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ACA EUROPE

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

ReNEUAL I –

Administrative Law in the European Union

"Single Case Decision-Making"

Cologne, 2 – 4 December 2018

Answers to questionnaire: Sweden

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

2. - 4. December 2018

Verwaltungsgericht Köln (Administrative Court Cologne)

Questionnaire

Introduction:

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

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

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

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

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

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

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

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

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

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

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

I. Parties to Administrative Proceedings: Categories and Legal Positions

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

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

Yes, all of them are potential parties before an administrative body, depending upon the legislation in force, of course. Addressees and applicants are always parties. Others can be, depending on their legal and factual interest (the main test being whether they are factually affected), organisations are handled as "others", with the addition that they can be parties as bearers of general interests in certain areas of law (environmental law i.e.). In cases where an administrative body is the addressee, as in public procurement issues for example, the body will be party to the administrative proceedings.

   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)

In the general codification a very general rule on standing etc. is provided and then developed further in the jurisprudence of the Supreme Administrative Court (SAC).

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!

Not really, as the general statute mentioned above is flexible enough to accommodate most situations under special legislation. Modifications can be done by case law from the SAC.

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

See above.

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?

This varies and is difficult to answer in general terms. In some cases, the administrations is required to try to identify others that may be affected by a decision in order to involve them in the proceedings, like for example building-permits. In other cases the potential parties must make themselves known to the administration, for example by a request to participate and the administration must then decide whether to include the party or not (as a request must always be answered by a decision of some sort).

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

See 3.

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

See 3.

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 consequences of not participating when allowed to do so can be that a party loses the ability to challenge legal decisions, but not necessarily. It depends upon the legislation in question and legal principals developed by the SAC.

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

a) Are they entitled to direct court actions against the administrative decision to not admit them as parties to the administrative proceedings? Are (only) original parties (parties by law) to the administrative proceedings entitled to do so?

An individual or organisation not admitted to an administrative proceeding may challenge this in court, this is not restricted to "parties by law".

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?

There might be cases where this is the case, but generally Swedish administrative law does not require such a final decision in order for a legal challenge.

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

The administrative Act provides the authority with an opportunity to change a challenged decision instead of sending it to the competent court.

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?

Yes, in principle, but individuals can have some additional procedural rights as compared to authorities, such as a right to an oral hearing, Administrative Act (2017:900) § 24.

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

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

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?

A new Administrative Law was introduced last year (2017) and no other reform is discussed at present. The law does not change the legal situation in respect to third parties.

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!

HFD 2017 ref. 24 – A public provider of health is not granted standing in cases concerning reimbursement of costs for treatment in another EU-country, even if that provider is the final bearer of the costs of that treatment.

HFD 2016 ref. 15 – In a case concerning permit to serve alcohol in a café, the court paid special attention to the fact that the owner of the building was not positive to such a permit.

HFD 2015 ref. 41 – A foreign company, established by cross-border fusion of a Swedish and a foreign company, is not allowed to intervene in a taxation procedure concerning the former Swedish company, due to that procedure's special nature.

II. Determination of Facts and Discretionary Powers

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

Yes, there is a general duty in the Administrative Act, but its concrete content I dependent upon the nature of the administrative action.

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

In cases where an individual seeks a permit or a financial grant or similar "beneficial" public decision, he or she is generally responsible to show that the qualification for such a decision is met.

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

Yes, see above.

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

Not generally. If the administrative action contains sanctions, rules of protections versus self-incrimination may of course limit the nature of an individual's duty to provide the authority with correct facts.

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,…)?

Yes, see above.

(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)?

In some areas of law, yes.

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

An unfavourable decision from the authority and – depending upon the relevant legislation – separate administrative sanctions for not fulfilling such duties.

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

The main difference is not so much the categories of parties as the nature of the proceedings (permits, administrative sanctions, expropriation, etc.)

(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?

It is subject to a large degree of administrative discretion, but includes some regulated steps that must be observed, such as letting the subject comment upon the administrations findings prior to its decision.

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

Yes.

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?

Such decisions are possible, especially within the same administrative authority.

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

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

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

A general rule of free evidential evaluation, applicable to all legal proceedings.

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

Historical experience with a more strict and rigid legislation on rules of evidence resulted in a reform in 1948 that broke dramatically with that tradition and established a rule of free evidential evaluation.

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

No.

(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?

The parties have the main role here, but the courts have a residual responsibility for the investigation of facts that can be of practical importance in cases where individuals lack legal representation.

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

Yes, claimants have a larger responsibility (see above 1.b) and administrative authorities that wants to use administrative sanctions as well.

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!

See above.

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?

Generally, no. In practice, fact finding of specialist authorities (i.e. the Agency of Chemical Control) will weigh heavy in the courts evaluation of facts.

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

No.

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?

No, such limitation would rather follow the nature of the proceedings (see above 2.c).

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

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

Not generally, but see above 6.a.

d) Do they prefer to focus on procedural aspects?

Such mistakes at the administrative level is of course easier for a court to identify and can sometimes therefore be a "first check" in order to establish how the case should be treated.

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

No.

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

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

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

There is a general provision in the Instrument of Government, 1 Chapter 9 §, that provides that all public authorities should only act in accordance with objectivity. In this is included that administrative decision should have a sound basis in facts. This provision is the basis for a lot of cases from the Parliamentary ombudsman concerning administrative actions and some case law as well.

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

See above.

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

Yes, in a constitutional reform 2011, a general provision providing a right to a fair trial (like article 6 of the ECHR) was introduced in the Swedish constitution. From earlier the principle of legality in the exercise of public power (1 Chapter 1 § section 3) already meant a strict duty to base any administrative action on legal norms.

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?

Not much. A few years back a discussion took place concerning the perhaps unusual powers of administrative courts in Sweden to not only quash administrative decisions, but also replace them with another, "better" decision. It was discussed whether influence from European law would make it necessary to reform the courts powers into a "cassation-style" system or if the Swedish system instead was better equipped to deal with such challenges than the traditional continental approach. The latter view seem to have prevailed.

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

The Supreme Administrative Court is a court that deals exclusively with legal precedent. As such, issues of evidence do not appear often, as the main task is to provide guidance for the interpretation of legal acts. As noted above, Swedish procedural law does not contain many substantive provisions on evidential evaluation. Such cases in SAC will therefore necessarily concern "thresholds" of evidence and sometimes structural issues on how to approach a certain problem.

HFD 2017 ref. 42 – Concerning whether a very small child's information on abuse from the parents can be the sole ground for a decision on compulsory care of the child.

HFD 2017 ref. 39 – A case on under which circumstances it is permissible to keep the residence of a child in compulsory care secret to one of the parents.

HFD 2014 ref. 46 – Concerned compulsory care of a teenager due to alleged mistreatment by the parents. SAC gave some general guidance on how to evaluate facts in relation to the protective nature of the legislation.

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?

Due to lack of time, we cannot answer this hypothetical question.

Annex to question II.6.b)

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

1. (abstract) interpretation of legal provisions;

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

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

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

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

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

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

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

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

1. compliance with procedural requirements,

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

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

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

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

4. avoidance of arbitrary considerations,

5. correct interpretation of the relevant legal terms.

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