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Administrative Procedures with Adversarial Parties – Extent and Restrictions of the Right to Inspect on Relevant Facts

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A. Introduction

The following issue is a problem of the daily practice for the administrative authorities, lawyers and the Administrative Courts in Austria. At the outset I want to demonstrate the problem with a legal provision regulating the party status of an administrative court proceeding. Art. 18 of the Austrian Proceedings of Administrative Courts Act[243] states the following:

„*Parties*

§ 18. The respondent authority shall also be a party."

This Paragraph does not give any remark *who else* could *also* be a procedural party. And there is no other legal provision after this paragraph (and none before) to add who could be party of the proceeding. It is obvious that the complainant will be party too. But who else? This legal provision is not a joke but an excellent example for the poor quality of the Austrian legislation in the last 20 years leaving it up to the jurisdiction to find answers instead of the legislator. Of course the Courts will find reasonable results in the way of the interpretation of procedural rules, but it should be up to the legislator to regulate because there are very

[243] Verwaltungsgerichtsverfahrensgesetz, Federal Act on Proceedings of Administrative Courts, Federal Law Gazette No. 33/2013.

important political aspects behind the question who should be participant of an administrative procedure.

In the following I don't want to focus on the typical administrative procedural scenario with the administrative authority deciding on a motion on the one hand and the applicant as the one and only party of the procedure on the other hand.

There are many constellations where other persons are potentially directly and intensively affected by an administrative decision. This phenomenon is called in the Austrian and German doctrine "administrative acts with third-party effect". The classical example for that is the administrative procedure concerning a construction permit for a building: Many Building Regulations provide that certain neighbours are entitled to participate in the procedure to pursue their rights when the application for the construction permit is considered and examined by the administrative body.

No one would deny the question if a person concerned by a decision of the administration authority may participate in the procedure dealing with the decision. Without a doubt it is not compatible with the Principle of the Rule of Law and many other fundamental rights that a person whose legal sphere is affected intensively by a decision is not entitled to be involved in the proceeding leading to this decision. In Austria jurisdiction and science derive from the Rule of Law Principle that in case of (significant) interferences in a person's right by actions of the administration body there must be provided the possibility to lodge a remedy with the courts by the affected person.[244]

B. Who is a Procedural Party?

1. The latest jurisdiction of the Court of Justice of the European Union

In Austria the issue of the party status of third persons has become more and more important in the near past, inter alia because of the latest jurisdiction of the Court of Justice of the European Union about the participation of neighbours in administrative procedures concerning environmental impact assessments: In Austria every big project, like the

[244] See VfSlg. 13.223/1992, 13.699/1994; see for example *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht IV (2010), p. 188.

construction of an airport, a motorway, wind park facilities or a power station, requires not only a building permit, but also an *environmental impact assessment* in order to examine the possible impacts of the project on the environment and to reduce negative effects on the environment (and other aspects like the health of the citizens living in the area where the project shall be realized).

Neighbours had always had party status in an approval procedure and could raise any defences or objections against the project, but they didn't have any party status in a special declaration procedure where the preliminary question is clarified if there is an environmental impact assessment necessary at all (the applicant may initiate such a procedure to obtain assurance whether an environmental impact assessment is necessary or not; in this proceeding special environmentalist's organisations and the local municipality are recognized as parties instead of neighbours). If the administrative authority decided within such a declaration proceeding that a particular project did not require an environmental impact assessment, the neighbours didn't have any opportunity to assert their rights in case of a wrong decision. After the Austrian Supreme Administrative Court had asked to the Court of Justice of the European Union for a preliminary ruling, the Court of Justice[245] held that such a national legislation breaches the law of the European Union when persons with "sufficient interest" or persons "impaired of a right" (such as neighbours) are precluded from bringing an action against the administrative decision declaring that a project does not require an environmental impact assessment.[246]

Due to this judgement of the Court of Justice of the European Union the Republic of Austria had to change the national legislation immediately and had to provide that neighbours may assert their rights in the way that they can lodge an objection when the administrative authority decides that an environmental impact assessment is not required in case of a special project.[247]

[245] Judgement of the Court of the European Union, 16th of April 2015, C-570/13, Karoline Gruber: The Judgement concerned the interpretation of Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment and Paragraph 3 of the Austrian Law on Environmental Impact Assessments stipulated that only a special ombudsman for the environment and the host municipality shall have the status of parties to the procedure. See for further details *Wolfgang Berger*, EuGH verneint Bindungswirkung von UVP-Feststellungsbescheiden, RdU 2015, p. 123; *Julia Kager*, **Neues zur Parteistellung in der UVP, ZVG 2016, p. 110**.

[246] See Paragraph 3 (7a) of the Law on Environmental Impact Assessments as amended by Federal Law Gazette No. 6/2016.

[247] The requirement of an environmental impact assessment depends on the concrete project: larger projects or those with potentially the most significant environmental effects, such as airports, oil refineries, or motorways always require an

2. The legal framework for the party status

In the end it is up to the legislator to determine if and in which extent a person is granted party status: In Austria the General Administrative Procedure Act[248] contains in Paragraph 8 the provision that

"Persons who make use of the services performed by an authority or who are affected by the activity of such authority, are persons involved, and, to the extent they are involved in the matter on the grounds of a legal title or a legal interest, they are parties."

Paragraph 8 of the General Administrative Procedure Act is not the basis for subjective rights but it is referring to the substantive laws where the subjective rights are implemented. An example for such a substantive provision is Paragraph 6 of the Construction Ordinance of Lower Austria which binds the party status to the direct proximity of the neighbours' property to the building or building project:

"(1) In building permit procedure laws and building supervisory procedures ... have party status:

1. the applicant and the owner of the building

2. the owner of the building property

3. the owner of the land adjacent to the plot ..."

The law establishes the legal interest of the neighbour. Another example is Section 75 of the Austrian Industrial Code requiring the participation of neighbours in the administrative procedure concerning the approval of production facilities and defines neighbours as "persons who might be endangered by the construction, the existence or operation of an operating system or harassed or threatened their property or other rights in rem".

This legal construction seems to me very usual as you can find similar regulations also in Germany[249], Norway[250], Switzerland[251], Kyrgyzstan[252] and in many other countries.[253]

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environmental impact assessment. In other cases the requirement of carrying out an environmental impact assessment depends on whether it is likely to have a significant effect on the environment, by virtue of factors such as its size, nature or location (see for example Annex I and II of the Directive 2011/92/EU).

[248] Österreichisches Bundesgesetz über das allgemeine Verwaltungsverfahren (AVG), Federal Law Gazette No. 172/1925.

[249] Section 13 of the German Administrative Procedure Act requires the participation of persons "opposing an application" or persons "whose legal interests may be affected by the result". Where "such a result has a legal effect for a third party, the latter may upon request be involved in the proceedings as a participant."

[250] According to Art. 3 of the Norwegian General Administrative Procedure Act, a party is "a person to whom a decision is directed or whom the case otherwise directly concerns (see Act of 10 February 1967 relating to procedure in cases concerning the public Administration).

In the daily practice substantive legal provisions as I already cited defining who is exactly party of an administrative procedure appear rather rare and occasionly. The absence of an explicit statement of the legislator must not lead to the conclusion, that the legislation did not recognize any party status. In many cases the Administrative Courts analyse on the basis of the legal provisions if there is an interest of a person which is legally protected by the law.

3. Legal interests

The legal interest of a person is in Austria the main criteria for his participation as a party in an administrative proceeding. Social interests or economical interests are not sufficient.[254] For example in case of a creditor who wanted to take part in the administrative proceeding of his debtor in order to prevent the withdrawal of his approval for the business pursuant to the Industry Code, the Supreme Administrative Court denied the legal interest of the creditor because his intention to participate in the proceeding in order to prevent the own credit default reveals an economical interest but not a legally protected interest.[255] In some cases it is rather complicated do distinguish between legal and especially economical interests.[256]

The recognition or appreciation as a party is closely linked to the question of the *subjective* (individual) *rights* of a person. The Austrian jurisdiction accepts a subjective right (and consequently) party status in favour of a person, when "the objective law imposes a duty on the administrative authority to act in the interest of a *specially concerned person and not only in the interest of the public in general"*.[257] The legal obligation of the administrative body shall not be

[251] Pursuant to Art. 6 of the Swiss Federal Act on Administrative Procedure of 20th of December 1968 Parties are persons whose rights or obligations are intended to be affected by the ruling and other persons, organisations or authorities who have a legal remedy against the ruling.

[252] Also the Constitutional Law on the fundamentals of administrative action and administrative procedure of the Kyrgyz Republic declares in Art. 2 "concerned persons" as participants of the administrative proceeding and states that a person whose rights and legally protected interests are potentially affected by the administrative act are such concerned persons.

[253] For further international comparison see *Jean-Bernard Auby* (edt.), Codification of Administrative Procedure (2013), 4.1.3.

[254] See *Dieter Kolonovits/Gerhard Muzak/Karl Stöger*, Verwaltungsverfahrensrecht (2014) 10th Edition, p. 55; *Magdalena Pöschl*, Wirtschaftliche Interessen und subjektive Rechte, in Festschrift Wimmer (2007), p. 494.

[255] VwSlg. 16936 A/2006.

[256] See *Magdalena Pöschl*, Subjektive Rechte und Verwaltungsrecht, in Verhandlungen des 16. Österreichischen Juristentages (2006) I/2, p. 18.

[257] See VwSlg. 9151 A/1976; VfSlg. 12.838/1991; for further details see for example *Christian Ranacher/Markus Frischhuth*, Handbuch Anwendung des EU-Rechts (2009), p. 351.

restricted to the public interest but shall (at least also) be in the interest of individuals which means that the legal provision serves to protect the interest of individual citizens.[258]

In detail the jurisdiction of the last decades turns out to be very casuistic and complex: In general a citizen does not have a subjective right or personal claim to certain police powers as long as he is not personally affected by its exercise. A neighbour has a subjective right to compliance with the building regulations, but only in that extent, that the concrete rules serve (also) to protect the neighbour.[259] Another example demonstrating the complexity of the jurisdiction may be the legal position of candidates for the occupation of major or higher positions in public office, for example for headmasters of schools: Pursuant to the jurisdiction of the Constitutional Court no candidate has a subjective right or claim to a special job but if a candidate was selected onto the shortlist of the nomination proposal, this person is allowed to lodge a complaint against the decision in favour of the successful candidate.[260]

4. The right of appeal for an "ignored party"

In reality it may happen that a party with a legal interest is not involved by the administrative authority in the administrative proceeding although it should have happened. Pursuant to the jurisdiction of the Supreme Administrative Court a socalled "ignored party" can either apply for receiving the administrative decision issued at the end of the administrative proceeding and appeal against this decision, or the party can appeal directly against the administrative decision.[261]

[258] See for example Supreme Administrative Court, 26th February 2003, 2000/03/0328. This approach has its origin inter alia in the theories of *Hans Kelsen* (see for example *Hans Kelsen*, Allgemeine Staatslehre [1925, reprint 1993], p. 152 et seq.). The legal scholarship calls that „protection standard principle" (see *Magdalena Pöschl*, Subjektive Rechte und Verwaltungsrecht, in Verhandlungen des 16. Österreichischen Juristentages (2006) I/2, p. 11 et seq.).

[259] For example the neighbour has the right to claim the compliance with the rules concerning the distance of a building to the neighbour's property boundary but not the compliance with the regulations regarding the interior's building at the neighbouring property (see in detail *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht IV (2010), p. 328).

[260] Though the appointing authority has wide discretion when selecting the most appropriate applicant, the subjective right of an unsuccessful candidate allows an examination of the exercise of discretion. See VfSlg. 9923/1984, 12.102/1989, 12.476/1990, 18.095/2007, 19.670/2012.

[261] See *Johannes Hengstschläger/David Leeb*, AVG² (2014), § 8 Rz 21; furthermore *David Leeb*, Die Bescheidbeschwerdelegitimation „übergangener Parteien", ÖJZ 2015, p. 975 ed seq. see also Administrative Court, 15th of November, 2001, 2000/07/0100; 21st of March, 2013, 2011/06/0118, 11th of March 2015, Ro 2015/17/0001.

C. Rights of a concerned person in an administrative procedure

1. Competitive situation and "Equality of arms"

The legal position and the extent of the rights of a party can be designed by the legislator in various ways. But you have to keep in mind that usually these parties are in a competitive situation of interests: The neighbour has special interests which very often might conflict with the interests of the applicant applying for a construction licence or a positive environmental impact assessment for a building or a tunnel railway through a mountain. These parties are in almost the same situation like parties of a civil litigation in a civil procedure. The same constellation appears in cases with several parties applying for a concession or permission and only "the best candidate" for the permission has to be found within the proceeding. The Austrian law provides such procedures for example to award a radio broadcasting licence or a permission for running special services like gambling licences for a casino or ground handling services on airports. In all of these cases when the applicant with the best qualification is granted the concession or licence, the unsuccessful candidates have the right to lodge a complaint with an administrative court to claim that he should have received the permission instead of the chosen candidate.[262]

There is no need to say that especially in such administrative procedures with several (adversarial) parties the "principle of equality of arms" has to be considered. Therefore a concerned person shall have basically the same rights like an applicant: That includes usually the right to be notified on launching of an administrative procedure, to reject officials of the authority, of experts or translaters in case of partiality, the right to receive the decision and to appeal against the decision and of course the right to a fair hearing, the right of access to the files and so on.[263]

[262] See for example Federal Administrative Court, 21st of July 2015, W139 2010508-1, concerning the award of a gambling licence for a casino in Vienna by the Federal Minister of Finance, or Federal Administrative Court 12th of August 2014, W194 2013711-1/12E, about the admission to use a certain transmission capacity for a radio programme in Vienna.

[263] See for example *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht IV (2010), p. 342.

These rights shall provide that the concerned persons can pursue their rights effectively. Most of them are also guaranteed by Art. 6 of the European Convention on Human Rights, the right to a fair trial in criminal law cases and cases to determine civil rights.[264]

2. Specific features in multiple-party procedures

The right to a hearing and the right to be heard are one of the core elements of an administrative procedure complying with demands of the Rule of Law and every modern legal state. Further more the right to be heard would not be worth much if it did not include the right of access to the files and the right to inspect and comment all evidence relevant for the case. It would be unbearable to restrict the right to be heard by limiting the access to the documents and facts which are substantial for the decision of the administrative authority.

But in special constellations like multiple-party procedures also this fundamental principle faces restrictions, as the preliminary ruling of the Court of Justice of the European Union in the case Varec vs. Belgium[265] demonstrates:

The decision was proceded a contract award procedure in respect of the supply of track links for "Leopard" tanks. When examining the two tenders, the Belgian State as the deciding instance considered that the tender submitted by Varec was unlawful and, by contrast, the tender by the second tenderer, Diehl Remscheid Inc., satisfied al the selection criteria. Varec brought an action for annulment of the award decision in favour of Diehl Remscheid Inc. to the Administrative Court. The file delivered to the Court did not contain the successful tender of Diehl Remscheid. Therefore Varec requested that the tender shall be added to the file, but Diehl Remscheid objected the transmission of the tender on the ground that Varec would be able to peruse confidential data and information relating to business secrets included in the tender. Varec claimed that the right to a fair hearing means that the parties are entitled to a process of inspecting and commenting on all documents or observations submitted to the court with a view to influencing its decision.

The Court of Justice of the European Union emphasized that the unlimited access for an economic operator to confidential informations of another competitor like in this case could be

[264] See for example *Grabenwarter* Europäische Menschenrechtskonvention (2008) 3rd edition, p. 340; *Heinz Mayer/Gerhard Muzak*, B-VG (2015) 5th edition, p. 732.
[265] Court of Justice of the European Union, 14th of February 2008, C-450/06, Varec vs. Belgium.

used to distort competition or damage the legitimate interests of economic operators who participated in the contract award procedure. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets (on the other hand economic operators would not participate in contract award procedures when it is evident when they have to expose their business secrets). The adversarial principle and the right to process of inspecting and commenting on the evidence submitted to the court do not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review of the award procedure. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. The deciding authority must be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets. But the authority also has to decide that the information in the file relating to such an award should not be communicated to the parties or their lawyers if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators whose rights are also enshrined in Art. 8 of the European Human Rights Convention which guarantees the right to respect for private life.[266]

This preliminary ruling of the European Court of Justice related to a contract award procedure but the problem is the same in many other administrative procedures with adversarial parties.

The balance between the right to be heard and the right of protection of business secrets, the Court of Justice pointed out, has to be solved from case to case (and even document to document in a file) individually.

[266] See further discussions concerning this decision *Claudia Hanslik*, Parteiengehör und Geheimnisschutz im Verwaltungsverfahren (2013) p. 25; *Claudia Hanslik*, **Keine bloße Augenscheinsprüfung bei der vereinfachten Zulassung eines Pflanzenschutzmittels. Offenlegung der Formel im Zuge des Parteiengehörs?, ZVG 2014, p. 374;** *Albert Oppel*, Betriebs- und Geschäftsgeheimnisse im Vergaberechtsschutz, ZVB 2015, p. 490.

D. Conclusio

The Administrative Procedure shall be the framework for applying different administrative laws with various difficulties and specific features. The legislation has to regulate Administrative Procedures in the way that the administrative authorities are able to face different challenges by the substantive laws. The procedural participation of persons potentially affected by an administrative decision is one of those challenges in the daily practice.