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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: Latvia

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

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Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

Introduction:

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

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

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

The ReNEUAL draft is a project which has mostly been promoted by European scholars with expertise in European Union law, in various national legal orders as well as in comparative legal studies (http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0). Yet, several legal practitioners, i.a. judges from several member states, have also contributed.

The ReNEUAL draft is available in English, French, German, Italian, Polish, Romanian and Spanish. For the purpose of this questionnaire, Book III (Single Case Decision-Making) is attached as a file in English. You will find links to other language versions on the ReNEUAL-website: http://www.reneual.eu/index.php/projects-and-publications/.

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

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

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

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

decisions having in mind that there might be different standards of review concerning the establishment of the facts and concerning the application of substantial law.

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

I. Parties to Administrative Proceedings: Categories and Legal Positions

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

- addressees of onerous administrative acts / applicants of beneficial acts,
- other individuals (please differentiate, in its case, further, e.g. between individuals claiming subjective rights, concrete legal interests, factual interests, individuals as members of the general public),
- associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements),
- other administrative bodies?

b) Are the categories of parties to administrative proceedings defined

- in a general codification (i.e. Code of Administrative Procedure,…),
- by reference to other codifications (e.g. Code of Court Procedure,…),
- by custom(ary law),
- by jurisprudence,
- in another way (please explain)?

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

Administrative Procedure Law does not exclusively defines “party” as it is in EP-Res. & ReNEUAL. Article 1 (8) of Administrative Procedure Law defines a private person as a natural person, a private law legal person or an association of such persons. According to Article 20 (2) of the Administrative Procedure Law administratively procedural legal capacity must also be recognised in regard to associations of persons if the persons are associated with sufficiently durable linkages in order to achieve a specific purpose and the association of persons has specific procedures for the taking of decisions. According to Article 27 (2) of the Administrative Procedure Law a public legal entity may also be an addressee of an administrative act or it may be affected in actual action cases where it finds itself in a similar situation as a private person and in the specific case is subject to the same legal regulations as private persons.

The categories of parties to administrative proceedings are defined in a general codification and additionally explained by jurisprudence.

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

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

Yes, sectorial pieces of legislation do explain the scope of party in administrative proceedings. Many laws explains various forms of private law legal persons, for example, Commercial Law explains the notion of capital companies, Co-operative Societies Law explains the notion of co-operative societies, Associations and Foundations Law explains the notion of foundations, Article 382 of Civil Law states that the estate is a legal person (an estate is the whole, which comprises all immovable and movable property, as well as transferable rights and obligations, which may be transferred to others and which, at the actual or legally presumed time of death, were owned by the deceased or a person legally presumed dead. In this context the deceased or the person legally presumed dead is called an estate-leaver. An estate is a legal person. An estate may acquire rights and assume obligations).

These categories are not considered as separate categories of parties; they rather fall under the notion of "private law legal persons" which is the rationale itself. That is to say, the sectorial pieces of legislation explain the notion of "private law legal persons".

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

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

According to Article 28 (3) of the Administrative Procedure Law a third party (private person whose rights or legal interests may be infringed by the relevant administrative act or who may be affected by a court judgment in the matter) must be granted the status of a participant in administrative proceedings by the decision of an institution or a court pursuant to the submission of such party. A third party may also be invited to participate in the matter pursuant to the initiative of the respective state institution or the court.

According to Article 28 (3-^{1}) of the Administrative Procedure Law if the status shall be granted to third party which is not identifiable, the judge of the relevant case must publish an invitation to attend the court hearings in the Official Publication Journal of Latvia. Such persons have to apply to a court within three months. If they do not apply, they lose the right to become a party to the relevant proceedings.

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

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

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

Generally, according to Article 28 (3) of the Administrative Procedure Law an institution has a right to invite a third party to participate in the matter on its own motion. In specific sectors of law, for example, environmental law, institutions have the obligation to inform people on specific administrative proceedings. However, as it will be mentioned in the next answer, the court, when it will review the case, has an obligation to identify all the parties which may be affected by its judgment and must invite them to court 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?

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

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

According to Article 76 (1) of the Administrative Procedure Law an administrative act may be disputed by a submitter, an addressee, a third party, a legal entity referred to in Section 29 of the Administrative Procedure Law, as well as by a private person whose rights or legal interests are restricted by the relevant administrative act and who has not been invited to participate in the administrative proceeding as a third party. Moreover, Article 303 (1)(2) (for court of appeal) and Article 327 (3) (for the cassation court) stipulates exceptional cases where a judgment of a lower instance must be set aside and the matter must be sent to a court of first instance to be adjudicated de novo, that is, irrespective of the grounds for the appellate complaint, an appellate

court must by its decision set aside a judgment of a court of first instance and send the matter to the court of first instance to be adjudicated de novo if the court adjudicated the matter in breach of the norms of procedural law which stipulate that participants in the administrative proceeding must be notified of the time and place of a court sitting, or has adjudicated the matter by way of written procedure notwithstanding that the written consent of the participants in the administrative proceeding was not obtained. Thus, the court is under obligation to identify all the parties which may be affected by its judgment. If the court fails to do that, its judgment will be set aside (judgment of the Supreme Court of 12 January 2009, case no. SKA-140/2009).

If the third party to the administrative proceedings is not admitted to the to the administrative proceedings by the competent authority on their request, this decision may be disputed by such person, an addressee or potential addressee to a higher institution but if there is no higher institution or it is the Cabinet of the Ministers, it may be appealed to a court, within seven days after the respective person is given notice of the decision or such person otherwise becomes informed thereof. The decision of a higher institution may be appealed to a court within seven days (Article 28 (5) of the Administrative Procedure Law).

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

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

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

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

Article 145 of the Administrative Procedure Law enumerates number of procedural rights of an applicant and defendant, including those mentioned in this question. Plus, according to Article 28 (4) of the Administrative Procedure Law provisions regarding procedural legal capacity and capacity to act of participants in administrative proceedings apply to third parties. Third parties have the procedural rights of submitters and of applicants with a few exceptions stipulated in this Law.

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?**

At the moment, there is no considerable political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to 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!**

The right of company to request to award the status of third party in case concerning business secrecy protection. Article 19 (3) of Commercial Law stipulates that the company (merchant) has the right to request the protection of business secrecy. That means that the interest of a company to ensure that its own business secrecy would not be available to other companies shall be legally protected (the interest shall be legally protected). Thus, the possibility that the business secrecy may be revealed as a result of the adjudicative court's judgment gives the rise to a possible impairment of the interests of that company. Therefore, such a company shall be granted the status of third party to administrative proceedings (Decision of the Supreme Court of the Republic of Latvia of March 11 2015, case No. SKA-622/2015).

Prerequisites for the recognition of a status of third party to administrative proceedings before a court. To award a person the third party status, the following prerequisites shall be met:

1) the person has the subjective rights;

2) those subjective rights "are" or "may be" impairment as a result of administrative act, actual action or public law contract;

3) and there exist causal link between act of state (action or omission) and existing or possible impairment of his or her subjective rights.

The word "rights" in the Article 28 (1) of the Administrative Procedure Law means subjective rights vested to the third party. But "legal interests" means all the interests of the third party which by means of the legal norm (of private law of public law) (by the Constitution, the law, rules of Cabinet of Ministers or rules of local municipalities) (but not the administrative act) becomes individual interests (Decision of the Supreme Court of the Republic of Latvia of August 8 2013, case No SKA-784/2013).

Loss of a right to appeal the administrative act. If the person has not exercised his or her rights to contest the administrative act, but at the same time the act is appealed to

a court by someone else, the first person who has not exercised his or her rights may not evade initial inactivity by means of the status of third party to the administrative proceedings before administrative court (Decision of the Supreme Court of the Republic of Latvia of 8 August 2011, case No. SKA-820/2011, point 6, the Commentaries of Administrative Procedure Law. Part A and B. Riga: Tiesu namu aģentūra, 2013, p. 340).

II. Determination of Facts and Discretionary Powers

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

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

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

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

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

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

In Latvia, principle of objective investigation generally is being applied towards courts as well as administrative authorities. According to Article 107 (4) of the Administrative Procedure Law in order to determine the true facts of a matter within the limits of the claim and achieve legal and fair adjudication of the matter, the court shall give instructions and make recommendations to the participants in the administrative proceeding, as well as collect evidence on its own initiative (principle of objective investigation). As for administrative authorities, according to Article 59 (1) of the Administrative Procedure Law after initiation of an administrative matter, an institution must acquire information as, in accordance with regulatory enactments, is necessary so that an appropriate decision will be taken. In order to acquire necessary information and to achieve a fair, just and effective outcome of the case, the authority gives the person guiding and suggestions.

According to Article 59 (2) of the Administrative Procedure Law in acquiring information, an institution may:

- use all legal methods, and obtain information from participants in the administrative proceeding and from other authorities,
- as well as by means of the assistance of:
    - witnesses,
    - experts,
    - inspections,
    - documents or
    - other type of evidence.
- If the information needed by an institution is not at the disposal of participants in the administrative proceeding but is at the disposal of another authority, the institution shall acquire the information itself rather than requiring it from participants in the administrative proceeding.

Additionally, according to Article 59 (4) party to the proceedings is obliged to provide evidences which are at their disposal and to present facts which may be decisive in matter.

Rules for determining the facts do not distinguish between administrative proceedings initiated ex officio or by application. However, in some type of cases, for example, tax cases, the case law has explained that the obligation of private individuals to provide the necessary evidence increases proportionally if the very decision-making process happens to be in the interests of the individual. In such cases individuals are obliged to provide facts which are in their interests (the burden of proof on a private individual) to adopt a favourable decision (see Nehl P.H. Principles of Administrative Procedure in EC Law. Oxford: Hart Publishing, 1999, p. 114.-115). Therefore, the role of the applicant in the administrative process cannot be passive and he or she must be actively involved in the collection of evidence. If the applicant cannot gather evidence himself, he may ask the court to request evidence.

There exist different models of fact finding in administrative proceedings, for example,

- The authority gathers evidences ex officio (the first sentence of the Article 59 (1) of the Administrative Procedure Law);
- In order to acquire necessary information and to achieve a fair, just and effective outcome of the case, the authority gives the person guiding and suggestions in gathering evidences (the second sentence of the Article 59 (1) of the Administrative Procedure Law).

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

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

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

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

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

As it was mentioned before, there exists the duty of the competent administrative authority to carefully and impartially investigate the facts of a case. According to Article 59 (1) of the Administrative Procedure Law after initiation of an administrative matter, an institution must acquire information as, in accordance with regulatory enactments, is necessary so that an appropriate decision will be taken. In order to acquire necessary information and to achieve a fair, just and effective outcome of the case, the authority gives the person guiding and suggestions. If the party does not cooperate, the authority adopts the decision based on those facts and evidences which are in its disposal. There are not considerable differences in the duty to cooperate among different categories of parties.

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

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

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

The principle of procedural equity requires institutions and courts, in taking decisions, observe impartiality and to give the participants in the proceedings an appropriate opportunity to express the viewpoint thereof and to submit evidence. An official in respect of whose impartiality there may exist justified doubts must not participate in the taking of the decision.

According to the Article 60 the institution may collect or require the submission of such information as is provided for by the relevant regulatory enactment or is directly necessary for deciding the matter. Other information may be appended to the matter only if it is not possible to separate it from the information necessary to take the decision. An institution may not collect, or use in an administrative proceeding information acquired by illegal methods. Thus, an administration must use only such evidence as is relevant to the matter and are admissible.

There are not specific rules concerning composite investigations.

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

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

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

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

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

Yes, according to the Article 59 of the Administrative Procedure Law in acquiring information, an institution may use all legal methods, and obtain information from participants in the administrative proceeding and from other authorities, as well as by means of the assistance of witnesses, experts, inspections, documents or other type of evidence. If the information needed by an institution is not at the disposal of participants in the administrative proceeding but is at the disposal of another authority, the institution shall acquire the information itself rather than requiring it from participants in the administrative proceeding.

If the necessary information contains information regarding the private life of a natural person (personal identity number, nationality, citizenship, place of residence, marital status, state of health, criminal record, income, property, religious and political opinions or any other information), the institution must explain to the private person the regulatory enactments on which it is based, and the purpose for the acquisition of the information wanted by the institution, as well as whether it is mandatory for the private person to provide the information in accordance with an external regulatory enactment, or the provision thereof is voluntary.

Rationale for the mentioned principles – facilitation of the protection of the rights and legal interests of private persons.

As for the court proceedings, the court must assess the relevance of evidence and the admissibility. According to the Article 151 of the Administrative Procedure Law the court must accept only such evidence which is relevant to the matter. According to the Article 152 of the Administrative Procedure Law the court must admit only such means of proof that are stipulated by law. Facts that, in accordance with law can be proved only by particular evidentiary means, may not be established by any other evidentiary means.

There are no such a specific rules concerning the inadmissibility of certain evidence as it is in criminal law, however, if the administrative case will fall under the scope of criminal case as it is defined by the case law of the European Court of Human Rights, national court may apply criminal law principles.

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

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

a) The court or the parties?

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

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

As it was mentioned before, according to Article 59 (4) of the Administrative Procedure Law party to the proceedings is obliged to provide evidences which are at their disposal and to present facts which may be decisive in matter. Thus, generally, facts and evidences must be presented by the parties. However, according to the Article 112 (1) of the Administrative Procedure Law courts of first instance and of appellate instance must themselves examine the evidence in the matter. According to Article 112 (2) the adjudging of a matter by a court must be based upon the evidence the court has itself examined.

An institution must prove the facts upon which it relies as the grounds for its objections. An institution may only refer to those grounds that have been stated in an administrative act. An applicant, according to his or her capacity, must participate in collecting evidence. However, if the evidence submitted by a participant in an administrative proceeding is not sufficient, the court must collect it on its own initiative.

According to Article 107 (4) of the Administrative Procedure Law in order to determine the true facts of a matter within the limits of the claim and achieve legal and fair adju-

dication of the matter, the court gives instructions and makes recommendations to the participants in the administrative proceeding, as well as collect evidence on its own initiative (principle of objective investigation).

The court must accept only such evidence as is relevant to the matter and must admit only such means of proof as are stipulated by law. Facts that, in accordance with law can be proved only by particular evidentiary means, may not be established by any other evidentiary means.

According to Article 154 of the Administrative Procedure Law court must assess the evidence in accordance with its own convictions which shall be based on comprehensively, completely and objectively verified evidence, and in accordance with judicial consciousness based on laws of logic, findings of science and principles of justice. No evidence must have such predetermined effect as would bind a court. A court judgment must state why preference has been given to certain evidence in comparison with other, and why certain facts have been recognised as proven while other facts as not proven.

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

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

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

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

Generally, national courts within the course of administrative proceedings, while performing its duties, themselves (ex officio) objectively determine the circumstances of a matter and provide a legal assessment of these. As well, courts perform control of the legality and validity of administrative acts issued by institutions or actual actions of institutions within the scope of freedom of action.

Current case law does not provide explicitly limited control in regard to the concept of technical discretion. However, there are number of cases where the court limits itself in control of state institution’s discretion. In such cases, the court does not evaluate the utility of certain decisions of the institution, but rather evaluates if the evaluation

performed by the institution was not manifestly faulty (errors of exercise of discretion). For example, in public procurement cases, particularly concerning tenders of unjustifiably low costs, rivals may argue that the state institution did not agree with their objections that the winning tender offered unjustifiably low costs. In such cases, the court cannot re-evaluate the position (opinion) of the institution that the winning tender will be able to perform its duties. In fact, the court can evaluate only if the institution performed due diligence, that is to say, the institution did not make obvious mistake by not evaluating the capability of winning tender to perform its duties at all (see for example, judgment of the Supreme Court of 16 April 2014, case no SKA-179/2014 (A420652611), judgment of the Supreme Court of 15 April 2014 case no SKA-24/2014 (A420472212)). As well, in civil service cases, the court cannot evaluate the discretion of the institution to determine certain criteria or qualities for the vacant positions (Judgment of the Regional administrative court of 28 May 2014, case no A42-00490-14/15), but in turn can evaluate if there is no errors of exercise of discretion. Similarly, for example, in cases concerning education and exams, the court could not evaluate the correctness of answers (it is up to examiner), but can control the procedural aspects, arbitrariness and observance of principle of equality in such cases.

These cases are subject to the general principles concerning discretionary powers of administrative authorities.

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

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

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

d) Do they prefer to focus on procedural aspects?

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

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?

As it was mentioned in the previous answer, the case law does not provide the concept of technical discretion. However, there are certain examples where there exist reduced controls. The rationale of such reduced controls is not to intervene within the domain of economic or managerial nature. In such cases courts focus on procedural aspects, arbitrariness and observance of principle of equality.

According to the Article 178 (1) of the Administrative Procedure Law a court must order expert-examination in a matter in all cases where special knowledge in science, engineering, art or other sectors is necessary for the determining of facts of significance to the matter. Where necessary, a court must order more than one expert-examination. Expert-examination must be performed by experts of an appropriate expert-examination institution or by other specialists. An expert must be selected by the court, taking into account the views of the participants in the administrative proceeding. Participants in an administrative proceeding have the right to submit to the court questions which, in their opinion, require the opinion of an expert. Questions requiring the opinion of an expert must be determined by the court. The court must give reasons for rejecting questions submitted by the participants in the administrative proceeding.

The reduced standard of control can rather be regarded as a consequence of different institutional competences of courts and administrative authorities. As it was mentioned before, the rationale of such reduced controls is not to intervene within the domain of purely economic or managerial nature of respective institution.

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)?

There are no constitutional provisions governing the questions mentioned above. However, there are number of administrative law and general law principles. For example:

- Principle of Observance of the Rights of Persons - in administrative proceedings, especially in adopting decisions on the merits, institutions and courts shall, within the scope of the applicable norms of law, facilitate the protection of the rights and legal interests of private persons;

- Principle of Equality. In matters where there are identical factual and legal circumstances, institutions and courts shall adopt identical decisions (in matters where there are different factual or legal circumstances - different decisions) irrespective of the gender, age, race, skin colour, language, religious beliefs, political or other views, social origin, nationality, education, social and financial status, type of occupation or other circumstances of participants in the administrative proceedings.
- Principle of the Rule of Law. The actions of an institution and a court shall comply with the norms of law. Institutions and courts shall operate within the scope of their powers as prescribed by regulatory enactments and may use their powers only in conformity with the meaning and purpose of their empowerment.
- Principle of Not Allowing Arbitrariness. Administrative acts and court adjudications may be based on facts such as are necessary for the taking of a decision and on the objective and rational legal considerations arising from such facts.
- Principle of Lawful Basis. An institution may issue an administrative act or perform an actual action unfavourable to a private person on the basis of the Constitution (Satversme), laws or the provisions of international law. Cabinet regulations or binding regulations of local governments may be a basis for such administrative act or actual action only if the Constitution (Satversme), law or the provisions of international law either directly or indirectly contain an authorisation for the Cabinet, in issuing regulations, or for local governments, in issuing binding regulations, to provide for such administrative acts or actual actions therein. If the Constitution (Satversme), law, or provisions of international law have authorised the Cabinet, then the Cabinet may, in its turn, by regulations authorise local governments.
- Principle of Procedural Equity. Institutions and courts shall, in taking decisions, observe impartiality and shall give the participants in the proceedings an appropriate opportunity to express the viewpoint thereof and to submit evidence. An official in respect of whose impartiality there may exist justified doubts shall not participate in the taking of the decision.

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?

   At the moment, there is no considerable political or academic discussion concerning any kind of reform with regard to the discretionary powers of the administration.

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!

Exercise of discretion. The party has the right to require the institution to exercise its discretion without any mistake. The court can only assess whether the institution, while exercising its discretional powers, did not acted legally. The discretion exercised by the institution cannot be considered legal if the mistake is present (if there is any mistake). Consequently, the court must examine the possible mistakes made while exercising discretion: not exercising discretion when it was needed, overriding its discretion, or misapplying its discretion (Judgment of the Constitutional Court of 22 December 2017, case no 2017-08-01, judgment of the Supreme Court of 6 December 2010, case no SKA-673/2010).

The action of police while ensuring order in public events. Depending on the type and nature of the threat, the police may have discretion or may have not. In criminal matters, the police have no discretion to initiate or not to initiate criminal proceedings depending on the nature of the event. In cases of minor disobedience (cases of minor threats to public order) if the police receives complaint or message, the police is subjected to the basic principles of proportionality and correct use of discretion. Here, the police must take action after assessing the intensity and importance of infringement of interests (Judgment of the Supreme Court of 3 March 2017, case no SKA-10/2017).

In the field of public procurement, the court assesses requirements (criteria, conditions etc.) requested by the contracting authority only in relation to the principles of public procurement law. The court refrains from assessing aspects of requirements that are solely within the competence of the contracting authority or tenderers. According the case law, such aspects include efficiency of the requirements, utility, as well as the economic utility of those requirements from the perspective of the tenderer and the contracting authority (see, for example, decision of the Supreme Court 14 January 2013, case no SKA-134/2013, decision of the Supreme Court of 18 December 2015, case no SKA-592/2015, decision of the Supreme Court of 18 September 2015, case no SKA-1209/2015).

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?

   F would be accepted (most probably) in the case as an applicant against decision addressed to A. In Latvia, we have very widely “open doors” to cases directly or indirectly linked to environmental matters. Article 9 (3) of the Environmental Protection Law grants to everyone the right to challenge and appeal the administrative act or actual action that does not comply with the requirements of environmental regulatory enactments, creates a threat of damage or damage to the environment. This provision is a "statutory exceptional" of the Article 31 of the Administrative Procedure Law, which requires a person to have his rights of legal interests to be infringed by administrative act. That means that in environmental cases a person may also go to court even if his or her rights are not directly infringed but an administrative act or actual action causes a threat of harm or damage to the environment (Decision of the Supreme Court of November 7, 2016, case no SKA-1318/2016). F does not bases his arguments directly on a threat of harm or damage to the environment. However, his complaint on disadvantages in managing his soil because of increasing traffic would be reviewed through environmental perspective (Decision of the Supreme Court of 10 July 2010, case no SKA-497/2010).

   From the description it seems that Mr. P does not bases his objections on environmental assumptions, but rather aesthetic assumptions. However, as it was mentioned before, Article 9 (3) of the Environmental Protection Law grants to everyone the right to challenge and appeal the administrative act or actual action that does not comply with the requirements of environmental regulatory enactments, creates a threat of damage or damage to the environment. The Supreme Court itself has accepted claims which are based on rather aesthetic assumptions within the notion of right to live in favourable environment as well (see for example, judgment of the Supreme Court of March 7 2011, case no SKA – 44/2011). For this reason, Mr. P would be accepted (most probably) to the proceedings as a party as well.

   As for the M, in Latvia according to the Article 28 (2) of the Administrative Procedure Law a public legal entity may be a third party in cases where it finds itself in a similar

situation as a private person who may be a third party in administrative proceedings, as well as where such is specified in an external regulatory enactment. In Latvia, municipalities are public entities which issue construction permits, therefore, in such a situation the municipality could not find itself in a similar situation as a private person. Respectively, it is unlikely that the M would be admitted to proceedings as a party.

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?

   O would be most probably admitted to the proceedings because of its arguments based on environmental assumptions (Article 9 (3) of the Environmental Protection Law). According to Article 79 (2) of the Administrative Procedure Law a private persons whose rights or legal interests are restricted by the relevant administrative act and who have not been invited to participate in the administrative proceedings as a third party, may dispute such administrative act within a one-month period from the day when the private person become informed of it, but not later than within a one-year period from the day the relevant administrative act comes into effect.

   However, it should be noted that before failing complaint to the court, applicants must first dispute such administrative act in institution.

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?

It seems that the result will not change in respect of admission of parties. However, the position of the O seems to be weaker as a result of additional explications of E. However, the result of the case will depend on comprehensive evaluation of evidences and facts.

Annex to question II.6.b)

In recent case law concerning European Union state aid law and European Union competition law (anti-competitive practices, merger control) the European Court of Justice established – according to recent academic writings – a concept of three levels (stages) for the judicial control of administrative fact finding and legal qualification of facts[1]:

1. (abstract) interpretation of legal provisions;

2. determination (or establishment) of (simple) facts (the factual basis);

3. only in case of complex factual matters (interdependencies, causalities, uncertainty,…) evaluation (or appraisal) of complex facts (economic impact, complex prognosis, certain risks for health and safety);

4. (concrete) legal qualification (or characterisation) of simple facts or of the results of a complex evaluation with regard to a legal term – sometimes based on the interpretation of a legal provision.

Concerning levels 2 and 4 the European Court of Justice applies a strict scrutiny while the Court reduces its control on level 3 under the rubric of a so called technical discretion which must be differentiated from classic discretionary powers. For example the European Court of Justice takes the view that the finding that a state aid favours (!) a certain undertaking as prohibited by Art. 107 (1) TFEU requires in some cases (!) a complex (!) economic evaluation of the factual situation. Thus, in such specific factual situations the Commission has a technical discretion and the Court will apply a reduced standard of control ("manifest error") focussing on procedural requirements especially with regard to the duty to carefully and impartially investigate the case[2]. In contrast, articles 107 (3), 108 (3) TFEU provide for a classic discretionary power ("may be considered") of the Commission according to the Court.

Many commentators compare this four-level-concept with concepts in French administrative law. Other jurisdictions tend to omit the 3rd level and to focus on levels 2 and 4. Nevertheless, some jurisdictions have established a broad understanding of discretionary powers probably comprising also categories like the technical discretion under European Union law. Also the German concept of "Beurteilungsspielräume" concerning the administrative concretisation of legal requirements (a form of discretion with a view to the facts rather than with a view to

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1 ECJ case C-104/00 P (DKV/HABM); case C-449/99 P (EIB/Hautem); see also case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

2 See ECJ case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

legal consequences) may share some parallels with the judicial control of technical discretion in European Union law. In both jurisdictions the judicial control focusses on:

1. compliance with procedural requirements,

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

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

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

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

4. avoidance of arbitrary considerations,

5. correct interpretation of the relevant legal terms.

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