the GALA (relating to the notification and communication of the final decision), that the applicant and addressees shall receive a copy of the decision (article 3:41). Other interested parties must be notified that the decision has been made (article 3:43). When the public preparatory procedure has been applied, a copy of the final decision must be sent to those parties that have stated their views on the draft (article 3:44).

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

See a.

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?

Considering that 'recent' is a relative matter, in 2005 the *actio popularis* (e.g. the right for *anyone* to lodge an appeal) in environmental law was abolished, owing to the political wish to shorten and simplify court proceedings in environmental cases. Since then, the right to lodge an appeal is reserved for interested parties pursuant to article 1:2 of the GALA. The right to participate in the administrative proceedings by stating views on the draft remains open to anyone. In case law and scientific literature the abolishment of the *actio popularis* has been criticized for a number of reasons. Firstly, research has shown that not many other persons than interested parties make use of the opportunity to state views on a draft, which shows that as far as the proceedings were considered lengthy and complicated before, this was likely not caused by the involvement of (many) persons that would now not be considered interested parties. Secondly, natural persons that are not considered interested parties because they solely represent general or collective interests can set up a non-governmental organization that represents those interests. These organizations can be considered interested parties and if they are, they have a right to lodge an appeal. Finally, since the abolishment of the *actio popularis* court proceedings have sometimes become more complex because whether a party is considered an interested party and is allowed to lodge an appeal, poses questions sometimes difficult to answer. For these reasons it has been said in jurisprudence and scientific literature that the abolishment of the *actio popularis* has not provided an effective solution for simplifying and shortening court proceedings in environmental cases. There are no legislative proposals to reinstate the *actio popularis*.

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!

- The case law relating to the status of third parties as interested parties has been consistent for many years. The status of third parties as interested parties has always been determined on the basis of the criteria mentioned in 1a. In environmental and urban planning cases these criteria have been defined more specifically. The question whether a third party is an interested party in these types of cases is determined based

on (a) the distance between the residence of the third party and the new development, (b), whether or not the third party will be able to see the new development and (c) whether the party will experience the environmental consequences of the development, such as an increase in traffic nearby.

Recently an additional criterion has been developed for determining the status of third parties in environmental and urban planning cases. This criterion holds that a party should be expected to experience consequences 'of some significance' as a result of the decision. This criterion is considered a correction of the above mentioned criteria (in particular concerning, but not limited to the third criterion), in the sense that a third party can nevertheless *not* be considered an interested parties because the expected consequences of the decision for this party are not considered significant enough. In other words, if the third party is expected to perceive the (environmental) consequences (e.g. noise, increase in traffic or obstruction of view) from a certain development, but these consequences are so insignificant that it cannot be said that the party will truly be negatively affected, this party will not be considered an interested third party. It must be noted that previous to the development of this new criterion, third parties that were insignificantly affected by a decision in a development or urban planning case, were not considered interested parties either. However, a clear criterion was missing that has now been developed.

- Recently, the Central Appeals Court has asked the Attorney General for an opinion on the subject of indirect interests. More specifically, the Attorney General has been asked to investigate on the basis of which criteria it should be assessed whether a third party (nevertheless) is an interested party in case of a decision whereby benefits or other financial entitlements of the addressee in the social domain are determined. The Attorney General is expected to give his opinion in November of this year.

II. Determination of Facts and Discretionary Powers

1a. 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)?

This is the case. Article 3:2 of the GALA states that when preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.

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

Besides the general duty of care for the administrative authority laid down in article 3:2, the GALA also provides, in case the proceedings are initiated by an application, a specific duty for the applicant to provide information. Article 4:2, subsection 2, of the GALA states that the applicant shall supply such information and documents as required for the requested decision as far as can reasonably be expected for him to obtain.

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

As mentioned above, the GALA includes two provisions that refer to the collection of facts during the preparation of a decision. Whereas article 3:2 of the GALA assigns responsibility for investigating the facts to the administrative authority in principle, article 4:2 assigns in principle a duty for the applicant to provide information. How both these provisions relate to each other precisely, is not easily determinable.

Generally speaking, when the proceedings are initiated by an application, the administrative authority will partly rely on the information given by the applicant. The applicant is only required to supply information he can reasonably obtain. When the administrative authority cannot solely rely on the information provided by the applicant, for instance when further information is needed about the consequences of the intended decision for third parties in order to weigh their interests, or when the information supplied by the applicant is disputed by the other parties, further investigation is needed. In those cases generally the administrative authority will be responsible for determining the facts.

In administrative proceedings concerning ex officio decisions article 4:2 of the GALA is not applicable. Generally, in those instances the administrative authority will, pursuant to article 3:2, be responsible for determining the facts.

From the articles 3:2 and 4:2, the general rule can be deduced that the burden of proof falls in principle to whomever wishes to effect a change in the legal order. In case of ex officio decision it is the administrative authority wanting to effect that change, in case of an application it is (initially) the applicant. This general rule applies in the relationship between the administrative authority and the applicant. In relation to third parties the administrative authority is responsible for determining the facts.

However, it must be noted that specific administrative legislation can provide for a different distribution of duties as regards the determination of facts.

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

With regard to the rules for determining the facts, a certain distinction is reflected in case law in the Netherlands between favourable and unfavourable facts.

When the proceedings are initiated by an application, it is expected of the applicant pursuant to article 4:2 to bring forward those facts favourable to him, i.e. the facts that support the application, as far as is reasonable to expect him to obtain. The applicant is not expected to supply unfavourable facts that support rejection of the application.

However, when article 3:2 of the GALA applies, and the duty to determine the facts falls to the administrative authority, it must take into consideration all the relevant facts, including those favourable to one or more parties. In case of an onerous decision, those favourable facts may be facts that cannot substantiate the intended decision and may exonerate the addressee, possibly resulting in the administrative authority refraining from the decision.

The fact that the administrative authority must take into account facts that are favourable to parties, does not mean it is required to go on an endless search for facts that can exonerate the addressee. The fact finding process by the administrative authority is limited, in the sense that the responsibility falls to the addressee when he either appeals to an exception to the applied rule or when he invokes a so called autonomous norm (e.g. the principle of legitimate expectations). In these instances the addressee does not dispute that the facts substantiating the decision were determined correctly, but proposes either exonerating circumstances or an exonerating norm. It falls to the person invoking the exception or autonomous norm to investigate and determine facts to substantiate that.

Specifically in Tax Law the rule of thumb is that the tax authorities should supply evidence for increasing the due tax amount, whilst the opposing citizen should supply evidence for diminishing the due tax amount.

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,...)?

Fact finding in administrative proceedings is generally governed by articles 3:2 and 4:2 of the GALA. However, specific rules can apply, for instance in cases regarding administrative punitive sanctions, such as the imposition of an administrative fine. Administrative punitive sanctions are subject to the requirements of article 6 ECHR. Different *models* of fact finding are not present in the Dutch legal order.

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)?

As mentioned above, article 4:2, subsection 2, of the GALA states that the applicant shall supply such information and documents as required for the requested decision as far as reasonably can be expected. This is not so much a duty to comply, as the applicant can easily decide not to supply the information requested without being sanctioned. However, the applicant runs the risk that the administrative authority will choose not to deal with the application or reject it.

With regard to ex officio decisions, the GALA does not hold a general provision obliging the addressee of a decision to cooperate in the investigation. However the GALA (division 5.2; supervision of compliance) does include many provisions attributing investigative powers to supervisors charged with monitoring compliance of the provisions made by or pursuant to any statutory regulation. If a certain provision is not complied with, the GALA attributes to the administrative authority the power to make a decision to take enforcement action. Article 5:20, subsection 1, of the GALA states that everyone shall be obliged to cooperate fully with a supervisor, who may reasonably demand this in the exercise of his powers, within such reasonable time limit as he may specify.

Third parties are not required to cooperate to in the investigation during administrative proceedings.

Not surprisingly, quite a number of specific laws (e.g. concerning social benefits, subsidies) do specify citizen's obligations to answer questions of provide documents.

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

With regard to the applicant article 4:5, subsection 1, of the GALA states the administrative authority may make a negative decision, not on substantial grounds, but only based on the insufficiency of the application, provided the applicant has been given the opportunity to amplify the application within a reasonable span of time, set by the administrative authority. Alternatively, the administrative authority can reject the application.

Concerning the duty to cooperate to a supervisor (article 5:20), the refusal to cooperate is punishable pursuant to article 184 of the Penal Code. Note however, that when the administrative authority intends to impose an administrative fine (*bestuurlijke boetes*) the right to silence (*nemo tenetur*) applies pursuant to article 6 ECHR.

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

There are some differences in the duty to cooperate, in the sense that the *consequences* of not cooperating are different.

Only with regard to the addressee of a decision about enforcement action, one can say that a real duty – i.e. that it is enforceable – exists.

An applicant runs the risk that the administrative authority will not decide on his application on substantial grounds, but based on the application's insufficiency only, in case he does not meet the requirements of article 4:2 of the GALA.

Third parties are not required to cooperate in the investigation during administrative proceedings. They are however required to substantiate either their views on the draft or their notice of objections with relevant facts. If they fail to do so, they run the risk that the administrative authority decides to declare their case inadmissible. In this sense, their 'duty' to comply is comparable to that of the applicant.

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 organization) or is this process subject to discretion of the administrative authority?

The administrative authority is not bound by strict procedural rules, e.g. demanding for a certain organization. In some cases however, the determination of some facts has to be done by persons or institutes with certain skills or expert knowledge. For example:

- the investigation in the context of enforcement in certain fields is left to designated supervisors, for example the Data Protection Agency (*Autoriteit Persoonsgegevens*) or the Authority for Consumers and Markets (*Autoriteit Consument & Markt*);
- To determine if a person is entitled to government benefits because of disability a medical examination must be performed by a medical doctor.

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

In the Dutch legal order, a distinction is made between *determining* the facts and *evaluating* the facts. The administrative authority has no discretion when it comes to determining the facts. The determination of facts is generally subject to full judicial control in an administrative court. However, the administrative authority, in some cases, does have discretion in evaluating (*waardering*) the facts. This can be illustrated by the following example. Say that a municipal bylaw (*Algemene Plaatselijke Verordening*) states that the administrative authority can decide to temporarily close a business when firearms are used and according to the burgomaster this constitutes a disturbance of the public order. If the administrative authority want to make use of this power, it has no discretion to determine whether firearms were indeed present. This is a fact that needs to be *determined* and is subject to full judicial control. If this fact is determined, however, the administrative authority subsequently does have discretion in *evaluating* whether or not this fact constitutes a disturbance of the public order. If the administrative authority holds that the presence of firearms does indeed constitute a disturbance of the public order, the court will apply limited control with respect to that evaluation of facts. Certainly not all provisions allow for the evaluation of facts. If the municipal bylaw had stated that the administrative authority 'shall close a business if firearms are found', the administrative authority does not have discretion since the provision leaves no room for evaluation of facts.

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 GALA provides for some rules concerning the collaboration of different administrative authorities (division 3.5 of the GALA). These rules are applied when more than one decision, such as permits, exemptions or subsidies, is required in relation to the same project and different administrative authorities are competent for each of these decisions. The rules regulate among other things which administrative authority is responsible for coordinating the administrative proceedings, what time limits apply and which administrative court is competent. The Spatial Planning Acts includes similar provisions relating to development projects.

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

In the Dutch administrative legal order, the so called doctrine of free-evidence (*vrij-bewijsleer*) applies. Rules of evidence are almost entirely absent and the court has great freedom in dividing the burden of proof (*bewijslastverdeling*), determining the admissibility of evidence (*bewijsmiddelen*) and evaluating the evidence (*bewijswaardering*). With regard to the distribution of the burden of proof it is generally determined in case law that, inherent to articles 3:2 of the GALA, the burden of proof lies in principle with the administrative authority, except in case of an application, where the burden of proof will lie with the applicant with regard to the facts he can reasonably be expected to supply with the application (see also 2.d.).

Specific administrative legislation can provide for a concrete distribution of the burden of proof. The rationale of these distributions can generally be found in the articles 3:2 and 4:2 of the GALA.

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

Not applicable.

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

With regard to fact finding in administrative proceedings some general rules, derived from case-law, apply, in addition to the one named above, derived from the articles 3:2 and 4:2 of the GALA:

- The responsibility for determining the facts, and with that also the burden of proof for these facts, falls in principle to whomever wishes to effect a change in the legal order;
- Generally all types of evidence can be presented to substantiate the facts;
- Specific administrative legislation can set rules for the type of evidence to be presented, such as a medical report drafted by a physician;
- Some types of evidence have more evidential value than others, such as a police report, signed by an officer who has taken the oath of office, but the findings are open to dispute;
- Administrative authorities can make use of unlawfully obtained evidence, unless the means by which this evidence is obtained go against what is allowed by a properly acting government in such a way that it must be qualified as unlawful under all circumstances.

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

The rationale for the doctrine of free-evidence is, as is evident from the parliamentary history of the GALA, the view of the legislator that the administrative court should play an active role in the process of fact finding in court proceedings. The court is expected to go in search of the relevant facts himself. This is expressed in article 8:69, subsection 3, of the GALA which state that the administrative court may supplement the facts on its own initiative. For the purpose of supplementing the facts, the GALA assigns various judicial investigative powers. Because of the active role of the administrative courts in the process of fact finding, the legislator was not inclined to codify rules of evidence in administrative proceedings, since these rules may be considered obstructive.

However, since the introduction of the GALA in 1994, a practice has arisen wherein the primary responsibility for presenting the facts more and more lies with the parties. It has been detected in jurisprudence and literature that the rationale of the legislator and the current practice of the courts have somewhat grown apart. Owing to this change in the legal order a distribution of the burden of proof based on the articles 3:2 and 4:2 of the GALA has been developed in case law. Academics have additionally deduced from case law so called rules of thumb (*vuistregels*), that offer some further guidance as to the distribution of the burden of proof. These rules of thumb are:

- The party that hampered the investigation of the facts, for instance because they are no longer in possession of necessary documents through their own fault, bears the burden of proof;
- The party that has an interest in the assessment of a particular fact, bears the burden of proof;
- The party who is best able to supply the evidence (e.g. operational data of a party's company) bears the burden of proof;
- The party that appeals to an exception to the rule (e.g. transitional provisions in urban planning) bears the burden of proof.

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

Since the GALA does not provide any general rules of evidence, it also does not include provisions pertaining to the admissibility of certain evidence. Therefore generally any type of evidence is admissible, although some exceptions exists. For example, some limitations are set to illegally obtained evidence (see 4.c.).

Another example can be found in immigration law, where limitations are set to the evidence that can be given in case of asylum claims related to sexual orientation. The asylum seeker is not required to submit explicit photo and video material to substantiate their sexual orientation and if such types of evidence are submitted of one's own accord, it is considered inadmissible.

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

a. The court or the parties?

Both the parties and the court have a role in the investigation and presentation of the facts and evidence. Generally, the parties are initially responsible for the investigation and presentation of facts and evidence. On the basis of the facts and the grounds for

appeal brought forth by the parties, the court will determine which facts are in dispute. It is with regard to those facts that the court can either make use of its investigative powers to determine which facts are true, or allocate the burden of proof to a certain party and instruct that party to deliver (further) evidence to substantiate the alleged facts.

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

In the Dutch legal order, there is a difference in the responsibility for the investigation and presentation of facts and evidence between the appellant on the one hand and the administrative authority on the other. When the administrative authority is responsible for the investigation and determination of the facts, pursuant to article 3:2 of the GALA, the burden of proof lies with the administrative authority to provide evidence to support those facts. In order to oppose those facts the appellant is merely required to establish a *reasonable doubt* as to the correctness of the facts. He is not required to deliver evidence to the contrary of the facts stated by the administrative authority. In this regard the burden that lies on the administrative authority to determine the facts is generally greater than the burden that lies on the appellant to oppose those facts. The difference in responsibility is further illustrated in the answers given in the case study (see III.).

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!

The administrative court is free in the consideration of evidence, pursuant to the doctrine of free-evidence.

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?

The *determination* of the facts by the administrative authority is in principle subject to full judicial control. Wherever the administrative authority is allowed (some degree of) discretion with regard to the *evaluation* of facts, the court will apply limited judicial control (also see 3.b.).

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)?

As mentioned before, the determination of the facts by the administrative authority is in principle subject to full judicial control. The administrative authority does not enjoy discretion in that regard. In principle, this applies to the determination of complex facts as well. These facts will often have been investigated and determined by an expert and set out in an expert opinion. When the investigation and determination of the facts is carried out by an expert, the administrative authority is obliged to check whether the investigation was carried out with due care (*vergewisplicht*). When the administrative authority has done so, the court will find that the administrative authority can in principle rely on the expert opinion, unless the opposing parties dispute the expert opinion and establish *reasonable doubt* as to the reliability of the expert opinion.

The courts apply a certain level of reduced control where they allow the administrative authority to rely on the expert opinion (provided that the *vergewisplicht* was kept), but only in so far no reasonable doubt as to the reliability is established. To establish this reasonable doubt opposing parties are not legally required to submit their own expert opinion, but often times there is a greater chance of success in establishing reasonable doubt when parties submit an expert opinion of their own.

In the field of competition law, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*; the competent court for cases on competition law), influenced by the case law of the European Court of Justice¹, applies a standard recital in which it is expressly stated that the administrative authority enjoys a certain level of discretion with regard to the *evaluation* of complex economic facts and circumstances in light of the provisions of the Dutch Competition Law Act. Certain terms in these provisions allow for an interpretation by the administrative authority (such as the term 'market concentration' in article 41 Mw). With regard to this *evaluation* of the complex facts the Tribunal applies a reduced standard of control. In so far, this practice is comparable with that of the European Court of Justice. However, contrary to the ECJ, the Tribunal does not solely focus on procedural requirements. The *determination* of the facts remains subject to full judicial control. Therefore the Tribunal can address material aspects of the facts, as is in line with the dogma as explained above.

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

Typical cases in which such a standard of reduced control is applied, can be found in environmental law, competition law and social security law (e.g. with regard to expert medical opinions).

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?

Neither. The reduced judicial control as described in 6.b., is brought about by the fact that the courts will generally not have the same expertise on the subject at hand as the expert(s) that drafted the expert opinion underlying the decision. The reduced control applied by the courts in this regard is not related to any discretion the administration might have with regard to the determination of complex facts since, again, it does not have any. In other words, the administrative authority has the same responsibility with regard to complex facts as it does with non-complex facts and the administrative authority must act in accordance with its general duty of care (article 3:2 GALA) in both cases.

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?

Since the administrative authority does not have discretion with regard to the determination of facts, the degree to which procedural standards are to be observed during administrative proceedings, is the same in each case, regardless of whether the decision is a discretionary or non-discretionary decision.

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

As has been said, the administrative authority does not have discretion in the classical sense with regard to the determination of the facts. For the sake of completeness, the types of discretion that the administrative authority does have, will be addressed here.

In the Dutch legal order discretionary powers given to an administrative authority can be differentiated in (1) discretion with regard to the evaluation of the facts and (2) discretion with regard to policy.

In the first case the legislator will have intentionally included vague terms in the statutory provision that is the basis for the decision in question (see the example in 3.b.). Some vague terms are deliberately left open to the interpretation of the administrative authority and therefore give discretion for an evaluation of the facts by the administrative authority. An example of such a term is 'disturbance of public order'.

With regard to policy freedom the legislator has left the assessment whether to make use of the power to the discretion of the administrative authority. For example, article 8 of the Act of Public Demonstrations specifies that the burgomaster *can* cancel a demonstration if the protection of health or prevention of riots or disorderly conduct demands it. The word 'can' implies a discretionary power.

With regard to these two types of discretionary power, the court applies limited judicial control. The rationale for this can be found in the principle of separation of powers, according to which the courts respect the discretionary power given to the administration by the legislator. Again, this discretion applies to the evaluation of facts and freedom of policy only, and not to the determination of facts.

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

In the Dutch legal order, administrative courts decide on the grounds brought forth by the parties. Therefore, if the grounds for appeal relate to the material decision-making of the administrative authority, which is often the case, the courts will address this.

d. Do they prefer to focus on procedural aspects?

No. The courts will focus on procedural aspects when these are addressed by the parties³. However, if the material decision-making cannot be considered defective although any procedural norm was violated, the courts will generally not proceed to nullify the decision. Article 6:22 of the GALA states that an order against which an objection has been made or an appeal has been lodged may be upheld by the authority deciding on the objection or appeal, despite an infringement of a written or unwritten rule or general legal principle, if it is plausible that the infringement has not prejudiced the interests of the interested parties.

³ The court is obliged to consider some procedural aspects *ex officio*. However, these procedural aspects have no bearing on the decision, but on the admissibility of the appeal (e.g. is the appealing party an interested party, has the party submitted views or a notice of objection?, see also the case study).

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

The administrative courts have the power to appoint their own judicial expert to investigate and determine the facts of a case. For environmental cases the courts can appoint the Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening (StAB). The StAB is an impartial and independent agency with expertise on the environmental effects of planning and development. The StAB will generally be appointed by the court to offer their expert opinion in those instances where the facts are complex and disputed by (expert opinions supplied by) the opposing parties. The expert opinion given by the StAB does not in principle have a superior validity in the sense that its opinion is unquestioningly assumed to be correct. However, the expert opinions given by the StAB are generally considered more persuasive on the grounds that it is an impartial and independent agency.

Another example can be found in immigration law, where the determination of the authenticity of documents by the Royal Military Police is considered to have a superior value based on the expertise of the Royal Military Police in this field. Although it is in theory possible to dispute the findings of the Royal Military Police, it is very difficult to do so practically speaking.

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?

The way the courts deal with the determination of complex facts by the administrative authority, in the sense that it applies reduced control, is brought about by the fact that the courts will generally not have the same expertise on the subject at hand as either the administrative authority itself or the expert(s) appointed by the administrative authority.

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

a. of the determination of facts of a case by the administration

No.

b. of the possibilities of the administration to enjoy discretion therein

No.

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)?

No.

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?

- There is an on-going academic discussion concerning the lack of general rules of evidence in the GALA, in particular rules pertaining to the distribution of the burden of proof. It has been found that some parties, especially those not represented by an attorney, are sometimes unaware that the burden of proof lies with them with regard to certain facts. When they are made aware of this, typically during the court hearing, procedural rules sometimes do not allow them to bring forth evidence at that (late) stage of the court proceedings. It is for that reason, some promote that rules on the distribution of the burden of proof should be codified. There are no legislative proposals on this matter.

- In the last decade, some criticism has been expressed of the standard of judicial control applied by the courts with regard to fact finding, stating that the courts too often leave the fact finding process to the discretion of the administrative authorities. It was said that the judicial control was limited to the evaluation of the fact finding process as done by the administrative authority, and that the courts did not do enough to determine the facts themselves. At the same time a need for a stricter control on the use of discretionary power was expressed in jurisprudence. As a response to the criticism, the courts recently started giving more attention to the standards of control that should be applied with regard to the determination of facts, the evaluation of facts and freedom of policy. As a response the courts also made more use of their investigative powers in recent years. There is a renewed understanding that the courts play an active role with regard to fact finding in court proceedings.

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!

- In 2017, the Central Appeals Court (*Centrale Raad van Beroep*) together with the Administrative Judicial Review Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State; ABRvS*), developed principles for the courts to apply in cases in which the administrative authority relies on an advice from its own medical expert. The judgments are based on a judgment of the European Court of Human Rights of 8 October 2015 (*Korošec v. Slovenia*). The principles developed are that the court must first check whether the advice has been carefully formulated and is transparent. Subsequently, there must be equality of arms between the person involved and the administrative authority when it comes to the possibility of presenting evidence. If this balance is missing, the court will have to restore this balance. The court can do this, for example, by appointing an independent judicial expert himself. If the person concerned has requested the court for such an appointment, and the court rejects this, it will have to explain why it judges itself capable of attaining a judgment without such an independent expert. (ECLI:NL:CRVB:2017:2226 and ECLI:NL:RVS:2017:1674).

- Also in 2017, the ABRvS developed additional principles on the gathering of evidence in decisions that impose administrative fines (*i.e. criminal charge; article 6 ECHR*) and, furthermore, re-established that the burden of proof with regard to the alleged violation, lies with the administrative authority. If any doubt as to whether the violation was

committed, exists, the addressee of the administrative fine must be given the benefit of the doubt (ECLI:NL:RVS:2017:1818 and ECLI:NL:RVS:2017:1819).

- In 2016, the ABRvS intensified its judicial scrutiny of administrative decisions in asylum cases and gave its interpretation of a rule in the European Asylum Procedures Directive on the manner in which the administrative courts should review the assessment of the State Secretary (the competent administrative authority) of the credibility of an asylum claim. In certain aspects of the credibility assessment, on the basis of the decision, the administrative court is just as capable as the State Secretary to assess whether an asylum claim is credible. In those cases the administrative court reviews intensively. However, if the asylum seeker does not provide proof for his claims, but only gives his own account of what happened to him, then the State Secretary has a 'margin of discretion' to assess whether the asylum seeker should be believed or not. In such cases the administrative courts may not dismiss the credibility assessment of the State Secretary and substitute it for its own assessment of the credibility (ECLI:NL:RVS:2016:890 and ECLI:NL:RVS:2016:891).

It must be noted that the margin of discretion that is given to the State Secretary does not detract from the principle in the Dutch legal order that the administrative authorities do not have discretion in determining the facts. This margin only applies to cases where evidence cannot be supplied by either side. In those cases the credibility assessment, and not the determination of the facts, forms the basis on which the decision is made.

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 organization, 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 exist 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?**

This case study relates to environmental law and spatial planning. In The Netherlands a decision like this would typically be prepared according to the public preparatory procedure, since the interests of many (unknown) parties may be affected by the decision. Pursuant to the public preparatory procedure the administrative authority, in this case S, would deposit a draft of the decision for inspection and would notify the public in a local newspaper and generally also on the internet, for instance on the town's website. The notification would have to include a short description of the content of the draft. The draft would, as is generally the case, be made available for inspection at city hall. The applicant would personally receive a copy of the draft. The other parties, all of whom are third parties in this case study, would not receive a copy. Therefore they would have to be alert for the notification of the depositing of the draft. Because the Spatial Planning Act is applicable, the opportunity to state views on the draft would not only be open to interested parties but to anyone. The draft would be available for inspection for six weeks.

In order for an appeal to be admissible in court the party lodging the appeal would have to be an interested party. Furthermore, they are obliged to have stated their views on the draft. If either of these criteria is not met, the appeal will be declared inadmissible.

With regard to F, the court would consider him an interested party since he owns the neighbouring piece of land. F was personally invited by the administrative authority to express himself on the application within a given time limit. However, this course of action is of no importance because it is not in accordance with the public preparatory procedure. F was therefore not required to respond to the invitation and the fact that he did not, cannot be held against him in court. However, it will be held against F if he has omitted to state his views on the draft decision within the six week period. Assuming that he did not, his appeal will be declared inadmissible.

Regarding M, an administrative body, the court will likely deem M to be an interested party. As is mentioned in 1.a, article 1:2, subsection 2, of the GALA states that concerning administrative authorities, the interests entrusted to them are deemed to be their interests. An interest is entrusted to an administrative body if a statutory provision confers on this administrative body a power to act on behalf of this interest. The Spatial Planning Act entrusts municipalities with the interest of appropriate land-use planning. The development of a commercial building falls under that interest.

Assuming that M only changed its mind about the development after the six week period, during which views can be stated, was over, M will likely not have stated views on the draft since it still supported the development during that time. In that case the appeal of M will be declared inadmissible in court.

In case M changed its mind before or during the six week period and did state views on the draft during which it expressed the wish to draw up a development plan

for the area, the appeal of M would be admissible.

A third scenario is also possible, in which M still supports the project during the six week period, but nevertheless states views on the draft, that relate for instance to the height of the building or the exact location relative to the existing infrastructure. In that case the appeal of M would be admissible in court because M stated views on the draft. Furthermore, M would be able to contest the development entirely in court. This is because the grounds for appeal do not have to correspond with what has been stated in the views of the draft. The fact that M changed its mind about the development completely will therefore not be held against it in court, as long as some views on the draft were stated.

The court would probably not consider P an interested party to the proceedings.

Firstly, assuming P is acting in the capacity of an authorized representative for the Association of Preserving the Traditions, the appeal would formally be lodged by the Association and the question whether that legal entity is an interested party would have to be addressed. The Association is a non-governmental organization for which article 1:2, subsection 3, of the GALA states that their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities. The interests represented by the legal entity are derived from its articles of association and the statutory objectives. Assuming that the statutory objective is, as the case study suggests, the 'defending of the beauty of the homeland', it would probably be considered so overly broad that no direct link between the objective and the decision can be made. Had the objective been specified either geographically or thematically, the Association would have been considered an interested party. Assuming also that there are no actual activities that show that the Association is particularly concerned with the beauty of the area in question, the Association would not be considered an interested party and its appeal will be declared inadmissible.

Secondly, assuming that P personally lodges an appeal representing the interest of defending the beauty of the homeland, this appeal would also be declared inadmissible. Since P is a natural person he cannot represent general or collective interests. P can only be considered an interested party if he has a personal interest in the development, which would be the case, for instance, if he lived nearby the new commercial building.

With regard to O, the environmental organization concerned with the safety of the red kite, the question whether or not O is an interested party will also be answered on the basis of its statutory objectives and its actual activities. Since the case study does not provide any information about this, there is no way to determine whether O is an interested party to the development of the commercial building. For the purpose of this questionnaire, we will however assume that the court will consider O an interested party.

O found out about the development only five months after the decision has been made. We can assume therefore that O has overlooked the notification of the depositing of the draft and has not stated views on the draft. In that case the appeal of O will be declared inadmissible. The fact that S did not involve O in the administrative proceedings is not going to help O's action to succeed in court because in the public preparatory procedure S is not required to involve O in the proceedings. O is expected to become involved on his own initiative by stating views on the draft.

Because the appeal of O is declared inadmissible, the matter of the red kite would not be addressed by the court, because the grounds of appeal of the other parties do not relate to this matter. The court is not permitted to go beyond the scope of the grounds of appeal (*non ultra petita*).

If we assume, for the purpose of this questionnaire, O's appeal is admissible in court, the court would then have to give judgement on O's argument that the breeding success of the local population of red kites would be seriously endangered once the commercial building is developed. As follows from the case study, S has, for the purpose of determining and evaluating the facts, made use of an expert opinion supplied by A, whose opinion is substantiated by the opinion of E, the state environment protection authority (hereafter: opinion AE). O has submitted an expert opinion of an internationally respected ornithologist which supports its allegations (hereafter: opinion O). On a side note, the fact that O has submitted the expert opinion in court and not during the administrative proceedings, does not matter. O is allowed to bring forth new evidence during court proceedings. In order to successfully dispute opinion AE, O will have to cast a reasonable doubt on the claim substantiated by opinion AE that the breeding success of the local population of red kites would not be seriously endangered by the development. This can be done by demonstrating that opinion AE is somehow defective, incomplete, inconsistent, based on incorrect or implausible premises or flawed for any other reason to such an extent that it cannot be considered reliable. O is expressly not required to provide evidence contrary to opinion AE and is therefore not required to submit its own expert opinion substantiating that the opposite of opinion E is true either ('the breeding success of the red kite would be endangered'). As the content of the expert opinion submitted by O is not apparent from the case study, it cannot be determined how the court would decide the argument of O regarding the red kite. It can be noted however that in case the court would find, based on the arguments brought forward by (way of opinion) O, that opinion AE is flawed to such an extent that it cannot be considered reliable, it would judge that the administrative authority had not met its burden of proof and had breached its general duty of care to investigate the facts (article 3:2 GALA).

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?

The court will not decide differently than is explicated in response to the initial case study.