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: Slovakia

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

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

2. - 4. December 2018

Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

ANSWER
Supreme Court of the Slovak Republic

A short introduction to Slovak legislation relating single-case decision making in administrative procedure:

The administrative procedure as provided by law is the procedure of the administrative bodies, the parties, the participants and other persons in issuing, reviewing and enforcing the decisions - individual administrative acts, which decides on the rights, legitimate interests and obligations of particular natural and artificial persons (parties) in specific legal relations in the sphere of public administration.

This is a unilateral legal procedure whereby the administrative bodies decide on its own initiative or on the application of the party by issuing an individual administrative act (the decision), that present the application of legal rules to a particular issue in fact. The single decision-making process is characterized by the fact that it is a legally regulated procedure for solving individual cases in which the parties have a special procedural status, means specific procedural rights and obligations, that is procedural capability.

The administrative procedure is legally regulated by:

- act no. 71/1967 Coll. on Administrative Proceedings (Administrative Code), which governs general administrative procedures and applies to almost every administrative procedure
- special legislation governing special administrative procedures such as the building permit procedure, environmental impact assessment, infringement proceedings, cadastral proceedings etc.

The relations between Administrative Code and special legislation may be:

- subsidiary use of Administrative Code on procedure regulated by special legislation – e.g. infraction proceedings
- limited subsidiary use of Administrative Code on procedure regulated by special legislation (the use of Administrative Code is explicitly specified in the special legislation) – e.g. cadastral proceedings or customs procedure
- Administrative Code does not apply – special legislation govern both the substantive as well as the procedural aspects of the matter in its entirety – e.g. octroi operation

The regime of subsidiary use of the Administrative Code results from a general definition of the scope of the Administrative Code and from the special legislation, which stipulate that to the procedure governed by this special act also apply general regulation on administrative procedure (Administrative Code).

In the sphere of public administration, Administrative Code governs a procedure in which the administrative bodies decide on the rights, the legitimate interests or the obligations of natural and artificial persons, unless otherwise provided in a special legislation. Administrative Code thus governs single decision-making processes in the public administration.

I. Parties to Administrative Proceedings: Categories and Legal Positions

At first, for this part of the questionnaire, it is necessary to explain the difference between the concepts: person (subject) to the administrative procedure and the party to the administrative procedure.
The subject to the administrative procedure is any actual or potential holder of procedural rights or procedural obligations.
We distinguish:

- the subject to the administrative procedure in the strict sence of the word = the subject of a particular administrative procedure; an entity which has real procedural rights and obligations in a particular administrative procedure
- the subject to the administrative procedure as a potential bearer of procedural rights and obligations, which may not be the subject to any particular procedure

In each administrative procedure, there must be two main subjects, which have a procedural and a substantive bear ship to the subject matter of the procedure; thus without which the administrative procedure cannot be taken:

- administrative body - only one administrative body can act and decide in one administrative procedure at a particular stage;
- the party to the proceedings - must be at least one or more.

Other entities are - the participants ("*zúčastnená osoba*"), the persons concerned (witnesses, interpreters, experts, translators), the persons who have documents and things, that may be evidence and respective authorities. These entities have only procedural rights and procedural obligations in administrative proceedings, and their participation in the administrative procedure is not necessary.

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

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

   b) Are the categories of parties to administrative proceedings defined

   - in a general codification (i.e. Code of Administrative Procedure,…),
   - by reference to other codifications (e.g. Code of Court Procedure,…),

- by custom(ary law),
- by jurisprudence,
- in another way (please explain)?

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

Administrative Code defines a party as a person whose rights, legitimate interests and duties are the subject matter of the proceedings or whose rights, legitimate interests and duties may be directly affected by the decision. Furthermore, any person claiming that his/her rights, legitimate interests and duties may be directly affected by the decision shall be party to the proceedings until the contrary is proved. The person whose status of the party to the proceedings is recognized by special legislation shall also be party to the proceedings.
Thus, Administrative Code differs **four types of party´s definition (categories)**:

i. persons whose rights, legitimate interests and duties are the subject matter of the proceedings are plaintiff (e.g. applicant for a building permit, applicant for change of name and surname), defendant (proceedings for damages) and a person to whom the administrative authority must act in ex officio procedure (infraction proceedings);
ii. persons whose rights, legitimate interests and duties may be directly affected by the decision, i.e. whose legal status may be influenced; these persons do not file a motion or make a motion against them, nor the decision making about their rights is the reason for the commencement of the administrative procedure, but the scope of their rights and duties can be changed by the decision (the owner of the land, who is not owner of the cultural monument, in the proceedings on the intention to restore such cultural monument);
iii. anyone who claims to be affected by a decision; to become a party the allegation is sufficient, while proof of the allegation belongs to the administrative body - if it finds that the allegation is not true and that the person is not directly concerned by the decision, the administrative body must issue the decision that the person is not a party;
iv. anyone whose status of the party to the proceedings is recognized by special legislation = the legislation governing the procedure of the administrative body in a particular type of administrative procedure, may define the parties in a different manner and admit the status of a party also to persons who would not be parties under Administrative Code. Most often, these are cases where persons do not have a substantive relation to the subject matter, but their status as a party is justified by the Slovak Republic's duty to fulfil an obligation resulting from an international treaty or an European legal act, e.g. the legal status of nature protection associations to which the Aarhus Convention guarantees the right of access to the courts also in administrative proceedings.

This implies that, except the point iii., the person acquires the status of a party directly **by law**.
They do not have to do any acts, and it is up to the competent body to properly identify and inform parties and to act with them in accordance with the principle of equality of arms.
The administrative body is required to verify whether all subjects meet the conditions for acquiring a party's status throughout the whole proceedings. The range of parties may be extended if it is found that there are other subjects that meet the legal criteria of being a party. The administrative body does not have to issue a decision on becoming a party to the proceedings. On the other hand, the administrative body always makes a decision if it refuses to recognize the subject as a party to procedure or revoke it.

Administrative Code cannot contain exhaustive list of all the persons considered as parties to the proceedings and therefore it only regulates certain characteristics based on which the person can be, from a point of law, reliably identified as a party. If particular persons fulfil these characteristics in a specific case, the administrative body is obliged to treat them as parties. Specific legislation establish who (natural person, artificial person, citizen, etc.) and under what conditions (integrity, age, ownership, operator, etc.) is holder of a public subjective right or duty.

CF - The definition of a party to proceedings is broader in EP-Res, seeing that any person who may be affected by the outcome of the administrative procedure is considered as a party and EP-Res does not contain any definition or limitation of the "affect". While the ReNEUAL definition is very close to our definition. According to ReNEUAL, we can determine three groups of participants: i. the addressees of the intended decision, ii. persons who may be adversely affected and, finally, iii. parties on their own request.
Our Administrative Code do not know the term "interested public" nor define it. In view of the concept meaning, the participant and respective authorities may be equivalent. In addition, the administrative bodies have a legal duty to inform the public about administrative proceedings. The requirement to inform the public on important matters concerning ongoing administrative procedures is a general requirement both in the context of the European Union states as well as in the Slovak legal order. Several laws, particularly in the environment, in detail govern the obligation to provide information to the public or to make public decisions. This provision is the elementary and therefore the lowest level of public information requirement that will have to be met in every administrative procedure. Special legislation have the possibility to regulate the obligation to inform the public in a broader and more specific form, depending on the subject matter. This relationship between general and special legislation derives from the subsidiary status of the Administrative Code against other special legislation.
The provision expresses the principle of transparency and the right of the public to information on administrative proceedings.

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?

The party is defined by a combination of three general criterions (see answer to question 1) and one specific criterion. In all cases, the sign of the party to the proceedings is the substantive proportion of the natural or artificial person to the subject matter of the proceedings. In other words, Administrative Code defines who is a party to the proceedings, but the answer to whom this definition apply gives the legislation of substantive law. From these legislation results a number of persons who are or may become holders of the rights and obligations on which the administrative body decides. Administrative Code gives the status of a party to anyone who fulfils procedural conditions, regardless of whether he or she actually meets the material assumes (at substantive law). The special criteria are contained in specific legislation that may alter the

concept of party by way of derogation. The range of subjects to which this status is admitted may be broader or narrower than in Administrative Code. The status of the party may even admit to whom the definition in Administrative Code does not apply at all. This specific legislation have priority in the application process before the general regulation contained in the Administrative Code.

A few examples:
According to Act No. 162/1995 Coll. on the Cadastre and on the registration of title to real property and other property rights (cadastral act), the party in the proceedings to sanction the record to be entered in the Cadastre is a party to a deed on the basis of which the property right is to be created, changed or abolished. It follows from the above-mentioned statutory text that the party is a person who acts as a seller, buyer, donor, donee, proprietors in case of termination and settlement of co-ownership, the entitled and the liable person in easement, the pledgor and the pledgee as well as former spouses as regards the agreement of community property of spouses.
Act no. 372/1990 Coll. Administrative Infractions Act admit the status of a party to the person accused of committing the infraction, to the aggrieved party, that is, the natural or artificial person who has suffered damage because of committing an infraction, to the owner of the thing that can be distrain or was distrained and also to the petitioner, on the basis of which the procedure was initiated.
Under Section 6 of Act No. 511/1992 Coll. on the Administration of Taxes and Fees, as amended, party to octroi operation are taxpayers, while third parties may participate in the tax procedure if their tax administrator asks them for the tax procedure; such persons have the status of a party to proceedings.

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?

See also answer to question 1.

Administrative Code include 4 types of party´s definition, while this question concern about one of them:
iii. anyone who claims to be affected by a decision; to become a party the allegation is sufficient, while proof of the allegation belongs to the administrative body - if it finds that the allegation is not true and that the person is not directly concerned by the decision, the administrative body must issue the decision that the person is not a party;

In order for a person to be a party to the proceedings, the allegation is sufficient and person becomes a party by delivery of such allegation to the administrative body. The administrative body is required to examine any such allegation.

If a person pretend to be a party in the administrative procedure, he or she is a party to the proceeding for procedural reasons, regardless of whether it is legitimate from the point of substantive law.
The administrative body is obliged to ensure that anyone who asserts to it that a decision can directly affect his or her rights, legitimate interests or obligations, is recognized as a party to the proceedings and to treat such person as party until the contrary is proved. The administrative body is obliged to decide by a separate decision on the non-acceptance of a party's status. The right of a person directly concerned to be a party to the proceedings before an administrative body is a prerequisite for the realization of his or her fundamental right to a fair trial under article 36 section 1 and 4 of the Charter of Fundamental Rights and article 46 section 1 and 4 of the Constitution.

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

As regards the parties, the administrative body is required to designate the persons to be parties to a particular administrative procedure.

Under section 15a of the Administrative Code:
A special law may state under what conditions a person other than the party to the proceedings (hereinafter referred to as the "participant") may be involved in the proceedings or part thereof.
The participant has the right to be informed about the commencement of procedures and other submissions of the parties, the right to attend the oral hearing and the local observation, the right to bring in evidence and to provide the source materials for the decision. A special legislation may grant more rights to the participant.
The legal institution of a participant was introduced into the Administrative Code by an amendment in 2003. The purpose was to create a legal opportunity for participation by natural and artificial persons, whose rights, legitimate interests and obligations would not be directly affected by the decision or, who do not meet the legal requirements to be parties to the proceedings, but still have a certain interest in the administrative procedure. The role of the participant is to act in the administrative procedure for the defence of a law-protected interest (public interest or interest of a wider group of persons).
The legal institution of a participant is a response to existing legislative practice, particularly in environmental acts, governing the participation of civil associations and interest groups in proceedings. However, in the result of an absence of basic procedural legislation, the position of the party to the proceedings was mostly admitted to them, but this contradicts definition of a party under Administrative Code because the proceedings do not decide on the rights and obligations of such associations. The participation of persons other than parties in the proceedings is desirable and will be significantly more frequent. In particular, these will be those procedures in which public or group interests may be affected, e.g. regarding the construction of large industrial enterprises, in the use of genetic technologies, in the authorization of public buildings.

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

Essential rights of the participant are: the right to be notified of the beginning of the administrative procedure; the right to attend the oral hearing or the local observation; the right to propose evidence and to provide the source materials for the decision. This basic standard range of rights always applies. At the same time, it is possible that special legislation provide the participant with a wider range of procedural rights for a particular type of administrative procedure. The participant has the right to act in the appropriate administrative procedure in all its stages, both in the appeal proceedings and in the proceedings for court´s review of the administrative decision. In order to protect the interest it pursues, the participant has the right to appeal to the administrative body or to the prosecutor for the review of the decision.

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)?

The answer stems from one of the basic principles governing (also administrative) proceedings - the right to be tried without undue delay (the right to be heard within a reasonable time).
Administrative procedure is a chain of procedural actions of the administrative body, parties and other entities. A certain amount of time is required to complete each procedural action - the time limit = the time interval in which the procedural action is to take place – the procedural period.
The lapse of time always gives rise to legal consequences. In the case of a time limit to carry out particular procedural act, set by the administrative body, the party loses the right to take such act. The expiration of the statutory time limit results in the lapse of claim or "weakening" of the right (statutory bar). For example by the lapse of time for filing an appeal, the party loses the right to have the administrative body examine the decision of the first instance administrative body. One of the legal consequences of the lapse of time is, for example, the delivery fiction - In case the addressee of the document to be delivered personally was not reached in spite of his presence at the address, the delivering authority shall advise him in an appropriate manner to be available on a specific day and hour when a new attempt to deliver shall be made. In case this new attempt to deliver the document is not successful, the delivering authority shall deposit the document at the post office or at the local National Council notifying the address accordingly in an appropriate manner. Should the addressee fail to take delivery of the document within three days from its deposit, the last day of this period shall be deemed to be the delivery date, even if the addressee was not aware of the documents being deposited.

In the case of an oral hearing, when the parties have their comments and objections, the administrative authority shall invite all the parties asking them to present their comments and make their proposals. Special legislation shall determine the cases in which the comments and objections made subsequently shall not be considered, the parties must be explicitly warned of this fact.
According to the general act on administrative procedure, the legal consequences are only a few in relation to the lapse of time. The specific legislation, especially those that include the regulation of its administrative procedure, has a specific role to play. Under the Administrative Code, the parties to the administrative procedure may immediately exercise their procedural rights,

but this does not mean that they cannot exercise their procedural rights at any time during the administrative procedure, that is, outside the oral hearing. This general rule that a party may make comments and objections at any time does not apply if a special legislation is based on the principle of concentration of proceedings.

5. If individuals / organisations / other public authorities are not admitted as parties to administrative proceedings by the competent authority on their request, what are the legal consequences?

See also answer to question 3.

One of the "types" of becoming a party to proceedings is under the claim. While the Administrative Code does not recognize party on request, for the purpose of answering this question, we will work with the third definition of party. As stated above, to become a party the allegation is sufficient.
The administrative body is required to review this allegation and, if it finds that the particular person cannot be directly concerned by the decision, the body is obliged to make a decision that the person is not a party to the proceedings. A regular remedial measure against this decision is admissible. The person loses the position of the party to the proceedings up to the validity of the decision that the person is not a party to the proceedings. Such a decision may also be the subject of a judicial review. If the court annul the contested decision of the administrative body and returns the case to the administrative body for further proceedings, it shall impose on the administrative body to act with the omitted participant.

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?

Yes. The Administrative Procedure Code (act no. 162/2015 Coll.) governs **the institute of the omitted party**. A natural or artificial person who did not act as a participant in an administrative proceeding, even though he or she should have been able to act with it, may seek redress by bringing an action before a court. Under the Administrative Procedure Code, if an administrative action is brought by someone who claims that the decision of a public authority or a measure taken by a public authority has not been delivered, even if he or she should have been involved as a party to the administrative procedure ("the omitted party"), the administrative court verifies the accuracy of that claim and whether or not three years have passed since the contested decision or measure has been issued and, if those conditions are met, it decides that a public authority is obliged to deliver the decision or measure issued to the omitted party. If a public authority unreasonably fails to deliver a decision or measure to an omitted party, the court may impose a fine on it.

As far as the third type of definition of the parties is concerned, that is becoming a party to proceedings is under the claim, such party have the right to appeal even against a decision by which the administrative body has ruled that they are not entitled to be parties to the proceedings. It is not excluded that they can also bring an action as omitted party.

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

See answer to 5. a).

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

Remedy is not provided. The administrative body has an obligation to act with the omitted party.

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?

The principle of active parties' interaction is based on the concept that a party is an active factor of the procedure and not merely a passive object of the administrative body's acts. The fact that the principle is taken into account in the administrative procedure is reflected in the circumstance that, throughout the proceedings, the parties participates actively. Administrative Code requires the authorities to create optimal conditions for such participation. This principle is further specified in the provisions governing the procedural rights of the parties – e.g. right of the access to the file, right to suggest evidence, to inquire the witnesses and the experts, right to appeal etc. The principle of active parties' interaction is understood primarily as the right that a party may or may not use, or a right may also be waived. On the other hand, it must be observed that the party to the proceedings is also holder of procedural obligations, which seek to ensure the uninterrupted procedure. Applying the principle of active interaction is particularly important at the stage of finding evidence necessary for the decision. Therefore, Administrative Code expressly imposes an obligation of the administrative authorities to give the parties the opportunity to express their views relating to the evidence necessary for the decision and to put forward their proposals. Breach of the principle of the active interaction is one of the grounds for the renewal of the proceedings.
An effective application of the principle of active interaction should also be helped by the administrative bodies' duty to assist and instruct the parties to avoid being prejudiced by ignorance of the law. This is, in particular, an instruction about the procedural rights of the parties concerned and about the consequences of the execution or non-execution of certain procedural steps.

Procedural rights of parties (e.g.):

- right to be informed about the commencement of procedures
- right to be invited to oral hearing

- right to inquire the witnesses and the experts during the oral hearing
- right to express party´s opinion of the supporting evidence and the methods of its establishment prior to the decision
- right to suggest additional evidence
- right to access to the file
- right to choose representative
- right to request a written decision within a specified period
- right to service the decision in written form
- right to appeal

Procedural obligations of parties (e.g.):

- to meet specified time limits
- to suggest the proofs which are known to party in order to support its propositions
- to submit the documents necessary for the evidence purposes
- to abide local observation
- to show up under summons
- to complete essentials of the proposal prescribed in the legal regulations

The party may act independently to the extent to which it is capable to assume rights and obligations through its own actions.

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

All the parties have the same rights and obligations in the course of the proceedings. If a special legislation confers the status of a party for the part of the proceedings, such party has procedural rights and obligations only in that part of the proceedings for which has been granted the status of a party.

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

Comparison of Article 9 with Administrative Code

It is the expression of the principle of material truth, which requires the decisions of the administrative authorities to be based on well-established facts of the case - the situation where the administrative authority acquires sufficient knowledge of the factual circumstances of the case based on evidence and proofs. Administrative Code state: The administrative authority must determine, in an accurate and comprehensive manner, the facts at issue and therefore to provide the evidence necessary for the decision-making. When providing the evidence the administrative authority shall not be bound by the suggestions of the parties. The evidence necessary to take the decision shall consist mainly in proposals, suggestions and opinions of the parties, proofs, statements under oath, as well as in facts generally known or known to the authority because of its activity. The administrative authority shall determine the extent and the methods for the establishment of the evidence. A party is entitled to suggest the evidence to be furnished, including the additional evidence and to inquire the witnesses and the experts during the oral hearing and the local observation. The administrative authority must provide the parties with the opportunity to express their view regarding the supporting evidence and the methods of its establishment prior to the decision and, if appropriate, to suggest some additional evidence to be

provided. The proofs shall mainly consist in examination of the witnesses, expert's opinions, documents and inspection.

Comparison of Article 11 with Administrative Code

A party shall be bound to suggest the proofs that are known to it in order to support its propositions. The proofs shall mainly consist in examination of the witnesses, expert's opinions, documents and inspection. If an assessment made by an expert is necessary to evaluate the facts important for the decision, the administrative authority shall appoint an expert pursuant to the appropriate legal rules. No citizen may refuse to be examined as a witness (except the person who would cause risk of penal prosecution for himself or for his close persons and person who would disclose State, business or service secret or violate the reticence duty imposed or recognized by the law); he or she must state the truth and must not leave unrelated any of the facts. The administrative authority shall instruct the witness prior to his examination on his right to refuse to be examined, on his duty to state the truth and not leave unrelated any of the facts and also on legal implications of a false and incomplete statement.

Comparison of Article 14 with Administrative Code

Administrative Code governs right to be heard in section 33: A party is entitled to suggest the evidence to be furnished, including the additional evidence and to inquire the witnesses and the experts during the oral hearing and the local observation. The administrative authority must provide the parties with the opportunity to express their view regarding the supporting evidence and the methods of its establishment prior to the decision and, if appropriate, to suggest some additional evidence to be provided.

The procedural rights listed there are part of an important procedural right - the right to be heard. This right under the administrative procedure involves the right: to apply proposals (to suggest evidence), to express themselves (based on evidence and proofs). The Administrative Code does not define the content of these rights in view of the diversity of cases. The limitation of their application is undoubtedly the purpose of the administrative procedure.

Comparison of Article 15 with Administrative Code

Administrative Code, in respect to the right of access to the file, provides that: The parties and their representatives are entitled to access the file other than voting minutes and make abstracts therefrom. The administrative authority may allow the access to the file or may provide information also to other persons, who must justify their request. The administrative authority must ensure that the access to the file does not result in a disclosure of a State, business or service secret or violation of the reticence duty imposed or recognized by the law.

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

According to our information, any political or academic discussion about the reform with regard to the participation rights of third parties in administrative proceedings is not in progress. The Administrative Code laid down the institute of the parties and the participants.

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!

In the case law of the Supreme Court of the Slovak Republic (hereinafter "the Supreme Court") there cannot be found many cases in which the Supreme Court would consider the issue of the legal status (i.e. rights and obligations) of third parties (*participants* according to the provisions of the Administration Code – hereinafter "participant") in the administrative proceedings itself. As a rule, if the Supreme Court does deal with the legal status of the participant, it considers in particular the question whether the legal status of the participant in the administrative proceedings implies the right to bring an action to the court and / or what rights the participant subsequently has in court.
The vast majority of this type of decisions concerns civic associations that work in the area of environmental protection. Their status is defined by the Act on Nature and Landscape Protection. It has been changed several times - initially civic associations had the status of a party to the proceedings, later it was reduced to the status of a participant and currently they have again the status of a party to the proceedings. There is especially one particular civic association, called the WOLF Forest Protection Movement, engaging very actively in administrative proceedings[1] and often appealing to the Supreme Court. As an example of an interesting decision, we would like to mention the judgment no. 5Szp/41/2009 of 12 April 2011, which was issued at a time when the civic association had only the status of a participant. Although this is not exactly a recent decision, it is interesting as well as important because it was a breakthrough in the case law of the Supreme Court regarding the status of the participant. Prior to this judgment, the Supreme Court did not, in similar situations, confer on the participants´ right to bring an action to the administrative court and the appeal to the Supreme Court, since such right was not (expressly) defined in law. However, in this case the Supreme Court changed its (own) legal opinion, taking into account the obligations of the Slovak Republic resulting from the Aarhus Convention[2]. The judgment of the Supreme Court was also based on the judgment of the Court of Justice of the European Union of 8 March 2011 in case C-240/09 and a large number of international and national sources of law and sources of Community law. It based its legal opinion, in particular, on the fundamental rights of the civic association - the right to a favourable environment and the right to judicial protection, and by the "extensive euroconformal" interpretation of the concept of a party to the proceedings, it conferred the rights of a party to the participant. This judgment influenced subsequent case law of the Supreme Court in this area (i. e. the participants have the same procedural rights before court as the parties to the proceedings).

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)?

[1] Namely, in the proceedings for granting an exception to the conditions of protection of protected species, which concerns the issue of brown bear hunting.
[2] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

The administrative authority must determine, in an accurate and comprehensive manner, the face of affairs and therefore to provide the evidence necessary for the decision making. When providing the evidence the administrative authority shall not be bound by the suggestions of the parties.
In the case of proceedings initiated by the administrative authority on its own initiative (the principle of official), the obligation to ascertain the real face of affairs is in the public interest and the burden of proof is fully covered by the administrative authority (the principle of investigation). None of the parties to such proceedings is in the process responsible for whether or not a certain fact can be proven.
The requirement of the law as fully and most accurately as possible to ascertain the real face of affairs is the procedural expression of the principle of material truth (§ 3 (4)).
The completeness of the documents found means that all the investigations and evidence that are of decisive importance for the case have been carried out.

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

A party and participant are entitled to suggest the evidence to be furnished, including the additional evidence and to inquire the witnesses and the experts during the verbal process and the inspection. A party shall be bound to suggest the proofs which are known to it in order to support its propositions.
The principle of active parties´ interaction is, in essence, a form of bilateral cooperation between the administrative authority and the parties.
The duty of the administrative authority to ascertain the true state of the matter corresponds to the right of a party to be found out and to the obligation of the party to submit evidence.
It is typical for the administrative proceedings that the party is proposing evidence already in their proposal to initiate the proceedings; specific rules oblige the party to attach the evidence to the application.

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

In various types of administrative proceedings, the obligation to propose or to seek evidence in various proportions and with different consequences is shared between the party and the administrative body. In adversarial procedure, the principle to hear is rather applicable, in the non-adversarial procedure, either the investigative or reasonable combination of the to hear and investigative principles is applied, in particular depending on whether it is an act that starts with an official duty (the principle of investigation) , or proceedings initiated at the request of a party (combination of the to hear and investigative principles). But there are always two common features here:
(a) only the administrative authority decides which of the proposed means of proof will be carried out,
(b) only the administrative authority performs the evidence.

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 administrative authority is required to protect the public interest and must therefore ascertain all the facts, whether or not they are in favor of the party to the proceedings.

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,…)?

The process of obtaining documents for a decision in administrative proceedings has some specifics, particularly in comparison with court proceedings. The administrative procedure is predominantly governed by the principle of written hearing. It is not decisive whether the action is initiated on the initiative of the participant or on the initiative of the administrative authority. Most of the substantive rules directly lay down what elements of a filling must be submitted in the relevant proceedings and which attachments must be attached to the filing. When examining the evidence for the decision, the administrative authority will normally be limited to assessing the submissions and subordinating them to the facts of a case of the relevant legal provision. This, of course, does not preclude, if the nature of the case so requires, or the provision of a special legal regulation, so that the administrative authority also orders an oral hearing. It can also make further evidence. The detection of grounds, in particular in the form of witness testimonies, is typical only for some types of proceedings (eg for hearing of an administrative delict).

(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)?

A party and participants are entitled to suggest the evidence to be furnished, including the additional evidence and to inquire the witnesses and the experts during the verbal process and the inspection. A party shall be bound to suggest the proofs which are known to it in order to support its propositions.
In the course of the proceedings the administrative authorities must proceed in close collaboration with the parties, participants and other persons concerned by the proceeding and make them always possible to plead their rights and their interests in an efficient manner, in particular to give their view on the evidence and to make proposals.

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

Neglect of duty of a party to file evidence of which he or she is aware may have adverse procedural consequences for the party to the proceedings. If he fails to perform this obligation with-

out reason, and thereby unnecessarily costs, the administrative body may impose an appropriate remedy.
The administrative authority may cause the parties, the participants, the witnesses and the experts to reimburse the expenses arisen to the administrative authority by their fault, furthermore it may cause them to reimburse the expenses arisen to the other participants by their fault.
Administrative body may impose a fine on a party, if the person complicates the course of the proceeding.
The person who complicates the course of the proceedings, mainly by failing to show up upon the administrative authority's request without any motivation to do so, by disturbing the course of the proceedings in spite of being reprimanded not to do so, by refusing to give the statement, deliver a document or enable the inspection, may be penalized by the administrative authority by a fine up to 165 EUR, even repeatedly.
If the party doesn´t propose disclosure of evidence in support it´s proposition, the administration authority has reason to consider his findings to be sufficient. For example, an administrative body is not required to invite a party to identify witnesses and the like. An administrative authority isn´t under an obligation to consider legally relevant reasons tending to the party which has not been put forward and subsequently to make the relevant factual findings. Proof of the administrative authority is limited by facts known to the administration and the parties are also responsible for the outcome of the proceedings.

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

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?

The extent and the methods for the establishment of the evidence shall be determined by the administrative authority. The administrative authority shall determine the extent and the method of the source of the decision, it shall be his discretion if he will make certain evidence or use another evidence.

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

The administrative authority evaluates the proofs in its own discretion, each proof shall be evaluated separately and then all of them in their mutual context.
Principle of discretionary weighing of evidence doesn´t mean administrative authority arbitrariness. The administrative authority shall introduce in the justification of a judgment
the facts, which were the source of decision, the manner of proof evaluating, and including the rationale, why some evidence hasn´t been made.

c) Does your national legal order provide for rules concerning composite investigations, i.e. the collaboration of different administrative authorities (like establishing a responsible officer of one administrative authority) or the collaboration of different officers within

one administrative authority, e.g. a hearing officer who may hold hearings with applicants (like asylum seekers) while another officer takes the final decision based on written reports of such a hearing officer?

The administrative authorities perform the processual acts within their own jurisdiction. In case the administrative authority may not perform an act within its own jurisdiction or if there are other reasons to do so, it may address a request to another administrative authority on the same level or on a lower level to carry the act for it.

The Administrative Code regulates the principle that the administrative authorities are essentially carrying out procedural acts themselves in their area of competence. The administrative authority may, when selecting the requested administrative authority, apply its claim only to the administrative authority of the same or lower instance. Authorization to appeal to another administrative authority does not apply to higher administrative authorities. The law does not explicitly provide for the possibility of requesting an administrative authority of another kind, but the view prevails that such a request is possible. However, they must correspond to the technical and professional capacities of the requested administrative authority.

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

The administrative authority evaluates the proofs in its own discretion, each proof shall be evaluated separately and then all of them in their mutual context.

Where the taking of evidence is not covered by the Administrative Code or by any other law, the administrative authority shall decide on the way in which the evidence is taken. The only limiting constraint is that evidence may not be carried out in contradiction of the provisions of the law. This requirement is also consistent with the principle of legality in the activities of state authorities, article 2 par. 2 of the Constitution of the Slovak Republic. According to this provision, the state authorities can act only on the basis of the constitution, within its limits and in the manner stipulated by the law.

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

---

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

The administrative authorities shall, in the course of the taking of evidence, proceed according to the procedural rules laid down by the law on administrative procedure, or by special procedural rules of administrative law.

Since the law does not prescribe in a binding manner the admissibility of specific evidence and its evidential force, it is up to the administration itself to determine what the evidential value of evidence in a particular proceeding. Correct conduct is controlled by so-called the principle of discretion in weighing evidence. The administrative body is not bound by any consideration of the importance and probative value of the individual evidence.

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

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

Evidence is inadmissible that would have been done contrary to an explicit prohibition under special regulations or in an unacceptable manner if the law regulates such a 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?

Administrative justice is predominantly based on a review of the lawfulness of the facts of the case and legal state already identified and, therefore, limited evidence is provided in the administrative judiciary. Administrative court doesn´t ascertain the facts of the case and it does so exceptionally. The party to the proceedings has a duty to argue and to propose evidence to substantiate his claims. The mandatory element of the action is the obligation to identify the evidence which the applicant seeks to carry out in the administrative proceedings. Evidence is based on the principle to hear. The procedural obligations and the procedural liability of the parties to substantiate the facts and to propose evidence are suplemented by the court's right to request further explanation, which allows the court to conduct proceedings. Thus, the law also determines the peace and opportunity of the court to participate in the search for truth in the administrative judicial process.

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

The parties to the proceedings have the same rights and obligations in the proceedings before the administrative court. It is also characteristic of an administrative judiciary that a public authority is no longer in an authoritative position but has the status of a party with the same rights (and duties) as the one in which the right is involved, including the possibility of expressing it.

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!

Evidence shall be evaluated by the court upon its discretion, each piece of evidence on an individual basis and all the evidence in contexture; in doing so, the court shall carefully consider all the information that has become known in the proceedings.
The principle of discretion in weighing evidence, as well as the rule of material conduct of the administrative proceedings, is applicable. The principle of discretion in weighing evidence follows from the constitutional principle of the independence of the courts.

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?

Administrative justice in the Slovak republic is based on cassation control of the lawfulness of decisions of public authorities. The administrative court in the administrative judiciary is predominantly based on the facts as found by a public administration authority, and the proving is only exceptional.

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)?

The administrative courts shall not review the rendering of decisions which explicitly depend on reviewing the health status of persons or the technical condition of items, unless such inherently represent a legal hindrance to the exercise of an occupation, employment, or entrepreneurial or any other economic activity.

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?

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

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

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

d) Do they prefer to focus on procedural aspects?

It depends on the circumstances, but in principle they do not focus only on the procedural aspect.

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

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

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

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

The principle of parties´equality and the principle of parties´interaction.
In the constitution expressed
1. the fundamental right to deny the denunciation,

2. the fundamental right to legal aid,
3. the fundamental right to equality with the other parties to the proceedings
Article 12 – (1) All human beings are free and equal in dignity and in rights.
Article 47 – (1) Everyone shall have the right to refuse to give testimony, which might cause a danger of criminal proceedings against that person or a person akin.
(2) Everyone shall have the right to legal advice from the commencement of proceedings before courts, other public authorities or bodies of public administration, under the conditions laid down by a law.
(3) All parties to any legal proceedings under paragraph 2 shall be treated equally.

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

The principle of material equality, which is based on the constitutional principle of equality before the law, the assessment of the substantive equality of the parties to proceedings is especially relevant in those cases where a rule of law which includes discretion is applied - in the assessment of factual or similar cases should proceed in a similar manner throughout the decision-making period, provided that the conditions have not changed.

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)?

Strict duty of administrative bodies to comply with legal requirements
Principle of legality
Article 2 – (2) State bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law.
(3) Everyone may do what is not forbidden by a law and no one may be forced to do what the law does not enjoin.
The purpose of the principle of "What is not permitted is forbidden“ is to create legal certainty for private-law entities that the authorities with jurisdiction will not act against them in contradiction with their jurisdiction and to establish legal certainty among public authorities regarding the jurisdiction they have conferred on them.

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?

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!

There are not many cases where the Supreme Court of the Slovak Republic (hereinafter "the Supreme Court") would address specifically the issue of the discretionary powers of the administrative authorities in this context (i. e. with regard to the determination of facts) and the corresponding reduced judicial control.

Case no. 3Szf/33/2010 (judgment of 15 March 2011) concerned the decision of the Office for Public Procurement, issued in the proceedings in which discretion was used regarding special technical matters in the area of transport and this discretion was based on an expert´s opinion. The applicant did not submit an opposing expert´s opinion in the proceedings. The Supreme Court therefore stated that if the Office for Public Procurement had decided on technical objections on the basis of an expert´s opinion, its discretion could be challenged in principle only by an opposing expert´s opinion.

Case no. 10Szd/33/2011 (judgment of 20 June 2012) concerned the examination of the legitimacy of the proceedings and the decision of the administrative body, which found the applicant guilty of committing a road traffic offence. The question was whether the administrative authorities acted correctly when they did not decide on the offence by issuing a traffic ticket[3] but in ordinary administrative proceedings. The Supreme Court stated that the question whether the offense had been reliably detected should be answered within the discretion of an administrative body, which, by using its discretionary powers, will assess whether the conditions[4] for issuing the traffic ticket are fulfilled. When reviewing the legitimacy of the decision and the proceedings of the administrative body in a particular case, the court will in principle be limited to answering the question whether the evidence introduced by the administrative authority is lawful (in particular regarding the source from which it originates or regarding a potential breach of any principles of administrative procedural law). Also the court will answer the question whether the introduced evidence makes the factual conclusion of the administrative authority logically possible. Court also assesses whether the administrative authority applied the relevant legislation to the case in question.

In older case no. 2Sz-o-KS/126/2006, the Supreme Court expressed its views on the evaluation of the evidence and the court´s review of discretionary powers. The administrative authority may, at its discretion, assess whether a certain fact in the taking of evidence has proved to be true; i.e. it may conclude that there is sufficient evidence or decide to obtain further evidence, more relevant to the decision.

Evaluating the evidence is a complicated intellectual activity, during which the administrative body attributes the introduced evidence the value of the importance for the decision, the value of legality and the value of its truthfulness.

The evaluation of evidence under the principle of discretionary weighing of evidence can not be arbitrary. According to the Supreme Court, the administrative authority may only proceed with the evaluation of evidence in accordance with the principle of the free evaluation of evidence once it has taken all the steps necessary to remove the existing discrepancies in the evidence.

[3] Issuing a traffic ticket is a shortened form of administrative proceedings.
[4] There are two conditions: the offense is reliably detected and the offender is willing to pay the fine.

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?

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?

ANSWER:

Applicable laws:
Act no. 50/1976 Coll. The Building Act
Act no. 24/2006 Coll. on Enviromental Impact Assessment
Act No. 543/2002 Coll. on Nature and Landscape Protection
Act no. 71/1967 Coll. on Administrative Proceedings (Administrative Code)
Act no. 162/2015 Coll. Administrative Procedure Code

In terms of the Slovak legal order, the municipality is the building authority. The scope of powers of the building authority constitutes the delegated performance of the state administration.
The Building Act (as a special rule towards Administrative Code) defines a specific set of parties. Parties in the building permit procedure are (§59):
a) the project owner,
b) the persons who have ownership or other rights to the plots and to the structures located on the plots, including neighbouring plots and structures, provided that their ownership or other rights to such plots and structures may be directly affected by the building permit,
c) other persons for which such a position follows from a special regulation,
d) the works inspector or qualified person,
e) the designer in the part that relates to the design of the structure.

Other persons for which such a position follows from a special regulation may be the public concerned under the act on Enviromental Impact Assessment and Act on Nature and Landscape Protection. The public concerned is the public which is affected or likely to be affected by a procedure concerning the environment or has an interest in such a procedure; a non-governmental organisation promoting environmental protection and meeting the requirements set out in this Act is deemed to have an interest in such a procedure,

Persons from assigned case in terms of Slovak administrative law:
applicant A = the project owner – the party
competent administrative authority of the district (S) – in terms of the Slovak legal order, the competent administrative authority would be municipality as public administration body
farmer F – the owner of the neighbouring plot – the party
a nature protection organization O = the public concerned; the organization would meet the definition of a party under Building Act (§ 59 let. c), see above) in connection with the definition of the public concerned under the Act on Enviromental Impact Assessment and Act on Nature and Landscape Protection.
Under Act on Enviromental Impact Assessment (§ 24), the public concerned has the position of a party in the procedures referred to in Part Three (that is Assessment of proposed activities) and afterwards the position of a party in the authorisation procedure concerning the proposed activity or change thereof, unless the participation of the public concerned follows from a special regulation (means Administrative Code). A non-governmental organisation promoting environmental protection is a civic association, a non-investment fund, a non-profit organisation providing public-benefit services, except those founded by the State, or foundation founded for the purpose of the creation or protection of the environment or the preservation of natural values (§ 3).
According to the Act on Nature and Landscape Protection (§ 82), the party is also a natural person, a citizens' initiative or an artificial person, whose such status is the result of a special regulation (means e.g. Act on Enviromental Impact Assessment).
municipality M – in Slovak administrative law the municipality is always a building authority and therefore cannot be a party to proceedings nor person concerned. On the other hand, the Building Act specifies specific exceptional cases where the municipality is not a building authority, namely in the case of construction of a motorway and expressway or the execution of a construction which is a significant investment under a special regulation, which is not the assigned case.
environment protection authority E = the authority concerned; under Building Act (§ 140a), authority concerned means the public administration authority that is an administrative authority

protecting the interests referred to in Section 126 Subsection 1[5] Administrative Code, where a procedure under the special regulation, governing powers of the authority concerned, forms part of a procedure under this Act, follows such a procedure or relates to such a procedure.
P president of the Local Association for Preserving the Traditions – it depends if Association would meet the definition of a public concerned (so it can act as a party in procedure; see below).

Deciding on the objections:

1. ***municipality M*** – Under Building Act, zoning plans[6] of municipalities (*municipal plan*) and zones are approved by the municipalities. The municipality shall approve the spatial planning documentation and declare its binding parts in the applicable decree. The approved spatial planning documentation is, to the determined extent, a binding or guiding basis for drawing up and approving further spatial planning documentation, for planning decisions and for drawing up the documentation of structures. (§ 27) The planning authority, which procured the spatial planning documentation, shall monitor systematically whether there is not any change of the land-technical, economic and social conditions based on which the territory organisation concept was drafted. If there is a change in the conditions or if it is necessary to place public works, the planning authority shall procure a supplement or change of the spatial planning documentation. On a regular basis but not less than every four years, the municipality is obliged to examine the approved zoning plan in order to find out whether it is necessary to adopt changes or supplements thereof or to procure a new zoning plan. (§ 30)
   In view of the above, and given that in our circumstances the municipality is (almost) always a building authority, it is very unlikely that a disadvantage would occur in the exclusive municipal planning competence. Since the municipality must always issue building permits in accordance with the municipal (zoning) plan and in accordance with the planning decision on the placement of a structure, the municipality cannot itself restrict in its own powers. For the construction itself, the most important is stage of the planning decision, so when the building is located. The building permit procedure is only technically solving what has already been placed under planning decision (on the placement of a structure). The building authority is obliged to proceed in the building permit procedure based on a lawful planning decision, even if in the meantime the zoning plan has been changed, whereby the planning decision must always be in accordance with the spatial plan.
   In the case of a change in the zoning plan after the building permit was issued, it would be considered as an interference with the ownership right of the person to whom the

[5] Where a procedure under this Act relates to the interests protected by regulations on the protection of public health, on the creation and protection of healthy living conditions, waters, on the protection of natural healing spas and natural medicinal sources, on the protection of agricultural land resources, on forests and forest management, on air protection measures, on the protection and use of mineral resources, on cultural monuments, on the State nature protection, on fire protection, on the prohibition of biological weapons, on safeguarding occupational health and safety, on waste, on veterinary care, **on environmental impacts**, on the nuclear safety of nuclear installations, on the prevention of serious industrial accidents, on the national border management, on roads, on railways and rail transport, on civil aviation, on inland navigation, on power engineering, on thermal power engineering, on electronic communications, on public water supply systems and public sewerage systems, on civil protection, on labour inspection and on the State geological administration, **the building authority shall issue the decision on the basis of a binding opinion of the authority concerned** under Section 140a **which raises the requirements under special regulations**.

[6] The spatial planning documentation addresses spatial arrangement and the functional use of a territory in a comprehensive manner, brings in line the interests and activities influencing the territorial development, environment and ecological stability, and sets out regulations for the spatial arrangement and functional use of the territory. The spatial planning documentation is drawn up on the nationwide and regional levels, and for municipalities and parts of municipalities. The spatial planning documentation consists of: a) Slovak Spatial Development Perspective, b) zoning plan of a region, c) zoning plan of a municipality, d) zoning plan of a zone. (§8)

building permit was issued. That would be the reason for bringing an action against the municipal decision, which changed the zoning plan.

2. ***farmer F*** - Under conditions of Slovak administrative law, the party is primarily entitled to appeal against the issued building permit. Appeal is a regular remedial measure. The appeal shall be settled by the authority on a higher level which is immediately superior to the authority which pronounced the appealed decision. Appellate authority is required to review the decision in its entirety and is not bound by the cause of appeal. Apart from the contested decision, the appellate authority is also required to examine the procedure of the first instance administrative body, which issued the contested decision. The appellate authority is required to examine both the legality and the correctness of the contested decision. It is required to consider whether the contested decision is subject to factual defects, legal mistakes and whether the first instance administrative authority correctly applied discretionary powers. The appellate authority is obliged to supplement the proceedings and remove any defects found. If reasons exist to do so, the appellate authority shall amend the decision or declare it null and void, otherwise the appeal shall be rejected and the decision confirmed. The appellate authority shall declare the decision null and void and the matter shall be resubmitted to the administrative authority by which it was pronounced in order to open a new discussion and to make a new decision, if this procedure is more suitable with regard to the swiftness and economy of the proceedings. The administrative authority shall be bound by the opinion of the appellate authority.

3. ***a nature protection organization O*** - Administrative Procedure Code governs the institute of the omitted party. A natural or artificial person who did not act as a participant in an administrative proceeding, even though he or she should have been able to act with it, may seek redress by bringing an action before a court. Under the Administrative Procedure Code, if an administrative action is brought by someone who claims that the decision of a public authority or a measure taken by a public authority has not been delivered, even if he or she should have been involved as a party to the administrative procedure ("the omitted party"), the administrative court verifies the accuracy of that claim and whether or not the contested decision or measure has expired for more than three years and, if those conditions are met, it decides that a public authority is obliged to deliver the decision or measure issued to the omitted party. If a public authority unreasonably fails to deliver a decision or measure to an omitted party, the court may impose a fine on it.
   In such a case, the omitted party is entitled to appeal against “new” decision of administrative body and the public administration authority is obliged to act and decide on this remedial measure. The omitted party may also bring an action against the new decision if the decision is already valid, or may bring an action against decision on the appeal.

4. ***president of the local Association*** – should take same steps as nature protect organisation (see above).

It follows of the above that the factual questions put forward by the individuals in the assigned case would most probably be settled at the level of the administrative bodies by way of appeal as a regular remedial measure. The administrative action is only a further stage of the administra-

tive procedure, the purpose of which is judicial review of the decision issued by administrative authority. The principle of subsidiarity of the administrative justice, which requires the use up of remedial measures (an appeal) in administrative proceedings (building permit procedure) prior to bringing an action before a court, is applied here. In court proceeding, the defendant is always a public administration body, which has decided on a remedial measure. An administrative action is always brought to a district (first instance court) or regional court (appellate court, in exceptional cases stated by law also first instance court). The Supreme Court is competent to decide on appellate reviews against the decisions of appellate courts (i.e. the Supreme Court is not first instance court, it does not decide on the administrative actions).

We cannot responsibly answer the assigned questions how the court would decide on the actions brought by the individuals in assigned case, because under the conditions of Slovak administrative law the objections raised by the persons in the case would most probably be resolved in the course of the appeal proceedings.

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[7]:

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[8]. 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

---

[7] 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).

[8] 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.