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: Serbia

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

SERBIA

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

2. - 4. December 2018

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 procedurallaw 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 makeit 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 isdealing with the legal position of different categories of (potential) parties to administrative proceedings (I.), the secondwith 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 questionsof 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 partyto 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.

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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:

Answer: **The Law on General Administrative Procedure of the Republic of Serbia (LGAP) defines the parties in the administrative procedure. According to the Article 44 of the on General Administrative Procedure: "A party to an administrative procedure shall be a natural person or legal entity whose administrative matter is the subject of an administrative procedure, as well as any other natural person or legal entity whose rights, obligations or legal interests may be affected by the outcome of the administrative procedure.(2) A party to an administrative procedure may also be the authority, organisation, settlement, group of persons and others who are not legal entities, under the conditions under which a natural person or a legal entity may be a party, or when thus specified by the law. (3) Representatives of collective interests and representatives of broader public interests, who have been organised in line with the regulations, may have the capacity of a party to an administrative procedure in case the outcome of the administrative procedure can affect the interests they represent."**

However, the Law on Administrative Disputes (LAD) defines the parties to the adminstrative dispute (articles 10-13). The parties to the administrative dispute are the plaintiff, the accused party and the interested party. The plaintiff in an administrative dispute may be a physical, legal or other person, if it believes that an administrative enactment has violated one of its rights or legally based interests. A state authority, an authority of the autonomous province and a local self-government unit, an organization, a part of a company authorised to perform legal transactions, a settlement, a group of persons, and others who do not have the status of a legal entity, may initiate an administrative dispute if they may be holders of rights and obligations that were the subject of the administrative proceedings. If an administrative enactment has violated the law to the detriment of the public interest, an administrative dispute may be initiated by the competent public prosecutor. If the administrative enactment has violated the property rights and interests of the Republic of Serbia, the autonomous province or a local self-government unit, the administrative dispute may also be initiated by the competent public defender's office. In an administrative dispute, the accused party is the authority whose administrative enactment is being disputed, that is, the authority that has failed to pass an administrative enactment upon the request or on the appeal of a party. An interested party is the person to whom the annulment of the disputed administrative enactment would be directly detrimental.

b) Are the categories of parties to administrative proceedings defined

Answer: **The parties are defined under the Law on General Administrative Procedure (LGAP) and the Law on Administrative Disputes (LAD).**

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

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

Answer: According to the LGAP (this is a general determinant), the administrative procedure is initiated by a party's request or ex officio, but a special law can determine how the administrative procedure in each individual area can be initiated, so whether it is initiated by a request or ex officio, who can be the applicant, or according to which the procedure can be initiated ex officio.

There are two categories of parties. A direct (main) party is a person whose administrative matter is the subject of the proceeding (the reason why the proceeding is initiated). An indirect party (an adjacent party, an intervening party or an interested person) is a person whose legal situation touches (or even intertwines) with the subject of administrative proceeding, with the administrative matter of a direct party. According to the criterion of initiating of a procedure, a direct party may be the person whose request the procedure has begun (active party), because it gives rise to a procedure - by requiring certain right to be recognized or increased or to be abolished (or at least reduce) a certain obligation. A passive party is the person "against whom the proceedings are being conducted". It is a person whose rights and obligations are decided in a procedure initiated ex officio. According to the number and orientation of the interests of the parties in the procedure, there are unilateral and bilateral or multilateral administrative matters. Unilateral things imply that in the administrative procedure there is a person opposite to the authority as a party or two or more persons who jointly take part in the proceedings. Their interests, their positions, do not contradict each other. These faces, in contrast to the organs, represent a process community. Thus, in the expropriation of the building, there are several faces. Bipartite and multiparty administrative matters - contradictory administrative cases are those in which two or more legal entities are involved in the capacity of parties whose interests in the proceedings are opposed. For example, when more people compete in one procedure for obtaining the same right, for example, certain scholarships, subsidies or incentives.

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

Answer: Already answered.

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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?

Answer: **Article 93 of the Law on General Administrative Procedure prescribes the possibility of filing a request for recognition of party's capacity. A person not participating in the procedure in the capacity of a party may file a request for the recognition of the party' s capacity, until conclusion of the second-instance procedure. Other parties are to be immediately introduced to the request in order to be able to submit observation.**
The person requesting to participate in the procedure is obliged to specify in its request precisely how this affects his right, obligation or legal interest. The decision on a request for recognition of party's capacity is decided by the authority. Other parties are informed about the related request. This determines the circle of the so-called "third parties" as potential parties to the proceedings (interested parties or by-passing parties), both because of the timely protection of their interests, especially for the purpose of equality with the main party (instead of repeating the procedure if the "other" / "third" subsequently " phenomena "or the public, i.e. the body finds out their relationship with the subject matter of the proceedings, at its regular termination), as well as for the establishment of objective legality and legal certainty.

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

Answer: **They are, if there is a possibility of identification and there is an obligation to include them in the procedure.**

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

Answer: **If administrative body identifies existence of third parties as party in administrative proceeding, it is obliged to enable them to participate in the proceeding. The principle of the right of the party to submit observation is defined as one of the general principles of administrative proceeding which refers to the following: the party may be provided with an opportunity to submit observation on the facts relevant for deciding in an administrative matter. Without prior observation to be submitted by the party, a decision can only be made if allowed by the law (Article 11. of the LGAP).**

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

Answer: **If party which is notified on initiation of the proceeding do not exercise its right to participate in the proceeding, it bears the consequences of such decision and administrative body can render a decision without the participation of this party on condition that is previously regularly notified on initiation of the procedure, on all action made under the proceeding etc. In our legal order there is no possibility to disable exercise of rights of the party in proceeding. If party is not granted a status of party in the administrative proceeding, it is a reason for filing an appeal and reason for filing a lawsuit in administrative dispute.**
However, the authority may directly decide in an administrative matter: 1) in case the findings of fact has been determined based on the facts and evidence presented by the party in the request or based on the generally known facts or facts known to the authority; 2) if findings of fact can be determined based on the data from official records and the party does not have to make a statement for the purpose of protection of its rights and legal interests; 3) if an oral decision is adopted, and the facts on which it is based are made probable (Article 116, paragraphs (5) and (6) of the LGAP); 4) if specified by a special law.

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?

Answer: **Already answered.**

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?

Answer: **Partially answered in the previous question. The right to an administrative dispute shall be made by each party from the administrative procedure but under the conditions prescribed by law.**

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

Answer: **The appeal on the decision rejecting the request to recognize the party's capacity shall be filed within 15 days from the date of notifying the party of the decision,**

unless otherwise prescribed by the law. Against the first instance decision can appeal to any person whose rights, obligations or legal interests can influence the outcome of the administrative procedure, in the time within which the appeal may be filed by a party.

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

Answer: It can, until the end of the first instance proceedings and in the second instance proceedings.

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

Answer: **Yes, all categories of parties to administrative proceedings enjoy the same procedural rights.**

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

Answer: **Article 44. of the LGAP defines the parties in the administrative proceedings, so in our legal order witnesses, experts, interpreters are participants in the proceedings and they do not have the status of a party in the proceedings.**

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

7. Is there a political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to administrative proceedings in your country? Are there recent legislative proposals concerning the participation rights of third parties to administrative proceedings?

Answer: /

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

Answer: /

REPUBLIC OF SERBIA

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)?

Answer: **The Law on General Administrative Procedure establishes the principle of truth and free admission of evidence (Article 10), by which the authority is obliged to regularly, truthfully and completely determine all the facts and circumstances significant for lawful and proper action in an administrative matter. The authorised officer shall at his/her own discretion determine which facts are to be admitted as evidence on the basis of a conscientious and careful assessment of each piece of evidence individually and the body of evidence as a whole, as well as on the basis of the outcome of the entire procedure. The investigation procedure (Article 106) shall be conducted if, in the procedure of direct decision-making, the facts conducive for deciding in an administrative matter cannot be established or if the parties need to be provided the opportunity to make a statement for the purpose of protection of their rights and legal interests the party shall be entitled to make a statement on the facts which have been presented, as well as on proposed evidence, to take part in the taking of evidence, pose questions to other parties, witnesses and expert witnesses, present the facts conducive for deciding in an administrative matter, propose evidence, present legal assertions and to challenge the allegations contrary to its own. The authority shall be obliged to decide on all requests and proposal of the party. The procedure cannot be terminated as long as the party is not offered the opportunity to make a statement on the facts conductive for deciding in the administrative matter (Article 11 of this 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)?

Answer: Proving in the administrative procedure is the sum of all activities in order to determine the complete and accurate factual state as the basis for the decision. The rule is that an authorised officer only assesses which facts will be taken as proven, based on a conscientious and careful assessment of each evidence, in particular in relation to other evidence, as well as on the outcome of the entire procedure. Evidence is the evidence base - the fact, or fact by which it is based on the existence or absence of that fact that is established. Facts of importance for dealing with an administrative matter (decisive facts) are established by evidence. Evidence begins when the authority finds out which facts are and which are controversial. There is no well-known fact. The facts the existence of which is assumed by law shall also not be proven. Proving that they are non-existent shall be permitted, unless otherwise prescribed by the law. (Article 116 of the LGAP, paragraphs 1-4). An administrative matter can be decided upon based on the facts which have not been fully established or which are indirectly

established by means of evidence (facts which have been made probable), if thus specified by law. The provisions of this Law relating to the presentation of evidence shall not apply to the presentation of evidence making the facts probable. (Article 116 of the LGAP, paragraphs 5 and 6) The scope of foreign right, from the point of view of the administrative procedure, is a fact and is proved by evidence. The authority conducting the procedure may, ex- officio or upon the proposal of a party, decide to have the probative procedure be conducted before the requested authority if the presentation of evidence before the authority conducting the procedure is not feasible or in relation to disproportionate costs and immense loss of time.

Providing evidence means establishing a fact for the solution of an administrative matter before it is regularly detected in the proceedings. In case of reasonable fear that it will not be possible to present certain evidence later or that presentation thereof will later be made difficult, evidence may be presented during the course of the procedure or prior to institution of the procedure (preservation of evidence). Preservation of evidence shall be possible upon completion or finality of a decision. (Article 135 of the LGAP, paragraphs 1 and 2) Preservation of evidence shall be ex-officio or at the proposal of the party or person having legal interest. The proposal for the preservation of evidence, apart from other, shall contain the facts being proved, evidence which need to be presented and reasons due to which the preservation thereof is sought. The proposal for the preservation of evidence shall be submitted to the opposing party to submit observation thereof. In case of threat of delay, the proposal shall be decided on without prior statement of' the opposing party. (Article 135 of the LGAP, paragraphs 3-6) The authority conducting the procedure shall decide upon the proposal for the preservation of evidence, by means of a decision. When the preservation of evidence is proposed prior to institution of the procedure or upon completion or finality of the decision, the authority on whose territory the object to be examined is located or on whose territory the person to be heard resides shall decide on the proposal. Evidence shall be presented before the authority deciding on the proposal for the preservation of evidence.

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

Answer: **The rules for determining the facts are the same whether the administrative proceeding is 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?

Answer: **No.**

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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,…)?

Answer: **There are no different models**. **With regard what is not to be proven, according to the article 116 para. 3, 4, 5 of the LGAP generally known facts shall not be proven, the facts the existence of which is assumed by law shall also not be proven. Proving that they are non-existent shall be permitted, unless otherwise prescribed by the law. An administrative matter can be decided upon based on the facts which have not been fully established or which are indirectly established by means of evidence (facts which have been made probable), if thus specified by law. The provisions of this Law relating to the presentation of evidence shall not apply to the presentation of evidence making the facts probable.**

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

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

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

Answer: **The parties to administrative proceedings have the right and obligation to cooperate within the investigation procedure.**

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

Answer: **The authority shall make a decision upon disposable evidences, even if party choose not to participate in the proceeding.**

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

Answer:**No.**

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

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?

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Answer: **Article 10 of the LGAP prescribes that the authorised officer shall at his/her own discretion determine which facts are to be admitted as evidence on the basis of a conscientious and careful assessment of each piece of evidence individually and the body of evidence as a whole, as well as on the basis of the outcome of the entire procedure.**

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

Answer: **Already answered.**

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

Answer:***/***

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

Answer: **Yes. The proving procedure in administrative proceeding is determined under articles 116-135 of the LGAP.**

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

Answer: **The most important principle is principle of protection of parties' rights and exercise of public interest (Article 7 of LGAP), the principle of truth and free admission of evidence (Article 10 of the LGAP), the principle of efficiency and cost-effectiveness of procedure (Article 9 of LGAP) the right of party to submit observation (Article 11 of the LGAP).**

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

Answer: **The principles and rules contained in articles 116-135 of the LGAP apply, which regulate the procedure of proving in the administrative proceeding.**

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

Answer: **The explanation for the model used in our legal system is contained in the principles of administrative procedure.**

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

Answer: **According to the article 10 para.2 of the LGAP the authorised officer has the right, at its own discretion, to determine which facts are to be admitted as evidence on the basis of a conscientious and careful assessment of each piece of evidence individually and the body of evidence as a whole.**

(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?

Answer: **According to the Article 2. of the LAD in an administrative dispute, the Court shall decide on the basis of the law and within a reasonable time, based on the facts established at an oral public hearing. Also, Article 22. of the LAD the appeal may also contain a reference to the facts on which the plaintiff is basing his claim contained in the petition. According to the Article 39. para. 2 of the LAD the Court shall decide at the hearing, which evidence will be presented for the purpose of establishing the state of the facts.**

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

Answer: **No. Each party in the administrative dispute can propose presentation of evidence and decision on which evidence shall be presented decides Court, no matter who proposed evidences.**

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

Answer: **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?

Answer: There is standard of control in full jurisdiction dispute. In accordance with Article 3 of the LAD in an administrative dispute, the Court shall decide on the legality of final administrative enactments, with the exception of the enactments in respect of

which alternative judicial protection is envisaged. Judgement in the administrative disputes Court renders based on facts determined at the oral hearing, except when Court resolves case without holding a hearing. The Court shall decide without holding an oral hearing only if the subject of the dispute is such that it clearly does not require direct hearing of the parties and separate establishment of the facts, or if the parties expressly agree to this. The Court is obliged to state in particular the reasons why it did not hold an oral hearing. A full jurisdiction dispute is excluded when the subject matter of the administrative dispute is an administrative enactment that has been passed based on a discretionary assessment. Exceptionally, in certain matters, a full jurisdiction dispute may be explicitly excluded by a special law.

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

Answer: **Everywhere where there is possibility for deciding in the full jurisdiction dispute, there is no limited control in regard to complex factual evaluations.**

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

Answer:/

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

Answer:/

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

Answer: **Yes, the procedural standards are stricter.**

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

Answer: **When assessing the legality of acts adopted at a discretionary power (free appraisal), the Administrative Court may value only the legality, but not the appropriateness.**

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

Answer: **Administrative Court may render a decision in full jurisdiction dispute only under conditions prescribed by Law.**

d) Do they prefer to focus on procedural aspects?

Answer: **In practice, the judgments in which the court focuses on procedural aspects are frequently adopted.**

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

Answer: **Our legal order recognizes only evidences prescribed by the Law on Administrative Disputes.**

f) As far as the concept of technical discretion applied by the ECJ in regard to administrative decisions (or similar) is applied in your national legal order (cf. II.6.b)), can the reduced standard of control be regarded as a consequence of different institutional capacities of courts and administrative authorities?

Answer:/

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

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

Answer: **According to the Article 198 of the Constitution of the Republic of Serbia regulates the legality of administration, specifically: "Individual acts and actions of state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units must be based on the Law. Legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceedings, if other form of court protection has not been stipulated by the Law."**

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

Answer: **Answered in previous question.**

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

Answer: **Article 32 of the Constitution of the Republic of Serbia defines the right to a fair trial, by which the Administrative Court is obliged to act and represents constitutional guarantee: "Everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them. Everyone shall be guaranteed the right to free assistance of an interpreter if the person does not speak or understand the language officially used in the court and the right to free assistance of an interpreter if the person is blind, deaf, or dumb. The press and public may be excluded from all or part of the court procedure only in the interest of protecting national security, public order and morals in a democratic society, interests of juveniles or the protection of private life of the parties, in accordance with the law.**

9. Is there a political or academic discussion concerning any kind of reform with regard to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts in your country? Are there recent legislative proposals concerning the discretionary powers of the administration and the corresponding reduced judicial control?

Answer: **In order to provide more efficient and effective protection of citizens' rights in the administrative dispute to the citizens of the Republic of Serbia, the reform of the administrative judiciary need to be carried out. Certain steps have already been taken, but also one of the most important activities is amending the Law on Administrative Disputes and its harmonization with the Law on General Administrative Procedure. Also, there are no indications that there will be reduced judicial control.**

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

Answer: /

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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 –astate 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 Directive2009/147/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 kitesdoes existedin 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 accurateinstruction 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 eyriehad 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?

Answer: **M could change its opinion on what should be built on the named location. It concludes that until A is issued a final and valid permit for the construction of a commercial building, it has the right to decide on the area development plan and to determine the its other purpose. In our law, F who has become a party in the administrative procedure, irrespective of the fact that he has failed to appear in the administrative procedure, he may, by the end of the administrative dispute, summarize the facts which are relevant to the court's decision on his appeal. P would not be grated as a party to the administrative dispute because he did not participate in an administrative procedure where he could report his participation, but didn't do so. The objections M and F would have been respected and P rejected.**

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?

Answer: S in the administrative procedure issuing a building permit for the construction of a commercial building was obliged to decide on the request O on granting the status of a party in the proceeding and to recognize the status of the party because the outcome of this procedure would directly affect the interests which O represents. As this was not done, O would have the right to file a complaint against the disputed act within 60 days from the day the decision was delivered to the party the last. If the lawsuit was filed within this period, then his complaint would certainly have been accepted because he has not been adequately involved in the administrative proceeding and the outcome of the administrative procedure may affect the interests he represents.

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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 Directive2011/92/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?

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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 3rdlevel 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 (Constenand Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/HauptzollamtMünchen-Mitte); case C-12/03 P (Commission/Tetra Laval).

2 See ECJ case 56/64 (Constenand Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/HauptzollamtMünchen-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 Unioncourts 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.