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: Italy

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

ACA-Seminar
ReNEUAL I – Administrative Law in the European Union
Single Case Decision-Making

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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,
   - 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?

Yes.
In Italian legal order, there are the following categories of parties:

a) *"parties who will be directly affected by the final measure"* (art. 7 l. 241/90[1]), which means addressees of onerous administrative acts and applicants of beneficial acts;

b) those "*who are required by law to intervene*" (art. 7 l. 241/90) who are the necessary intervenients, and moreover, the law provides that: "*should a measure be capable of adversely affecting identified or easily identifiable parties other than its direct addressees*" (art. 7 l. 241/90), they also have to be invited to participate to the proceeding.

c) According to art. 9, l. 241/90, "*Any party having either public or private interests, as well as parties having diffuse interests and legally established as associations or committees, who may be adversely affected by a measure, shall have the right to intervene during the related procedure*." (so called "voluntary intervenients").
So individual third parties with subjective rights, concrete legal interests or factual interests can participate in the administrative procedure.
Moreover, associations, ONGs (environmental, consumer, ect.) can be parties, provided that they have set up either an association or a committee.

d) Other administrative bodies can also participate, if they want and have a concrete interest in the procedure. Of course this is a different case from that in which other administrative bodies are asked to give thier advice.

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,…),

[1] L. n. 241 of 1990 is available in English at the following address: http://www.ijpl.eu/assets/files/pdf/leggi/Law%20no%20241-1990%20-%20for%20publication%20-%2025.03.2011.pdf

- by custom(ary law),
- by jurisprudence,
- in another way (please explain)?

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

The categories of parties to administrative proceedings are defined by law n. 241/1990, which is regarded as the Italian Administrative Procedure Act. It is mostly a regulation about principles of administrative procedure than a "codification".
The regulation given by l. 241/1990 about parties in administrative procedure is very wide, complete and of general application.

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?

There are many pieces of legislation in specific sectors, which provide details on parties of the procedures, by specifying them. Nevertheless, they do not create additional categories of parties nor modify them because all the parties mentioned by specific piece of legislation fall within the categories as defined in law n. 241/1990.

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 qualification as parties, which means the possibility to receive communications, to submit documents and written arguments and to inspect the procedure's documents, is given by the law.
No specific request to participate by the third parties is required by the law neither any act of admission by the administration is necessary.
They shall simply submit documents and written arguments to the officer who is responsible of the administrative procedure. On the contrary, the administration might say that the participation of an intervenient is not admissible (but the case is very rare).

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

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

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

a) The administrative authority is obliged to announce the beginning of the procedure only to the necessary parties, that is to say to the "*parties who will be directly affected by the final measure", who have to intervene* and to other "*identified or easily identifiable parties*" who can be affected by the measure. Of course, they are not third parties. Anyway there are particular rules governing notice and comment when many persons can be potentially, and adversely, affected by the final measure.

b) No third party is entitled to the right to be informed neither to be searched to participate in the procedure. There are, instated, for rule making procedures (for example in urban planning sector), specific rules providing the publication of the commencement of the procedure, in order to inform the public and facilitate their participation.

c) If the (potential) party does not make use of its right to participate in the administrative proceedings there is no any preclusion with regard the later court proceeding.

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?

a) If there is an administrative decision of not admission, as parties in the proceeding, those who want to participate have to challenge this decision immediately before the administrative Court (this case is actually very rare because, generally, administrative authorities do not deny participation).
b) No. see. Answer a). What can really happen is that the administration may fall to communicate the commencement of the administrative procedure to a party to whom the final measure is addressed or that may be affected by it. In this case, the party can attack the final administrative decision claiming a procedural defect, showing that his or her participation would have influenced the content of the final decision. Nevertheless, he or she is not limited to claiming the procedural defect for lack of own participation, but can claim also substantial violations of law. On the contrary, other parties, who had taken part in the procedure, cannot complain the lack of participation of a different party.

c) As already seen, third parties are not entitled to be noticed of the commencement of the procedure. It is up to them to ask for participating in the procedure. If their participation is declared not admissible (which is very rare), this decision can be revoked by the administration until the procedure lasts.

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

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

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

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

The various categories of parties to the proceeding have different procedural rights.
Only parties who are directly affected by the measure (addressees of onerous administrative acts; applicants of beneficial acts, necessary internments or "*identified or easily identifiable parties*" who can be affected by the measure), have the right to receive a communication of the beginning of the procedure (art. 7 l. 241/1990). Moreover, before the formal

adoption of a measure refusing an application, they have also the right to receive a notice about the reasons preventing the allowing of the application (art. 10 bis l. 241/1990).
All the parties, instead, included third parties, can submit documents and written arguments have access to the file and inspect the procedure's documents (art. 10 l. 241/90).
The administration is requested to take those documents and evidence into account, if they are relevant for the object of the procedure.

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?

No. there is no any academic or political discussion about any kind of reform of participation rights of third parties.
There is, instead, an academic discussion concerning the limits to the participation in rulemaking procedures under Article 13, l. 241/1990, which is dedicated to measures having a normative, general administrative, planning or programming function.

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!

1) **Consiglio di Stato, sez. V, 12/09/2017, n. 4310**
Regarding the communication of the commencement of an administrative procedure, provided by art. 7 of law n. 241/1990, the Italian Council of State has always stated that it is not a formalistic requirement. Thus, the private person cannot only complain for the lack of participation but has to indicate acts, circumstances or facts that, if brought to the administrative authority during the proceeding, would have modify on the content of the final decision.
This case law apply art. 21 octies law n. 241/1991, which provides inter alia: "an administrative measure shall not be voidable on the grounds of failure to communicate the commencement of a procedure if the authority shows at trial that the content of the measure could not have been other than that actually adopted." The idea is to quash an administrative decision only if there is a substantial violation of law, not only a formalistic one.

2) **Consiglio di Stato, sez. VI, 07/06/2017, n. 2757**
This recent ruling exemplifies the consequences deriving from the failure to consult a local authority. The case was concerning the procedure for the delivering of a permission of drilling a well for the research of hydrocarbon. The municipality was not invited to participate in the procedure and, for this reason, it challenged the final decision. The opponent made and exception of lack of interest because it was not said by the municipality that for not having participated there have been concrete damages.

The Court stated that the interest of the municipality to participate in the procedure was *in re ipsa* and that it was not necessary to demonstrate any concrete and specific damage due to the lack of participation, because it is the law which provides as mandatory the participation of the municipalities in such a case (art. 1, comma 78, l. n. 239/04).

3) **Consiglio di Stato, sez. IV, 28/02/2017, n. 908**
The claimant challenged an order of demolition of an illegal building, complaining that he, as owner of the building, did not receive any notice of the commencement of the procedure. The Court, according to the case-law on this subject, rejected the claim saying that there was not any duty to notice the owner of the building of the commencement of the procedure in that case because the power of the administration to order the demolition of illegal buildings is bound by the law and there is not any discretion. Thus, the participation of the private person would not have been able to influence in any way the content of the final decision.
This judgment shows that, according to the case-law of the Italian Consiglio di Stato, rules on participation must not be applied mechanically and formalistically, but they have to be functional to protect the effective right of parties to give their concrete contribution in the procedure.

4) **Consiglio di Stato, sez. IV, 10/10/2016, n. 4163**
This judgement shows that, in Italian legal order, the parties, once they have received the notice of the commencement of the procedure, have to behave with diligence in the next activities of participation in the proceedings. This means that administrative authority is not obliged to communicate to the parties all the following internal acts because is up to the parties to take information and to exercise their procedural guarantees.
According to art. 10 *bis* l. 241/90, in procedures requested by interested parties, the officer responsible for the procedure or the competent authority shall only, before the formal adoption of a measure refusing an application; promptly communicate to the applicants the reasons preventing the allowing of the application.

II. Determination of Facts and Discretionary Powers

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

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

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

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

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

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

a) Italian administrative law implements the principle of investigation, so administrative authorities have a general duty to investigate carefully and impartially the case *ex officio*.
In Italy, this duty is provided by Article 6 Law n. 241/1990 (principle of investigation) whereas the duty of impartiality, fairness and timeliness is provided by Article 1 par. 1 Law n. 241/1990.
The duty of impartiality and good administration is provided by Article 97 of Italian Constitution, too.

b) Article 10 Law n. 241/1990 provides that the parties to the proceedings have the right to present written arguments and documents, which administrative authorities are obliged to take into consideration, if relevant. The parties to the proceedings are not generally obliged to present facts or evidence of their own accord.

c) Usually, in Italy, the rules for determining the facts do not distinguish between administrative procedures initiated ex-officio or by an application.

d) Usually, in Italy, the rules for determining the facts do not distinguish between facts which are favourable to the individual and others which are unfavourable to him.

e) Law n. 241/1990 does not provide different models for determining the facts with regard to different subject-matter, although the different subject-matters might have specific rules for determining the facts.

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

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

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

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

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

a) Generally, private parties are not obliged to cooperate with administrative authorities in the investigation, unless this cooperation is specifically required by the administration.

b) In this case, the time-limit to reply is provided by specific rules of the proceeding and, if the private party is an applicant and does not comply with such a duty to cooperate, the consequence is the dismissal of his petition. In the administrative procedures initiated ex-officio there are other consequences specifically provided by the rules of the proceeding.

c) The Law n. 241/1990 does not provide differences concerning the duty to cooperate among the parties.

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

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

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

a) Usually, every administrative authority has its own organization concerning the fact finding process; nevertheless, it may require the cooperation of other authorities or agencies. Sometimes the cooperation of other administration is provided by specific sector regulations.

b) Usually, the administration have broad discretionary powers both in organising the fact finding process and evaluating the facts found during the investigation process.

Though, as observed earlier, it has the duty to consider the evidence brought by the parties, if it is relevant for the object of the procedure.

c) In Italian legal order, there are rules concerning composite investigations: the Article 14 par. 1 L. n. 241/1990 provides the collaboration of different authorities in fact finding process and in evaluating the facts found (so called “conferenza di servizi istruttoria”).
The final decision is often taken by persons different from officers who found and evaluated facts: for example, unauthorized building are often verified by police but the order of demolition is given by the officers of local government.

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

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

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

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

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

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

a) There are not specific rules of evidence for administrative fact finding.

b) Anyway, the Article 6 Law n. 241/1990 provides that the officer responsible of the administrative procedure verify facts ex officio, doing whatever it is needed. The duty of impartiality, fairness and timeliness is provided by Article 1 par. 1 Law n. 241/1990 in general and not only for fact finding and investigation; the rule provided by Article 6 bis Law n. 241/1990, concerning the conflict of interests, is applied to witnesses and experts too.

c) The rationale is the principle of investigation, i.e. the officer responsible of the administrative procedure verifies facts ex officio, doing whatever it is needed.

d) The Law about administrative procedure does not provide rules concerning inadmissibility of evidence; generally, we can say that investigations are not exploitable if they are realized too much time before taking the final decision.

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

a) The court or the parties?

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

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

a) According to Italian Code of administrative trial, the parties are responsible for the presentation of facts and evidence that are available to them (Article 64 par. 1). However, "*Notwithstanding the burden of evidence lying with them, the court may also ask the parties ex officio for clarification or documents*" (Article 63 par. 1).
b) The difference is not between the responsibility of claimants and defendants but between the party who has the run of of the evidence and the party who has not the run of the evidence.
c) According to Article 64 par. 4, "*The court has to weigh the evidence according to its discretion and can infer proof from the behaviour of the parties during the trial*."

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

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

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

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

a) Preliminary, we have to distinguish between discretionary powers of administrative bodies (i.e., when administrative authorities have the power to decide about the public and private interests involved in its decision, the so called "administrative discretion") and the so called technical discretion (i.e., when administrative authorities do not decide about interests but appreciate the fact with a technical but debatable valuation.

The technical discretion is connoted by the application of rules of a non-exact science having a certain degree of disputability; it therefore differs from the "technical verification", which is based on the application of an exact science in order to attain a sure outcome.
We have instead "administrative discretion", when the Public Administration aims at a public purpose attributed to its care by law, by means of an activity of selection, acquisition, comparison and evaluation of public and private interests implied in its action.

b) In case of administrative discretion, administrative judge cannot substitute the administration; in case of technical discretion, administrative judge may exercise a limited control concerning complex factual evaluations. This type of control is called "weak control" because it can only assess the rationality of the technical choice and the absence of macroscopic mistakes.
Instead, in case of technical verifications (simple factual evaluations) the judge can control the facts with-out any limitations (for example think of the calculation of an alcoholic degree of a beverage, or the calculation of the square metres of a building ect.) In this case, the judge can appoint an expert to evaluate the facts.

c) The reduced standard of control is applied, for example, typically when administrative authorities decide about the results of exams or public competitions; or when administrative authorities decide about the protection of national heritage and landscape; or when Antitrust Authority says what is the "relevant market" or when the administrative authorities decide about psychophysical fitness of troops and policemen, ect...
In these cases, Italian administrative judge cannot substitute administration in doing the factual evaluations, neither arranging a technical expertise; the administrative decision can be annulled only if the factual evaluation is manifestly wrongful or illogic.

d) These cases of reduced standard of control are qualified as cases of "*technical discretion*", which, as specified sub a), is different from discretionary powers of administrative bodies.

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

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

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

d) Do they prefer to focus on procedural aspects?

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

a) yes, we can say that, according to the case law, the procedural standards to be observed by administrative authorities in their fact finding are the more stricter the more the administrative authorities are conceded substantive discretionary powers;

b) The concept of technical discretion applied by the ECJ in regard to administrative decisions (or similar) is applied in Italian legal order (cf. II.6.b)); the rationale of reduced standards of control is that there are different institutional capacities of courts and administrative bodies with regard to the evaluation of complex factual constellations. So, it is held that administrative judges cannot replace the public administration neither when exercising its substantive discretionary powers nor in evaluating complex facts.

c) Courts are not reluctant to interfere with material decision-making of administrative authorities, but shall respect the division of powers and cannot substitute the discretionary decision of the administration with another one. They can only assess the legitimacy of the measure, by an external control.

d) yes, Courts generally prefer to focus on procedural aspects, since they have a redused standard control on technical discretion;

e) Italian national legal order does not know the instrument of prepositioned or anticipated expert opinions (e.g. in environ-mental law) to which a superior validity is conceded.

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)?

The Article 113 par. 1 of the Italian Constitution provides that "*The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always*

permitted against acts of the public administration." It is implied in constitutional principles a strict duty of administrative authorities to comply with legal requirements.

Article 97 of Italian Constitution, as already told, provides also the principle of impartiality and good administration, which are the basis of the principle of ex officio investigation in fact finding proceedings.

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?

Lately, in Italy, there has often been both a political and an academic discussion concerning the powers of administrative judge. It is often believed that administrative judge has too much power and that it too often interferes with material decision-making powers of administrative agencies.
In this moment, there are not legislative proposals concerning this topic.

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!

1) **Cons. Stato, Sez. VI n. 5870/2017.**
   In a public procedure related to a public service, a company challenges the final adjudication because – according to the claimant – the tender is not reliable. The recourse is turned down because the tender evaluation is questionable by administrative judge only if manifestly wrongful or illogic.

2) **Cons. Stato, Sez. IV, 4107/2017.**
   In a competitive state exam a candidate challenges the authority's negative evaluation, explaining that it is wrongful and unjustied. The recourse is turned down because the evaluation about the fitness of a candidate is characterized by technical discretion, so is questionable by administrative judge only if manifestly wrongful or illogic.

3) **Cons. Stato, Sez. IV, n. 3070/2017.**
   A high-ranking army's officer challenges the decision with witch the promotion to major general is earned by an other officer. The recourse is turned down because the evaluation about the choice of the best officer for a specific task is characterized by technical discretion, so is questionable by administrative judge only if manifestly wrongful or illogic.

4) **Cons. Stato Sez. VI, Sent., 12-10-2017, n. 4733**.

Seven companies challenge the decision with witch the Authority Antitrust fine them because of an agreement that restricted free competition. The recourse is turned down because “relevant market” is a so-called “indeterminate juridical concept”; in similar cases, deciding if there is a “relevant market” is a complex and debatable valuation, questionable by administrative judge only if manifestly wrongful or illogic.

III. Case Study

Initial Case:

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

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

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

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

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

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

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

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

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

Questions:

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

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

Regarding the objection of M, probably the Court will emphasise the fact that the Municipality was invited to participate in the procedure and that it has given a positive reply, at the beginning. So its change of mind probably will not be considered relevant in the case, seen that the new development plan seems not to have been adopted, yet (so we understand).

Regarding the objection of F, he was invited to participate in the procedure. So no procedural violations can be found. The fact that F is afraid of facing disadvantages in managing his soil because of increasing traffic means that F certainly has legal standing and can challenge the measure before the Court, but it is not a reason to quash the permission.
The objection regarding the number of commercial company in the village will not be relevant for an Italian administrative Court since in Italian legal order, in compliance with the principle of competition, there are no restrictions regarding the number of commercial companies in a place.

Regarding the action brought by P, he probably has legal standing as President of a local Association.
The question of the risk for the beauty of the homeland and that the approved project does not fit into the landscape is a question of technical discretion. So, the Court should assess the case with a reduced standard of control.

Regarding the objection of O, probably the Court will not find a violation of the participation rights of O since that the opinion of E was not communicated to O, because parties have to behave with diligence in the activities of participation in the proceedings. This means that administrative authority is not obliged to communicate to the parties all the internal acts because is up to the parties to take information and to exercise their procedural guarantees.

Going to the merits, the Court should take into consideration the evidence brought by O concerning the fact that very close to the designated location of the project, an eyrie had been found and the opinion of the expert.
The Court might ask clarifications to the administration and also to an expert, in order to evaluate if the opinion of E is manifestly wrongful or illogic or not.

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 same way. The crucial point seems to be to establish the distance of the designated location from the breeding area of red kites and to evaluate in the opinion of E is manifestly wrongful or illogic or not.

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[2]:

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[3]. 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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[2] 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).

[3] 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.