Bundesverwaltungsgericht

ACA EUROPE

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

ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

Cologne, 2 – 4 December 2018

Answers to questionnaire: Portugal

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ACA-Seminar
ReNEUAL I – Administrative Law in the European Union
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Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

Introduction:

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

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

It is in the interest of the member states that the relationship between European Union law and the national legal orders remains one of mutual interchange, better: a dialectic process. It would be contrary to the common European project, if it degenerated into a one-way-street. Recently, there have been two proposals which try to implement this process by developing a European administrative law. These proposals are <u>not</u> directed at modifying the national laws of administrative procedure. Their purpose is to establish for a first time a general codification of administrative procedural law binding for the institutions of the European Union, particularly the Commission.

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-

publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed. The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book III (Single Case Decision-Making) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

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

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

As the seminar cannot investigate the national administrative laws of the member states in their entireties the seminar has to limit its scope: first, to single case decision-making as the probably most typical form of action of the administration. Other forms of action, especially administrative rulemaking, pose another variety of questions which could make it worthwhile dedicating another seminar to this topic. Second, the seminar focuses on two important areas of administrative procedure, which are covered by the first two parts of the following questionnaire. The first is dealing with the legal position of different categories of (potential) parties to administrative proceedings (I.), the second with the administrative determination of facts and discretionary powers (II.). The last part contains a small case study in which these areas of administrative procedural law play a decisive role (III.). This sequence is, of course, not meant to prejudice the order of answering.

The first part deals with the questions of who is or can become a party to administrative proceedings before an administrative authority (not before an administrative court!) and of what rights and/or obligations might follow from being a party to administrative proceedings. The second part centres on the question of how administrative authorities

determine the facts on which to found their decisions. Although here, too, the main focus is on the proceedings before administrative authorities, this part also makes reference to proceedings before administrative courts. In this regard it deals with the administrative courts' review of administrative decisions having in mind that there might be different standards of review concerning the establishment of the facts and concerning the application of substantial law.

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

I. Parties to Administrative Proceedings: Categories and Legal Positions

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

   - addressees of onerous administrative acts / applicants of beneficial acts, (a)
   - 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) (b)
   - associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements) (c)
   - other administrative bodies? (d)

Answer: all above mentioned categories are recognized, by article 68.º of the 2015 Portuguese Code of Administrative Procedure (hence forth CAP2015), as parties to administrative proceedings for single case decision making.

(a) The CAP2015 recognises as parties to administrative complaint proceedings not only the applicant but also counter-parties. Counter-parties are those whose rights or interests may be adversely affected by the decision of the complaint.

(b) Members of the general public are recognized as parties to administrative proceedings in cases related to the protection of diffused interests when the administration's behaviour may cause relevant damage to public health, housing, education, environment, land use planning, urban planning, quality of life, consumption of goods and services and cultural heritage (see article 68.º/2/a CAP2015)

(c) In the case of associations or non-governmental organisations article 68.º/1 CAP2015 demands that the proceedings must come within the objectives they can pursue. Worker's unions are the most common example of such parties, which (like other associations) are granted the possibility to defend the rights or interests of all the associates or the rights or interests of a particular associate. Article 68.º/2/b also refers specifically that associations are recognized as parties to administrative proceedings regarding diffused interests they are charged of protecting.

(d) Local authorities (such as municipalities) are recognized as parties to the administrative proceedings in cases related to the protection of diffused interests when the administration's behaviour may cause relevant damage in their territory (see article 68.º/2/c CAP 2015).

Administrative bodies may be party to administrative proceedings in two cases (see article 68.º/3 CAP2015): i) when the administrative proceedings may result in a decision that benefits or damages diffused interests that the legal person they belong should defend or ii) when the administrative proceedings may result in a decision that affects subjective rights, interests, powers, duties of the legal person they belong.

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)?

Answer: the categories are defined in a general codification (article 68.º CAP2015).

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

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

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

Answer: it is common that sectorial pieces of legislation have rules regarding the parties to specific administrative proceedings but these rules do not preclude the application of the general rule.

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

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

Answer: The CAP2015 only in regards to proceedings of administrative complaint, which have the objective of voiding or modifying a previous decision (see articles 192.º and 195.º CAP2015), explicitly recognises the administration's duty to call those whose rights or interests may be adversely affected by the decision of the complaint.

They are known as counter-parties (in the sense that they have an interest contrary to the applicant).

Also some sectorial pieces of legislation (for example regarding land use planning and urban planning - Law Decree 555/99 – or environment – Law Decree 151-B/2013) demand that before the decision is taken the administrative authority must publicise the request submitted in order to allow public participation.

Since 2015 the environment ministry as used the internet (www.participa.pt) to fulfil the duty to publicize requests made under Law Decree 151-B/2013 (transposition of Directive 2011/92/UE) regarding public and private projects which may have significant effects on the environment.

However anyone that considers that theirs rights or interests may be affected by the decision can require the administrative authority to be admitted to participate in the proceedings (even if the proceedings is not on of administrative complaint).

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

Answer: see answer to question nr. 3.

b) Is the administrative authority obliged to announce the beginning of administrative proceedings to (potential) third parties to enable their participation?
Answer: see answer to question nr. 3.

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)?

Answer: The only consequence for the potential party is that it's arguments won't be analysed by the administration, which can be particularly relevant in cases where the law provides some latitude for the content of the administration's decision.

However the lack of participation does not preclude the ability to challenge in court the decision nor the right to be heard by the court if other puts the decision under judicial review.

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

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

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

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

Answer: Anyone that has requested the administration to participate in a proceeding and as seen its request denied has the right to bring the administrator's decision under judicial review, not depending on the will of the original parties, which however must be heard by the court when deciding the petition.

If the court finds the complaint is well founded it can condemn/order the administration to admit the party to the proceedings.

If the third party (excluded from the proceeding) does not bring the decision of non-admittance under judicial review in a certain time (usually three months) frame it loses the right to put the final decision under judicial review (see article 51.º/3 of the Code of Process in the Administrative Courts).

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?

Answer: all parties to the proceeding have these rights.

However the counter-parties (like the one mentioned on answer I 3 in administrative complaint proceedings) can't petition the administration on the same proceeding that they intervene as counter parties, they can only use the above mention rights with the scope of presenting they arguments as to why the administration shouldn't accept the complaint. If they wish to petition the administration they should open a proceeding (that is they should present an application to the administration).

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

Answer: see answer to question I. 6 a.).

(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?

Answer: At the present moment there is no discussing worthy of note. In 2015 came into force a new Code of Administrative Procedure (substituting the one that was in place since 1991). The articles regarding third party participation in proceedings weren't the target of much alternation.

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

Answer: there is no relevant jurisprudence on this matter.

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)?

Answer: Yes. Article 58.º CAP2015 determines that the administration must take the steps that are appropriate and necessary for the preparation of a fair and legal decision, even concerning facts or arguments not mentioned in the applications or in the responses of the interested parties.

Article 108.º/2 CAP2015 imposes on the administration the duty to correct, on its own, the shortcomings of the applications, in order to prevent that the interested parties suffer damages as a result of simple irregularities or mere imperfections of their requests.

Along the same line article 115.º/1 CAP2015 determines that the administration must seek to ascertain all facts appropriate and necessary to take a legal and fair decision within a reasonable time and may, for that purpose, use all means of proof admitted in law.

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

Answer: Article 58.º CAP2015 is tempered with article 116.º/1. The latter states that without prejudice of the stipulation of article 115.º/1 it is up to the interested parties to prove the facts that they have alleged.

Article 116.º/2 CAP2015 also stipulates that the above mention burden of proof is satisfied when the applicant clearly identifies the proofs in possession of the administration .

Articles 58.º 115.º and 116.º CAP2015 must be interpreted within the scope of Articles 10.º/1 and 60.º CAP2015, which stipulates that administration and parties to the proceeding must act in good faith which implies a duty to collaborate to reach a legal and fair decision.

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

Answer: No. Article 58.º CAP2015 clearly states that the principle of investigation is applicable even if the proceeding if initiated by application.

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

Answer: No. Articles 58.º and 115.º/1 CAP2015 clearly states that the administration must seek to ascertain all facts relevant to reach a fair and legal decision even if they are favourable to the applicant.

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,…)?

Answer: The principles laid out on the article 58.º 115.º and 116.º CAP2015 (read within the scope of the principal of good faith) are generally applicable to all proceedings.

However specific sectorial pieces of legislation have rules regarding proofs (usually documents) that an applicant should submit with the application (for example regarding land use planning and urban planning - Law Decree 555/99).

In this case, if the applicant doesn't submit the documents required the administration is obliged to at least notify the applicant to present them in a certain time frame before deciding to reject the application. It is also defensible that the administration should, on its own, collect the documents if such documents are in its possession, according to articles 108.º/1 and 115.º/1 read in the light of the principle of good faith and collaboration.

In proceedings regarding administrative sanctions the burden of proof lays only on the administration, since in such proceedings the accused benefits of the presumption of innocence.

Other pieces of sectorial legislation have specific rules regarding the burden of proof. For example: Law 27/2008 (regarding asylum and subsidiary protection) states that even though the applicant for international protection must give proof of its allegation there is a special duty of the administration to gather information from sources such as the European Asylum Support Office, UNHCR and relevant human rights organizations to confirm (or deny) the applicants allegation, and in case of doubt is the account is credibly the administration mustn't reject the application.

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

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

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

Answer: Yes. Article 117.º/1 CAP2015 states that may the administration may notify the interested parties to provide information, present documents or things, submit to inspections or to collaborate in other means of proof. Also as a general principal Article 60.º CAP2015 stipulates that the parties to the proceedings and the administration must cooperate with each other, refraining from requiring unnecessary diligence and resorting to expedient proceedings, in order to obtain a legal and fair decision in a reasonable time.

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

Answer: Article 119.º/2 and 3 CAP2015 determines that the refusal to comply is freely assessed by the administration, which in doing so must consider circumstances of the case. However the refusal to cooperate does not relieve the administrative body of the duty of seeking to ascertain the facts or decide the application.

When the information, documents or acts requested from the interested party are necessary for the decision the procedure must not be followed and the individual must be notified of this fact.

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

Answer: The rules of Article 119.º/2 and 3 (see last answer) are thought to be directly applicable to the applicants and counter-parties.

In proceedings regarding administrative sanctions the accused is not obliged to collaborate (see answer II 1 e).

(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?

Answer: The CAP does not regulate in fine detail the fact finding process.

Article 56.º stipulates that the agent/body responsible for the conduct of the procedure enjoys discretion in its structuring, which, in compliance with the general principles of administrative activity, should be guided by the public interests of participation, efficiency, economy and speed in the preparation of the decision.

Also Article 57.º stipulates that within the scope of procedural discretion, the body competent for the final decision and the interested parties may, in writing, agree on the terms of the procedure, with binding effect. The object the agreement may pertain to the organisation of oral hearings between interested parties in a certain decision and those who oppose it.

The administration may use all means of proof permitted by law (article 115.º/1).

The means of proof and procedural rules regarding the gathering of proof are regulated by the Civil Code (which provides general rules about the value of proofs) and the Procedural Code for the Civil Courts (which provides general rules about the way to obtain certain proofs such as expert evidence).

Most administrative procedures rely on documents and witnesses.

Sectorial legislation (for example: expropriation proceedings) have specific and concrete rules about the fact finding process (in case expropriation proceeding Law 168/99 established the way experts intervene).

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

Answer: The administration is free to evaluate the proof. However it is bounded by the rules establish in the Civil Code or specific legislation regarding mandatory means of proof for certain facts (example: marriage must be proved by the wedding certificate; certain contracts can only be proved by public deed). The administration has the duty to express the reasons why considered certain facts proved or not proved.

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 differ-

ent officers within one administrative authority, e.g. a hearing officer who may hold hearings with applicants (like asylum seekers) while another officer takes the final decision based on written reports of such a hearing officer?

Answer: Yes.

Article 55.º/2 CAP2015 stipulates as a general rule that the agent/body who will decide must delegate the direction of the procedure in a lower hierarchical agent/body, who, in turn, may delegate the specific procedural initiatives regarding the gathering of proof in another agent.

Article 78.º CAP2015 also establishes the possibility of creating procedural conferences which are intended to jointly exercise or combine the competencies of various organs of the public administration, in order to promote efficiency, economicity and speed of administrative activity. Procedural conferences may relate to a single procedure or to several related procedures, and may be directed to the making of a single decision or several decisions together

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

Answer: See answer II 3 a.

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

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

Answer: See answer II 3 a.

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

Answer: Combine the pursuit of public interest, the speed and efficiency of the administration with the respect for the individual's rights in particular the right to participate in proceedings that directly concern them.

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

Answer: See answer II 3 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?

a) The court or the parties?

Answer: In judicial proceedings the general rule is that the parties have the burden of providing the court with all relevant and essential facts.

However the court may also consider publicly known facts and facts that are brought to the court's knowledge by virtue of its function.

More importantly the court can also consider other facts as long as they complete or are instrumental to the parties' allegations, which is particularly important in case of judicial review of administrative action since the court often resorts to the description of the administrative proceeding even if the parties do not allege all the facts pertaining to it.

The general rule is that the party that alleges a certain fact must offer proof of the fact.

In judicial proceedings in administrative courts the plaintiff should identify in the petition the means of proof he/she wants to rely on, even if all the proof consists of documents in possession of the administration, in which case the plaintiff should inform the court of this fact.

Regardless of the party that offered the proof the court may consider it to decide that a certain fact is true (for example: if the administration provides the court with a document, this document can be used to consider a fact alleged by the plaintiff as proved).

The general duty of providing proof of the alleged facts is different from the rules pertaining to the absence of proof of a certain fact.

In this case the court must consider which party should have proved the fact.

As a general rule one can say that in case of simple judicial review of administrative acts if the plaintiff alleges that the administration's decision was factually wrong the burden of proving that the factual basis of the administrative act is true lies with the administration (since the administration doesn't benefit from a presumption that it's decision is correct) .

However in a significant number of cases put forth before the administrative courts the plaintiff wants more than just a simple judicial review of administrative acts, since the plaintiff petitions the court to condemn the administration to act or to abstain to act in a certain manner.

In this case, if the plaintiff alleges that the factual basis of the administrative act is wrong he/she must prove which facts are indeed true. If the plaintiff fails to do so the court can't find the petition well founded.

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

Answer: In judicial proceedings put forth before the administrative courts the administrative authorities have a special duty regarding presentation of facts and ev-

idence finding since they are obliged to provide the court with all the documents and informations concerning the administrative proceeding underlining the dispute. The failure to comply with this duty may carry civil, criminal or disciplinary responsibility and/or can even lead to the application of a daily pecuniary penalty until the duty is fulfilled.

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!

Answer: In judicial proceedings put forth before the administrative courts the general rule is that courts are free in the consideration of evidence. However it is bounded by the rules establish in the Civil Code or specific administrative legislation regarding mandatory means of proof for certain facts (example: marriage must be proved by the wedding certificate; certain contracts can only be proved by public deed).

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?

Answer: administrative courts can control if the fact finding of the administrative authority was sufficient and/or correct to decide the matter.

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)?

Answer: The legal order does not formally recognize the notion of technical discretion, however doctrine and jurisprudence use this concept.

Jurisprudence resorts to this concept considering that in cases of technical discretion the court should control the administration's actions in the light of the general principals of equality, proportionality, good faith, pursuit of the public interest, protection of trust and the legitimate rights and interests of individuals. The judicial control of the respect for these principals depends on the quality of the reasons expresses by the administrations, which has to be succinct but sufficient, without contradictions and clear.

The administrative decision in cases of technical discretion can only be voided by the court when such principles where violated (or when the court cannot ascertain if they were or weren't violated due to the administration's failure to express properly the reasons underlining the decision) or in cases of manifest error regarding the facts considered by the administration.

The Code of Procedures of Administrative Courts stipulates this general rule in cases of discretionary powers of administrative authorities (and not only in cases of technical discretion):

In cases of administrative acts that involves the formulation of valuations proper to the exercise of the administrative function, when a plaintiff petitions the administrative court to condemn the administration to decide in a certain way if the court considers that the specific case does not allow to identify only a decision as legally possible, the court can not determine the content of the act to practice, but should explicitly the linkages to be observed by the administration in the issuance of the due act.

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

Answer: Jurisprudence usually resort to the concept of technical discretion in cases where the administrative decision pertains evaluation of competitors (for example: in proceedings regarding the access to the civil service or public office; public procurement proceedings).

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?

Answer: see answer II 6 b).

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?

Answer: No. However the more the administrative authorities are conceded substantive discretionary powers the more should the administration state the factual and legal ground for the decision, since only doing so can the administrative courts provide effective judicial review (see answer II 6 b).

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

Answer: The rationale underline the rule stipulated by the Code of Procedures of Administrative Courts described in answer II 6 b) in cases of discretionary powers of administrative authorities (and not only in cases of technical discretion) is the respect for the separation of powers.

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

Answer: No. The Code of Procedures of Administrative Courts obliges them to do so but respecting the rule described in answer II 6 b) in cases of discretionary powers of administrative authorities.

Since the 2002 reform the Code of Procedures of Administrative Courts clearly states that (observed certain assumptions) the administrative court shouldn't just void the administrative decision but should decide if the plaintiff is entitled to have his request met by the administration.

d) Do they prefer to focus on procedural aspects?

Answer: see last answer

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

Answer: No the administrative courts (like the judicial courts) freely evaluate expert opinions.

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?

Answer: see answers II 6 b) and 7) a) and b).

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

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

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

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

Answer:

a) and **b)**: The Constitution provides the general principles that govern public administration. They are the following: Article 266.º «1. The Public Administration shall seek to pursue the public interest, with respect for all those citizens' rights and interests that are protected by law. 2. Administrative organs and agents are subject to the Constitution and the law, and in the exercise of their functions must act with respect for the principles of equality, proportionality, justice, impartiality and good faith».

c) The Constitution does have any provision regarding this matter. The provisions regarding this matter are in the Statue of Administrative Courts and the Code of Procedures of Administrative Courts

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

Answer: At the moment there are no political or academic discussions concerning this matter.

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

Answer:

Case nr 1

Supreme Administrative Court, case n.º 0299/14 (23-06-2016) (available on-line http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/a98f19f20020ca4280257fe100448081?OpenDocument&ExpandSection=1#_Section1)

Facts of the case:

A (municipal administrative authority) issued a construction permit request by request by **B**. The permit was issued under an exception that establishing in certain areas where construction is not (as a rule) permitted A can permit the construction of isolated building if the interested party gives substantial reasons for the request, for example if said reasons are related to the organization of agricultural enterprises or if the construction will serve the interests of the local population, in cases when, from a humanitarian, social or economic point of view, there is not alternative to the construction.

The parties of the case and the petition before the first instance administrative court:

The **public persecutor's office** filled a case against **A** (municipal administrative authority; defendant) and **B** (interested third party) asking the first instance court to void B's permit.

The first instance court decided against the public persecutor's office, who appeal to the second instance court, which in turn ruled in favour of the public persecutor's office.

The case was brought before the Supreme Administrative Court.

The Supreme Court's ruling

The Supreme Court centred it's decision on the interpretation of "substantial reasons" and considered the following:

«(…) the use of indeterminate concepts does not necessarily imply the attribution of discretionary powers, but in any case it implies the existence of a considerable margin of appreciation (…)

The legislator used the expression "substantial reasons" followed by the an exemplification of a situation as a ponderous reason, referring to the organization of agricultural enterprises.

From here we can draw various conclusions: (i) "substantial reasons" may relate to personal interests, namely the organization of an agricultural enterprise by an individual; (ii) the legislator gave prominence to a substantial reason that links personal reasons to agricultural land use; (iii) the example given by the administration is just that and as such does not exclude other reasons, namely of a personal nature - that is to say, the reference to agricultural enterprises does not abolish the indeterminacy of the concept used; (iv) is not any reason that should be accepted as ponderous.

(…)

Thus, for example, the invocation of strictly individual and clearly non-exceptional reasons, such as those presented by B and accepted by A should not be considered adequate to fulfil the concept of "substantial reasons".

(…) it should be pointed out that the administration, when deciding on request for a permit under an exception rule that grants considerable margin of appreciation, must provide a sufficient and adequate statement of reasons, first of all because the discretion enjoyed by the administration in this area is not complete and unlimited. (…) It is clear that A only adhered to the motives invoked by B, making this a motive, adding nothing to support the decision. In addition to the common character of the grounds presented, it should be pointed out that, as the public prosecutor pointed out in due time, two technical information were issued by A's architect against A's request. These are more than sufficient reason to justify should have given an sufficient and adequate statement of reasons, which would allow the judge to assess whether, for example, there was no misuse of power. "

Case nr 2

Supreme Administrative Court, case n.º 01472/14 (20-10-2016) (available on-line http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/feb3261ebba9495e8025805d0058dfee?OpenDocument&ExpandSection=1#_Section1

The Supreme Court's ruling

The question brought before the Supreme Administrative Court regarded the extent of judicial control of the administration's evaluation of proposals presented in public procurement proceedings.

The plaintiff asked the court to attribute a certain punctuation to is proposal.

The Supreme Court considered the following:
«The exercise of discretionary powers is covered by judicial review. For example in this situations: misuse of powers; error regarding the decision's factual reasons; breach of the general principles that govern the administration's action; infringement of the duty to state reasons or breach of the right to be heard.
The administration when evaluating proposals presented in public procurement proceedings acts using technical discretion and as such judicial review is limited to cases of external illegality (for example: infringement of the duty to state reasons or breach of the right to be heard), manifest error or violation of the general principles that govern the administration's action.
An error is manifest when necessarily reflects an evident and serious maladjustment of the administrative decision in the concrete situation, in terms of deserving a particular censorship».

Case nr 3

Supreme Administrative Court, case nr. 01001/16, (16-02-2017) (available on-line http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/c05ad12a00d0c77b802580d000328bf0?OpenDocument&ExpandSection=1#_Section1)

Facts of the case

The Ministry of the Environment exempted the EIA procedure of a project to co-incinerate hazardous industrial waste, based on a exception rule that stipulates that in exceptional and duly substantiated circumstances, the licensing or authorization of a specific project may be total or partially exempted of the EIA if the interested party so requires.

The parties of the case and the petition before the first instance administrative court:

This decision was brought under judicial review by several citizens.
The defendants were the Ministry of the Environment and A, who requested the permit.
The plaintiffs requested the first instance administrative court to void A's permit arguing, among other things, that the exemption of the EIA procedure was illegal.
The first instance administrative court decided against the plaintiffs, who appeal to the second instance that overturned the first decision considering that the Ministry of the Environment could not have exempted the EIA procedure.
The Ministry of the Environment appeal to the Administrative Supreme Court arguing that the second instance decision was an undue interference by the court in a task that belonged to the administration and in any case the second instance court had erred when interpreting the concept of "exceptional and duly substantiated circumstance".

The Supreme Court's ruling

The Supreme Court considered the following:
«(…) the rule contains the type of fluidity normally surmountable by means of administrative determinations, to be made "*in concrete*" and according to criteria of opportunity or convenience, also of a technical nature. (…) When the rule says that the Administration 'may' (license or authorize with total or partial waiver of the EIA procedure), the verb 'power' is not used in the sense of opening a possibility; but it is used in its other sense, which is the recognition of an active power - meaning that if the Administration is able to discern the appropriate "exceptional circumstances" in the particular case, immediately assumes the power to dispense with "the EIA procedure".
Accordingly, the margin of discretion conferred by the rule does not lie in the possibility of dispensing or not dispensing ('the EIA procedure') but in the judgment assessing the 'circumstances' of the case as 'exceptional' (…)
Thus, the administration has an area of relative freedom in detecting those 'exceptional circumstances'. It is relative because not everything will fit the limits of the notion. Indeed, by the very nature of things, 'exceptional circumstances' (…) must be linked, on the one hand, to the urgency of the project in question and on the other hand to the assumption that the EIA would not jeopardize the project - since the suspicion that the EIA would be unfavorable must be taken as an obstacle to its dispensation.
Without prejudice to the principles that generally govern discretionary activity, these are the criteria of the judgment of exceptionality that, in relation to the "circumstances" of the case, the Administration issues under that art. 3, no. 1, of Law Decree no. 69/2000. In addition, the rule makes extrinsic requirements by requiring

that 'exceptional circumstances' be 'duly substantiated'. It is an imposition that seems to exceed the normal duty to state the reasons for the acts and which (…) aims to allow greater control of the exercise of discretion. The evaluative judgment of 'circumstances', which may culminate in its classification as 'exceptional', constitutes the central core of the discretion conferred by the rule; since it expects the Administration, after carefully considering and describing the circumstances of the case, to resort to its experience and know-how, so that, within the area of relative freedom mentioned above, it may consider them as "exceptional" and, therefore, justification exemption from the EIA procedure.

This shows that the proper reasoning - which the standard imposes - also constrains the exercise of administrative power (to qualify the 'circumstances' of the situation as 'exceptional'), although *'ab extra'* and secondly. If the Administration bases its judgment on the exceptional circumstances of the case in reasons unrelated to the urgency and the probable unnecessary mentioned above, it will become clear that it failed to meet the criteria of the administrative power conferred on it by the law , in an ostensibly inadmissible judgment.

Only then will the exercise of discretion be judicially reviewed. On the other hand, if, in view of the stated reasons, the judgment on the exceptionality of "circumstances" remains within those parameters, limits or criteria, it must necessarily be concluded that the Administration exercised the evaluative power according to the law; in that case, and if they do not detect any manifest error, the courts can not review the way in which the administration actually exercised the prerogatives of evaluation granted by the legislator - otherwise the judicial power would invade the "*munus*" of administrative power.

The contested judgment reviewed the legality of the act beyond these limits.

First of all, it should be noted that the second instance court did not deny the reality of the reasons of exceptionality, invoked in the act, but only its value.

The contested judgment argued that the reasons or motives given by the administration, taken individually or globally, did not in any way guarantee that the project for the co-incineration of hazardous industrial waste would not entail any risk to the environment or to the health of the population.

But the judgment of exceptionality that the Administration issued did not have to be based on this degree of certainty, perhaps unattainable; since it had to rely on a collection of technical data which sufficiently pointed to the high probability that such risks did not exist - which would make it justifiable to waive the EIA procedure.

That is how the administration acted.

(…). It was clearly a demanding and complex matter, and the defendants are wrong to maintain that the judgment of exceptionality was accessible to 'any layman'.

Thus, with regard to the risks of co-incineration, the second instance court went beyond what it was permitted to do, since it wanted to override the proper and typical judgment of the Administration by its own views. In this way, and without mentioning any overt or obvious lapse (…) it exceeded its powers of investigation because it entered a decision-making area reserved for the administration. (…)».

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?

Regarding M's argument if the court find that indeed it was M exclusive competence to decide on A application the court will decide in favour of M and void the permit issued by S.

Regarding M F and P arguments pertaining to the project's landscape insertion, as far as the legal framework provides that S, when deciding A's application, should take into account such factor the court will apply the rule described in answer II 6) b), that is to say it will first analyse the reasons given by the administration on evaluating the project's impact on the landscape in order to determine if such reasons are succinct but sufficient, without contradictions and clear. If the reasons given by the administration do not respect these requirements the court will void the permit.

If the reasons given by the administration respect said requirements, then the court will determine if such reasons reveal a manifest error regarding the facts considered by the administration or if the decision violates general principles that govern the administration's action (for example: the principle of equality, proportionality, good faith, pursuit of the public interest, protection of trust and the legitimate rights and interests of individuals) and if so the court will void the permit.

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?

If the court concludes that A's project will interfere with a special area of conservation or a special area of protection as defined in Law Decree 140/99 (related to the bird protection directive) the court will consider that the lack of participation of O in the ad-

ministrative proceedings is cause to void A's permit, since said Law Decree demands that the projects in such areas have to be subjected to public discussion.

If this is not the case, the court won't consider that the mere lack of response by S to O's request is cause for voiding A's permit.

However the court would void A's permit because S should have investigated further about O's reasons and not just relying on E's statement since this statement was mostly given relying on an expert opinion handed in by A, which is cause to conclude that S violated the general duty of investigating all relevant and necessary facts to issue the permit.

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 would void A's permit because matters concerning environmental impact assessment are subject to public discussion, thus the lack of such formality (made evident by O's lack of participation) is cause to void the permit.

The court would also void A's permit on the considering the lack of proper consideration of O's arguments.

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

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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).

the administrative concretisation of legal requirements (a form of discretion with a view to the facts rather than with a view to legal consequences) may share some parallels with the judicial control of technical discretion in European Union law. In both jurisdictions the judicial control focusses on:

1. compliance with procedural requirements,

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

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

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

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

4. avoidance of arbitrary considerations,

5. correct interpretation of the relevant legal terms.

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