Bundesverwaltungsgericht

ACA EUROPE

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

ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

Cologne, 2 – 4 December 2018

Answers to questionnaire: Montenegro

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

2. - 4. December 2018

Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

MONTENEGRO

Introduction:

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

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

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

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

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

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

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

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

The first part deals with the questions of who is or can become a party to administrative proceedings before an administrative authority (not before an administrative court!) and of what rights and/or obligations might follow from being a party to administrative proceedings. The second part centres on the question of how administrative authorities determine the facts on which to found their decisions. Although here, too, the main focus is on the proceedings before administrative authorities, this part also makes reference to proceedings before 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 - **YES**
   - 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**
   - associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements) - **YES**
   - other administrative bodies? - **YES**

Explanation:

According to the Law on Administrative Procedure, a party in the administrative procedure is a natural or legal person upon whose request administrative procedure has been initiated and on whose rights, obligations or legal interests are decided in the administrative procedure ex officio. A party in the proceeding is also a person who, in order to protect rights or legal interests, has the right to participate in the proceedings.

A party in the administrative procedure may also be a state or other body, a settlement, a group of persons, etc. which do not have the status of a legal entity, if they can be holders of rights and obligations or legal interests that are decided upon, or in connection with which other administrative activities are undertaken in administrative matters.

During the entire administrative procedure, the public law authority will, ex officio, ensure that the person appearing as a party can be a party to the proceedings and whether the party is represented by its legal representative or authorized representative.

   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)

The categories of parties are defined by the general law – Law on administrative procedure.

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?

As stated in the answer to question no. 1, the Law on Administrative Procedure has determined who can be a party to the proceedings, in a procedural sense. However, whether a person can be the holder of rights and obligations, i.e. whether can be a party to the proceedings, depends on whether according to the substantive legal regulations governing a particular administrative matter, a person can have, acquire or lose rights or obligations or legal interests, since rights and obligations derive from specific substantive legal regulations regulating particular administrative matter.

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? – **most of the time.**
   - Is a decision of the administrative authority admitting the party required? – **A special decision is made only if the authority does not recognize the status of the party to the interested person.**
   - Is the administration obliged to qualify potential parties ex officio? – **Yes.**

Explanation:

In addition to the party upon whose request the administrative procedure was initiated and the party to whom the procedure was initiated ex officio under the Law on Administrative Procedure, the status of the party also has a person who, in order to protect his/her rights or legal interests, has the right to participate in the proceedings. This is the so-called interested person.

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

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

The authority conducting the proceedings is obliged, before the start of the examination procedure, to invite all the persons for whom the authority is aware that they can express a legitimate interest in taking part in the proceedings. If a person who did not participate in the procedure appears in the course of the procedure and request for the status of the interested person, the authority should examine this right and issue a decision on this.

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)?

If an interested person has participated in the first instance procedure, a decision must be submitted to him/her and he/she has the right to appeal as the main party. When the interested person has not taken part in the first instance proceedings, he/she has the right to request the delivery of the decision and the right to appeal. The appeal is timely only if it is declared by the deadline in which the main party can lodge an appeal in a timely manner.

In the event that the interested person was not involved in the procedure because he/she was not aware of the procedure or because the public authority failed to involve him/her in the procedure, or a public law authority on the basis of the case file did not conclude that there is an interested person and the deadline for the appeal expired, then the interested person was not allowed to participate in the procedure, so he/she can apply for a reopening of the proceedings.

If the interested person had the opportunity to timely declare an appeal, but did not declare it or it was rejected as untimely, then the reopening of the procedure can not be initiated. A party who fails to comply with the established legal protection system and does not use the remedy available to him/her, has a position of a person who will not use legal protection, which belongs to the dispositive of that person.

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?

The decision of a public authority by which it did not recognize the status of a party to an interested person, may be challenged by an appeal.

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?

Interested person has the right to initiate the administrative dispute against the decision brought in the second instance proceeding.

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?

Interested person to whom the status of the party has been recognised, has the right to appeal against the decision.

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

The second instance public authority can abolish the decision of the first instance public authority by which the request for the recognition of the party status was rejected.

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)

All parties in the administrative procedure are entitled to the same rights.

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 this moment there is no political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to the administrative proceeding, since the new Law on administrative procedure is in force from July 2017.

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!

According to the Law on Inspection Control, inspection supervision is initiated and conducted ex officio, but anyone can submit an initiative to launch the inspection supervision procedure.

Based on the above legal provisions, the administrative authorities stood at the point of view that the initiator of the inspection supervision procedure cannot have the capacity of the party. In an administrative dispute, the court took the view that the initiator may have the status of an interested party (party) if that procedure can be of significance for the protection of his/her rights or legal interests (for example, in the case of the construction of the building, the claimant argues that his property or other rights are infringed).

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)?

The basic principles of the administrative procedure when it comes to determination of facts are: the principle of establishing the truth, the principle of independence and the free assessment of evidence and the principle of obtaining information ex officio.

The principle of establishing the truth implies that in the administrative procedure all facts and circumstances that are relevant for the lawful and proper decision-making on the administrative matter must be properly and fully determined.

According to the principle of independence and free assessment of evidence, the authority independently determines the facts and circumstances in the administrative procedure and on the basis of the established facts and circumstances decides on the administrative matter. What facts and circumstances will be taken as a proven, authority will decide by free assessment, based on a conscientious

and careful assessment of each evidence in particular and of all evidence taken together, as well as on the basis of the results of the overall administrative procedure.

The principle of obtaining evidence ex officio means that a public law authority, when deciding in an administrative procedure, ex officio inspects, obtains and processes data from official records and registers maintained by that public authority or other competent authority, unless access to such data is limited in accordance with the law.

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

The party is obliged to present the exact, truthful and precise factual situation on which the request is based, to provide evidence for its allegations and, if possible, submit it, unless the request is based on legal assumptions and generally known facts, or on the official records.

If the party does not act in the forefront, the authority will order him/her to do so within a specific period of time. If the party on whose request the administrative procedure is initiated does not act in the above manner, the authority will reject the request.

In cases where the administrative procedure was initiated ex officio or at the request of the opposing party, and the party did not provide the required evidence within the deadline, the authority will continue the procedure and solve the administrative matter.

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

No, the rules are the same.

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, the rules are the same.

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)

The basic principles are the same.

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)

   Each party is obliged to present the facts and submit evidence on which his/her application is based or by which it rejects the allegations and evidence of the opposing party. The party is obliged to submit the document itself to prove the allegations.

   When one party invokes the document and claims that it is in the possession of another party, the authority will invite that party to submit the document.
   The party can not refuse to submit a document if he/she invokes the document for proof of the allegations, or if it is a document required by law or if the document is, with regard to its content, considered to be common for the both of the parties.

   In the light of all the circumstances, the authority, by its conviction, appreciates the importance of the implications of the others' party refusal to submit the document that he/she holds.

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?

   What facts and circumstances will be taken as a proven, the authority will decide by a free evaluation based on a conscientious and careful assessment of each

evidence in particular, of all the evidence together, as well as on the basis of the results of the overall administrative procedure. In doing so, the authority appreciates what facts are important and what evidence will be carried out. In so doing, the authority is obliged to state the reasons why the facts highlighted by the parties are not relevant and why there was no need to conduct the evidence that was proposed, but not processed.

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?

If, in order to exercise the rights or legal interests of a party in accordance with a special law or other regulation, it is necessary to carry out a number of administrative activities, the public law bodies shall be obliged, at one place, to allow the parties to submit requests and other submissions, receive information, advice and prescribed forms related to the exercise of its rights or legal interests within the jurisdiction of those public authorities.

The application and other submissions received in one place by the public law authority, shall be, without delay ex officio submitted to the public authority competent for decision-making, or acting upon a request or other motion.

Public authorities are obliged to provide assistance to each other in administrative proceedings. A public authority may seek assistance when it needs knowledge of the facts, data and other evidence available to another public authority or, where necessary, to take actions outside the area of a public authority.

Legal assistance for the execution of certain actions in the administrative procedure can also be sought from the court in accordance with special regulations.

Legal assistance in relation to foreign bodies is provided in accordance with a valid international treaty, and if there is no such agreement, the principle of reciprocity shall apply.

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

All facts and circumstances relevant for the lawful and proper decision-making in an administrative matter must be correctly and fully established in the proceedings. The official person who conducts the procedure decides on which facts to determine. The decisive fact (facts that can influence the resolution of administrative matters) is established by different evidence and their complete and lawful determination is necessary for the proper application of substantive law.

In the administrative procedure, all means capable of determining the facts of the case which correspond to a particular case, such as documents, testimonies of witnesses, statements of the parties, findings and opinions of experts, may be used as evidence.

General facts, facts that are known to the public law authority and legal assumptions should not be proven.

It is the duty of the authority to obtain ex officio data on which the official records are kept (it inspects, acquires and processes data from official records and registers maintained by that public authority or other competent authority, unless access to such data is limited in accordance with law), but also there is the obligation of the party to present the exact, true and specific factual situation upon which his/her request is based.

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

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

In matters concerning evidence which are not regulated by the Law on Administrative Procedure, the rules on evidence prescribed by the Civil Code Procedure will be applied accordingly.

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

The effort to correctly and fully determine all the facts and circumstances essential for the successful and complete realization and protection of the rights and legal interests of the parties or other participants in the procedure, as well as the protection of the public interest.

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

The authorized official person independently determines the facts and circumstances in the administrative procedure and on the basis of established facts and circumstances decides on the administrative matter.

What facts and circumstances will be taken as a proven authorized official person determines by free assessment, based on a conscientious and careful assessment of each evidence in particular and all the evidence taken together, as well as on the basis of the results of the overall administrative procedure.

(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?

In addition to the lawsuit, an act against which the lawsuit is filed shall be submitted, in the original or certified copy, or evidence of an administrative activity being challenged.

The respondent is obliged to submit to the Administrative Court all the documents relating to the case.

If the respondent public authority does not submit the file of the case or if it declares that it can not submit them, the court can solve the matter without the case file.

If the Administrative Court resolves an administrative dispute based on an oral hearing, it will decide on the facts established at the oral hearing and on the basis of the facts established in the administrative procedure.

When deciding in a non-public session, the Administrative Court shall make a decision based on the factual situation established in the administrative procedure.

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

The respondent is obliged to submit to the Administrative Court all the documents relating to the case.

If the respondent public authority does not submit the file of the case or if it declares that it can not submit them, the court can solve the matter without the case file.

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!

The Administrative court is free in the consideration of evidence.

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 in the administrative dispute checks the legality of the administrative acts, which implies that during the control procedure the court is oblige to examine whether the administrative procedure has been conducted in accordance with the law, whether the factual situation is correctly and completely determined and whether the substantive law is properly applied.

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?

They are subject to the general principles, concerning the discretionary powers of the administrative authorities. Namely, when a substantive legal regulation empowers the authority to decide on the free assessment. In that case, the authority decides within the borders and in the light of the given authorization, and in the reasoning of the passed decision, it must state the reasons for which it was guided during the decision making process.

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, please see the explanation under the section 6d.

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

In administrative matters in which the authority is empowered to decide based on a free assessment, the second instance authority is empowered to examine the legality and rightness of the adopted decision on the appeal. In these situations, the Court examines the legality of the disputed act. On that occasion the Court assesses whether the body has acted within the limits of the empowerment and in accordance with the objective in which the empowerment is given. There is no incorrect application of substantive law if the competent authority has acted upon a free assessment based on and within the limits of the prescribed empowerment and in accordance with the objective in which it was given and in accordance with earlier decisions made by the public authority in substantively identical administrative matters.

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

When the Administrative Court has already annulled the disputed act in the same administrative matter, it is obliged to solve the subject matter on a complaint against a new act of a public authority when the nature of the administrative matter permits it.

d) Do they prefer to focus on procedural aspects?

In an administrative dispute, the Court will, with equal care, examine the violation of the rules of procedure, whether the factual situation is fully and correctly determined and whether the material law is correctly applied to the established material law.

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

Every expert opinion is subject to a court assessment.

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?

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

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

General principles are determined by the Law on Administrative Dispute.

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

General principles are determined by the Law on Administrative Dispute.

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 constitutional principles.

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?

There is no political or academic discussion at the moment.

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!

The claimant challenged the decision of the Ministry of Justice (Institute for the Execution of Criminal Sanctions) by which the Ministry refused the request of the claimant to suspend the execution of the sentence of imprisonment due to his health condition.

The Administrative court rejected the lawsuit. In its reasoning the Administrative court stated that the Ministry of justice has the right to decide upon this request on the basis of the free assessment and that the request should be decided by taking into account the opinion of the head of the Institute. The Court concluded that this represents the discretionary powers of the administration and applied the limited control of the challenged act.

III. Case Study

Initial Case:

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

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

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

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

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

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

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

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

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

the local population of red kites would be seriously endangered. O submits an expert opinion of an internationally respected ornithologist which supports its allegations.

Questions:

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

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

   According to the Law on Spatial planning and construction of structures, the investor shall build the structure on the basis of a notification of building work and documents stipulated by the Law. As of the date of notification of building work, the investor shall erect an information board at the place of building, with information related to: the employer, design engineer, responsible reviewer, contractor, engineering supervisor, chartered engineer who managed the engineering documents development, reviewer who managed the engineering documents review, chartered engineer who is managing the building and the reviewer who is managing engineering supervision, etc.

   Every interested person may initiate inspection control which is undertaken by an urban development and building Inspector. Inspector has the authorisation to ban the construction if the zoning and technical specifications were not issued in accordance with the planning document, i.e. if he determines that the final design was not developed and reviewed in accordance with the zoning and technical specifications in terms of the basic zoning parameters.

   The same Law prescribes that the planning documents shall be adopted by the Parliament. These documents prescribe the designated use of surfaces and also contain guidelines for the regulation and protection of nature and the environment.
   After the decision to develop the concept of the planning documents has been issued and planning document concept developed, the Ministry shall organise information provision to the interested public regarding the objectives and purpose of developing the planning document, possible planning document designed solutions and effects of planning. Planning document is a general act and it cannot be challenged in the administrative procedure.
   With all of the above mentioned, M, F and P may initiate inspection control. What decision will be adopted depends on whether the construction is done in accordance with the planning document.
   The lawsuit filed by O directly to the Administrative Court will be rejected, be-

cause the administrative dispute cannot be conducted against the application for construction. In the administrative dispute, the legality of an administrative act or other administrative activity is decided, and the application is not of such character.

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?

In the concrete case, in accordance with the Law on Environmental Impact Assessment, the project owner is obliged to initiate a procedure for deciding on the need to assess the environmental impact of the project.
The competent authority shall inform the interested authorities and organizations and the general public about the submitted request, and after the conducted procedure, it may decide on the need for an impact assessment.
In this case, a study on impact assessment is provided. The broadcaster is also informed about this study and organizes public discussion. Evaluation of the report is provided by the Impact Assessment Commission. Based on this assessment, the competent authority decides on the granting of approval or refusal of the request for approval of the study.
There is a right of appeal against this decision and an administrative dispute may be initiated against the second instance decision.

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.