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: Poland

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

2. - 4. December 2018

Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

REPORT OF POLAND (SUPREME ADMINISTRATIVE COURT)

Introduction:

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

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

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

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative

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

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

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

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

The first part deals with the questions of who is or can become a party to administrative proceedings before an administrative authority (not before an administrative court!) and of what rights and/or obligations might follow from being a party to administrative proceedings. The second part centres on the question of how administrative authorities determine the facts on which to found their decisions. Although here, too, the main focus is on the proceedings before administrative authorities, this part also makes reference to proceedings before adminis-

trative 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,**

Answer:

According to Article 28 of the Polish Code of Administrative Procedure (Act of 14 June 1960, consolidated text: Journal of Laws 2017, item 1257, as amended - hereinafter: CAP), each person whose legal interest or duty the proceedings concern or who requests the authority's action due to his legal interest or duty, shall be a party.

In consequence addressees of onerous administrative acts / applicants of beneficial acts would be covered by the above indicated procedural definition of the party.

However rights or obligations of the entity (individual or legal person) and legal interest in the enforcement of said rights and obligations that decide on the status of the party to administrative proceedings should result from the provisions of substantive law, whereby, as the Supreme Administrative Court has repeatedly stressed, this is a provision of universally binding law, a law or regulation issued on the basis of the Acts (acts of parliament). Each of the proceedings has the same scope of procedural rights and obligations, and the same authority conducting the proceedings also has the same scope of rights and obligations towards each party.

The only exception is made in the provisions of the CAP in favor of entities with the rights of a party whose participation in the proceedings is not legitimate in their own legal interest or obligation. This category has only the party's procedural position, which enables them to fulfill their official or statutory duty.

- **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),**

Answer: The Polish CAP does not directly regulate the institution of a third party. This is primarily the construction known in the civil proceedings, which aims to enable a third party to participate in a trial between two parties to protect the legal interest. In the absence of a legal construction similar to the third party regulation in civil proceedings, the issue of qualifying subjects as a party or persons having an actual interest is solved *ad causam* in relation to

a specific nature of administrative case. The variety of legal provisions making up this procedural institution does not lead to differentiation of procedural roles.

In administrative proceedings subject to the principle ex officio, there is no legal possibility, nor the need to distinguish the plaintiff, the defendant or the third party. Any entity that has a legal interest or an obligation that requires concretization through a decision to use applicable law and a competent administrative body is a party to proceedings with the same procedural position. The following is a division that includes third parties as participants in the administrative proceedings.

The participants of the proceedings are grouped according to various criteria. In particular according to the criterion of the function (role) and the purpose of the proceedings. In general, two basic groups can be distinguished: authorities conducting proceedings and other participants. Therefore, issues regarding the participation in the relevance of decisions of two or more public administration bodies, face the need to broaden the reference to the two-party structure of proceedings.

The first category of participants are those entities whose legal interest is concerned. Therefore, those entities that act to implement their legal interest, or those who participate in its protection against violation by another entity. These entities remain in material connection with the administrative matter being the subject of the proceedings. In other words, they are materially interested in the ongoing proceedings, as its result influences their rights and obligations.

The next group of participants in the proceedings is the one participating in the proceedings due to a weak legal interest, which legal provisions do not provide protection for the so-called actual interest. Such an entity is interested in resolving an administrative matter, but it cannot support this interest in the generally applicable provisions of law. This provisions are to form the basis for an effective demand for relevant administrative acts. This kind of third party may propose to the administrative body certain actions or question the actions taken by the body, or his actions may be the most impulse for any action.

Similarly to participants with the rights of a party, interested parties do not become subjects of rights and duties shaped by an administrative decision. In exceptional situations defined by law, these parties are involved in administrative proceedings and may perform specific procedural actions. On the ground of the CAP, the procedural rights of these persons are limited to the possibility of taking part in the hearing or submitting a statement or evidence before the hearing if the administrative body conducting the proceedings deems it nec-

essary due to the subject matter. Wider entitlements of interested persons envisage, among others rules on environmental protection.

The third group of participants are entities whose participation in the administrative proceedings is to explain the factual circumstances of the case. Primarily provide information relevant to the content of the future administrative decision, such as witnesses, experts, translators, persons required to present the subject of the inspection and hearing) to the so-called proxies. These participants perform auxiliary and essentially indivisible functions in the proceedings.

- **associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements),**

Answer: A separate procedural category are the entities that participate in proceedings to protect the public, collective or group of interest. These entities are called participants on the rights of the party and constitute a very diverse group, including, among others, social organizations, associations or foundations. They are not, despite the interest of the proceedings, obtaining a decision of a specific content, materially involved in the proceedings or materially related to the administrative matter being the subject of the proceedings. The decision of the body contained in the administrative decision does not shape their legal situation, i.e. they never become addressees of the rights or obligations shaped in the decision. The second characteristic feature of this category of entities is manifested in the fact that the participant's function and goal is to participate in the proceedings due to the need to protect certain general values, with a non-individual, social group, and not individual dimension. Entities on the parties' rights do not act in their own legal interest and in order to protect them, but their participation is a consequence of acting in the interest of another entity that is a party to the proceedings.

According to Article 31 para. 1 of the CPA in the matters concerning another person, a social organization may demand that the proceedings be initiated and that the organization be allowed to participate in the proceedings. If such a demand is justified by the statutory goals of the organization and public interest.

If a public administration authority considers such demand of social organization as justified, the authority shall order initiation of the proceedings ex officio or to allow the social organization to participate in the proceedings. Upon initiation of the proceedings in a matter concerning another person, the public administration authority shall notify thereof a social organization, if in the authority’s opinion the organization may be interested in the participation in the proceedings due to its statutory goals and if it is justified by public interest. A social organization which does not participate in the proceedings “as a party” (exercising in

course of the proceedings the rights such a party sensu stricto), may upon the consent of the public administration authority present to the authority its opinion pertaining to the matter, expressed in a resolution or a statement of its statutory body.

- **other administrative bodies?**

Answer: A separate procedural category that constitutes other administrative authorities that participate in proceedings to protect the public interest.

These entities are called participants on the rights of the party. These include the Ombudsman, public prosecutor and other public administration bodies, indicated by some special acts. They are not, despite the interest of the proceedings, obtaining a decision of a specific content, materially involved in the proceedings or materially related to the administrative matter being the subject of the proceedings. The decision of the body contained in the administrative decision does not shape their legal situation, i.e. they never become addressees of the rights or obligations shaped in the decision. The second characteristic feature of this category of entities is manifested in the fact that the participant's function and goal is to participate in the proceedings due to the need to protect certain general values. Entities on the parties' rights do not act in their own legal interest and in order to protect them, but their participation is a consequence of acting in the interest of another entity that is a party to the proceedings. For example, according to the Article 182 the CAP a public prosecutor may apply to a competent public administration authority to initiate proceedings in order to eliminate any infringement of law. This entity may participate in any stage of proceedings in order to ensure compliance of the proceedings and determination of the matter with law. The public administration authority shall notify the public prosecutor of the initiation of proceedings and of any pending proceedings in any case the authority deems the participation of the public prosecutor necessary.

b) Are the categories of parties to administrative proceedings defined

- **in a general codification (i.e. Code of Administrative Procedure,…),**

Answer: The categories of parties are defined in the Code of Administrative Procedure (hereinafter: the CAP). According to the legal definition of the party each person whose legal interest or duty the proceedings concern or who request the authority's action due to his/her legal interest or duty, shall be a party (Article 28 of the CAP).

The party is a substantive concept, not a procedural term, and therefore whether a given party is a party to administrative proceedings is governed by substantive law which is applicable in a specific factual situation, but not in procedural law (see for instance, the order of

the Supreme Court of the Republic of Poland, Administration, Labour Law, Social Security and Public Affairs Chamber, 14 November 2002 r., III RN 19/02).

In the CAP, numerous provisions set out the position of the party to the proceedings, starting from general principles, due to special provisions regulating ordinary and extraordinary proceedings. The party to legal proceedings are the complainant and the authority whose inaction or excessive length of the proceedings is the subject of a complaint. In the administrative proceedings - apart from the complainant and the body who are parties - other entities that participate in court proceedings on the parties' rights may take part.

It is worth to indicate that public administration bodies are: ministers, central bodies of government authority, voivodes, other regional bodies of government administration acting on their own or on someone else's behalf, and other state authorities and other bodies, if they have been formed by the force of law or on the basis of agreements in order to resolve individual matters being determined by way of administrative decisions. Public administration body acting in a particular legal relationship may simultaneously possess and exercise the dominant state power.

The characteristic of dominance in administrative legal relationship means that the parties have unequal legal status and this distinguishes administrative legal relationships from civil ones. These are so-called other participants. In practice, they can be anyone: a natural person, a legal entity (artificial person) or entities not having the status of a legal person (Article 29 of the CAP). In addition, the subjects of an administrative legal relationship may also be two public organs, in which case we speak of internal administrative relationships.

- **by reference to other codifications (e.g. Code of Court Procedure,…),**

Answer:

The limitation of the parties to the proceedings is introduced in some matters regulated by the provisions of the construction law.

According to Article 28 para. 2 and Article 3 para. 20 of the Construction Law (Act of 7 July 1994, consolidated text: Journal of Laws 2018, item 1202) parties to the proceedings in reference to issue a building permission will be defined, together with the investor, as persons who have entitlement to the particular real estate located in the area of restrictions caused by the construction object as to the development of the area. Article 28 para. 2 of Construction Law provide a special provision limiting the application of substantive character of this Article, but it still applies to the legal interest of the neighboring property owner. Only the old and the new investor will take part in the proceedings for the transfer of the building permission to another entity (Article 40 of the Construction Law), the same restriction is introduced in Arti-

cle 63 para. 5 of the Spatial Development Act (Act of 27 March 2003, consolidated text: Journal of Laws 2017, item 1073) - regarding the decision on building conditions.

- **by custom(ary law),**

No. It is not possible.

- **by jurisprudence,**

Answer: The jurisprudence can only precise legal terms of statutory law but not create directly legal definition of the party to the administrative proceedings.

- **in another way (please explain)?**

Answer: Not applicable.

(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!

See answer 1 b).

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: In principle, the regulations strengthening the circle of parties to proceedings are introduced, bearing in mind its subject. The concept of a party to administrative proceedings is referred to in Article 28 of the CAP and is very capacious due to the application of a structural element of the legal interest criterion or an obligation assessed on the basis of legal provisions falling within the scope of public administration properties and its competence to concretize the law by issuing an administrative decision. This gives the party a broad legal dimension. However, the scope of its application is also determined by the provisions of Article 29 of the CAP.

Due to the legal heterogeneity of the matter in which decisions can be issued, it was not possible to establish in Article 29 of the CAP the strict criteria for granting administrative capacity to the party. It is justified by such regulation which is provided by a rational legislator who wanted to allow the widest possible circle of entities to participate in administrative proceedings, to protect their legal interest and actively participate in determining the obligation. Furthermore, the specified administrative and legal capacity does not coincide with the legal entity in the field of substantive and procedural civil law. It does not either correspond to

its scope of judicial capacity. In this way, it is differently marked because of its inherently substantive provisions governing the operation of public administration.

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?**

Answer: According to Article 61 of the CAP shall be initiated upon the demand of a party or ex officio. Action on a request refers to cases where the legal situation of an individual is determined within the scope of its powers related to the disposition of its legal interest, and action ex officio can be initiated when it concerns imperious determination of an entity's duties, restriction or withdrawal of rights.

Due to a particularly important interest of a party, a public administration authority may initiate the proceedings ex officio also in such matters where, in accordance with the law, an application of a party is required. The authority shall obtain consent of the party thereto in the course of the proceedings, otherwise the proceedings shall be discontinued (Article 61 para 2 of the CAP). In the proceedings initiated on the request, the party itself delineates the boundaries of the case being examined. In such case the decision of the body must refer directly to its request and may not contain a decision on the subject on which the party has not applied. In the course of office proceedings, the framework and boundaries of the case examined are determined by the administrative body.

- **Is a decision of the administrative authority admitting the party required?**

Answer: The separate decision of the administrative authority admitting the party is not required.

According to Article 61a. para 1 of the CAP, if the demand for initating of the administrative proceedings (specified in Article 61 of the CAP) has been submitted by a person who is not a party or due to other justified reasons the proceedings cannot be initiated, the public administration authority issues an order (that may be may be challenged) refusing to initiate proceedings.

It must be also pointed out that if a specific provision so provides, a matter may be disposed of without notice being given by the authority. The matter shall be regarded as disposed of without notice by the authority and in a way that complies with the party’s demand in its entirety if within 1 month of the day when the demand was submitted to a relevant public administration authority or within another time limit specified in the specific provision. This authority has not issued a decision or order terminating the proceedings in the matter (silent closing of the proceedings) or has not filed (expressed) an objection by way of a decision (tacit consent) (see Article 122(a) of the CAP).

- **Is the administration obliged to qualify potential parties ex officio?**

Answer: The obligation of the administrative authority to qualify potential parties ex officio seems to arise from the Article 61 para 4 of the CAP. According to this provision, all persons being parties to the proceedings shall be notified that the proceedings have been initiated ex officio or upon an application of one of the parties.

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

Answer: As a general rule pursuant to Article 90 para 1 of the CAP before the hearing, the public administration authority shall undertake actions necessary to hold the hearing. In particular, the authority shall summon: the parties to provide explanations, documents and other evidence before the hearing and to appear at the hearing personally or through representatives or attorneys-in-fact, an witnesses and experts to appear at the hearing. The authority shall provide notice of hearing to state and self-governmental organizational units, social organizations and other persons, if their participation in the hearing is justified due to the subject of the hearing. In such a case, the authority shall summon them to participate in the hearing or to submit statements and supporting documents before the hearing.

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

Answer: According to Article 91 of the CAP the summons shall indicate the date, venue and subject of the hearing. Parties, witnesses, experts and state and self-governmental organization units, organizations and other persons summoned to participate in the hearing shall be summoned in writing or in the form of electronic document. If it is probable that, in addition to the parties summoned and already participating in the proceedings, other parties that not known to the public administration authority may be concerned with the matter, the notification of the date, venue and the subject of the hearing shall be also communicated by means of public announcement or in other manner customarily accepted in the given location or by making the document available in the Public Information Bulletin, on the own website of the relevant public administration authority. Additionally, notification about hearing the date of the hearing shall be set a manner that the service of the summons and the announcement on the hearing take place at least 7 days prior to the hearing.

It should be pointed out that the invitation raises the obligation to appear under the sanction specified in Article 88 para 1 of the CAP. However, the notification, leaves the participant to evaluate the participation in the hearing. The adopted solution indicates the aspect of who and when determines the interest of these entities at the hearing, if it is done by the body, then it should immediately call without notice to participate in the hearing, if the individual decides about the interest, just the notification itself constitutes a sufficient legal title to make a statement.

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 CAP does not introduce neither the system of preclusion nor the discretionary power of the adjudicating authority. A party who has not cited facts or evidence in proceedings before the first instance administrative authority, may cite them in proceedings before the second instance authority or may defend its interests in extraordinary proceedings, requesting the resumption of proceedings under Article 145 para 1(5) of the CAP.

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?

A party deprived, even if for reasons not attributable to the authority, to participate in the first-instance proceedings, may seek protection of its rights by means of two measures - appeal or request for reopening proceedings. Lack of the party's participation in the proceedings before the first instance does not deprive him of her the status of the party in the appeal proceedings. There is no competition between these measures. As long as the decision of the first instance has not taken the last resort, the non-participating party is entitled to appeal.

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?

Answer: In turn, no appeal can be lodged against the final (not challengeable) decision, and only one can be demanded on the basis of art. 145 para 1 point 4 of the CAP - reopening. In this case, the general premise of applying the institution of the reopening of the proceedings resulting from the Article 145 para 1 of the CAP *ab initio* applies, namely that the matter must be terminated by a final decision.

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

Answer: Article 145 of the CAP allows reopening of the proceedings in a matter concluded with a final decision. The proceedings shall be reopened if a party, not due to his/her fault, did not participate in the proceedings. For reasons specified in this provision the proceedings may be reopened only upon demand of a party. In this context, due to a particularly important interest of a party, the administrative body may initiate the proceedings ex officio also in such matters where, in accordance with the law, an application of a party is required. The authority shall obtain consent of the party thereto in the course of the proceedings, otherwise the proceedings shall be discontinued.

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

- **to be heard (orally or in writing),**

Answer: each party has the right to be heard by a public administration body before a decision is issued because that may adversely affect its situation. Each party have the right to opt out of the hearing before an individual decision is issued if the immediate decision is absolutely necessary due to the public interest or because of the serious risk associated with the delay. If the hearing should take place after the decision, which has been issued, unless there are very valid reasons against it. The public administration body justifies the inclusion of these reasons and is required to provide evidence in support of its justification.

Each party has the right to be notified on the main issues decided by the public administration body and the main arguments and their justifications, so that the party can effectively express its position in the case and exercise its rights of defense. The party must be given adequate time to respond after receiving notification. The public administration body sets clear deadlines for answering. The public administration body is free in terms of the form and con-

tent of the hearing. It includes the choice: whether the hearing should be oral or written, or allow the confrontation.

Deciding on the manner of exercising this freedom, the public administration body takes into account several aspects the objectives of legislation, legal provisions, the importance of the person's interests, the importance of additional procedural guarantees to protect the interest of the person and the costs of granting such specific procedural guarantees.

The complex proceedings means an administrative procedure in which EU and Member State authorities or administrations of different Member States have different functions that are interdependent. Such proceedings may also be considered as a combination of two administrative proceedings that are directly related to each other. The right to be heard must be respected at every stage of the proceedings submitted with the participation of the EU and the Member States leading to a decision being taken in a specific way. The implementation of this right depends on the division of responsibilities in the decision-making process. In the case of a complex proceeding in which the EU administration body issues a decision, it is obliged to comply with the procedural requirements.

- **to be advised by the competent authority concerning the relevant procedural rights,**

Answer: During the proceedings, administrative bodies are obliged to inform and explain to the parties of the factual and legal circumstances pertaining to the case (Article 9 of the CAP). The right to information is also provided for by the European Administrative Code, which in Article 10 para. 3 states that if necessary, the official serves the unit with advice on a possible way to proceed in the case regarding the desired resolution of the case.

The parties have the following rights related to be advised by the competent authority:

- to be given information on all questions related to the procedure in a fast, clear and understandable manner,
- to communicate and to complete, where possible and appropriate, all procedural formalities at a distance and by electronic means,
- to be notified of all procedural steps and decisions that may affect them.

Public authorities shall promote the provision of updated online information on the existing administrative procedures, wherever possible and reasonable. Priority shall be given to application procedures. Such information may include, among other things: a link to the applicable legislation in its consolidated version, a brief explanation of the main legal requirements and its administrative interpretation, a description of the main procedural steps, the indication of the authority competent to adopt the final decision, the indication of the time-limit for the adoption of the decision, the indication of remedies available, a link to standard forms that

may be used by parties in their communications with the public authority within the procedure. The information shall be presented in a clear and simple way.

- **to submit documents,**

Answer: Yes. The parties can submit documents in the course of proceedings.
Due to Article 75 para. 1 of the CAP, anything that may contribute to clarifying the matter and that is nit violation of the law may be admitted as evidence, in particular documents, witness testimony, expert opinions and inspections may constitute evidence.

- **to have access to the file, including documents submitted by other parties,**

Answer: According to the provision of the Article 73 para 1 of the CAP, the party has the right to access to the case files, and to make notes and copies. This right remains also after the proceedings are concluded.
Nevertheless, according to the Article 74 para 1 of the CAP, Article 71 will not be applied to case files protected as classified secret information with clause "confidential" or "strictly confidential" an to other files which the public administration authority excluded due to important state interest.

The refusal to enable the party to review the case files, to make notes and copies, to certify such copies or issue certified copies can be effected by means of an order which is subject to complaint (Art. 74 para. 2 of the CAP).

- **to call witnesses or to initiate other gathering of evidence,**

Answer: The public administration body relies on such evidence, which after consideration is necessary to establish the facts of the case. It may, under the conditions set out in the above-mentioned provisions, collect information of any kind, hear parties, witnesses and experts or collect statements of parties, experts and witnesses in written or electronic form, obtain documents and records.

In order to fulfill the obligations regarding evidence set out in substantive law relevant for a given sector, the public administration body may request a hearing of the party or providing all necessary information. Each party can oppose this request. The parties may propose witnesses and experts. Additionally, parties may produce evidence that they deem appropriate. They shall assist the competent authority in ascertaining the facts and circumstances of the case and shall be given a reasonable time-limit to replay to any request of cooperation, taking into account the length and complexity of the request and the requirements of the investigation. Where the administrative procedure may lead to a penalty, the parties shall be reminded of the right against self-incrimination.

- **to be provided with a copy of the final decision,**

Answer: According to the Article 109 para 1. of the CAP, the decision shall be delivered to the parties in writing or by means of electronic communication.

- **to file a claim in the administrative proceedings?**

Answer: Yes. A claim (complaint) may be filed by a party against orders issued in the course of the proceedings but only if the CAP provides so (Article 141 para. 1 of the CAP). According to Article 123 of the CAP, in the course of proceedings the authority issues orders. They may concern the particular issues which arose in the course of proceedings, but they do not conclude the matter as to the merits, unless the provisions of the CAP provide otherwise (see Article 113 of the CAP).

b) Or do different categories of parties to the administrative proceedings have different rights? If so, please provide information about the most important differences!
(cf. Art. 9, 11, 14, 15 EP-Res.; Art. III-15, III-23, III-24 ReNEUAL)

Answer: In administrative proceedings subjected to the principle ex officio, there is no legal possibility, nor the need to distinguish between the plaintiff, the defendant, or the main or incidental intervener. Any entity that has a legal interest or an obligation that requires concretization through a decision to use applicable law and a competent administrative body is a party to proceedings with the same procedural position. Each of the proceedings has the same scope of procedural rights and obligations, and the same authority conducting the proceedings also has the same scope of rights and obligations towards each party, and even - it cannot differentiate it, because it would lead to doubts of proceedings resulting from violation of the principle of equality of the party. The only exception is made in the provisions of the Code in favor of entities with the rights of a party whose participation in the proceedings is not legitimate in their own legal interest or obligation. They have only the procedural position of the parties, which enables them to fulfill their official or statutory duty.

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: Some authors in academic discussion perceive the negative effects of the lack of administrative institutions on the grounds that in the civil proceedings there is enable protection of the interests of various types of third parties. (see for instance, I. Lipowicz, A. Agopszowicz, gloss to the judgment of the Supreme Administrative Court of 19 January 1995, case no. I SA 1326/93) This institution is intended to enable a third party to participate in the process between two parties to protect the legal interest which one of them has. Therefore, the third party is not a party to the proceedings; it is only a legal interest in ensuring that the decision is for the benefit of one of the parties.

- The institution could prove to be helpful in administrative matters. In the administrative proceedings there is a need to ensure protection of entities remaining with one of the parties. Often demanding protection for them in order to the settlement in a proceeding provides for the benefit of one from the party.
- In the light of the absence of a legal construction similar to a third party, the problem of qualifying the various entities as a party or persons having a factual interest is solved *ad causaum* in relation to a specific type of administrative case. It should be outlined the insufficient protection of third parties in the course of administrative proceedings[1].

In polish judicial jurisprudence and scientific approach it cannot be found a unified position in this matter. There are two main perspectives: either granting the status of a party to the entity (which makes it become participant in the proceedings) or deny it this status, giving it a category of the interested persons[2].

The 2017 revised provisions of the CAP stipulate that if the subject of the administrative proceedings is to impose on a party an obligation, to limit or to revoke a party's right in a matter where doubts remain as to the meaning of a legal norm, such doubts shall be resolved in favour of the party, unless it is rendered impossible due to conflicting interests of the parties or interests of third parties which are directly affected by the outcome of the proceedings (Article 7a of the CAP) or the uncertain doubts about the factual presumption (Article 81a of the CAP), these provisions shall not apply if important public interest, including essential state interest, and in particular interest relating to state security, defense or public order so requires and to personal matters of functionaries and professional soldiers.

[1] W. Chrościelewski, J.P. Tarno, *Postępowanie administracyjne i przed sądami administracyjnymi,* Lexis Nexis, Warszawa 2016, s. 95 – 96). [Administrative proceedings and proceedings before administrative courts]
[2] A. Skóra, *Współuczestnictwo w postępowaniu administracyjnym*, Wolters Kluwer, Warszawa 2009, s. 54 – 55).[Co-participation in administrative proceedings]

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: To illustrate this issue, the following may be mentioned:

1) Limiting the parties to proceedings in the matter of a building permission, beside the investor, to the owners, perpetual usefructuary or property managers, located in the area affected by the facility, as specified in Article 28 para. 2 of the Construction Law, cannot Article 28 of the CAP, if in accordance with that provision, the status of the party should have also other entities, such as those referred to in Article 5 para. 1 point 9 of the Construction Law.

   Given that the provision of Article 28 para. 2 of the Construction Law introduced a restrictive group of parties to proceedings for a building permission, it constitutes an exception to the rule resulting from Article 28 of the CAP. This exception should be analyzed by means of an extended interpretation, unduly limiting the rights resulting from Article 28 of the CAP. According to W. Chrościelewski, the provision of Article 28 para. 2 of the Construction Law does not introduce any significant subjective limitations in relation to the group of entities designated on the basis of art. 28 of the CAP. Nevertheless, according to this author, the most controversy in administrative practice was caused by the question of having a legal interest in matters related to building permits[3]. The enterprise (operator) to which the transmission equipment referred to in Article 49 § 1 of the Act of 23 April 1964 Civil Code (i.e. 2016, item 380, as amended) it should be interpreted as an entity performing public utility tasks. This means that entity is a party to proceedings for a building permission, if these devices are in the area of the object's impact. (see for instance, judgment of the Supreme Administrative Court of 13 January 2017, case No. II OSK 1005/15).

2) Going under the preview to the systemic internal interpretation of Article 262 of the Act of 29 August 1997 - Tax Ordinance (Journal of Laws of 2005, No. 8, item 60, as amended, hereinafter: the Tax Ordinance), it should be indicated that pursuant to Article 133 para 1 of the Tax Ordinance the party to the tax proceedings is a taxpayer, a payer, collector or their legal successor as well as third parties referred to Article 110-117(a) of the Tax Ordination. This categories of parties due to their legal interest, de-

[3] W. Chrościelewski, *Konsekwencje prawne złożenia odwołania przez osobę, która nie jest stroną postępowania administracyjnego*, ZNSA 2016, nr 5, s. 22). [Legal consequences of submitting an appeal by a person who is not a party to administrative proceedings]

mand the activities of the tax authority, to which the tax authority acts or whose legal interest.

It should be pointed out that the reference made in Article 116 of the Tax Ordination leads to the conclusion that the legislator treats the members of the board of a limited liability company listed in this provision as third parties. This means that member of the management board of the company it is not treated as a taxpayer, but as a third party who in specific circumstances may be a party to the proceedings.

In the case examined, the party was itself a company - a legal entity that acts through its organs, but these bodies are not a party to the proceedings. The chairman of the company's management board (the complainant) is not a taxable person in the case, neither the payer nor the collector or their legal successor, or a third party referred to in the provisions of Article110 to Article 117(a) (see for instance, judgment of the Supreme Administrative Court of 8 December 2014, case No. II FSK 3111/14).

3) It should be assumed that the person who participated in the administrative proceedings and did not lodge a complaint, if the outcome of the legal proceedings concerns its legal interest, acquires the status of a participant in proceedings with the rights of the party and related procedural rights (including, inter alia, the law bring legal remedies) only if the proceedings are aimed at the substantive examination of the complaint.

Interlocutory appeal against the order to reject the complaint, brought by a person who acquires the status of a participant in the proceedings on the parties' rights, in accordance with art. 33 para. 1 Act of 30 August 2002 Law on Proceedings before Administrative Courts (consolidated text: Journal of Laws 2018, item 1302; hereinafter: LPAC), only when the complaint is successful, should be considered inadmissible (see for instance, order of the Supreme Administrative Court of 19 May 2016, case No. II OZ 512/16).

II. Determination of Facts and Discretionary Powers

1. a) **<u>In administrative proceedings</u>, 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: In the scope of evidence proceedings, pursuant to the Article 77 para 1 of the CAP imposing on the public administration body the obligation to exhaustively collect and consider the evidence. The principle of objective truth (Article 7 of the CAP) results in the order of

the public administration body to take all steps necessary for a thorough explanation of the facts of the case. This provision imposes on the public administration body conducting the proceedings the obligation to collect exhaustively the evidence and then exhaustive consideration of the entirety of this material in order to correctly determine the actual basis of the administrative decision. The obligation of public administration authorities resulting from this principle that exhausts the examination of all factual circumstances related to a specific case, in order to create its actual picture and obtain the basis for the correct application of the law[4]. The principle of objective truth results from the authority conducting the administrative proceedings, the duty to determine which evidence is necessary to establish the facts of the case and the obligation to carry out such evidence ex officio. According to Article 56 (2) of the Act of 2 April 2009 on Polish citizenship (consolidated text - Journal of Laws 2017, item 1462), the person and entity requesting confirmation of possession or loss of Polish citizenship are obliged to attach documents confirming the data and information contained in the application, unless obtaining these documents is difficult to overcome.

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: From the content of art. 77 para 1 of the CPA it follows that the taking of evidence is based on the principle ex officio. This means that the public administration body is obliged ex officio to take all steps aimed at the exhaustive gathering of evidence. Therefore, this provision determines that the burden of conducting evidence proceedings lies within the public administration authority and cannot be passed on to the party. Therefore if the party submits incomplete evidence, the body is obliged to supplement it on its own initiative.

The administrative decision cannot be based on an alleged factual situation, unsettled in administrative proceedings, whose truth the party contradicts, and the public body's consideration of the whole body of evidence and its comprehensive assessment in accordance with the requirements of the provision enclosed in Article 80 of the CAP is possible only after exhausting all evidenced in the course of the administrative proceedings evidence of relevant factual circumstances.

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

[4] W. Dawidowicz, *"Ogólne postępowanie administracyjne. Zarys systemu",*Warszawa 1962, p. 108 . [General administrative proceedings. Outline of the system]

Answer: According to Article 61 of the CAP the administrative proceedings are initiated at the party's request or ex officio. Any action on a request refers to cases where the legal situation of an individual is determined within the scope of its powers related to the disposition of its legal interest, and action from the office may be initiated when it concerns imperious determination of an entity's duties, restriction or withdrawal of rights. Such a definition of two different forms of initiating proceedings means that if administrative proceedings were initiated by submitting an application (Article 61 para 3 of the CAP), such character must have until the end. In the proceedings initiated on the request, the party itself delineates the boundaries of the case being examined. The decision of the body must refer directly to its request and cannot contain a decision on the subject on which the party has not applied. In the course of office proceedings, the framework and boundaries of the case examined are determined by the administrative body.

Two administrative proceedings cannot be conducted in parallel on the same subject because one was initiated at the request and the other ex officio. It should be pointed out that the provision of Article 61 § 1 of the CAP does not exclude the possibility of conducting ex officio proceedings, if during the proceedings conducted on request, the authority collected evidence and materials justifying the need to initiate proceedings ex officio.

An application initiating administrative proceedings, in case of doubts as to the content of the request, constitutes the basis for the authority to make arrangements in the scope of the actual will of the person from whom it comes. This proceeding is accompanied by proper and comprehensive information on the factual and legal circumstances that could affect the determination of rights and obligations subject to administrative proceedings. The transition of the authority to action from the office, when the matter requires an application is acceptable only when a particularly important interest of the party is involved. The public administration body is obliged to comply with the provisions governing the initiative to start administrative proceedings.

In cases where the action is only possible at the request of the violation of the principle of complaint, it constitutes a significant violation of the provisions of procedural law subject to the sanction of invalidity of the decision (Article 156 § 1 para 2 of the CAP). The provisions of Article 154 and 155 of the CAP do not provide for exclusivity in the form of initiating proceedings, but this does not mean that the application may be ignored when it was submitted. A change in the action from the application form to action from office cannot result from the change in the legal basis of the authority's decision, or the claim that the claim is obviously unfounded, as assessed by the authority.

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: In administrative proceedings, the principle in relation to the burden of proof rests on whoever derives legal effects from a specific fact. This means that the obligation to look for evidence of holding not only on the administration authority, but also on the side, which in its well-understood interest should demonstrate the care of presenting evidence. Therefore, the evidence initiative must be manifested in this respect not only by the authority, but above all by the party to the proceedings. One cannot disregard, because of a sufficient explanation of the case, evidence presented by the party, when the existing evidence proceeding leads to conclusions contrary to the new evidence presented by the notifying party.

From the provision of Article 78 para 2 of the CAP indicates that the administrative authority may not take into account the request of the party to take evidence, if it was not made in the course of evidence or at the trial, only if the request relates to circumstances already established by other evidence. However, if the evidence requested by the party is relevant to the case, even the belated request should not be dismissed. The public administration body is not competent to refuse to take evidence because the party does not point to specific facts which it requests to prove through the evidence provided.

Article 78 para 1 of the CAP provides that the party's request for proof should be taken into account if the object of the evidence is the relevant circumstance. Since the applicant has not indicated any specific facts and circumstances to which witnesses are to be heard, the authority is obliged to ask for clarification as to which facts are to be proven by these means of proof. It must, pursuant to this Article, assess whether these circumstances are relevant to the resolution of the case or whether they are irrelevant.

The role of public administration bodies is not to search for reasons that would allow a negative recognition of the party's application, but to conduct and interpret the demands and demands made by the parties in a way that will fully enable them to fulfill their rights set out in substantive law standards and will be consistent with the real intent of the party. In this context of the administrative procedure, the principle of resolving any doubts in favor of the individual is generally accepted.

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

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

Answer: Apart from the obligation to inform about the change of address during the proceedings Article 41 of the CAP and the obligation to appear in person at the request of Article 51 of the CAP, does not indicate the obligations of the parties to the proceedings. It is significant that many times it accentuates their rights, such as the right to notify the venue and date of evidence from witnesses, experts or inspections at least seven days ahead of schedule, and the right to participate in these proceedings in accordance with Article 79 para 1 and 2 of the CAP.

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)?

Answer: The administrative body is obliged to exhaustively collect and consider all material, but the party is not exempt from co-operation in explaining the facts, since failure to prove a specific fact may lead to a decision unfavorable to it. The party to administrative proceedings cannot feel relieved from cooperating with the authority in fulfilling the duty of collecting evidence, especially if not documenting a specific fact depends only on the will of the party, and the authority has no legal instruments authorizing to replace the lack of action by the applicant.

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

Answer: If the party refuses to provide the document requested by the authority from which he has a certain right, the authority, if it is unable to otherwise determine the circumstances resulting from this document, may refuse the party's request, and such refusal does not violate the law and does not give the court grounds for the annulment of the contested decision. It is possible to obtain negative effects for a party, in the case of not providing specific evidence, after the term has been marked on the party to provide this evidence.

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)

Answer: The Polish legislator imposes a number of obligations on the authority conducting the proceedings. It does so in Article 9 of the CAP the obligation to provide the parties with the opportunity to participate actively in each study of the proceedings, Article 35 of the subsequent Labor Code (duties related to compliance with deadlines) or Article 66 of the CAP. Article 77 para 1 of the CAP imposes an obligation on the public administration body to exhaustively collect and consider all evidence, besides the obligation to inform about the change of address during the proceedings (Article 41 of the CAP) and the obligation to appear on the summons (Article 51 of the CAP). However, it does not indicate the obligations of the parties to the proceedings.

It is significant that it also emphasizes their rights, such as the right to notify the place and date of evidence from witnesses, experts or inspection at least seven days before the date and the right to participate in these acts of conduct expressed in Article 79 para 1 and 2 of the CAP. What is more, the party may even in certain situations apply to the administration body with demands. From that aspect of this Article, it draws attention, to the party's request for evidence to be taken into account, if the object of the evidence is an event relevant to the case (Article 78 of the CAP). The public administration body has a fairly limited possibility of disregarding the request, i.e. only if it has not been made in the course of evidence or at the hearing or if the request relates to circumstances already envisioned by other evidence, unless they are relevant to the case[5].

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 structure of administrative recognition is expressed in the possibility of choosing legal consequences in the determined facts of the case. Therefore, administrative recognition does not consist in the freedom of the administrative body in the scope relating to determining the facts. Acting under administrative discretion, the public administration body is obliged to thoroughly examine the facts and reflect the outcome of the evidence proceedings in the case files. A decision issued in the conditions of administrative recognition cannot be an arbitrary decision, but must result from a comprehensive and in-depth consideration of all the facts of the case and in a proper manner balancing the legitimate interest of the party and

[5] J. Supernat, B. Kowalczyk, *Kodeks postępowania administracji Unii EuropejskiejInstytut,* Wydawniczy Europrawo, Warszawa 2016, pp. 241-242 [Code of Administrative Proceedings of the European Union]

the public interest. In this respect, it is also desirable to operate with fully objectified criteria for assessing cases of a given type.

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

Answer: The administrative body is required to make a comprehensive assessment of the circumstances of the specific case based on the analysis of all evidence, and the position expressed in the decision justified in the manner required by the CAP.
The obligation to collect all evidence by a public administration body should be understood as meaning that the authority either does so on its own initiative if it considers it necessary for the case to be properly dealt with, or gathers evidence in the case files provided by the parties if they are relevant to the case. Only the collected evidence provides the body with a basis for its free assessment. This evaluation, so that it does not turn into a free trial, must be made in accordance with the norms of procedural law and observing the rules of this assessment:

- it should be based on evidence gathered by the body, subject to the exceptions provided for in the law,
- the evaluation should be based on a comprehensive assessment of the whole body of evidence,
- the body should assess the significance and value of evidence for the pending case. The authority may refuse to believe certain proofs, but only after comprehensive consideration, explaining the reasons for their assessment, reasoning, as a result of which the body determines the existence of facts should be consistent with the principles of logic (see for instance, the judgment of the Supreme Administrative Court of 17 May 1994, case No. SA / Lu 1921/93).

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

Answer: This concept is not defined in the CAP, but in many cases, the norms of administrative law impose on public administration bodies the obligation to cooperate with other authorities when issuing decisions by seeking their opinions, giving consent or agreeing. Provisions of substantive law impose an obligation to cooperate in the process of recognizing and resolv-

ing a case, causing that the determination of the facts of the case will refer to the principle of objective truth. The sanction for violation of the provisions on the obligation to cooperate is contained in Article 145 para 1 point 6 of the CAP, introducing a sanction for the annulment of the decision in the procedure of resumption of proceedings.

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

Answer: Generally, polish jurisdiction does not provide specific rules of evidence for administrative fact finding. Public administration body in administrative proceedings has to collect and consider all evidence of the case. According to the Article 80 of the CAP, a public administration authority evaluates on the basis of all evidence collected whether a given circumstance has been proven.

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

Answer: The main principles of administrative proceedings include:

• obligation to make an assessment based on the entirety of the evidence,

• the obligation to collect and consider the full evidence in the case,

• the obligation to allow the party to participate in the evidentiary proceedings and to comment on the evidence carried out. A party to the right to participate in evidentiary proceedings, may ask questions for the witnesses, experts and parties, and may submit explanations.

The CAP states also the factual presumption in the Article 82 – according to this provision, a factual circumstance may be presumed proven if a party had the opportunity to present his / her opinion as to the collected evidence (unless circumstances specified in Article 10 (2) of the CAP occurred – that is public administration authorities may depart from the principle of hearing of the parties if the matter must be decided without delay due to threat to human life or health or due to threatening irreparable material damage).

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

Not applicable – see answer 4 a.

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

Answer: The particular significance of evidence proceedings is set out in case-law. Properly conducted investigation allows only to assess whether the relevant provisions of substantive law have been correctly applied in the case. Such a function for the authoritarian concretization of the norms of substantive law is also currently underlined in court jurisprudence. Viola-

tion of Article 7 in conjunction with 77 para 1 of the CAP is the basis for the administrative court to apply the measure. Repeal of the contested decision or order. This type of violation of the law is the cause among the most frequent infringements in the ongoing administrative proceedings.

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)

Answer: Article 75 § 1 of the CAP states that anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence. In particular documents, witness testimony, expert opinions and inspections may constitute evidence. These rules of administrative proceedings determine what is admissible evidence, which can be used at proceedings and become part of the permanent record, and inadmissible evidence, which may not be mentioned at trial or viewed or considered by the administrative body. *A contrario,* it shall includes the phrase *fruit of the poisoned tree* is usually used to refer to an exclusionary rule of evidence which, in polish jurisdictions renders inadmissible evidence which has been obtained illegally.

It should be pointed out that the order of listing evidence in reference to Article 75 para 1 of the CAP does not create a hierarchy. Additionally, the acceptance by the authority without a clear statutory basis that certain facts can only be proved by strictly defined evidence would be contrary to this provision. In the course of the proceedings, public administration authorities should accept as evidence all that may contribute to the clarification of the case, and is not contrary to the law. Never the less, the authority is not bound by any restrictions as to the binding force of individual evidence, as each evidence may be contested in the course of the proceedings by another proof (see for instance, judgment of the Voivodship Administrative Court in Warsaw of 21 February 2012, case No. VI SA / Wa 1949/11). However, the jurisprudence emphasizes that if the authority can use direct evidence in the case, replacing them with indirect one is a violation of provisions of the CAP. For example: a private document cannot replace evidence from a witness (see for instance, the judgment of the Supreme Administrative Court in Warsaw of 14 May 2013 r., case No. II OSK 991/12).

In the administrative proceedings, the parties were limited to making notes from conversations with the neighbors of the party and they were not heard as witnesses. In the course of hearing a witness, there may be disclosure of relevant circumstances that go beyond the

written note or statement (see for instance, the judgment of the Voivodship Administrative Court in Szczecin of 27 June 2007, case No. II SA / Sz 1034/06).

It should also be taken into account that in an administrative proceeding there is no obligation to hear the party (see for instance, the judgment of the Voivodship Administrative Court in Warsaw of 23 June 2010, case No. I SA / Wa 526/10). Proof from the hearing of the parties may be carried out in the alternative only if, after exhaustion of the evidence or due to their lack, there remain unexplained facts relevant to the resolution of the case (Article 86 of the CAP).

5. <u>In court proceedings</u>, who is responsible for the presentation and investigation of facts and evidence?

a) The court or the parties?

Answer: As a rule, the court is responsible for examination of the correctness of the explanatory proceedings carried out by the public administration body. The court examines the compliance of the decision with the law (legality) and does not conduct the evidence proceedings. The court takes into consideration the established facts and the state of the law that exists at the time when the decision was issued. Therefore, the court relies on evidence produced during the administrative proceedings.

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

Answer: According to the Article 54 para 2 of the LPAC the administrative authority whose action, failure to act or excessive length of proceedings has been challenged, is obliged transfer the complaint, together with complete and ordered case files and the response to the complaint, to a court within thirty days of its receipt.

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: According to Article 134 para 1 of the LPAC court shall determine a case within its limits while not bound by the charges and requests of the complaint and the legal basis. The court may not issue a decision in disfavour to the complainant, unless the court finds that there has been a violation of law resulting in the declaration of invalidity of the challenged act or action. A complaint against written interpretation of the provisions of tax law issued in an individual case, a protective tax opinion or a refusal to issue a protective tax opinion may be grounded only on the allegation of an infringement of procedural provisions, erroneous interpretation or erroneous assessment as to the application of a provision of substantive law. In

that last case administrative court shall be bound by the charges of the complaint and the legal basis relied on.

The court recognizes on the basis of the case file, and the exception is admissible only when the body that carried out the public administration did not send the files of the case. In such a case, at the request of the complainant, the court will hear the case on the basis of a written copy of the complaint, if the factual and legal state presented in the complaint does not raise reasonable doubt.

Faulty determination of the facts constitutes the basis for assessing the illegality of other acts or actions subject to judicial review. In the CAP and in the Tax Ordinance a ban has not been introduced to include in the review investigation phase new evidence and new factual circumstances. Thus, the court recognizes on the basis of the files of the case, which means that the court examines the case on the basis of the facts that existed on the day the action was taken, inactivity or lengthy proceedings. Therefore, the court does not take into account the facts that arose after taking action. This leads to a limitation of the proceedings conducted by the court. However, the court may ex officio or at the request of a party can decide on taking additional evidence from the documents if it is necessary.

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: As indicated above, the court does not conduct the evidence proceedings. There is one exception to this general rule. Article 106(3) of the LPAC creates the possibility for conducting limited evidential proceedings based on documents . However, two requirements must be fulfilled in order to conduct such proceedings. These are as follows: (1) it is necessary to clarify substantial doubt; and (2) evidence proceedings will not extend excessively the proceedings on the case.

The court does not determine the facts of the case or evaluate the evidence, but assesses the correctness of the investigation conducted by public administration bodies.

The administrative court examines whether during the administrative proceedings:
- all circumstances relevant to the (challenged) decision were disclosed;
- all circumstances have been taken into account by the authority when issuing the decision;
- complete evidence was collected;
- how the evidence and facts were assessed (see for instance – judgment of the SAC of 12 April 2007, case No. I FSK 379/06).

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: No applicable. The LPAC do not provide for any written procedures within the meaning assumed in complex factual evaluations like the EU concept of technical discretion.

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

Answer: not applicable.

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: not applicable.

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: The concept of initiating proceedings is determined by which entity applying for the request or the administrative body, should have the right to make an assessment, with legal effect in the form of initiating proceedings, whether the demand to settle a particular matter has a legal interest. In this respect, the normative concept of a party to administrative proceedings is of key importance for a public administration body.

Decoding the above-mentioned assessment, is a measure of the discretion exercised by it in the scope of initiating proceedings. The concept of discretionary power was expressed in Article 61 para 2 of the CAP, the provision of this Article indicates the possibility of the administrative authority initiating proceedings in a case in which proceedings are initiated in accordance with the applicable provisions at the party's request. This solution provides examples of discretionary power at every stage of the application of law:

- in the form of the discretion of administrative bodies,
- so-called the interpretation gap, which entails the formulation of the scope of application of this standard by the not-sharp concept, the particularly important interest of the party,
- at the stage of free evaluation of evidence on the basis of which the reasons for initiating the procedure expressed in this way are proven.

The sphere of discretionary power vested in administrative authorities with respect to initiating administrative proceedings depends directly on the concept adopted by the party to the proceedings. Acceptance of the subjective concept of a party to proceedings results in binding administrative bodies with a request to initiate proceedings brought by an entity that claims to protect its legal interest in administrative proceedings.

The legal norms that can be decoded from the provisions of the CAP refusing to initiate proceedings on the adoption of an objective concept imply that the administrative authorities take actions that underlie the elements of discretionary power at the stage of interpretation of the law and the free assessment of evidence. The existence of such standards results in a real threat of violating the procedural rights of entities convinced that there is a legal interest on their side that deserves legal protection in a sphere beyond effective judicial control.

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

Answer: According to the provisions of the Polish Constitution, the rationale of reduced controls exercised by the administrative courts results from the control nature of the functioning of administrative courts, and the essence of their action amounts to issuing a ruling on the legality of the act, actions, inactivity or excessive length of the body within the limits of the material jurisdiction prescribed by statute. The activity of administrative courts contributes to shaping the sum of currently applicable rights or obligations of individual entities operating within the administrative law, and thus formulates the existing network of administrative and legal relations at all times[6]. For this reason, the task faced by administrative courts is, of course, to protect the established legal order, but its primary role is to safeguard the individual's freedoms and rights in its relations with the public authority.

Generally, the model of functioning of the administrative courts adopted in the Polish legal order provided courts with cassation powers, not the competence to make substantive decisions. The latter lies within the competence of the public administration authorities and the courts cannot replace them in this matter. For this reason, interfering with the courts in the area reserved for administration activities is a kind of deviation from the adopted assumptions. Accepting by the courts of the competences of the body to settle the matter would go

[6] J. Zimmerman, *Z podstawowych zagadnień sądownictwa administracyjnego* [w:] *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005*, red. J. Góral, R. Hauser, J. Trzciński, Warszawa 2005, s. 492 – 493).[From the basic issues of administrative judiciary]

beyond the defined constitutional framework for the administrative courts to control the activities of public administration[7].

According to the Article 145 para 1 (1) a-c and 2 of the LPAC the court, granting the complaint against an decision or order, shall:

1) set aside the decision or order in whole or in part, if it finds that there has been:

a) a violation of substantive law, that have affected the outcome of the case,

b) a violation of law which provides the basis to reopen administrative proceedings,

c) other breach of procedural provisions, if it would have substantially affected the outcome of the case;

2) find that the decision or order is invalid in whole or in part,

if there exist grounds specified in Article 156 of the CAP (grounds for the declaration of the decision invalid) or in other provisions;

3) find the decision or order to be issued in violation of law, if there exist grounds specified in the CAP or in other provisions.

In case of the Supreme Administrative Court, with some exceptions it may find a cassation appeal justified and as a result may reverse the judgment subject to review in whole or in part and remand the case for re-examination to the court that has issued the judgment (Article 185 of the LPAC).

However, since the Act of 9th April 2015 on the amendment of the LPAC entered into force (15th August 2015): the Supreme Administrative Court has possibility to examine the cassation appeal on its merits if it considers that the essence of the case has been sufficiently clarified (Article 188 of the LPAC provides that "In the event that a cassation appeal is granted, the Supreme Administrative Court shall, annulling the challenged decision, hear the appeal if it finds that the substance of the case has been clarified sufficiently").

The voivodship administrative courts (courts of first instance) have been granted the power of adjudicating on the merits – if the authority does not observe the court's obligation to issue a decision or order within a time limit specified by the court, the court will, at the party's request, issue a decision on the merits, if this is allowed by the circumstances of the case.

According to Article 145(a) of the LPAC in the case when the court finds that there has been a violation of substantive law, that have affected the outcome of the case or finds that the decision or order is invalid in whole or in part and the circumstances of the case so

[7] B. Adamiak, *Rozgraniczenie właściwości sądów w polskim systemie prawnym* [w:] *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005*, red. J. Góral, R. Hauser, J. Trzciński, Warszawa 2005, s. 10 – 11). [The delimitation of jurisdiction in the Polish legal system]

justify, the court shall oblige the authority to render a decision or order within a specified time limit, indicating the manner in which the case should be handled or determined.

If the decision or order is not rendered within the time limit specified by the court, the party may lodge a complaint, requesting that a decision be rendered whereby it is declared whether or not the right or obligation exists. The court shall render a decision on this matter if the circumstances of the case allow.

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

Answer: see answer 7 b.

d) Do they prefer to focus on procedural aspects?

Answer: see answer 7 b.

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: not applicable.

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: Not applicable.

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

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

Answer: According to the Article 7 of the Constitution, the organs of public authority shall function on the basis of, and within the limits of, the law. Therefore the question of the determination of facts of a case by the administration is in details regulated by the statutory, subconstitutional law.

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

Answer: There is no constitutional provision regarding explicite the possibilities of the administration to enjoy discretion, but the constitutional limitation of the discretionary powers

of the public administration is the principle of proportionality (Article 31 para 3 of the Constitution).

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

Answer: The constitutional standards of control to be applied by the administrative courts result from the Article 184 of the Constitution. This provision implies that the Supreme Administrative Court and other administrative courts (voivodship administrative courts) exercise (to the extent specified by statute) control over the performance of the public administration, which shall also extend to judgments on the conformity to statute, of resolutions issued by the authorities of local self-government and normative acts of territorial authorities of government administration.

The limits of the competences of administrative courts were encoded directly into the Consitution, although according to Article 177 of the Constitution, "the common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts".

The constitutional guarantee of effective judicial remedy results from the Article 2 of the Constitution (*Rechtsstaat* clause – "state ruled by law" clause) and from the Article 45 (1) – the right of access to a court.

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: The subject of administrative discretion was often undertaken in monographic studies. It may be recalled the position of B. Wojciechowski. *Dyskrecjonalność sędziowska*[8]. A theoretical study - collective work edited by T. Stawecki *Dyskrecjonalność w prawie*[9] . The

[8] B. Wojciechowski. *Dyskrecjonalność sędziowska. Studium teoretycznoprawne,* [Judicial discretion. Legal theory study], Toruń 2004.
[9] T. Stawecki *Dyskrecjonalność w prawie* [Discretion in law],Warszawa 2010.

previous studies concern, however, the discretion embodied in the theory and philosophy of laws, with particular emphasis on discretionary power.

It should be emphasized that in addition to administrative courts, the admissibility of using a different pattern of control of discretionary decisions than the criterion of legality was drawn to the Supreme Court. In a judgment of 7 June 2010, the Court shared the view that a judicial review of the decision underlying the principle of administrative recognition depends on the analysis of individual measures in terms of proportionality, effectiveness, expediency and equity in the severity of the measure used, but also taking into account the public interest and just interest of citizens (see for instance, judgment of the Supreme Court of 2002, case No. III RN 105/00, OSNAPU, No. 2, item 30).

The Constitutional Tribunal in its judgment of 13 October 2008 indicated that any violations at the stage of applying the law of constitutional limitation of law should be subject to control by means of general administrative proceedings and court-administrative proceedings (see for instance, the judgment of the Constitutional Tribunal, case file K16 / 07, OTK-A 2008, No. 8, item 136).

The academic discussion touched mainly upon the three perspectives:

- General issues referring closely to public administration activities. Studies on the correlation between the concepts of discretion and decisive loops. The considerations refer to decision-making delays occurring at the stage of establishing administrative law. This approach reveals the relations between discretion and general principles of European law, such as the principle of transparency or the principle of good administration, and the fundamental principle of a democratic state ruled by law in Article 2 of the Constitution.
- The issue of discretion in substantive administrative law. Norms of the law of substantive administrative contain many authorizations to act in a discretionary manner, which is wrongly equated with administrative recognition. The discussed aspects of discretionary power concern the Construction Law, planning and spatial development, economic activity, public procurement, social insurance, public and local government, and Environmental Law.
- The concept of discretion in the light of the case-law of administrative courts. In this aspect rises the issue of the admissibility of judicial-administrative control over the decisions of public administration bodies taken within the framework of broadly understood discretionary power. This matter in question is particularly important in Polish administrative law from the perspective of the effectiveness of protection of citizen's interests

in relation with the activities on the part of public administration body. Both in the jurisprudence of administrative courts and in the doctrine, the principal aim is to expand the control over discretionary activities of the public administration in order to ensure the fullest possible implementation of subjective right to court of the citizen against unilateral actions of administrative bodies[10].

The views of individual representatives of legal doctrine show far-reaching distinction, justifying the continuation of research on the discretion of administrative activities. In the doctrine, the main postulates refer to the perspective of analyzes organizing terminological issues and aiming at establishing individual types of discretionary measures, especially when considering the need for a differentiated approach to control of these activities.

Pursuant to amendment of the CAP - the Act of 7 April 2017 amending the Act - The Code of Administrative Proceedings and Certain Other Acts (hereinafter: the Amending Act) the CAP‘s provisions brings the most far-reaching reform of the Code since 1980.
The amendments introduced by the Amending Act included, first and foremost, the general principles of administrative proceedings, the regulation concerning measures to counteract excessively lengthy proceedings of the administrative body, as well as explanatory proceedings (in both instances). The most important aspects related to administrative recognition are indicated in the following Articles:

- Article 7a of the CAP, *in dubio pro libertate* a principle of benefit of doubt as the interpretation of legal norms. If the object of administrative proceedings is to impose an obligation on a party, to limit or to revoke a party’s right in a matter where doubts remain as to the meaning of a legal norm, such doubts shall be resolve in favour of the party, unless it is rendered impossible due to conflicting interests of the parties or interest of third parties which are directly affected by the outcome of the proceedings. These provisions shall not apply if important public interest, including essential state interest, and in particular interest relating to state security, defense or public order so requires and to personal matters of functionaries and professional soldiers.
- Article 7b of the CAP - principle of appropriateness, proportionality.
- Article 8 of the CAP - principle of deepening trust.
- Article 13 of the CAP - principle of amicable resolution of disputed matters
- Article 81 of the CAP - factual presumption- factual circumstance may be presumed proven, if a party had the opportunity to present his opinion as to the collected evidence,

[10] K. Ziemski, M. Jędrzejczak, *Dyskrecjonalność w prawie administracyjnym*, Wydawnictwo Naukowe UAM, Poznań 2015. [Discretion in administrative law]

unless according to Article 10 para 2 the matter must be decided without delay due to a threat to human life or health or due to threating irreparable material damage.

- Article 106-106 a of the CAP - co-operation of authorities.
- Chapter 8a of the CAP - settlement without notice by the authority.
- Division VIII A of the CAP - European Administrative Cooperation, Article 260a Rules of assistance to authorities of other Member States of the European Union .

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: To illustrate this issue, the following may be mentioned:

- An important approach to administrative recognition was presented in the judgment of the Supreme Administrative Court. In the light of this judgement an administrative body operating under the substantive law providing for discretionary character of the decision is obliged in accordance with the principle of Article 7a of the CAP settle the matter in a manner consistent with the legitimate interest of the citizen, if it does not stand in the way of social interest, nor does it exceed the possibility of the administrative authority arising from the rights. This interpretation of administrative recognition means that the body does not have complete discretion when making the decision. This view has become a determinant of looking at the problem of administrative recognition for years, and is also unknown to current case law (see for instance, the gloss to the judgment of the Supreme Administrative Court of 11 June 1981, case file SA 820No/81, ONSA 1981, No. 1, item 57.)
- The rules applied in the case of public administration law-making acts concerning the administrative use of administrative discretion draw the courts attention to the commitment of the administration authorities to loyalty to the citizen they provided information. Additionally, the citizens' actions shall be taken in the trust of the law and deserve legal protection from the state authorities.

  The entitlement which a citizen receives in connection with issuing by an administrative body an act presenting the use of administrative discretion has a guarantee that his legal institution will not be determined in a less favorable manner than indicated in the legisla-

tive act. (see for instance, the judgment of the Supreme Administrative Court of 3 October 1997, case file No III SA 1360/97).

- The administrative body has the freedom to refer to non-legal assessments to fill the concept of important taxpayer's interest and public interest with concrete content. Subjective feeling of a taxpayer who applies to the authority for relief pursuant to art. 67a § 1 of the Tax Ordinance must therefore be reflected in legal norms, the interpretation of which was left to the authority tax.

  Even if the authority determines that there is a significant interest of the taxpayer or the public interest justifying the granting of relief, then the content of the provision of art. 67a § 1 of the Tax Ordinance and the phrase *may* be used in it means that the body has no legal obligation to cancel arrears. The administrative recognition should be interpreted in categories of the authority, despite the identification of the important taxpayer's interest justifying the granting of relief, in relation to fact that the administrative body has the right to refuse to grant it.

  Judicial review perspective of Article 67a para 1 of the Tax Ordinance comes down only to the assessment of whether the authority has investigated the case regarding non-legal referrals, as well as whether it collected and considered all evidence. The court's control may only concern the correctness of the evidence proceedings carried out by the tax authorities and the conclusions reached by them as to whether the facts of the case are filled with the not-clear important taxpayer's interest and public interest. As part of its discretion, the administrative body selects the legal consequences of the established facts.

  There is no legitimate position that a reduced taxpayer's ability to pay, which was created before the tax relationship was established, will always be prompted by the authority to grant a tax relief pursuant to Art. 67a para 1 of the Tax Ordinance. (see for instance, the judgment of the Supreme Administrative Court of 16 July 2013, case No. II FSK 2148/11)

- The court allowed the opportunity to assess the rationality of the views expressed in the grounds of the decision as a reference criterion for integration into the applicant's rights and for the purposes that may be achieved as a result of this interference. The discretionary decision should meet the requirement of compliance with substantive law and procedural rules, but also take into account the criterion of the rationality of the authority's interference in the legal sphere of the citizen (see for instance, the judgment of the Voivodship Administrative Court in Warsaw of 26 March 2013, case file No VII SA / Wa 2672/12).

- Proceedings regarding granting relief in the form of cancellation of tax arrears, initiated by the taxpayer's application, oblige the tax authority to analyze the actual state of affairs from the point of view of the occurrence of conditions under Article 67a para 1 of the TO In the outlined normative context, it is contrary to the principle of free assessment of evidence, expressed in Article 191 of the Tax Ordinance, should be considered the practice of assessing evidence, which is based on emphasizing the importance of one piece of evidence while ignoring or diminishing the weight of others, because this kind of assessment will be detached from the whole body of evidence, will be incomplete (see for instance, the judgment of the supreme Administrative Court of 4 November 2016, case No. II FSK 2964/14).
- There are some limits of administrative recognition within which the tax authority may move, making a decision following the condition of "important taxpayer's interest" or "public interest" referred to in Article 67a para 1 of the Tax Ordinance. The crossing of these legal borders takes place, among others, when the choice of a decision-making alternative has been made:

  (-) with a gross violation of the principle of justice;

  (-) due to the inclusion of obviously irrelevant criteria (trivial) or irrational;

  (-) on the basis of false premises (arguments that are untrue)

  (see for instance, the judgment of the Supreme Administrative Court of 2 March 2016, case file No II FSK 2474/15).

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?**

First of all, the court must prove if all claimants within the court proceedings have legal standing. In case of M and F, that were participants to the administrative proceedings run by S regarding the construction permit for the construction of a commercial building on the plot of land owned by A, the question is rather clear – both entities received from S also copy of the decision containing an accurate instruction on the right to appeal to the administrative court within one month.

In case of P. it is controversial if his organization has legal standing because we do not know if it is nature protection organization, if one of its statutory goals is nature protection and if the previous administrative proceedings run by S. required public participation of such an organization. If it is not the case the P. would have no legal standing. Also O. would not have legal standing.

In case of the objection raised by F and M that A's project does not fit into the landscape, that is a question if the landscape in the given area is protected in qualified form of landscape or nature protection provided by EU or domestic law. We do not know if such a circumstances occur in the given case.

Besides the objections of F and M seems to be to general. In case of objections of F. the court could find them relevant if the given project of A. would have impact on concrete legal interest and rights of F (property rights).

That is a question if M's allegation that it feels itself impaired in its exclusive municipal planning competence is justified. M. would have to prove that S. violated the statutory legal provision constituting the basis of his competence in the given case to issue a construction permit for the construction of a commercial building at a location on the edge of the built-up area of municipality M.

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 ac-**

tion 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?

In case of O. it is a question, if the court will allow the O. to participate in the administrative court proceedings. In Polish law nature protection organizations may declare the willingness to participate in administrative proceedings requiring public participation and in administrative court proceedings if one of its statutory goals is nature protection.
The possibility of the participation of O. in given administrative court proceedings would be directly connected with the question if the previous administrative proceedings run by S. required public participation.

When it comes to M statement regarding development plan for the area concerned in Polish situation the new development plan would have impact first of all on future legal situations and not for already previous decided matters.

To assess the question of the risk for the red kite is not the competence of the administrative court in Poland, because the Polish administrative court has limited competence to decide on the merits of the case. It is the competence of the administrative authority. The court would rather asses if the procedure leading to the issuing of EIA was legally correct. The court can express his doubts regarding the correctness of the EIA in the guidelines that are binding for the administrative authority in case the court repeals the challenged decision and sends the case back to the administrative authority.

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?

Wind farms are qualified by Polish and EU regulations as projects that can significantly affect the environment. Therefore, they may be subject to an environmental impact assessment. Administrative proceedings regarding permit under pollution control law for the con-

struction of a small wind farm may lead also to the conclusion that there is no need to conduct an EIA.

If the administrative court would have doubts as to the impact of the project on the environment, in Polish situation it could send back the case to administrative authority whereby the court should formulate guidelines regarding further proceedings run by the authority (regarding lack of the sufficient impact assessment on environment or Natura 2000 area).

When it comes to M statement regarding development plan for the area concerned in Polish situation the new development plan would have impact first of all on future legal situations and not for already previous decided matters.

To give more detailed answer on both questions within case study we would need more factual and legal details regarding main case and modified case.

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[11]:

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[12]. 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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[11] 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).

[12] 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.