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Seminar of the Federal Administrative Court and ACA-Europe

ReNEUAL I

**Administrative Law in the European Union
Single Case Decision-Making**

Cologne, 2 – 4 December 2018

General Report

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Funded by the Justice programme of the European Union



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Introduction

The questionnaire in preparation of the ACA seminar ReNEUAL I – Single Case Decision Making – was answered by 27 members, observers and guests (Belgium [BE], Bulgaria [BG], Cyprus [CY], Czech Republic [CZ], Germany [DE], Estonia [EE], Spain [ES], the United Kingdom [GB], Greece [GR], Finland [FI], France [FR], Croatia [HR], Hungary [HU], Italy [IT], Luxemburg [Supreme Administrative Court – LU], Latvia [LV], Montenegro [ME], Malta [MT], the Netherlands [NL], Norway [NO], Poland [PL], Portugal [PT], Romania [Legislative Council – RO], Serbia [RS], Sweden [SE], Slovenia [SI] and Slovakia [SK]). The thorough work of the rapporteurs offers a solid basis for the comparative law studies to be undertaken and deepened during the seminar in Cologne.

Being closely linked in a European legal community it is eminent for supreme administrative courts to dare the glance into our neighbours' jurisdictions. This is not only important to foster the uniform application and interpretation of European Union law. It also matters because we share (partly) common legal traditions and we are widely facing the same or similar problems. In the ReNEUAL project (Research Network on EU Administrative Law) legal scholars and practitioners elaborated model rules for an EU Administrative Law de lege ferenda using the methods of comparative law with a view to finding not the average solution, but the supposedly best or most appropriate solution.

The seminar ReNEUAL I is not designed to modify these model rules. It strives for applying the same methods the ReNEUAL project has used to the national laws of administrative procedure. The 27 answers gathered form an immense pool of legal traditions and ideas which are worth a closer look. This look will allow all participants in the seminar and all consumers of its results to learn from one another.

In general terms the evaluation of the 27 answers has produced some aspects of administrative procedure which are treated in all participating jurisdictions almost unanimously. This may find its reason in a common European Union law background (e.g. environmental law) which does not allow for deviations. But there



are also some aspects which are not regulated uniformly by European Union law and which still have been described with very little or no variance. This may be considered evidence of the fact that some questions are dealt with by common convictions or – common sense. Yet, quite a few questions were answered differently, sometimes showing a somewhat similar basic thought, but great variety in detail.

The seminar in Cologne will offer the chance to scrutinize these differences much more closely. The presentations, panels and discussions will be rounded up by a moot court which will present the case study, which has formed part of the questionnaire, in an interactive format.

In preparation thereof this general report tries to roughly summarize the compound of answers. It is structured into two main chapters like the questionnaire: Parties to Administrative Proceedings (I.) and Determination of Facts and Discretionary Powers (II.). The sub-structure (1. – 6. and 1. – 7. respectively) makes reference to the numbering of the questionnaire in order to facilitate linking the summary to the single questions.

I. Parties to Administrative Proceedings: Categories and Legal Positions:

1.1 Concerning the question of who is or can become a party to administrative proceedings there are some aspects which have been (almost) unanimously answered by the members. First of all and self-evidently, the person (natural or legal) who is or is to become the addressee of an (onerous) administrative decision and the person (natural or legal) who applies for a (beneficial) administrative decision is a party to the proceedings leading to this decision. They may be considered the original parties. Likewise the ReNEUAL draft considers a party any addressee of the intended decision (Art. III-2 (3)).

1.2 Considering anyone who is not an addressee or an applicant in this sense (= not an original party) a “third person”, there must be additional prerequisites to make this third person a party to the proceedings. There seems to be a vast conformance



in the answers that a third person whose subjective rights are affected by an administrative proceeding can become or is by law a party to the administrative proceedings. Much more variety in the answers can be observed considering the prerequisites for a third person to become a party to the proceedings on grounds of an affected “interest” – in contrast to a subjective right. Such an interest may be of a legal or of a merely factual, economic or idealistic nature. Jurisdictions which demand a “legal interest” (partly “legitimate interest”: HU) use this term synonymously to the prerequisite of a subjective right which may be affected by the administrative proceedings (DE, EE, ME, PL, SI, SK) or they use the term of a “legitimate interest” (BG, ES, LU), “immediate legal interest” (NO), “concrete legal interest” (HR), “sufficient interest” (GB), merely “interest” (EE, FI, FR) or affected person (SK) in a somewhat broader sense than the aforementioned legal interest or the subjective right. If the relevant jurisdiction is not directly asking for a subjective right, but rather for a somewhat broader “interest” only, this interest is mostly not to be defined by the potential party, but it is subject to the scrutiny of the administrative authority and/or administrative courts. Such an interest must be defined by objective criteria. According to the answers of some member states the holder of such an interest may be equated with an original party, if the interest is personal, direct, legitimate, certain and present (ES, FR, LU). Likewise the Dutch answers have further explained such a broader interest as objectively determinable, personal, own, direct and current. In some jurisdictions a factual or diffuse interest may be sufficient to become a party to the proceedings (IT, PT, RO, SE). Portugal allows the participation of the general public.

1.3 Some jurisdictions also differentiate in the sense that those, whose subjective rights are affected by the administrative proceedings, are automatically or ex officio a party to the proceedings whereas the mere affection of a broader interest leaves their participation within a discretionary margin of the public authority (EE) or leads to reduced participatory rights (PL).

1.4 In all jurisdictions associations and non-governmental organizations also enjoy the right of participation. This goes with no exception, if their subjective rights are



affected and if they have juridical capacity. In most jurisdictions the lighter criteria of interest etc. (see above) also apply to such organizations. Some jurisdictions also allow the participation of organizations which do not have a legal capacity, but simply represent by fact a certain group of people (ES, ME).

1.5 In most jurisdictions special rules provide for the participation in certain fields of law (e.g. environmental law), under low or no conditions. As far as associations or non-governmental organizations are concerned they may only be a party if the administrative proceedings are conducted within the margin of the object of the association (DE, NL, PT, RO), if the organization has proven activity in this field (NL) or if the association has existed for a certain period of time and has a minimum number of supporters (CZ). In some jurisdiction they only enjoy reduced participation rights (PL); in Luxemburg the general rules of participation apply, if they are more generous than those of specialized law, even if the specialized law is more recent.

1.6 As to other administrative bodies there are different categories of participation in administrative proceedings conducted by another administrative authority. Some members stress that administrative bodies may just as well be party to administrative proceedings, if their own subjective rights are concerned. Even though many answers did not point to this, it may be assumed, that this is true for all or at least many members. A possible subjective right could be the planning competence of a community (CZ, DE, see also case study).

In another context administrative bodies may be a party to administrative proceedings conducted by another administrative authority, if the law entrusts them with protecting a specific public interest within its competence (NL; e.g. in ES: public economic or social organisations; RO: consumer protection, National Agency of Civil Servants, GB) or a specific private interest (e.g. that of the addressee of the administrative decision), as is the case with the ombudsman (PL, similar PT).

1.7 The rules about who can become a party are to be found mainly in the codes of administrative procedure. Additional rules are laid down in special laws with a limited scope. In the United Kingdom, lacking a central codification of the law of



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administrative procedure, party status will depend on specific legislations. Jurisprudence has in many member states helped to clarify the legal stipulations. No member has made positive reference to customary law.

1.8 In comparison with these findings the ReNEUAL draft chooses moderate conditions defining a party next to the addressees of the intended decision as any other person “adversely affected” by it. Yet, the motivation of the draft makes clear that adversely affected is more than just an interest. Adverse affection accordingly is an objective criterion (see Explanation No. 7). A restriction is established insofar as these persons only become a party, if they request to be involved in the procedure (Art. III-2 (3)). Somewhat narrower is the EP-Resolution which reduces possible affected interests to “legal positions” (Art. 4 lit. f). This must be interpreted in a sense of being closely linked to subjective rights.

2. Almost all members have confirmed that specific legislation may create additional categories of parties or, better said: alter the conditions of being a party. In the United Kingdom party status will always depend on specific legislation. Specific regulations apply complementary to general procedural rules. They may establish conditions which are narrower or broader than general rules, although the vast majority of examples points to the broadening of conditions, i.e. of the partial introduction of elements of an actio popularis. Due to European Union Law as well as the Aarhus Convention Environmental Law seems to be the prime subject of reference, in which non-governmental organizations whose objective lies in the field of environmental protection are granted the right to participate. Other fields mentioned are (urban) planning law (DE, EE, ES, NL), public procurement (GR) or the protection of the historic patrimony (ES). Next to non-governmental organizations there are some fields of law, which allow “anyone” to participate (CY, ES). The reasons given for opening the procedures are to foster the quality of the final decision by integrating professional expertise from outside the administration (CY, DE, NL, SI), to create more acceptance for the administrative decision, to



protect certain public interests (ES, SI; e.g. giving the environment a voice, DE) or simply to comply with EU Law and the Aarhus Convention (EE, FI).

3./4. The jurisdictions of almost all members know the participation of (further/third) parties, i.e. those which are not parties by law. These may become parties upon their own initiative or upon action by the public authority.

3./4.1 Most jurisdictions provide for the possibility that a natural or legal person who is not already an original participant (FR) or party by law may become a party to the administrative proceedings by its own request (cf. Art. III-2 (3) of the ReNEUAL-Draft) or intervention. In some member states it is sufficient to claim the status of a party (CZ, EE, SK), to submit documents (IT) or to lodge an objection (NL); there will be no formal (positive) decision about this status, but possibly a negative one (CZ, IT, ME, SK) rejecting this status. Yet, being rightfully considered a party may depend on material criteria (see above, 1.) such as having a legitimate interest to participate in the proceedings (GR).

In other member states the status of party depends on a formal decision by the administrative authority (BG, DE, LV, SI). Also, granting the status of party may depend on material criteria. As explained above (1.), in these jurisdictions the status of a party can only be granted if a subjective right or legitimate interest of the potential party is or may be affected by the administrative decision to be taken.

3./4.2 Administrative authorities are only partly obliged to investigate potential parties ex officio (EE, HR, HU, ME, NL, NO, PL, PT, SE: e.g. building permits, SI). Such an investigation apparently makes only sense in those member states which do require potential parties to fulfill certain material criteria in order to be regarded as a party. A somewhat lesser obligation exists in member states where the public authorities are obliged to inform potential parties of proceedings, which so far have not been publicly notified, when – alongside the proceedings – they become aware that the material criteria of participation – i.e. having a legitimate interest or subjective right affected – are fulfilled (BG, ES, NL). In Germany the investigation of



potential parties ex officio is (only) an option, which has to be considered by the public authority within the sound exercise of its discretion.

3./4.3 The ways of complying with the obligation to investigate potential parties and to enable their participation are different. In some member states a public (internet) notification is considered sufficient to fulfill this obligation (LU, LV), especially according to sectorial legislation, e.g. environmental law (CY, FI, PT). Such a public notification comes down to the announcement of the beginning of administrative proceedings to potential third parties. The ReNEUAL draft expressly calls for the provision of updated online information of existing administrative procedures (Art. III-4 (1)). It also requires the notification of the initiation of an administrative procedure to the parties (Art. III-5 (2)). Likewise, in some member states administrative authorities will have to notify potential parties directly (ES, NL, NO, PL, PT). In the United Kingdom administrative authorities are not obliged to identify parties ex officio. However, once a party has identified as an interested party, then administrative authorities will keep them informed.

3./4.4 The law of some member states also allows for a party to involve another person, which so far has not been a party. Upon request of this party or upon a motion by the administrative authority a third person can become a party even against its own will. In France an original party may “summon” a third party by way of a forced intervention.

5.1 In the practice of most member states there seem to be only few occasions where the status of a party is formally denied by the administrative authority. A lack of participation may result from a default of the administrative authority to rightfully announce/publish the commencement of administrative proceedings, where it is obliged by law to do so, or – in jurisdictions which demand a legal/legitimate/sufficient interest - where this interest is denied and the allegation of the party declared inadmissible (cf. FR, NL). This seems understandable, keeping the following in mind: jurisdictions which do not know restrictions to the possibility to participate in administrative proceedings will usually not produce a denial of



participation; administrative authorities in these jurisdictions have no ground to investigate the status of an alleged party. Jurisdictions which do know material restrictions to the status of party will found a denial to participate on the lack of fulfilling these requirements. Also, the denial of certain procedural rights as described in question 6 may be considered as partially denying the status of a party (NL).

5.2 If the status of a party is denied or its move declared inadmissible, this decision, taken by a an administrative authority, may in some member states be contested in an isolated procedure before the same or a higher administrative authority (CZ, ES, LV, ME, RO, SK) or before administrative courts (BG, EE, FR, GB, IT, LU, LV [if there is no higher administrative authority], NL, PT, RO [after fruitless complaint to higher administrative authority], SE, SI, SK). Bulgaria provides a special in camera-procedure for these kinds of cases.

In some member states an isolated procedure with the object of determining the status as a party is not possible (CY, DE, FI, GR, NL, NO). For reasons of procedural efficiency only the final – material – decision may be challenged, unless irreparable harm would be done to the left-out party (DE). Some member states which allow an isolated procedure also provide for the possibility to contest the final act (ES, IT, ME, PL [only if the denial of party status has been challenged within a certain time limit], PT). In case of an unrightful denial of party status this may be a reason to annul the administrative decision; partly only if the participation would have led to a different outcome of proceedings (LU). In Greece a public authority does not have the right to invoke to not have been admitted to proceedings conducted under the competence of another public authority.

5.3 Most member states also provide for the possibility to remedy the omission to admit a party. This may be concluded by re-opening the matter, by amending or annulling the decision (CZ, DE, ES, FI, GB, GR, HU, LU, ME, NL, PL, RO, SE, SI).

6.1 Member states almost unanimously stated that parties to the procedure all enjoy the same procedural rights – in principle. Some minor exceptions can be observed



with regard to third parties. The right to demand a public hearing is restricted to the original party (addressee of an onerous administrative act or applicant of a beneficial administrative act) in the Czech Republic; in Sweden public authorities – as parties – do not have the right to an oral hearing. Also, in Finland and in the Netherlands the right to be heard may be restricted. In Greece and Italy third parties are not notified to participate and deliver their representations. Further restrictions involve the access to documents (LU) and the right to appeal against planning refusals (GB – Scotland). Also, special legislation may provide for modifications of procedural rights for not original parties (DE, LV, MT, RO).

6.2 The EP-Resolution also does not differentiate between different kinds of parties when it comes to their procedural rights. Thus, all procedural rights (to initiate procedure [Art. 5, 7], to be given relevant information, to communicate by electronic means, to use any of the languages of the Treaties, to be notified of all procedural steps, to be represented by a lawyer, to pay only reasonable and proportionate charges [Art. 8], to produce evidence [Art. 9], to be reminded of the right against self-incrimination [Art. 10.3], to be heard, to have sufficient information, to express views in writing or orally [Art. 14] and to access files [Art. 15]) are equally granted to any “party” as defined by Art. 4 lit. f (see above). Similarly, the ReNEUAL-Draft grants procedural rights such as the right to propose witnesses and experts (Art. III-15), the right of access to files (Art. III-22), the right to be heard, the right to notice of the central issues (Art. III-23 and Art. III-24) and the right to notification of a decision (Art. III-33) to parties as defined by Art. III-2 (3) without making any difference between several types of parties.

II. Determination of Facts and Discretionary Powers

1.1 The determination of facts in administrative proceedings is in almost all member states governed by the principle of investigation as also proposed by art. III-10 ReNEUAL, although there are notable differences in the specific degree of the duties to carefully and impartially investigate imposed on the administrative authorities (exceptions: LU, where the principle of party presentation is the general rule; GB,



where there are no set rules for determining facts, but where the duty of fairness is the overarching principle for the topic of the determination of facts). This can be observed especially as far as administrative proceedings are initiated not ex officio but upon application of an interested party. Here, the majority of the legal orders of the member states still has the principle of investigation as a starting point, but imposes in different degrees obligations on the party. A number of member states' legal orders provide for a duty of the parties to cooperate (CY, CZ, DE, HR), while others emphasise that the party has the right to make statements and has to be heard, but is not obliged to present facts and evidence (BE, CZ, ES, HU, IT, MT, NO, RS, SK). In other member states' legal orders the parties are required to present facts and evidence for circumstances that are favourable for them in proceedings initiated on their application (EE, FI, LV, ME, NL, NO, PT, RO, SE, SI). In another group of member states the administrative authority has to investigate the facts even though the proceedings were initiated on the application of a party. Yet, this duty can be limited as far as the interested party alleges favourable facts. Poland emphasises that the obligation to look for evidence rests not only in the administrative authority in these cases; in Germany – although there is no legally binding duty of the parties to participate – the scope of the investigation might exclude aspects the administration could not reasonably be expected to consider if the parties did not allege these aspects. Another group of member states' legal orders requires the parties only to present facts and/or evidence (especially documents) in specific cases where the law explicitly provides for such a participation (GR, PL) or on an specific request by the administrative authority (ME, SI). Similarly, some members emphasise that the administration is held to provide guidance to the party and to ensure clarity in the applications and/or statements of a party (LV, NO). Generally, a majority of member states' legal orders differentiates along this line between administrative proceedings initiated ex officio and on application of a party demanding a certain administrative action. In the latter case much higher obligations are imposed on this interested party (CY, EE, FI, LV, ME, NL, NO, PL, PT, RO, SE, SI, SK). A significantly lower number of member states' legal orders in general does not establish a difference here (CZ, ES, GB, HR, HU, IT,



MT, RS). As far as member states make reference to contentious proceedings, there the obligations of the parties to present facts and evidence favourable to them seem to be the highest (CZ, FR), partly requiring the administrative authority to rely on the facts presented by the parties (CZ), partly giving it the possibility to also base its decision on facts not alleged by them (FR).

1.2 In a large majority of member states specific legislation provides for different rules for specific subject matters, as also provided for by art. III-11 of the ReNEUAL proposal. The subject matters named mostly are the law of administrative sanctions (DE, ES, NL, PT, SE) and tax law (DE, EE). While all the member states making reference to tax law state that here the obligations of the individual to cooperate with giving information is higher than in general, in the case of administrative sanctions all member states making reference hereto cite the procedural guarantees enshrined in European Convention on Human Rights.

2.1 As reflected by art. III-13 of the ReNEUAL proposal, a majority of member states' legal orders provide for a more or less intensive obligation of the parties to administrative proceedings to cooperate, at least in proceedings initiated on application (BG, CY, CZ, DE, EE, ES, FI, GR, HR, HU, LU, ME, MT, NL, PT, RO, RS, SE, SI, SK). Nevertheless, there are big differences in the design and the extent of this obligation in the member states. Some members put emphasis on the parties' right to participate, especially to make statements and to suggest evidence (LU, PL, RS, SK), or make clear that a lack of cooperation of the parties does not relieve the administration from investigating the facts (PL, PT) or does not prejudice the legal position of the party (GR). In several member states there is a general obligation of the parties to cooperate (CZ, DE, EE, FR, HR, HU, LU, ME, MT, PT, RO). However some of these members make clear that this obligation is not enforceable (DE, PT), while, in the contrary, there is a group of member states in which incompliance with the obligation to cooperate might lead to an administrative fine (CZ, SE, SK) or even to criminal responsibility in certain cases (CZ, NO). To give false information or to suppress relevant facts knowingly might lead to an administrative penalty in Hungary. In some member states the party which causes additional expenses (of the



administration or even of another party) by disobeying a duty to cooperate may be obliged to reimburse these costs (HU, SK). In Luxemburg, where, as a general rule, the principle of party presentation applies, this is not only true in respect of claims against the party, but also a party might be entitled to claim damages from the administration if the latter does not comply with its duty to cooperate. In a large majority of the member states' legal orders the consequences of incompliance lie mostly in the position the interested party assumes as a consequence of its lack of cooperation. As in a majority of member states the interested party has to take the burden of proof of alleged facts, a lack of cooperation in the sense of not presenting and, if necessary, proving the relevant facts is likely to result in the dismissal of an application (CY, CZ, DE, EE, FI, FR, HR, IT, LV, ME, MT, NL, PL, PT, RS, SE, SI, SK). It is noteworthy that in the Netherlands the negative decision might be taken not on substantial grounds, but merely on the basis of insufficiency of the application, provided that the applicant was given time to amplify the application. On the contrary, in some member states a lack of cooperation does not have negative effects on the party concerned (BG, GR). Some member states make reference to specific consequences of a lack of cooperation provided for by specific legislation (EE, ES, IT, NL, NO, RO). In the Netherlands for example there are specific rules for enforcement actions which include an enforceable duty to cooperate with a supervisor; incompliance might lead to punishment.

2.2 In general, the duty to cooperate in the member states' legal orders differ in respect to different categories of parties where on the applicant rests a significant burden of proof (CY, EE, FI, LU, MT, NL, RO). In member states where there is only a minor duty to cooperate or where the administration's duty to investigate is more central, no differences between different types of parties can be noted (BG, CZ, DE, ES, HR, HU, IT, LV, PL, PT, RS, SI, SK).

3.1 The administration has in a majority of the member states a rather wide discretion in both the fact finding and the evaluation of the facts (CY, CZ, DE, EE, FI, GB, GR, HU, IT, LU, ME, NL, NO, PL, PT, RS, SE, SI, SK). The United Kingdom emphasises the duty of candour. In another part of the member states there are



rather strict rules that determine the fact finding by the administrative authorities (BG, ES, HR, MT, RO). Poland and Croatia make reference to a series of requirements the administrative decision-making has to fulfil in respect of the process of evaluating the facts, like among others a comprehensive assessment of the whole body of evidence, of the significance and value of the evidence and the need to give reasons. Nevertheless, a number of member states of the first group states that this discretion is limited by the law or by general principles (CY, CZ, GB, ME, NO, PT, SE). Also, a number of member states indicate that there may be specific rules in specific areas of administrative law (EE, ES, GR, IT, NL). The Netherlands point out that in the Dutch legal order there is a difference between the determination and the evaluation of the facts of an administrative case: while the administration does not have discretion in the determination of the facts it may enjoy discretion in some cases in evaluating the fact, depending on the specific law to be applied. Romania and Malta state that the administration has to observe procedural rules in the fact finding procedure, but has discretion (MT) or might enjoy a certain margin of discretion in the evaluation of the facts depending on the field of activity (RO). Latvia especially emphasises the impartiality as a rule to be observed by pointing out that an officer whose impartiality is reasonably doubted must not participate in the proceedings. Also in Latvia only information directly necessary or as provided by law may be gathered, with the further exception of information acquired by illegal methods. In Portugal all means of proof permitted by law can be used. This refers to the Civil Code and the Procedural Code for Civil Courts regulating the means of proof as well as specific requirements to prove certain facts. These rules are also to be observed by the administrative authorities thus limiting their discretion. In Portugal it is also possible to make agreements on the fact finding process with binding effect.

3.2 In a number of member states there are no general rules for composite investigations (ES, FI, GB, GR, HR, LU, LV, MT, NO, PL). In some member states there are specific rules for a certain cooperation among different administrative authorities or for providing a specific distribution of tasks within administrative authorities. Partially one administrative authority might take action on the request



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of another, mostly in cases the action has to be taken out of the jurisdiction of the first or the requested authority is in possession of certain information or documents needed by the requesting one (EE, HU, SI, SK). In Poland and Montenegro administrative authorities have the general obligation to cooperate; in the Czech Republic the cooperation of administrative authorities is regarded as a consequence of the principle of good administration. In Finland and Norway administrative authorities cooperate without specific rules on an informal basis or based on the discretion in organising the fact finding. In Greece and Luxemburg cooperation might be provided for by specific legislation. In Italy collaboration of different administrative authorities in both the fact finding process and the evaluation of the facts is provided for. In the Netherlands, Germany and Bulgaria there are some rules for the cooperation of different administrative authorities in more complex cases requiring decisions or contributions of different specific administrative authorities providing for one administrative authority as responsible for the coordination or leading the proceedings. Rules for the cooperation also exist in Romania and Cyprus. In Portugal both the delegation and the joint exercise of combined competencies is provided for.

4.1 One group of member states' legal orders provides for specific rules of evidence for the fact finding in administrative proceedings (DE, EE, HR, HU, LV, RO, RS, SI) similar to the proposed regulation in art. III 10 par. 2 and III-15 ReNEUAL, whereas another group does not (CY, CZ, ES, FR, SK, FI, GB, GR, IT, LU, ME, MT, NL, PL, PT). In Sweden there is a general rule of free evidential evaluation which is applicable to all legal proceedings. In Norway there might be rules of evidence, depending on sector specific law; although in most cases they depend on general and non-statutory law. Some members state that specific legislation might require specific proof for specific facts (HU, NL, PT, SI). Mostly the requirement of a public document or of a report by a physician is mentioned in this context. Among the principles governing the administrative fact finding named mostly by the members are the obligation to collect and assess fully the available evidence and to make the assessment on the entirety of the evidence, legality, impartiality, fairness, timeliness and to avoid unnecessary costs. Estonia names as one of the principles



also the equality of electronic operations to written ones. Besides legality loyalty is a central principle in Luxemburg since the Administrative Procedure Law has put more emphasis on partnership between administration and citizen moving away from a more vertical attitude. By way of reference or as subsidiary regulations the Civil Code and the Code of Civil Procedure are mentioned by Romania, Montenegro, Portugal and Spain.

4.2 In respect of the inadmissibility of certain evidence a number of member states' legal orders does not provide for specific rules (EE, FR, GB, IT, LV, NL, RS, SI). Finland has no general rules, but there is some case law declaring evidence inadmissible. The United Kingdom invokes the duty of the administrative authority to act fairly, rationally and lawfully. In another group of member states evidence is inadmissible if it was acquired illegally (CZ, HU, LU, PL). Some member states' legal orders require a balance rendering evidence as inadmissible if there is a specific prohibition or if it was acquired in a specifically illegal way (DE, ES, NL, SI, SK). In Poland indirect evidence is also inadmissible if direct evidence can be used. In the Netherlands the administration may, in general, also use illegally obtained evidence. In Italy investigations that have been realized a long time before the decision is made might have lost their value.

5.1 Similarly to the administrative proceedings also in court proceedings in one part of the member states' legal orders it is the responsibility of the parties to present the facts and evidence (CZ, ES, FR, GB, HU, IT, LU, MT, NO, PT, RS, SI), whereas in another part it is the courts who investigate the facts and gather evidence (DE, FI, GR, HR). In several member states the responsibility is shared by the parties and the courts (CZ, EE, LV, NL, SE), usually meaning that the parties are required to present facts and evidence, but the courts still are responsible to actually establish the facts and therefore also use some investigative powers. Yet, in another group of member states the review by the courts is focused on the legality of the challenged administrative act and therefore (predominantly) based on the facts established in the administrative procedure (CY, ME, PL, SK). Norway points out that there are no specific administrative courts and that the judicial review of administrative



decisions is performed by ordinary courts where, except for specially regulated cases, the parties are responsible to present the facts.

5.2 As to differences of different categories of parties, one group of member states points out that there are none (CZ, GB, SK, HR, HU, RS, SI). A significant group of members make reference to specific obligations of the administrative authority as a party to court proceedings which usually consist in presenting its files to the court (CY, DE, LU, ME, PL, PT), but also in material burden of proof (in the Netherlands the appellant only has to establish reasonable doubt in cases in which the administrative authority is responsible for the investigations; France and Sweden note that differences might arise from different burdens of proof). Estonia points out that by statutory law there is no difference, whereas case law has established slight differences aiming at assistance to be provided by the court to the “weaker” side, i.e. the individual.

5.3 The courts are free in the consideration of the facts and evidence in almost all member states (CY, CZ, DE, FR, ES, FI, IT, LV, LU, ME, NL, NO, PT, RS, SI, SK). As far as the members mention specific types of proof (e.g. public documents) they refer to specific rules in Civil Codes or in Codes of Civil Procedure (DE, EE, LU, PT, SI). In some members there are rules for the assessment of evidence by the courts which usually prescribe that the evidence is to be assessed individually and in conjunction with the whole body of evidence relevant for the case (HU). In the Czech Republic limitations in the free discretion exist as far as the questions whether and by whom a crime had been committed are significant for the procedure of an administrative court. Malta and Croatia make general reference to the procedural rules. The United Kingdom notes that judicial review should be limited as its purpose is mainly to assess the manner in which a decision was made.

6.1 In a number of member states the general standard of control applied by administrative courts does not only include a review of the lawfulness of the challenged administrative decision, but also includes a review of the facts (CY, CZ, DE, FR, EE, ES, FI, HR, LV, NL, SE). In Sweden, although there are generally no limitations to judicial control, in practice the fact finding of a specialised



administrative authority weighs heavily. The Netherlands state that there is a difference between the determination of the facts by the administrative authority which is subject to full judicial control, and the evaluation of the facts, which only is subject to a limited judicial control as far as the administrative authority has discretion. As far as the control of discretionary powers of the administration is mentioned, Estonia and Croatia state that the limits of the discretion are subject to judicial control. Italy, where a difference between administrative discretion and technical discretion has to be made, points out that, in cases of administrative discretion the court cannot substitute the exercise of discretion by the administration. France states that discretionary powers lead to a reduced standard of control (*erreur manifeste*). On the other hand Malta states that the judicial review is to determine whether an administrative act was reasonable and just.

6.2 In another group of member states the function of the judicial review focusses much more on the question, whether the administrative authority has applied the law correctly on the facts established by it, although (limited) exceptions might apply (GB, ME, NO, PL, RS, SK). Cyprus, although stating that the facts are subject to judicial review, too, seems to partially fit in both groups as it points out that, with exceptions given, for reasons of separation of powers the judicial review is not about evaluating the correctness, but the legality of an administrative decision. Partly the member states made reference to a limited control of facts, which for example in some cases only allows to take evidence on documents (PL) or aims at checking whether the facts were established correctly by the administrative authority (ME, PT, SI).

6.3 Regarding complex factual evaluations one group of member states' legal orders do not provide for a limited judicial control (DE, EE, ES, FI, HR, LU, MT, PT, RS, SE, SI). Nevertheless in certain circumstances some kind of compensation is provided in a number of these member states, too. Finland remarks that in some very technical issues the role of evidence from experts is important. Other member states' legal orders provide for a reduced standard of control for (difficult) technical facts (Slovakia: health status or technical conditions; Italy: technical discretion in cases of



technical, but debatable valuation; Portugal limits judicial control in practice to general principles; Spain cites a decision, too; in Germany case law provides for a reduced judicial control in environmental law as far and as long as there is no generally accepted scientific standard). The Netherlands state that complex facts are often investigated by experts, leaving the administration with an obligation to check whether this investigation has been carried out with due care. If this is the case the administration can then rely on the expert's opinion, unless an opposing party does establish a reasonable doubt. The determination of the facts this way remains subject to judicial control and the administrative courts do not solely focus on procedural requirements. Luxemburg has abandoned the concept of manifest error and developed an approach of global control which contains a concept of the excess of the margin of discretion which is conditioned by both the range of the margin and the complexity of the case.

7.1 In quite a number of member states' legal orders there can be observed that the procedural requirements are stricter where the administrative authorities are conceded substantive discretionary powers. In a part of the member states – at least by case law or judicial practice – the procedural requirements are stricter or the intensity of judicial review of procedural aspects is or might be more intense in cases of substantial discretion of the administration (CY, DE, FR, IT, LV, LU, RS). In other member states there is no difference between the procedural requirements in cases which imply substantive discretionary powers of the administration and those which do not (EE, ES, FI, NL, NO, ME, MT, PT, RO, SE, SI, SK). Estonia, Montenegro, Portugal and Cyprus make reference to the increased importance of the reasoning the administrative authority has to give when it makes a discretionary decision, though. The Netherlands point out that in the Dutch legal order there is no discretion with regard to the determination of the facts, while there only could be one with regard to the evaluation of facts. As far as the members give reasons for reduced controls they mainly mention the separation of powers (CY, DE, EE, FR, HR, NL, PT, SI) and different institutional capacities of courts and administrative authorities (DE, FR, GB, IT, LV). Some member states' (administrative) courts in general focus much more on a review of legality than of material correctness of the



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administrative decisions under review and therefore they do not that much engage in reviewing facts anyway. Consequently there is hardly space for a concept of a reduced standard of review of complex facts in relation to a (full) review of facts (CY, GB, PL).

7.2 With regard to specific experts' opinions to which a superior validity is conceded most member states report that their legal orders do not provide for such. Nevertheless, some member states made reference to specific opinions of mostly specialised administrative bodies which are considered to be especially reliable (SI: National Cultural Heritage Authority in proceedings about a construction permit; NL: impartial and independent agency with expertise on environmental effects of planning and development; CY: Planning Authority and impact assessment reports of the Environmental Authority). Sweden makes reference to certain opinions of specialised administrative authorities which do not legally have superior validity, but which in practice do weigh heavily. In Finland there are expert judges in cases concerning the Environmental Protection Act and the Water Act. In Malta courts can be, by decision of the presiding chairman, assisted by experts.