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ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

Cologne, 2 – 4 December 2018

Answers to questionnaire: Norway

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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 Norway

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 be-

fore 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?*

The term “party” is defined in the Norwegian Public Administration Act Section 2 e) as “a person to whom a decision is directed or whom the case otherwise directly concerns”. The decisive factor is the actual connection to the case. The definition is quite general and thus case law and legal theory specifies the categories that are comprised.

Addressees of onerous administrative acts / applicants of beneficial acts are recognised as parties to administrative proceedings for single case decision-making.

As to other individuals, it depends on a case specific assessment of whether the individual’s interest in the case is sufficient. As Section 2 e) states, the case has to directly concern the individual. An individual claiming subjective rights is a party to the case. Claiming concrete legal interests can be sufficient if the consequence of the persons legal interests is immediate. A competitor in the same application process will be considered a party. Indirect interest, whether legal or factual, is in general not sufficient. E.g. it is in general not sufficient to be a competitor in the same business area as the applicant, unless they compete in the same application process. A clear factual interest may be sufficient. E.g. a neighbour to a huge construction site. Individuals as members of the general public will however not be considered as a party in the case.

An association or a non-governmental organisation is a party to administrative proceedings where the organisation’s own rights or duties are concerned. E.g. that the organisation applies for a building permit. An association or an organisation cannot however be a party to administrative proceedings on behalf of its members.

As to other administrative bodies, firstly, an administrative agency has the same status as a private legal person if the agency has the same interest or status in the case as private parties may have, cf. Section 2 (4). It is not sufficient that the case concerns the administrative agency’s scope of authority. However, the agency may be considered a party when it is the natural representative for the interest group concerned. E.g. the city municipality in a case

regarding preservation of natural resources where the individual citizens affected are hard to identify.
Also note that although the categories of parties to administrative proceedings are narrow, the legal interest in appealing the case is wider, especially for associations or non-governmental organisations.

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)?*

Please see answer to I. 1 a).

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

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

In general, basis will be taken in the definition in the Public Administration Act also when sector specific legislation is applicable. Some sector specific legislation give more guidance as to when the general term is fulfilled in the sector specific area, however we do not know of any explicit additional categories or modifications as such.

Individuals/organizations/authoritites may however have a right to appeal a case without being a party to the case. They may also have a right to give a statement in the case without being considered a party. E.g. environmental representatives in environmental cases.

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

N/A

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?*

The administration is obliged to qualify potential parties ex officio. The administrative body will often actuate a case without any defined parties. Eventually, and keeping in mind that the parties right to be notified of the case is fulfilled, the administration has to consider who the parties in the case are and give a notification. It is however no need for an explicit decision.

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

Not in general, however it may differ in some sector specific areas. Information on existing administrative procedures is however given online, similar to the provision in Article III-4.

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

No, not in general, however it may differ in some sector specific areas.

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)?*

In general there is no direct consequence if the party does not make use of its right to participate in the administrative proceedings. The party's lack of contribution to the case may however affect the content of the decision and an appeal. E.g. if the decision is based on incorrect facts, and the party is to blame, the decision may be considered valid even though it is to the detriment of the party. Thus, it may have legal consequences to not make use of its right to participate in the proceedings.

The Norwegian system does not have a particular preclusion regulation. However, the authority may impose a duty on the party to make use of the administrative appeal possibilities before the decision can be challenged in court proceedings, cf. the Public Administration Act Section 27 b. This relates to cases concerning the validity of the decision or claim for damages as a result of the decision. The opportunity is not frequently used by the authority. However, it is common that the party appeal the decision to the administrative appeal agency before challenging the decision in court. An appeal to the administrative appeal agency must be made within three weeks from the date on which notification of the administrative decision has reached the party concerned.

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?*

In general only the final administrative decision may be subject to court actions.

However, the person/organization/public authority who has submitted a request to be allowed to examine a document in a case may appeal against the refusal, and may appeal the refusal on the grounds that they should be considered a party in the case (Section 21 in the Norwegian Administration Act).

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

Yes, the competent authority may review the case and hear the new party in question before making a new 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!*

The Norwegian law does not differentiate between categories of parties. The individuals or organisations/administrative bodies considered a party all have the same rights.

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

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?*

A law committee is currently evaluating the Norwegian Public Administration Act. The comittee will give its proposal for a new law in February 2019. It is not known whether the participation rights of third parties will be discussed in the proposal.

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!*

As Norway has an extensive system of rights for administrative appeals, all administrative decisions relating to the rights or duties of one or more specified person (natural or legal) can be appealed to a superior administrative agency, the case law is not as extensive in this area. The question for the court is rather whether the third party has a right to be a party before the court, which is not the same assessment.

However, a Supreme Court Judgment dated 29 January 2015 (the Maria-case) concerns among others the question of whether a third party was a party to the administrative proceeding. The case concerned immigration law. A Kenyan woman who remained in Norway illegally after her application for asylum was rejected, had an expulsion order imposed on her by the Immigration Appeals Board (UNE), and her application for a residence permit on the basis of family reunification with her five-year-old daughter, who is a Norwegian citizen, was rejected. The Supreme Court concluded that it was a procedural error that the immigration authority had failed to establish the daughter as a party to the hearing of the case. The rejection interfered with the daughter's family life with her mother and challenged her care situation in a way that was of fundamental importance to her upbringing and future.

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)?*

Yes. It is set out in Section 17 that the administrative agency shall ensure that the case is clarified as thoroughly as possible before any administrative decision is made. The duty is relative based on the importance of the case, its complexity etc. The duty seems quite similar

to Article 9 EP-Res.

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

Not in general. A party have the right to express his opinion in the case, but is not obliged to.

There is however some sector specific areas where the party is obliged to present facts or evidence, e.g. in the pollution area (see the Pollution Act Section 49 and 51).

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

As a general starting point, the authority is responsible for finding the facts in proceedings initiated ex officio. When a party applies for a good, the starting point is the opposite. The authority is likely to base its decision on the information given in the application. However the authority still have a duty to provide guidance to the party and the duty to ensure that the case is sufficiently clarified, cf. Section 17. The provisions set out in article III-10 and 11 seems in many ways similar to the Norwegian law.

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

Not explicitly, however the duty to ensure that the case is sufficiently clarified may be more lenient concerning facts that are favourable to the individual.

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,…)?*

There are some sector specific laws that impose a duty on the parties to provide information and conduct inspections, e.g. in the pollution area (the Norwegian pollution act section 51). The pollution act also impose a duty to conduct an environmental impact assessment, cf. Section 13.

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

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

Not as a general rule. As mentioned, there are however sector specific laws that impose a duty on the parties to provide documents or answer questions. This is especially the case in supervisory cases, e.g. competition law cases (the Norwegian Competition Act Section 24) and cases concerning the Norwegian Marketing Control Act (Section 33).

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

The consequence depends on the relevant sector specific provision, but will typically encompass a compulsory fine, a fine, or criminal liability. All these remedies are e.g. available in competition law cases.

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

Not in general, but this will depend on the legal basis in each sector specific law.

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

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

The process is mainly subject to discretion, bearing in mind the authority's duty to clarify the case and provide information.

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

Yes, but confined by the authority's duty to be objective and conduct a sound process.

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?*

We do not have general rules concerning composite investigations. There are however examples of co-operation between different administrative authorities. In general the authority responsible for the proceeding may ask for information or guidance from another authority, however this will mainly be based on a more informal procedure.

As to collaboration of different officers within one administrative authority, the procedure is in general written and an officer at the competent authority both prepare and make a decision in a case. There are however exceptions in some sector specific areas, e.g. the procedure of the Immigration Appeals Board (UNE). The board handles immigration and citizenship cases. In the cases before the board, one officer prepares the case and a committee holds a hearing with the applicant and makes a decision in the case.

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

The rule of evidence will depend on the relevant provision in the sector specific law, the authority's duty to clarify the case and the conditions applicable if the decision is tried by the court. In most cases, however, the rule of evidence is based on general and non-statutory law, and will follow the standard rule of evidence in civil cases.

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

As a general starting point, the authority will have the burden of proof in cases concerning intervention from the authority. When a party applies for a good, the starting point is the opposite, in a sense that it will be to the detriment of the party if he does not submit information suggesting that he is entitled to the good.

It is in general relevant whether the proceedings concern granting of a good or if it is imposing a burden, and whether it is the administrative authority or the private party that has the right to initiate the case.

Further, the burden of proof is modified by the authorities' duty to clarify the case and to provide information, in a way that they cannot decide on a case without considering the party's need for guidance.

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

See the answer to question a) and b).

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

The fundamental principles in Norwegian administrative law is legal protection and efficiency, and these principles forms the basis for the rules of evidence in each case.

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

N/A

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

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

Norway does not have any administrative courts, and all judicial review is conducted by ordinary courts of law, with the Supreme Court pronouncing judgments in the final instance. As a consequence, we have not answered all the questions below, as this may lead to misleading answers.

a) *The court or the parties?*

In general, the parties are responsible for the presentation and investigation of facts and evidence. However, in some cases the court will have an independent responsibility for the presentation of facts and evidence, cf. the Norwegian Civil Procedure Act Section 21-3 (2), e.g. in cases concerning child welfare.

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

N/A

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!*

Yes, the general court is free in the consideration of evidence in cases concerning public administrative law.

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 general court has certain limitations in its competence in administrative matters. The judicial control in administrative matters is often referred to as a "control of legality" or a "con-

trol of validity" of administrative decisions. A party who wants to challenge an administrative decision before the courts may therefore only challenge the validity of the decision, i.e. whether the relevant administrative body had legal basis for the decision, whether there are any errors in the factual basis for the decision or whether the decision is invalid due to procedural errors. If the legislation provides certain consequences if relevant statutory or legally binding conditions are met (e.g. tax exemptions or rights to social benefits) the courts can also undertake a full review of the content of the decision and determine whether it is in accordance with the law. The same applies if the law stipulate that the court shall review all aspects of the case (e.g. in case of judicial review of administrative decisions on coercive measures against individuals).

If the law has exclusively entrusted the administration with the discretion to decide whether a decision is to be made and what it will involve (e.g. whether a person should be allowed to serve alcohol in his restaurant or be given a building permit), such discretion will normally not be subject to judicial review. In such instances, the content of the decision may only be challenged before the courts if the administration has based the decision on considerations that lie outside the legal framework, there can be proven unfair discrimination, or the decision appears to be arbitrary or highly unreasonable.

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)?*

N/A

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

N/A

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?*

N/A

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?*

There is no general distinction in this regard.

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

N/A

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

N/A

d) *Do they prefer to focus on procedural aspects?*

N/A

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

N/A

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?*

N/A

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

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

N/A

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

N/A

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)?*

N/A

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?*

N/A

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!*

N/A

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?*

As mentioned, Norway does not have administrative courts. All judicial review is conducted by ordinary courts. An administrative decision like this will most likely be appealed to a superior administrative agency, and the appellate decision may eventually be challenged in court. The superior administrative agency will try the case in full. The court, however, only has a "control of legality" of administrative decisions.

F
As a neighbour to the construction site, the farmer has a right to take action in the case. The court can however only try the validity of the permit, i.e. whether S has legal basis for the decision, whether there are any errors in the factual basis for the permit or whether the permit is invalid due to procedural errors. In order to challenge the content of the permit, F has to argue that S has based the decision on considerations outside the legal framework or that the decision is arbitrary or highly unreasonable.

P
The court has to decide whether the association can take action in the case. This depends on whether the association has legal interest in the case. The association may have legal interest if the question in the case is within the purpose of the association. It will be necessary to investigate the association's statutes. Further, the association needs to be representative, i.e. a natural representative for the interests involved in the case.

M
The court first has to decide whether the municipality is entitled to take legal action in the case. This will depend on whether the municipality has a genuine need to have the claim determined. This shall be determined based on a total assessment of the relevance of the claim and M's connection to the claim.

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 suc-*

ceed? Supposing that this is not the case, how is the court going to assess the question of the risk for the red kite?

As with P, the court has to decide whether the organisation can take action in the case. The assessment is the same as with P. The court will look at the purpose of the organisation and whether its representative for the case.

It is not of relevance that S did not involve O in the administrative process.

The court may consider whether there is an error in the factual basis for the permit.
The court may also investigate whether the case was sufficiently clarified before decision was taken.

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 can only try the validity of the decision, i.e. whether S has legal basis for the decision, whether there are any errors in the factual basis for the permit or whether the permit is invalid due to procedural errors. In order to challenge the content of the permit, A has to argue that S has based the decision on considerations outside the legal framework or that the decision is arbitrary or highly unreasonable.

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.