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ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

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Answers to questionnaire: Estonia

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

Answers to the Questionnaire
Supreme Court of Estonia

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,

(***YES***, see below APA § 11 section 1 p. 1 and 2)

- 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),

(***YES***, see below APA § 11 section 1 p. 3)

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

(***YES***, see below APA § 11 section 2)

- other administrative bodies?

(**YES**, see below APA § 11 section 1 p. 4)

Estonian Administrative Procedure Act (APA)[1] § 11 enumerates the participants in proceedings. According to § 11 section 1 APA the following are participants in an administrative proceeding:

1) a person applying for the issue of an administrative act or the taking of a measure, or a person who makes a proposal for entry into a contract under public law (applicant);
2) a person at whom an administrative act or measure is directed or to whom an administrative authority makes a proposal for entry into a contract under public law (addressee);
*3) a person whose **rights or obligations** the administrative act, contract under public law or measure **may affect** (third person);*
4) an administrative authority which, according to an Act or regulation, is required to submit to an administrative authority which hears the matter its opinion on or approval for issue of a legal act or for taking of a measure.
*(2) An administrative authority may involve **other persons** and bodies whose interests may be affected by an administrative act, contract under public law or administrative measure as participants in proceedings.*

In comparison to *cf.* Art 4 (f) EP-Res., in Estonian law instead of "*party*" the term "*participants in an administrative proceeding*" is used. By this, the "*participants*" is defined as openly as in Art 4 (f) EP-Res. The main difference is that pursuant to Estonian law an administrative authority may be a party as well.

The other difference between the regulation of Art-s III-2 (3) and (4), III-25 ReNEUAL and Estonian APA is that APA does not regulate "*interested public*". Notwithstanding the "*interested public*" is not defined in APA, the regulation of open proceedings aims for the participation of the interested public and therefore the requirements for notification of open proceedings, display of the draft of the legal act or application, submission of proposals and objec-

[1] Entry into force 01.01.2002; available in English at: https://www.riigiteataja.ee/en/eli/523012018001/consolide.

tions in open proceedings as well as hearing of the matter at a public session are regulated (see §§ 46–50 APA).

There are no special restrictions or requirements concerning **associations or non-governmental organisations**. Associations or non-governmental organisations can be parties to administrative proceedings for single case decision-making similarly to all other persons, although there is no specific norm for them. The sphere of parties to administrative proceedings is regulated very broadly.

b) Are the categories of parties to administrative proceedings defined

- in a general codification (i.e. Code of Administrative Procedure,…),
(please see 1.a)
- by reference to other codifications (e.g. Code of Court Procedure,…),
- by custom(ary law),
- by jurisprudence,
Jurisprudence has specified, based on the fairly general wording of APA, in which cases it is obligatory to give certain persons a chance to participate in the proceedings.
- in another way (please explain)?

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!

YES, sectorial pieces make an addition to the categories of parties to administrative proceedings. F. ex. the General Part of the Environmental Code Act (GPECA)[2] stipulates access to justice in environmental matters and the legal definition of a non-governmental environmental organisation as follows:

§ 30. Access to justice in environmental matters
*(1) A person whose right, including the right to the environment meeting the health and well-being needs, has been violated may file **an intra-authority appeal** with the administrative authority in accordance with the procedure provided for in the Administrative Procedure Act or file a claim with the administrative court in accordance with the procedure provided for in the Code of Administrative Court Procedure.*
*(2) If an environmental organisation contests an administrative decision or a taken administrative step in accordance with the procedure provided for in the Code Administrative Court Procedure or in the Administrative Procedure Act, **it will be presumed that its interest is reasoned or that its rights have been violated** if the contested administrative decision or step is related to the environmental protection goals or the current environmental protection activities of the organisation.*

§ 31. Non-governmental environmental organisation
(1) For the purposes of this Act, a non-governmental environmental organisation is:
*1) **a non-profit association and foundation** whose purpose under its articles of association is environmental protection and who promotes environmental protection by its activities;*
*2) an association that is **not a legal person**, but that promotes environmental protection and represents the opinions of a significant portion of the local community on the basis of a written agreement between its members.*
(2) For the purposes of subsection (1) of this section, the promotion of environmental protection also means the protection of the elements of the environment for the purpose of ensur-

[2] Entry into force 01.08.2014; available in English at: https://www.riigiteataja.ee/en/eli/528062018002/consolide.

ing human health and well-being as well as the research and introduction of the nature and natural cultural heritage.
(3) Upon assessment of the promotion of environmental protection, the association's ability to attain its goals set out in the articles of association must be considered, taking into account the activities of the association to date or, upon absence thereof, its organisation structure, number of members and the requirements of becoming a member as laid down in the articles of association.

Also, according to § 9 Planning Act (PA)[3], the planning proceedings are public in Estonia. **Everyone** is entitled to participate in the planning proceedings and, during those proceedings, express his or her opinion regarding the spatial plan. Everyone is also entitled, free of charge, to receive relevant information regarding the planning proceedings and the spatial plan. According to § 127 section 2 PA **the persons whose rights the detailed spatial plan may affect**, as well as persons who have **expressed an interest** in being invited to participate in the preparation of the detailed spatial plan are invited to participate in the preparation of the plan. In instances where the conduct of strategic environmental assessment is mandatory when preparing the plan, persons and bodies that are **likely to be affected** by the significant environmental impact that may be presumed to result from implementation of the plan, or that **may have a legitimate interest** in such an impact, including, through an **organization** that unites them, e**nvironmental non-governmental organization**s, as well as any **foundations** and **non-profit organizations representing the residents of the planning area**, are also invited to participate in the preparation of the detailed spatial plan.

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

In the explanatory letter of GPECA, it is said that the special regulation for environmental organisations was needed **in order to apply the Århus convention and European Law**. It was an important change, because before that the Administrative Court Procedure Act did not contain any particular articles for environmental matters. Before the coming into force of GPECA, the concept of environmental organisations was missing in Estonian law.[4]

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? ***YES/NO*** (see below)
- Is a decision of the administrative authority admitting the party required? ***NO*** (see below)
- Is the administration obliged to qualify potential parties ex officio? ***YES*** (see below)

Pursuant to § 35 section 1 APA administrative proceedings for issue of an administrative act or taking a measure shall commence as follows:

*1) by submission of **an application** to an administrative authority;*
*2) in administrative proceedings commenced on the initiative of an administrative authority, **by notifying a participant** in the proceedings of the proceedings;*
*3) in administrative proceedings commenced on the initiative of an administrative authority, by the performance of **the first procedural act** with regard to a participant in the proceedings.*

[3] Entry into force 01.07.2015, available in English at: https://www.riigiteataja.ee/en/eli/513072018002/consolide.
[4] Explanatory letter of GPECA is available in Estonian at: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/a1cafc27-2f02-448d-8509-8e9fa312a129.

A *decision* by the administrative authority admitting the party is not required. The administration should qualify potential parties in accordance with the investigation principle and the principle of good administration that is mainly elaborated in Estonian case law. In addition, according to § 17 section 1 APA, an administrative authority **has the right to summon persons as participants in proceedings**, witnesses, experts, interpreters or translators.

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

The **principle of investigation** is one of the most important principles in Estonian administrative procedure. This is stipulated in § 6 APA and according to this principle:

*"during proceedings in a matter, **an administrative authority is required to establish the facts relevant to the matter** and, if necessary, **collect evidence on its own initiative** for such purpose."*

Identifying third parties is also covered with this principle. In the case of open proceedings, this is clearly stipulated in § 47 section 2 APA, which obligates the administrative authority to notify the following persons of the commencement of open proceedings:

*1) **the addressee of the administrative act** to be issued by way of open procedure;*
*2) **persons whose rights may be restricted** by the administrative act;*
*3) **the administrative authority** which is required to approve the issue of the administrative act or provide its opinion on the draft thereof, and to the administrative authority the issue of whose administrative act is required for the issue of the legal act by way of open procedure.*

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

YES. In addition to personal notification explained above, in case of open proceedings, planning proceedings, proceedings involving environmental decisions as well as in certain situations in general proceedings **the publication of documents in a newspaper is mandatory**. According to § 31 APA:

*(1) The resolution contained in a document shall be published **in a national daily newspaper or**, in the cases provided by law, **in the official publication Ametlikud Teadaanded**[5] if:*
*1) the document needs to be **delivered to more than one hundred persons**;*
*2) there is **no information concerning the address or e-mail address of a participant** in proceedings or the participant in proceedings **does not reside at the address** known to the administrative authority or if a natural person **does not confirm the receipt of a document transmitted by electronic means** and his or her **actual whereabouts are unknown**, and the document cannot be delivered in any other manner;*
3) an administrative act must be made public and is not subject to publication in Riigi Teataja[6] *(*State Gazette*).*

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)?

[5] Official online publication of the Republic of Estonia, which publishes notices, invitations, summons and announcements; available in Estonian at: https://www.ametlikudteadaanded.ee/.
[6] Available in Estonian and partially in English at: https://www.riigiteataja.ee/index.html.

If a participant in proceedings fails to appear for conduct of a procedural act without good reason, the administrative authority shall **adjudicate the matter without his or her presence** (§ 42 section 3 APA).

If a person who applies for the issue of an administrative act or the taking of a measure fails to appear at a procedural act without good reason, the administrative authority may refuse to review the application and **terminate the proceedings** (§ 42 section 4 APA).

We have neither law nor jurisprudence that would preclude a party from disputing the final decision due to its illegality if they did not participate in the administrative proceedings.

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?** (see below)

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

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

As said in answer 3, there is no formal decision taken for the "*admission as being a party*". However, for example in case of a hearing at session, § 45 section 3 APA provides that:

"*In addition to the representatives of an administrative authority and participants in proceedings, also representatives of an administrative authority exercising supervision over the administrative authority may participate in a session. The administrative authority may permit other persons to participate in the session if no participant in the proceeding objects thereto.*"

So, in this case it is relevant whether the authority considers someone a party or an "*other person*" (but: since in case of environmental decision-making and planning, everyone is entitled to participate in the proceedings, this does not affect such matters).

If someone is indeed refused access to the hearing, they might be able to direct a court action against such a decision. Generally, according to § 45 section 3 of the Code of Administrative Court Procedure (CACP)[7]:

"an action may be brought against a procedural act without contesting the administrative act or administrative measure, if that act or measure infringes the applicant's non-procedural rights independently of the administrative act or measure, or if the unlawfulness of the procedural act would inevitably lead to the issue of an administrative act or the taking of an administrative measure which infringes the applicant's rights."

So **it would depend on the circumstances of the case whether such an action would be admissible**. Generally, if a person has in some way been able to express his/her opinion during the proceedings and has also received an answer to his/her objections, the jurisprudence does not consider it '*fatal*' if some procedural mistakes have been made. So even if the authority wrongfully does not consider the person a party, but still allows him/her to pre-

[7] Entry into force 01.01.2012, available in English at: https://www.riigiteataja.ee/en/eli/512122017007/consolide.

sent his/her opinion and objections, and responds to them, the authority's actions, while illegal, would probably not lead to the annulment of the final act. There is also a list of circumstances where the hearing of opinions and objections of a party is not necessary, so even this might not necessarily lead to the annulment of the act.

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

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

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

There are no differences regulated concerning procedural rights of different categories of parties to administrative proceedings in APA.

The duty of the administrative authority to give explanations is granted **"***to* ***a participant*** *in proceedings or to* ***a person who considers submission of an application****, at the request of the person*" (APA § 36). In comparison to *cf*. Art 14 section 2 EP-Res. only "*parties*" shall receive sufficient information.

Also the right of access to the file in Estonia is more broad than in cf. Art 15 section 1 EP-Res.. Pursuant to § 37 section 1 APA **everyone** (not only parties) has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority. An administrative authority shall prohibit examination of a file, document or a part thereof if disclosure of information contained therein is prohibited by an Act or on the basis of an Act. The main act giving a basis to declare a file or some documents therein classified for internal use is the Public Information Act[8], more specifically its § 35.

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?

Currently, there is no active political or academic discussion. As to the recent legislative reforms see answer to question 2. b).

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

The Supreme Court made on 11.10.2016 a judgment in **case no 3-3-1-15-16**[9], where it is said that an administrative authority shall involve into administrative procedure **every person**

[8] Entry into force 01.01.2001, available in English at: https://www.riigiteataja.ee/en/eli/516102017007/consolide.
[9] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-3-1-15-16.

whose rights may be restricted by the administrative act, when it is possible to foresee it by careful performance of administrative tasks. The restriction of rights should not be evident, it is sufficient when there is **a reasonable suspicion** of that.

The aforementioned decision was made in a case where wind turbines were planned. The Supreme Court noted that this may result in impacts (noise, shadow, *etc.*) on the inhabitants of the immediate vicinity. If the distance between the wind turbines and the immovable belonging to a person is sufficiently small, it must be clear to the local government that building permits may affect the rights of this person. Therefore the local people must at least be **personally informed** about the administrative procedure.

In addition, in its ruling of 16.12.2016 in **case no 3-3-1-87-16**[10], another building case (this time concerning the building of residential houses on the immovable neighbouring that of the applicant), the Supreme Court explained that since the distance between the buildings and the applicant's immovable was **not** such that **a negative impact** on his property **could be excluded**, he should have been notified of the proceedings and **given a chance to express his opinion**. It must be noted, though, that the ruling only concerned standing.

II. Determination of Facts and Discretionary Powers

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

YES, please see answer to question 4. a).

In comparison to *cf.* Art 10 EP-Res. and Art III-13, III-14 ReNEUAL, the wording of the principle of investigation in APA is not so detailed, but generally has the same meaning.

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

YES, pursuant to § 38 section 3 APA, "*a participant in proceedings is required to present evidence to an administrative authority and notify it of facts which are known to him or her and are relevant to the proceedings. Upon failure by a participant in proceedings to perform this duty, the administrative authority may refuse to review the application upon issue of an alleviating administrative act.*"

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

YES. As said above, the failure of the applicant to perform the duty of cooperation is a basis for refusing to review the application. A similar basis does not exist in proceedings initiated *ex officio*.

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

NO.

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

[10] Available in Estonian at: https://www.riigikohus.ee/lahendid?asjaNr=3-3-1-87-16.

projects on application, administrative sanctions, specific sectors of administrative law,…)?

YES, laws regarding specific sectors of administrative law sometimes include different and much more specific rules related to fact finding. For example, a very thorough regulation concerns environmental impact assessment (based on the relevant directives).

As another example, in Taxation Act (TA)[11] **the principle of investigation** is stipulated little differently from general principle of investigation in APA. § 11 TA stipulates as follows:

*(1) When verifying the correctness of the payment of taxes and making an assessment of tax, a tax authority is required to take into consideration **all facts relevant to the matter**, including facts which increase and facts which decrease the tax liability.*
(2) A tax authority shall decide on the need to perform acts in order to verify the correctness of the payment of a tax and on the type and extent of the acts and shall collect evidence which is necessary to make a decision in the matter. When ascertaining facts relevant from the point of view of taxation, a tax authority is not only restricted to the requests and evidence submitted by participants in the proceedings.

Also, **the obligation of the taxable person to cooperate** is regulated in TA. According to § 56 TA:

*(1) A taxable person is required **to notify a tax authority of all facts** known to the taxable person which are or may be relevant for taxation purposes.*
*(2) A taxable person **shall keep records of facts** relevant for taxation purposes, provide explanations, submit returns and other evidence and preserve such returns and evidence for the term prescribed by law. If a mandatory type of evidence is provided by law, a taxable person may only use such type of evidence as proof.*
(3) A taxable person shall not prevent a tax authority from performing procedural acts.

In state supervision proceedings, the general rule is stipulated in § 23 section 3 of the Law Enforcement Act (LEA)[12], which states:

"*A person **is required to tolerate state supervision measures** applied to him or her on the basis of and pursuant to the procedure provided by law.*"

The Supreme Court has explained in recent case law (judgment of 20.04.2018 in **case no 3-15-443**[13]) that this provision only places on the person **an obligation to passively tolerate the supervisory measures**, not actively cooperate with the authority. To require active co-operation from the person, a specific provision is needed. The disturbance that is the basis of issuing a precept must be proven by the authority.

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)?

YES, please see question II 1. b).

[11] Entry into force 01.07.2002, available in English at: https://www.riigiteataja.ee/en/eli/516042018001/consolide.
[12] Entry into force 01.07.2014, available in English at: https://www.riigiteataja.ee/en/eli/529062018002/consolide.
[13] Available in Estonian at: https://www.riigikohus.ee/lahendid?asjaNr=3-15-443.

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

Refusing to review the application, see please question II 1. b). In addition, negative consequences may arise in certain specific fields based on special provisions. For example, in tax proceedings, the refusal of the taxable person to fulfil his/her duty to cooperate may have certain negative consequences to him/her, if the tax authority has shown justified doubt.

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

As for potential addressees of the final decisions, see please question II 1. e). There are no other categorical differences stipulated.

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?

In APA there are no strict procedural rules. In special administrative laws, of course, there may be several special provisions. The only special provision in APA which may be connected to fact finding is § 16 on approval and opinion of another administrative authority. In some administrative procedures an approval or opinion of another administrative authority is required for adjudication of an application. In this case both of the authorities have a duty for fact finding in their field. There is a provision § 16 sec 2 APA according to which *unless another administrative authority refuses to grant approval within a designated term or extends such term, approval is deemed to be granted. Unless another administrative authority provides its opinion within a designated term or extends such term, the application may be adjudicated without the opinion of the other administrative authority.* In aforementioned cases the fact finding may also be constrained.

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

It depends on the nature of concrete proceedings. In certain special fields of administrative law, there are rules limiting the evidence by rather formal criteria, but in others (usually such cases where the authority has a wider scope of discretion in deciding as well), the authority is quite free in its evaluation of facts (limited, of course, by the general principles of administrative procedure).

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?

YES. If the rules for cooperation are not already provided by law, the **professional assistance between administrative authorities according to** Administrative Co-operation Act (ACA)[14] is possible. On the basis of and pursuant to the procedure provided for in this Act, an administrative authority shall issue an act or take a measure within the limits of its competence at the request of another administrative authority in order to support the performance of a duty of that administrative authority (professional assistance). (§ 17 section 1 ACA). §

[14] Entry into force 01.07.2003, available in English at: https://www.riigiteataja.ee/en/eli/529062018001/consolide.

18 ACA regulates the bases for application for and provision of professional assistance as follows:

(1) ***An administrative authority may apply for professional assistance from another administrative authority if****:*
1) the issue of an administrative act or taking of a measure necessary for the performance of a particular administrative duty is not within the competence of the administrative authority;
*2) i****nformation*** *which the administrative authority does not have or is unable to ascertain is required for the performance of a particular administrative duty;*
3) ***documents or other evidence*** *in the possession of the other administrative authority are required for the performance of a particular administrative duty;*
4) the administrative authority is unable to issue an administrative act or take a measure for other reasons;
5) the use of professional assistance is ***economically significantly more advantageous*** *than not using professional assistance.*

According to recent case law of the Supreme Court (judgment of 07.06.2018 in **case no. 3-16-586**[15]), the authority cannot ask for professional assistance, if this authority has a **duty to react on its own** pursuant to law.

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

The only general regulation is in § 38 APA. We do not have more specific rules of evidence for the fact finding in administration law.

APA § 38. Evidence
(1) In administrative proceedings, an administrative authority has ***the right to require*** *participants in proceedings and other persons* ***to provide evidence and information*** *which is known to them and on the basis of which the administrative authority establishes the facts relevant for adjudication of the matter.*
(2) Explanations of participants in proceedings, documentary evidence, physical evidence, on-the-spot visit of inspections, testimonies of witnesses and opinions of experts may serve as evidence.
(3) A participant in proceedings is required to present evidence to an administrative authority and notify it of facts which are known to him or her and are relevant to the proceedings. Upon failure by a participant in proceedings to perform this duty, the administrative authority may refuse to review the application upon issue of an alleviating administrative act.

The provisions in particular areas of administration may be more specific. So, Taxation Act regulates, that:

"***evidence in tax proceedings is any information collected with regard to the matter****, including information, documents and things obtained from taxable persons, third parties and state, local government and city agencies, facts established by observation and expert opinions.* ***A tax authority shall decide****, according to the functions imposed on the tax authority by law and the right of discretion, which evidence needs to be collected in a particular matter* (§ 59 section 1 TA).

For assessment and analysis of risk of violation of acts concerning a tax, the tax authority for state taxes has the right to receive, on the basis of a justified request, ***free data from the state database*** *concerning the persons related to the assets in the ownership or possession of the persons, concerning the business activities of the persons and the nature and logistics of the goods and services related thereto. The administrator of the database shall notify the*

[15] Available in Estonian at: https://www.riigikohus.ee/et/lahendid/?asjaNr=3-16-586/29.

tax authority for state taxes of the facts which make it impossible to execute the request or due to which it is necessary to extend the term for execution of the request (§ 59 section 1^1 TA).

*A tax authority has **the right to examine any documents** relating to the economic or professional activities of a taxable person or to the payment of taxes by a taxable person, and to take inventory or control measurements of goods, materials, other assets, work performed and services provided* (§ 59 section 2 TA).

For another example of taxation procedure, there is a rule in § 49^1 section 2 TA pursuant to which:

"*upon calling a person to the authority for giving **oral explanations** the procedural act may be conducted in the office rooms of the tax authority or over the phone or by means of such technical solution that the person conducting the proceedings and the person giving explanations, who are located in different administrative units at the same time, can see and hear each other directly by live transmission. The corresponding reference shall be made into the record of oral explanations*.

The Supreme Court has stated recently that video conferences between two offices of the tax authority are also in line with the requirements of § 49^1 section 2 TA (judgment of 07.06.2018 in **case no. 3-14-50103**[16]).

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

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

In general, administrative procedure is governed by the following principles (§§ 3–6 APA): **proportionality**, **choice of form** (the authority shall determine the form of procedural acts and other details of administrative procedure on the basis of the right of discretion), **purposefulness**, **efficiency**, **avoiding superfluous costs and inconveniences to persons**, **promptness**, **equality of electronic operations to written**, and **the principle of investigation**.

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

This topic has not been in the middle of academic discussion or analysed in case law, outside of specific fields of law with their more specific rules.

e) Are there any rules in your national legal order providing for the inadmissibility of certain evidence? If so, please give some details! ***NO***

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

a) The court or the parties?

***Both*.** According to § 38 section 1 p 8 of CACP, an action must, *i.a.*, include a list of evidence which confirms the facts asserted by the applicant, including specific reference as to which evidentiary item is to support which fact. § 59 section 1 of CACP provides that "*unless the law determines otherwise, **a participant of proceedings must prove** the factual assertions on which his or her submissions are founded and, if the court requires, also the facts in relation to which it may be assumed that the participant has access to the corresponding evidentiary items. If submission of the evidence is not possible, the reasons for such impossibility*

[16] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-14-50103/66.

must be shown and the location or possible location of the evidence must be disclosed. However, *where evidence required for a just determination of the matter has not been presented or where insufficient evidence has been presented, the court proposes that the participant of the proceedings on whom it is incumbent to prove the relevant fact present the requisite evidentiary items, or takes evidence itself. When making the proposal, the court explains which facts must be proved"* (§ 59 section 3 CACP). So, while the parties are obliged to prove their claims, **it is the court's duty to explain** to them, if needed, **which evidence is necessary for solving the case** – or, if needed, to collect the evidence itself. Only "*in the case that a participant of proceedings does not present an evidentiary item concerning a fact which he or she is required to prove by virtue of section 1 of this §, and evidence concerning that fact or a rebuttal thereof cannot be obtained by other means, **the court may adopt an assessment of the fact which is adverse to the participant**"* (§ 59 section 4 CACP).

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

While the law does not specify any differences, case law stresses the importance of the c**ourt's duty to explain especially towards the 'weaker' party**, *i.e*. most often a natural person not using legal representation. In addition, if the authority failed to fulfil its duty to investigate during administrative proceedings, **the burden of proof** to show the illegality of the administrative act will not be on the applicant in administrative court proceedings.

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!

In administrative court proceedings, "*evidence means **any information** which appears **in a format that the law foresees** in relation to proceedings, and on whose basis, in accordance with the procedure provided in the law, the court ascertains the presence or absence of facts that serve as foundation for any claims or objections made by participants of proceedings, as well as any other facts material in order to determine the matter justly* (§ 56 section 1 CACP). For more specific rules regarding types of admissible evidence, the CACP refers to the Code of Civil Procedure (CCP)[17]. CCP provides rules on the testimony of witnesses (§ 251 *etc* CCP), statements of parties given under oath (§ 267 *etc* CCP), documentary evidence (written document or other document or similar data medium which is recorded by way of photography, video, audio, electronic or other data recording and can be submitted in a court session in a perceptible form, § 272 *etc* CCP), physical evidence (§ 285 *etc* CCP), inspection (§§ 290–292 CCP) and expert opinion (§ 293 *etc* CCP).

*"The court takes guidance from the law in objectively **assessing the evidentiary items** of a matter **in their fullness** and in relation to all of their aspects, and decides, acting in all conscience, whether or not an assertion made by a participant of proceedings has been proved"* (§ 61 section 1 CACP). "*The court does not regard any evidentiary item as possessing **predetermined strength** in the matter. The court assesses the evidentiary items as a body of evidence and considers relations between evidentiary items"* (§ 61 section 2 CACP). Even facts which have been established in the reasons of an earlier (final) court decision are assessed by the court as part of the body of evidence (§ 61 section 4 CACP; only the operative part of an earlier court decision with the same parties is binding). The court **may** refuse to admit an evidentiary item and return it, if it has been submitted after the expiration of the time-limit set by the court, it has been obtained as a result of the commission of a criminal offence or breach of a fundamental right, the evidentiary item is not accessible, or no reason has been given for the need to present or take the evidence (§ 62 sections 1 and 3 CACP). So, **the court has a wide margin of discretion**.

[17] Entry into force 01.01.2006, available in English at: https://www.riigiteataja.ee/en/eli/506022018001/consolide.

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

The court is not bound by the fact finding of the administrative authority. "*When it enters a judgment in the matter, the court assesses the evidence and determines the legislative act which falls to be applied in the matter and whether the action is to be granted"* (§ 158 section 1 CACP). "*Unless the law provides otherwise, the court ascertains any fact of the matter as that fact stands at the time of entering the judgment. The court assesses the lawfulness of an administrative act or measure by reference* ***to the time that the act was issued or the measure taken"*** (§ 158 section 2 CACP; an exception to this is in § 158 section 3^1 that concerns the assessment of decisions refusing to grant international protection as of the time of entering the judgment). The scope of judicial control is more limited in case of **discretionary decisions**, where § 158 section 3 CACP provides: "*In assessing the lawfulness of an administrative act issued or an administrative measure taken as a result of the exercise of a discretionary power, the court also verifies compliance by the administrative authority with the limits and objective of the power, and with other rules which govern the exercise of discretion. The court does not conduct a separate assessment of the expediency of a discretionary decision. When verifying the lawfulness of an administrative act or measure, the court does not engage in an exercise of the discretionary power in the place of the administrative authority.*"

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)?

NO. The only area with a very limited judicial control that has so far been specified is discretionary decisions, especially **various assessments** such as exams or, for example, architectural contests, as well as **prognosis decisions**, where mostly procedural aspects (including reasoning, if it is required) are controlled.

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

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? (see above)

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?

NO. It has only been stressed in jurisprudence that discretionary decisions require a more thorough reasoning.

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

Mainly, it has been justified by the separation of powers – *i.e.* **the court cannot 'step into the shoes' of the administration** and make a discretionary decision in the authority's stead.

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

Sometimes, especially when the administrative act or activity does involve a **large margin of discretion** and is based on a complex assessment of facts or a prognosis.

d) Do they prefer to focus on procedural aspects?

YES, and that is partly supported by § 158 section 3 of CACP (see above).

However, during trainings, some judges have also confessed reluctance as well as difficulty to, for example, **use expert opinions** to assess facts differently from the authority, especially when each party submits an expert opinion and they do not match in content (this is especially relevant in environmental cases, but not only). Thus, the judges feel more confident when dealing with purely legal, procedural aspects.

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

NO.

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? (see above)

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

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

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

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

YES. According to § 3 of the Constitution of the Republic of Estonia[18], governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. The **separation and balance of powers** is provided in § 4 of the Constitution. Everyone is entitled to **protection by the government and of the law**, and the law protects everyone from arbitrary exercise of governmental authority (§ 13 of the Constitution). It is **the duty** of the legislature, the executive, the judiciary, and of local authorities, **to guarantee the rights and freedoms provided in the Constitution** (§ 14 of the Constitution). Everyone whose rights and freedoms have been violated has **the right of recourse to the courts** (§ 15 of the Constitution). From §§ 14 and 15 of the Constitution, the right to an effective judicial remedy and to due process in a reasonable time have also been derived.

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?

NO, at least not in general. Changes in some laws concerning specific fields of administrative law may sometimes limit or, *vice versa*, widen the scope of discretion of the relevant administrative authorities.

[18] Available in English at: https://www.riigiteataja.ee/en/eli/521052015001/consolide.

The only recent change concerning the scope of judicial control was the addition of § 158 section 3^1 to CACP that enables both courts and the administration **to take into account possible new facts** arisen during the court proceedings in cases concerning international protection.

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

In **case no 3-3-1-88-15**[19], a natural person asked for the annulment of a detailed plan which allowed the construction of two wind generators about 400m from her home. One of the issues was the question if the noise from a nearby mine would cumulate with the noise of wind generators. The person had already raised the issue in the planning procedure, but it was not handled in neither the planning decision nor in the noise assessment. The Supreme Court said in its judgment of 08.08.2016 that since the issue had not been investigated in the planning procedure, **the administrative authority had violated the duty to investigate**, and therefore, **the burden of proof** to show that there was a cumulative impact was not on the applicant – it was enough to raise **a reasonable doubt**. Another point under dispute was a document the applicant had presented during court proceedings which contained the noise measurements of similar wind parks in a nearby area. The document showed that while the noise prognosis using the same methodology as in this case had shown a noise level below the allowed limit values, the actual noise had significantly exceeded the noise limit values. The first and second instance courts had considered this document inadmissible, because the measurements had taken place after the planning decision had been made, so the authority could not have taken them into account. However, the Supreme Court found that since this **document could be considered as evidence** of the untrustworthiness of earlier noise prognosis methodology, it should have been accepted. The Court drew a parallel to expert opinions ordered by the court which are similarly created after the planning decision. In this case, the planning decision was annulled by the court, based on several other issues in addition to these, but these are the main points relevant to this question.

In **case no 3-3-1-41-15**[20], there was a dispute between a municipality and the state about the compensation of certain educational costs which were due to an obligation imposed by the state and outside the normal activities of a municipality. Next to the principal discussion on the legal basis of demanding this compensation from the state, the state also argued that the court cannot grant the action including a specific sum that the state had to pay, because the state had a discretionary power in deciding which costs were reasonable. The Supreme Court, in its judgment of 12.01.2016, stated that the determination of the specific sum by the court was permissible. **The court should not interfere into the administrative discretionary powers, but in this case, there was no real discretion**. The question of whether the costs were relevant and had a legal basis could also be checked during court proceedings. In fact, the state had not brought any material objections to the costs in court.

The **case no 3-3-1-51-16**[21] concerned an architectural contest (a design contest in the sense of the public procurement directive) where a winner had been chosen and one of the other contestants disputed this decision. The Supreme Court explained in its judgment of 09.08.2016, that while the contest jury had to rely on the criteria set out in the contest notice in its assessment, **the control of the jury's opinion in court is limited to obvious errors**. Since one of the bases for the assessment of the projects was artistic value, the jury's assessment may contain subjective elements that cannot be reasoned in the same way as

[19] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-3-1-88-15. Summaries in English and French available on JuriFast.
[20] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-3-1-41-15.
[21] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-3-1-51-16.

usually expected in administrative procedure. Court proceedings are a place to resolve legal, not aesthetic disputes. Mainly, the court can interfere into the jury's assessment when it is obvious that the winning work did not correspond to the conditions of contest. In addition, formal and procedural aspects can be checked.

III. Case Study

Questions:

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

M:
According to § 44 sections 4 and 5 CACP, a municipality has standing to protect its rights (including, for example, ownership) or if the administrative act or measure of another public authority significantly hinders or complicates the performance of the duties of the local authority. Thus, it is possible that M has a standing in this case. However, merely the abstract protection of its municipal planning competence is not enough. According to the Supreme Court's ruling of 16.01.2014 in case no 3-3-1-41-13[22], M would have to show that the inability to plan the concerned area as wanted would impair the fulfilment of the municipality's functions (which are defined by law). However, there is no information in this case on to whom the land belongs – if it is owned by the municipality, then it has a standing as any other land owner.

If M's action is admissible, M can only rely on the provisions protecting its autonomy (or ownership rights, if relevant) – in this case, for example if S took M's legitimate interests into account when weighing whether to give the permit – or on the breach of its procedural rights (mainly if M was given the opportunity to present its objections). From the facts presented above, no errors in either of these aspects appear.

F:
Since F is the owner of the neighbouring piece of land, it is likely that he would have a standing if the construction of the commercial building would impair his use of the land he owns. According to the Supreme Court jurisprudence, even a non-intensive impairment of the applicant's rights is sufficient to create a standing.

However, it is doubtful whether his action would be granted. Like the municipality, F can also only protect his own subjective rights when disputing the permit, so his most promising argument would be the disadvantages in managing his soil because of increasing traffic. Only the fact that he did not respond to S's notice does not exclude him from presenting this argument, since S obviously knew of the possible impact on the land F owns already. But since the description above states no procedural errors, we can presume that the environmental impacts of the construction and use of the commercial building were sufficiently investigated and no adverse impacts over the limit values set by law were found; and that his interests were sufficiently weighed when making the decision on the permit. Since the commercial building will be on the edge of the already built-up area of the municipality, the traffic increase most likely will not be such as to disproportionately impact his land use (though this depends on the facts of the case). F's wish to avoid the settlement of commercial companies in his vicinity and the fact that he thinks there are enough of them in the village are probably not protected interests, unless there exists a higher-ranking spatial plan which indeed forbids this area from being used for commercial purposes (designating it as a green area instead, for example).

P:

[22] Available in Estonian at: https://rikos.rik.ee/?asjaNr=3-3-1-41-13.

It does not appear as though the permit impairs P's own rights in any way. As a natural person, he/she cannot bring an action for the annulment of a permit based on the protection of a public interest. Thus, he/she has no standing. However, it is possible that the "Association for Preserving the Traditions" could have a standing to protect the local landscape (this depends on whether the organisation fulfils the criteria of a non-governmental environmental organisation in § 31 GPECA (it is important to note that an association that is not a legal person could qualify as well)). In that case, the court may have a duty to explain to P that he/she could instead bring the action in the name of the association.

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

The mere fact that O was not involved in the proceedings might (though not certainly) lead to the annulment of the permit. § 58 APA provides that the repeal of an administrative act cannot be demanded solely for the reason that procedural requirements are violated upon issue of the administrative act or the administrative act does not comply with the requirements for formal validity if the above-mentioned violations cannot affect the resolution of the matter. However, it is the consistent jurisprudence of the Supreme Court that since the administration has a wide range of discretion in environmental cases, only a lawful, efficient and just procedure can lead to the substantive lawfulness of the environmental decision. Usually, it is not possible to decide in these cases that in spite of the procedural errors the end decision is still substantively lawful. For instance, the Supreme Court has annulled a mining permit due to the lack of publication of the environmental impact assessment report, after substantial changes were made in it, although that was required by law (judgment of 15.10.2013 in case no 3-3-1-35-13[23]). However, since O has only one very specific objection to the permit (risk to the red kite), it may be argued that if that risk had been sufficiently investigated and the determined situation were in accordance with the requirements of the (legislation transposing the) Natura directives, the procedural error would not be fatal. But especially if an expert opinion is submitted which shows otherwise, and if the existence of an eyrie very close to the location of the building is proven, this could also lead to the annulment of the permit due to a substantive error. Asking for an opinion from E based on the new evidence is also a possibility (§ 24 section 1 CACP), though this opinion is not binding for the court.

Modification:

How is the court going to decide on the actions now?

Nothing would change in relation to **M**'s action – M would still need to show that the planned wind farm would impair the fulfilment of M's functions.

In relation to **F**, his standing would largely depend on whether he lives on the neighbouring land, or just uses it for agricultural purposes – it is doubtful how a wind farm could impair him from continuing to use the land for agriculture, but for residential buildings, the noise limit values set by the state are stricter, and in addition, **S** would need to take his interests into account even if it were proven that noise limit values were not exceeded (judgment in case no 3-3-1-88-15, referenced above).

As for **P**, nothing changes.

In relation to **O**, the procedural issue still stands. Supposing that the requirements of the (legislation transposing the) EIA directive were fulfilled, again, the court would need to evaluate based on all evidence gathered (if necessary, ordering an additional expert opinion), whether

[23] Available in Estonian at: https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-35-13.

the assessment by S and the possible disturbance to the red kite are in accordance with the (legislation transposing the) Natura directives.