**SEMINAR ORGANISED BY
THE FEDERAL ADMINISTRATIVE COURT OF GERMANY
IN CO-OPERATION WITH ACA-EUROPE**

Leipzig, 2 February 2026

REDEFINING THE TERMS AND LIMITS OF JUDICIAL REVIEW, PARTICULARLY IN RELATION TO DISPUTES OF A HIGHLY TECHNICAL NATURE

GENERAL REPORT

1. Introduction

This general report for the one-day seminar scheduled for 2 February 2026 at the Federal Administrative Court in Leipzig is based on a semi-structured questionnaire with fifteen questions and a case study. The Federal Administrative Court received thirty-one national reports. It seeks to focus on common lines, while highlighting different aspects of how councils of state and supreme administrative courts deal with disputes of a highly technical nature.

The report will serve as a starting point for the discussions during the three sessions of the seminar. Of particular interest could be to look - from a court perspective - at the internal technical expertise. Thus, we could examine how "expert judges" contribute to the judicial review. *Vice versa* we could have a look at the sphere of external technical expertise. This could include listening to experiences with specialised "expert public authorities" or other expert organisations. We could also explore how technical standards are set and applied, when it is possible to deviate from them and how administrative decisions remain open to technical and scientific progress. Finally, we could delve into the realm of uncertainty and investigate the topic of court decisions containing a prognosis. Following the structure of the questionnaire, the general report will address each question separately, apart from questions 2 and 4 as well as 9 and 10.

2. Summary of responses to the questionnaire

Question 1

Is your court competent to answer questions of fact and law, questions of law only or questions of law and partly questions of fact?

The majority of jurisdictions deal with questions of law and partly with questions of fact (Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Montenegro, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Switzerland). The remaining jurisdictions are seized with questions of fact and law (Belgium, Croatia, Finland, Lithuania, Luxembourg, Malta, the Netherland, Serbia, Sweden, and Türkiye). No jurisdiction deals with questions of law only.

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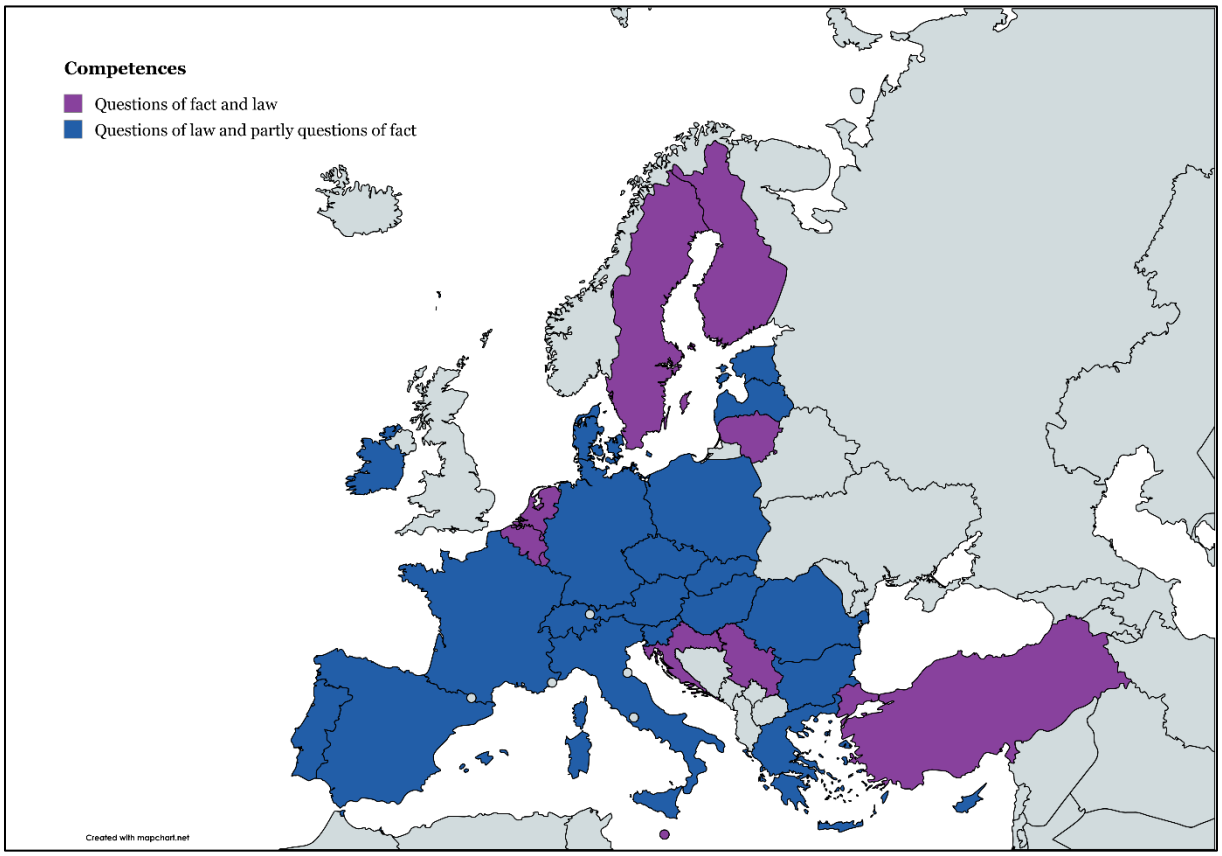


The map shows the distribution of jurisdictions dealing with questions of fact and law as well as those dealing with questions of law and partly with questions of fact.

Questions 2 and 4

Is your court competent in environmental law, health law, urban planning and building law and/or spatial planning law, telecommunications law and public procurement law? In what field of law, in which kind of cases do you specifically see technical challenges to the judges of your court?

Almost one quarter (22.6%) of the councils of state and supreme administrative courts have no (Germany and the Netherlands) or only partly (Lithuania, Poland, Romania, Slovenia, Switzerland) jurisdiction in the field of public procurement law. About one sixth (16.1%) of them exercises only partial jurisdiction (Estonia, Germany, the Netherlands, Slovenia, Switzerland) in the field of health law. 12.9% have no (the Netherlands and Türkiye) or only partly (Estonia and Switzerland) jurisdiction in the field of telecommunications law. Romania has only partly jurisdiction in the field of urban and spatial planning and building law, whereas Sweden exercises merely partial jurisdiction in the field of environmental law.

Most frequently, environmental law (80.6%) is mentioned to be technically challenging. It is followed by urban and spatial planning and building law (74.2%), telecommunications law as well as health law (61.3%), public procurement law (58.1%), energy law (41.9%), tax and customs law (38.7%), competition law (25.8%), data protection law, finance law, and property law (all 19.4%, respectively), mining law and social law (16.1%, respectively), as well

as intellectual property law (including copyright law and patent law), labour law, and state aid and subsidies law (all 12.9%, respectively).

The bar diagram shows the sixteen most frequent fields of law mentioned to be technically challenging.

Question 3

Give an estimate or - if possible - a number as to how many legal disputes of a highly technical nature your court is faced with on an annual basis.

More than two fifth (45.2%) of the councils of state and supreme administrative courts state that they cannot provide an estimate of cases of a highly technical nature. The countries that provide data either refer to cases of certain fields of law that are typically considered to be technically challenging (Croatia, Czech Republic, Finland, France, Latvia, the Netherlands, Poland, and Portugal) or give an estimate (Belgium, Denmark, Estonia, Germany, Greece, Italy, Lithuania, Malta, and Slovakia).

The percentage of cases of a highly technical nature per year varies from 60% (Malta) to approximately 0.76% (the Netherlands). The percentages in-between range from slightly below 40% to 1%, but vary considerably in absolute numbers, i.e. Belgium (37.5%, 1,045 cases), France (below 31.48%, 3,030 cases), Germany (30%, approximately 75 cases), Italy (30%, 2,000 cases), Greece (20-25%, 450-550 cases), Poland (below 16.12%, 3,483 cases),

Lithuania (approximately 10%), Finland (below 10%, 330 cases), Latvia (7%, 44 cases), Estonia (5-7%), Denmark (less than 5%), Czech Republic (less than 3%, 50 cases), Croatia (about 2.16%, 112 cases), and Portugal (below 1%, 15 cases). Slovakia estimates that it deals with fewer than 24 cases of a highly technical nature per year.

Question 5

Does your court employ technical staff in order to help the judges better understand technical questions?

Finland and France state that their courts employ technical staff in order to help the judges better understand technical questions.

The Supreme Administrative Court of **Finland** employs so-called expert judges (Expert Counsellors on the Environment and Chief Engineering Counsellors). They are appointed for five years (fixed-term) and attend sessions dealing with specific cases defined by law (concerning, for instance, environmental protection, water management and patent cases). Their main occupation is at universities or other scientific institutions.

The Council of State of **France** also employs additional judges, the masters of petitions on special service (*Maîtres de requêtes en service extraordinaire*). The Council of State can furthermore rely on the services of the Legal Research and Dissemination Centre (*Centre de recherches et de diffusion juridiques*) and of judicial assistants and trainees. The additional judges are assigned to a chamber of the Litigation Section (*Section du contentieux*) of the Council of State and report to it on the cases. For the time of their appointment, which is limited to four years, they hold a position similar to ordinary members of the Council of State. They are appointed based on their qualification and particular expertise, which they have acquired during their professional career. The judicial assistants and trainees also engage in research on technical issues.

Additionally, **Spain** points to the fact that its Supreme Court employs one group of technical staff, namely forensic medical doctors.

Question 6 a) to c)

How many persons of the technical staff are employed at your court? How are these persons involved in the decision-making process? How does the transfer of knowledge take place?

The Supreme Administrative Court of **Finland** employs 12 expert judges out of 35 judges in total (which amounts to approximately 34% of all judges). There are eight Expert Counsellors on the Environment and four Chief Engineering Counsellors.

The Litigation Section of the Council of State of **France** consists of 149 members, of which 26 are masters of petitions on special service. It is assisted by 11 judicial assistants and approximately 30 trainees. The Legal Research and Dissemination Centre (*Centre de recherches et de diffusion juridiques*) is headed by three members of the Council of State, who are assisted by 14 officials and four trainees.

In **Finland**, the expert judges participate in the proceedings as full members of the court, may vote on the outcome of the proceedings and act under the same responsibility for the legality of their actions as the ordinary judges. Their viewpoint during court sessions, however, is mainly scientific or technical. They may also participate in site visits providing technical or scientific observations. After the court session, they may review and comment on the draft of the decision or even draft the decision themselves together with a referendary and other judges. Knowledge is mainly transferred through discussions.

The masters of petitions on special service in **France** equally take part in all stages of the court proceedings. The transfer of knowledge is carried out throughout these proceedings.

Question 7

How does your court cope with technical questions, which need to be understood to solve the case? May judges rely on internal or external experts?

The councils of state and supreme administrative courts of most of the jurisdictions have to understand the technical questions or have to acquire the necessary knowledge themselves. Almost all positively state (except for Austria, Cyprus, Greece and Poland) that they have the possibility of relying on external experts.

Technical expertise is already present in various forms: Naturally, judges profit from their work experience. There are also specialised chambers, allowing judges to accrue technical knowledge (Belgium), sometimes specialised training is available (France). The Supreme Administrative Court of Finland and the Council of State of France rely on expert judges (→ Questions 5 and 6). Much of the technical expertise is made available to the judges by the parties' submissions, especially in the form of filed expert reports.

The judges, sometimes the court's case management (Ireland), may request further clarification from the parties. The **Polish** Supreme Administrative Court may hear further explanations in a public hearing where judges may pose questions to a public administration employee. In **France**, during the *instructions à la barre*, the parties express their analysis on technical points of the case during an oral investigation that completes the written procedure. In **Latvia**, there is a preparatory hearing to discuss unclear issues or respond in writing to questions concerning factual circumstances and the legal nature of the case. In **Greece**, the judge-rapporteur and the parties cooperate to clarify the facts and issues of the dispute. The judges may also rely on the doctrine of "scientific common knowledge", meaning disseminated and popularised scientific research.

In some jurisdictions, the courts may also contact other public authorities, which they consider necessary. In **Estonia**, the Supreme Court can even add other public authorities for their professional opinion to the proceedings.

A few jurisdictions accept submissions from an institution not party to the proceedings as *amicus curiae* (Czech Republic, France, Ireland, and Latvia).

As to the commission of external experts, some councils of state and supreme administrative courts emphasise that they only rarely do so (Estonia, Finland, Germany, Hungary, Lithuania, Luxembourg, Portugal, Romania, and Spain), namely if the court lacks the necessary technical expertise and the facts in the filed expert reports are disputed (Croatia, Germany). This is particularly the case if the expert reports filed by the parties contradict

each other (Czech Republic and Lithuania). In **Estonia**, the Supreme Court has so far only once involved an external expert, in that case on a contractual basis. In **Switzerland**, the Federal Court orders judicial expert opinions and regularly invites the authorities specialising in a particular field to give their opinion. In **Bulgaria**, external experts are commissioned only after allocating the burden of proof between the parties.

Some jurisdictions differentiate between certain types of expert expertise. In the **Czech Republic**, expert opinions are distinguished from professional statements. The latter are written statements of an expert or public authority on simple factual issues. Likewise, in **Slovakia**, expert evidence for complex issues is distinguished from expert opinions from a professionally qualified person. The **Italian** jurisdiction distinguishes between technical expertise (professionals working in the private sector) and verification (professionals having a service relationship with a public administration other than the one that is a party to the proceedings). In **Lithuania**, the court may summon a specialist for the examination and evaluation of documents, objects or actions, requiring special knowledge. In **Luxembourg**, there are consultants as well as experts. The Federal Court in **Switzerland** allows for general expert opinions that "have the scope of principle and go well beyond the dispute submitted" to the Court.

In two countries, one particular expert organisation is often involved in cases of particular fields of law: In environmental and spatial planning law, the Council of State of **the Netherlands** often relies on the expert opinions of the impartial publicly funded Administrative Jurisdiction (Environment and Spatial Planning) Advisory Foundation (STAB). The advisers are trained engineers, technicians, chemists, biologists, etc. They carry out file researches, site inspections, talks with the parties to the dispute and prepare an expert report. In environmental law, the Federal Court of **Switzerland** mainly relies on the Federal Office for the Environment (*Office fédéral de l'environnement* – OFEV). It issues recommendations, calculation programmes and other implementation aids.

Question 8

If judges may rely on external experts, how are they chosen?

As far as applicable (→ Question 7), all external experts are chosen by the respective council of state or supreme administrative court.

Often, they may choose to appoint external experts recommended by one of the parties or the parties (Belgium, Croatia, Czech Republic, Finland, France, Germany, Ireland, Latvia, Lithuania, Montenegro, Portugal, Slovakia, Slovenia, and Spain).

In some countries, experts are chosen from a list (Czech Republic, Hungary, Romania, Slovakia, and Türkiye) or register (France and Serbia). If in **Romania** and **Latvia** no authorised expert is available, the court or the parties may request the opinion of one or more specialists in the specific field. In **Serbia**, in such a case, the court may appoint a person of an appropriate profession. In **Türkiye**, experts not listed may be commissioned if they have the required specialisation.

In **Belgium**, external experts are usually chosen from among the experts already sworn in and working for the courts of the ordinary jurisdiction. In **Hungary**, if a forensic expert was appointed in the preliminary administrative proceedings, a private expert or an expert

appointed in another proceeding may not be called upon to give evidence on the same specialist subject-matter.

In environmental and spatial planning law cases, the Council of State of **the Netherlands** often appoints experts of the STAB. In the field of environmental law, the Federal Court of **Switzerland** mainly relies on the opinions of the OFEV (→ Question 7).

Questions 9 and 10

May your court rely on technical expertise as laid down in regulations or certain other documents to answer technical questions, and to what extend does this technical expertise have a binding effect?

A large majority of the jurisdictions may rely on all of the documents listed in the questionnaire containing technical expertise: regulations, other government documents or documents by public authorities, documents published by the EU Commission and documents published by experts or groups of experts. However, there are differences in the reliance on additional material and in the binding effect of the documents concerned.

The vast majority of the jurisdictions stated that **regulations** containing technical specifications must be observed. The Supreme Administrative Court of **Finland** emphasised that while regulations have a binding effect, they may incorporate guideline values, providing the court with a greater margin of appreciation when applying such regulations. In **Romania**, laws and emergency ordinances of the Government as well as ordinances and decisions of the Government are binding, whereas orders, instructions, etc. issued by ministers and state authorities are only binding insofar as the rules do not conflict with higher-ranking legislation.

Other government documents or documents by public authorities may be relied upon in Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, and Switzerland. In **Lithuania**, these documents may be binding if they qualify as normative administrative acts, i.e. legal acts adopted by public administration entities for repeated application, setting rules of conduct for an individually undefined group of persons. In **Germany**, the content of the administrative rules based on the Federal Immission Control Act is to be interpreted in the same manner as a legal norm according to administrative jurisprudence. The technical standards, estimations and prognoses contained therein have a binding effect unless there is reliable new knowledge in the fields of science and technology. In **Slovenia**, courts can (only) be bound *de facto* by an administrative document containing technical expertise (that is not a legal act) if there are no other sources of expert interpretation of a certain technical question. In **Sweden**, occasionally, government documents or documents by other administrative authorities contain rules that may bind the court to have regard to technical expert opinions. Such rules presuppose that the court shall make its own assessment of the issue. In **Switzerland**, there are recommendations adopted by federal offices containing technical requirements. They serve as aids to decision-making as a reference, but are not binding.

The courts from Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta,

Montenegro, the Netherlands, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, and Sweden may rely on **documents published by the EU Commission**. They are mostly considered as aid, providing guidance, for the interpretation of EU law. As far as decisions by the EU Commission are concerned, they are binding.

Documents published by experts or groups of experts may serve as technical expertise in Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

In **Belgium**, the Council of State may take note of any technical document of use, provided that it is known to the parties and that they are in a position to discuss the document's relevance. **Italian** courts may rely on widely accepted scientific or technical guidelines, if they have been presented in court as documents by the parties. **Lithuanian** courts may also rely on these documents if they are widely recognised and methodologically sound. In **Croatia**, **Germany**, and **Greece**, if the technical guidelines set up by private experts or expert organisations are not widely recognised, they must at least be reasonable and not obviously deficient. In **Finland**, if technical stipulations as well as generally recognised scientific or technical guidelines are absent, the courts may rely on any reasonable expertise. In **the Netherlands**, in case of differing or not yet fully crystallised approaches in the documents, the approach chosen must at least be reasonable. The documents then have a self-binding effect on the authority. In **Portugal**, courts will assess technical opinions from independent experts, academics, or groups of specialists according to the rules of common experience and free conviction. In **Spain**, all documents must be properly introduced into evidence or are a matter of public record before courts can rely on them. In **Switzerland**, guidelines or recommendations issued by associations of experts specialising in a particular field may contain non-binding technical requirements that shall assist in decision-making.

In the **Czech Republic**, the courts sometimes cite international standards or guidelines of international organisations. Domestic technical standards become binding only if a special legal regulation refers to them. Preparatory works are used as interpretation material in **Finland**. In **France**, courts can refer to any other document, which they consider useful in order to form their conviction. In urban planning cases, they can base their decision on the public reference data produced by the (state-subsidised) National Geographic and Forest Institute (IGN). In **Luxembourg**, reliance on any other documents than binding international and national technical regulations is possible only if the adversarial principle is observed. In **Switzerland**, foreign directives, which are sufficiently substantiated from a technical point of view, may be taken into account under certain conditions, provided that the criteria on which those documents are based are compatible with those of Swiss law. However, they are not binding on Swiss authorities.

Question 11

How does the court react if technical questions relevant to the case cannot be answered, not even with expert help?

In **Austria**, the Supreme Administrative Court annuls the contested decision and refers the case back to the court which issued it, if the decision lacks essential elements in order to answer the technical question. The same applies for the Supreme Court of **Estonia**.

Since in **Slovakia**, the Supreme Administrative Court primarily assesses legal questions, it is not the task of the Court to resolve situations with no established scientific knowledge. It falls within the competence of the public authority, which for this purpose can rely on what is called administrative discretion (→ Question 14).

For the **French** Council of State, the case must be decided, even though there are conflicting expert opinions. In **Malta**, the Court of Appeal refers to its discretionary power to resolve the respective issue, whereas in **Serbia**, the Supreme Court judges rely on their free judicial conviction, which must be based on the application of the respective legal regulations to the relevant factual circumstances.

In **Belgium**, the Council of State is able to resolve all disputes on a strictly legal level, even if technical questions cannot be answered. If the scientific community is not in a position to formulate a unanimous opinion on a technical issue, the Council of State will assess whether the contested acts are reasonable and proportionate in relation to the objectives sought. Although the **Czech** Supreme Administrative Court has not yet experienced such a situation, it would likely - quite similarly - assess whether the approach taken by the public authority is reasonable, with emphasis on legal principles such as the precautionary principle. The Council of State of **the Netherlands** follows the same path and grants public authorities a margin of appreciation to choose from different approaches (→ Question 14). The Council of State will assess whether the choice is not unreasonable. The Council of State of **Greece** will accept the public authority's choice if sufficient reasoning is given. The public authority is not under an obligation to initiate new research not yet available. The same is true for the Supreme Administrative Court of **Portugal**, which, in such a situation, will rely on reasonable common experience. Like in the Czech Republic and Ireland, the *Cour administrative* in **Luxembourg** has not yet experienced such a situation. It would, however, follow the most plausible solution found, taking into account all the knowledge acquired at the relevant time. In **Latvia**, the Supreme Court will accept reasonable approaches that are free from obvious deficiencies. The Court must provide a reasoned explanation in its legal analysis as to why it accepts one opinion over another. The assessment may also be influenced by principles specific to the respective field of law concerned.

In **Poland**, the Supreme Administrative Court would verify whether the public authority has acted in accordance with the expert opinion available for that particular case, to the extent that this is possible.

If technical issues cannot be answered with the help of experts in **Bulgaria**, they should be resolved with the help of any other permissible means of evidence provided for by law. In **Lithuania**, the courts may summon specialists, since the public authorities are not expected to initiate scientific research not yet available. In **Türkiye**, the principle of *ex officio* investigations applies. The judges must employ any necessary means to resolve the dispute.

In **Germany**, if a scientific or technical question arises, which is not subject to a legislative standard or a generally recognised guideline, the courts have to examine whether the public authority relied on a reasonable expertise or a reasonable method and its decision is not otherwise obviously deficient. The courts do not have to initiate new research not yet available. Apart from that, the courts generally adhere to the rule of (substantive) burden of proof. A decision based on the burden of proof is only possible after consulting with an external expert. Equally, the High Administrative Court of **Croatia** will apply the rules on the burden of proof, if it cannot positively establish a fact based on the evidence adduced. If

technical questions cannot be answered with expert help, the Court may rely on any reasonable expertise served during the administrative proceedings.

In **Finland**, the consequences of a lack of information depend upon the burden of proof, which in turn varies according to the applicable law and the circumstances of the case at hand. The public authority has a duty to prove that its decision is founded on acceptable grounds. Sometimes, this duty may also rest on the private party. The Supreme Administrative Court under no circumstance has to initiate new scientific research, which is not yet available to the scientific community. The Supreme Court of **Denmark** would also solve the issue based on the burden of proof. If the party with the burden of proof fails to meet the requirements, the Court may draw conclusions contrary to the party's position. As a general rule - with many modifications - it is the party seeking to obtain something or to change the status quo, who bears the burden of proof. In **Hungary**, if the expert evidence is inconclusive, the court shall decide the case based on the other available evidence, likewise having regard to the burden of proof. The Supreme Court of **Montenegro** also applies the burden of proof. Apart from the fact that there are no such cases before the High Court of Cassation and Justice in **Romania**, the courts would base their decisions on the burden of proof. **Slovenia**, like Montenegro, accentuates the general rules and principles of evaluating evidence, among them the burden of proof. Also in **Spain**, in such cases the burden of proof standard will be applied, because the courts are under an obligation to decide all cases before them. In **Switzerland**, this obligation is linked to the prohibition of denial of justice. The rules of evidence, including the burden of proof and the assessment of evidence, allow the judges to decide all cases, even when technical uncertainties remain.

In **Italy**, the impossibility of answering technical questions implies either that the administration has not provided an adequate scientific demonstration with respect to the factual premise or the failure or impossibility of the claimant to demonstrate that the public authority's decision is unlawful.

Question 12

Do these criteria described above also apply to proceedings granting temporary relief?

The answers to the question as to whether the criteria for dealing with disputes of a highly technical nature also apply to temporary relief proceedings can be allocated to certain groups.

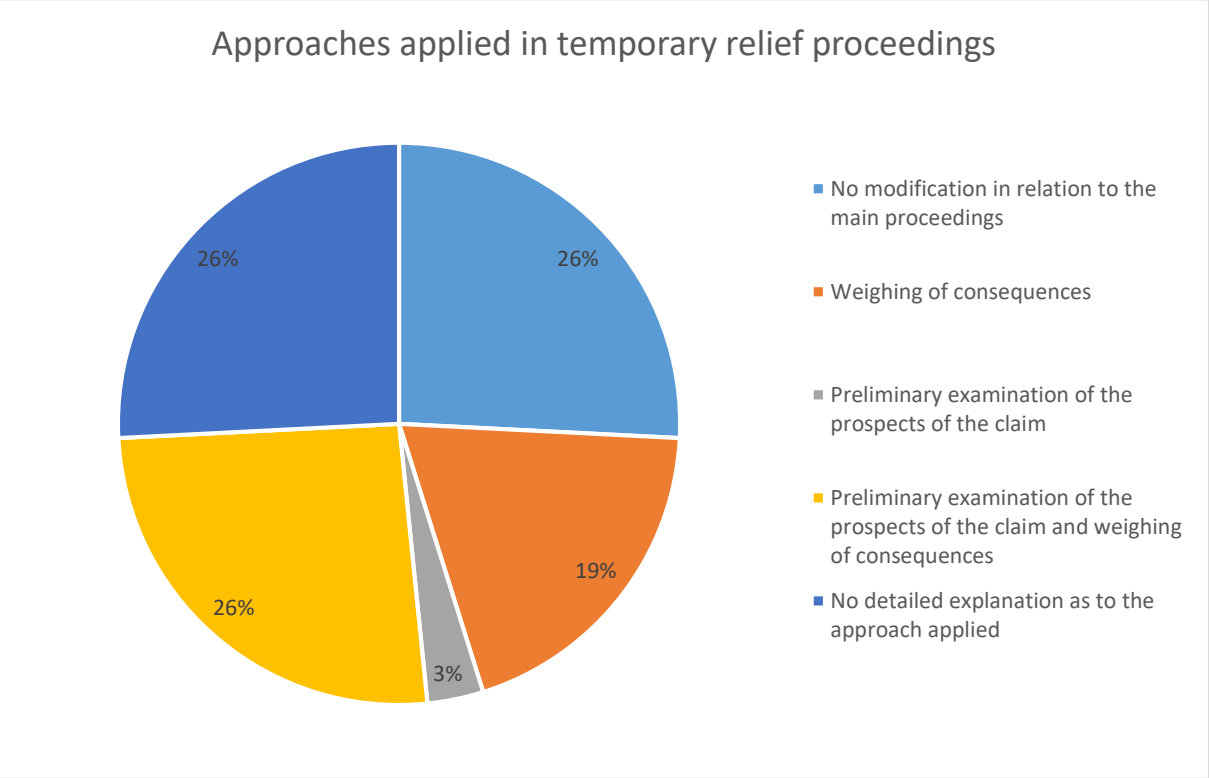
The first group features no modifications in relation to the main proceedings. This is true for Croatia, Finland, France, Poland, Romania, Slovenia, Sweden, and Türkiye.

The second group of jurisdictions focuses on the weighing of consequences, i.e. (serious) harm for the parties' interests (Austria, Hungary, Italy, the Netherlands, and Slovakia). In **the Netherlands**, the decision is normally based on a weighing of interests. Only where technical questions have already been sufficiently clarified, judges may confine themselves to a provisional judgment on lawfulness.

In **Belgium**, the Council of State relies on a preliminary examination of the prospects of success of the action. Since a decision on temporary relief must be taken within a limited period of time (three months), it is hardly possible to commission expert examinations. However, the Council of State may question the parties or authorities that could shed light on the technical issues. It has to assess whether there is an urgency incompatible with the handling of the annulment case and whether at least one serious plea is raised, the

examination of which lends itself to accelerated treatment and which is *prima facie* capable of justifying the annulment of the contested act or regulation. Therefore, pleas, which require the support of a detailed technical or scientific analysis, cannot be dealt with in the context of temporary relief.

Other jurisdictions apply - in some form or other - a combination of both, a preliminary assessment of the prospects of the success of the action and a weighing of consequences (Cyprus, Estonia, Germany, Greece, Latvia, Lithuania, Luxembourg, and Portugal). In **Cyprus**, the effects of an administrative act may be suspended if the court is satisfied that there is a risk of irreparable harm or manifest illegality. Due to time pressure, the Administrative Law Chamber of the Supreme Court of **Estonia** assesses the need for interim measures as well as the prospects of the complaint, weighs the public and private interests and assesses the foreseeable consequences of the order. In **Ireland**, lower evidentiary thresholds apply. The courts must determine whether it has been established that there is a fair question to be tried, i.e. whether the case will probably go to trial, and how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice. Temporary relief decisions prioritise procedural fairness and immediate harm prevention over technical analysis. In **Germany**, the decision may be based on a preliminary examination of the prospects of success in the main proceedings. If the factual and legal situation cannot be fully established during the temporary relief proceedings, the decision shall be based on a weighing of the parties' interests, with the aim of preventing any factual prejudice to the main proceedings. If there is not enough time for a complete assessment, the **Latvian** courts will engage in a weighing of consequences. The Council of State of **Greece** applies the general rules in cases of interim relief in public procurement cases. Apart from that, technical issues do not have to be answered in these proceedings. The Council of State grants interim relief if it deems that the imminent enforceability of the contested act would cause the applicant irreparable or hardly reparable damage in the event that the action for annulment is to be upheld and furthermore if it considers that the application for annulment is manifestly well founded. It may not grant interim relief if, after weighing the applicant's damage, the interests of third parties and the public interest, the consequences of granting interim relief would be more significant in relation to the applicant's interests. In **Lithuania**, a court may base its decision on the evaluation and balancing of interests of the parties involved, if a *prima facie* justification of the claim is provided and if, in the absence of interim measures, significant irreparable or hardly reparable harm may be caused. The *Cour administrative* in **Luxembourg** does not hear applications for temporary relief. At first instance, however, a decision is based on the assessment whether there is serious and irreversible damage and whether the pleas raised on the merits appear to be sufficiently serious. In **Portugal**, also only a summary assessment is carried out. Precautionary measures are based on the assessment of the probability of merit of such relief and a well-founded fear of creating a *fait accompli* situation or damage to the interests of the applicant that could be difficult to remedy. Interim measures are granted if there is proof of the likelihood of existence of the right in question and the fear of its infringement. Expert evidence may exceptionally be admitted if indispensable for the proper decision of the case.



The chart shows the frequency of the different approaches applied when dealing with cases of a highly technical nature during temporary relief proceedings.

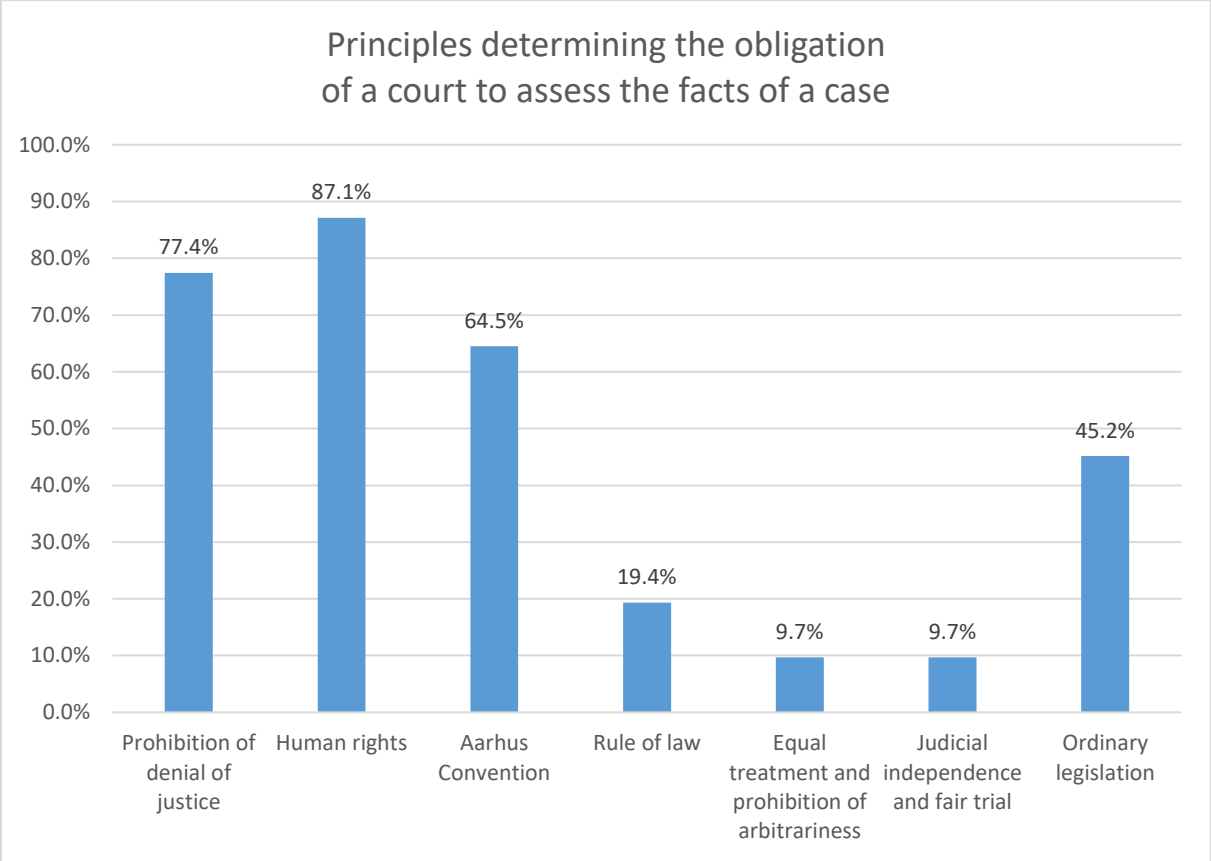
Question 13

Which constitutional or other general principle of law determines the obligation of the court to assess the case on a factual basis?

The councils of state and the supreme administrative courts refer to the following categories when addressing the principles determining the obligation of a court to assess the facts of a case:

- the **Prohibition of denial of justice** (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Montenegro, Poland, Romania, Slovakia, Spain, Sweden, Switzerland, and Türkiye),
- **Human rights** (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, and Türkiye),
- the **Aarhus Convention** (Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Poland, Portugal, Spain, and Sweden),
- the **Rule of law** (Austria, Cyprus, Estonia, Ireland, Sweden, and Türkiye),
- **Equal treatment** and **Prohibition of arbitrariness** respectively (Austria, Sweden, and Switzerland),

- **Judicial independence** (Ireland and Serbia), and **Fair trial** (Ireland, Serbia, and Türkiye),
- **"Ordinary" legislation** (Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, the Netherlands, Serbia, Slovakia, Slovenia, and Türkiye).



The bar diagram shows the mentioned sources of the court's obligation to assess the facts of a case and their frequency.

Question 14

In your jurisprudence, does the legislature and/or the competent public authority dispose of a margin of appreciation when addressing technical questions?

When addressing technical questions, many jurisdictions stated that the **legislature** possesses a margin of appreciation binding on the supreme administrative courts or councils of state (Austria, Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Romania, Spain, Sweden, and Türkiye). The legislatures in **France** and **Luxemburg** enjoy a wider margin of appreciation when addressing technical questions. Also in **Belgium**, if there is no specific technical or scientific framework, the margin of appreciation of the legislature may be wider, but it must be possible to justify the adequacy with the current state of technical or

scientific knowledge, the requirements of the precautionary principle must be observed and the scientific or technical choice must be sufficiently reasoned.

The jurisdictions name as limits to the legislative margin of appreciation the law of the European Union (Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Greece, Italy, Latvia, Lithuania, Romania, Spain, and Sweden), the national Constitution (Austria, Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Romania, Spain, and Sweden), human rights obligations (Finland and Sweden), public international law (Luxembourg and Netherlands), namely the ECHR (France, Greece, and Serbia), higher-ranking national law (Cyprus, Finland, Ireland, Luxembourg, Montenegro, and Romania), the limits of unreasonableness and arbitrariness (Croatia and, Cyprus) as well as manifest disproportionality of the legislative act (Croatia).

The different jurisdictions provide several means for their **public authorities**, and thus also for the courts, to deal with technical questions. There is the **margin of appreciation**, there is **discretion**, and there is **both**.

In **Bulgaria**, public authorities enjoy a **margin of appreciation** in selecting a scientific and technical approach to justify the legal basis of an administrative act. However, it is subject to judicial review. Also in **Croatia** and **Slovenia**, the public authority enjoys a margin of appreciation when dealing with technical questions. In Croatia, the limits correspond to those of the legislature. In Slovenia, the limits concern a manifestly illogical, inconsistent or incoherent reasoning. In **Cyprus**, the public authorities enjoy a significant margin of appreciation when dealing with technical questions. In **Denmark**, **Greece**, **Italy**, and **the Netherlands**, public authorities likewise enjoy a margin of appreciation for technical questions, especially when there is no binding legislation or there are no generally recognised scientific or technical guidelines. In Denmark, the courts review whether the authority has used accurate and sufficient facts as a basis. In Greece, review is limited to obvious deficiencies of the approach chosen, erroneously established facts and ill motivation. Review in the Netherlands is limited to the question as to whether the approach chosen is not unreasonable and whether the decision is based on proper and stated reasons, and is not disproportionate. The review in Italy consists in examining whether a party has introduced evidence suggesting a misinterpretation of the facts or an insufficient or illogical statement of reasons. In **Finland**, the applicable law determines the limits of the margin of appreciation enjoyed by public authorities. Review is limited mainly to a correct procedure, correct facts and law, the respect of the limits of the margin of appreciation and the general principles of law. In **Latvia**, if the legislature has not defined a specific technical standard and instead employs an undefined legal concept to express a condition within a legal provision, judicial review is limited to manifest errors of assessment or procedural irregularities capable of influencing the outcome of the decision. In **Luxembourg**, the administrative courts assess whether the administration has not exceeded that margin of appreciation and apply the principle of proportionality. In **Spain**, the public authorities also enjoy a margin of appreciation in technical matters. Only a decision that is irrational or contrary to the facts or deficient in this regard serves as a basis for annulment. Public authorities in **Montenegro** have a margin of appreciation when decisions require technical knowledge or expert assessment. These decisions must comply with the law and the objectives of the public interest. In **Poland**, public authorities may be granted a margin of appreciation by an act of parliament or a regulation. Review is limited as to whether the public authority has overstepped the statutory limits. Public authorities in **Switzerland** are granted a certain scope for action in assessing technical issues, provided that they have examined the decisive

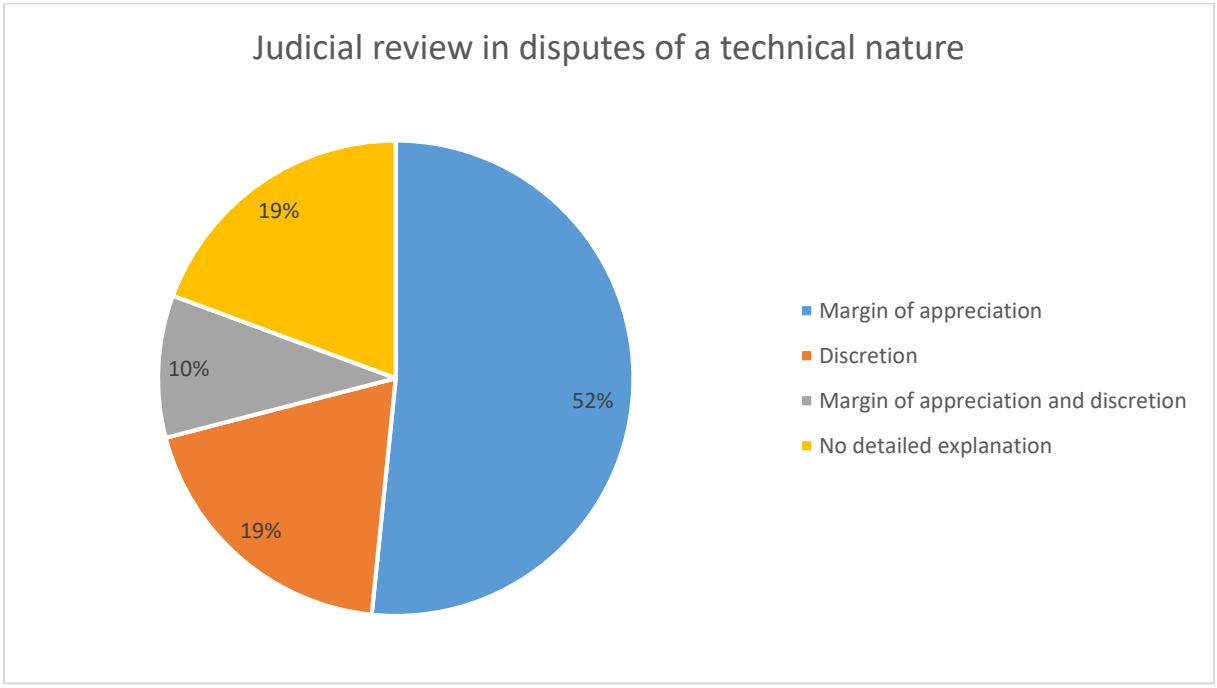
points of view and have gathered the necessary information in a conscientious and comprehensive manner.

In **Germany**, in the absence of binding legislation or generally recognised scientific or technical guidelines, the courts are limited to review the approach used under the aspects of obvious deficiencies, erroneously established facts or ill motivation.

In **Austria**, the first instance courts cannot modify or annul a decision by considering that another exercise of **discretion** is more appropriate, only if the exercise of that discretion has not been carried out in accordance with the law. The Supreme Administrative Court may examine whether the first instance court was authorised to exercise discretion and whether it did so in accordance with the law. The discretionary decisions by public authorities in **Estonia** cannot be substituted by a decision made by a court. They are reviewed as to the compliance with the rules of discretion and proportionality. In case of an exceptionally wide discretion, review is further limited. However, assessment decisions may be reviewed more intensively and may be substituted by the court's own assessment. Judicial review of public authorities' discretionary power in **Portugal** is limited to assessing legality and constitutionality, but not opportunity. When examining discretionary administrative decisions, the court verifies whether the administration's decision has a legal basis, respects the different manifestations of the rule of law, is substantiated, and is not manifestly arbitrary or unreasonable. The discretion exercised by public authorities in **Romania** must be in line with the powers conferred by law and respect the rights and freedoms of the citizens. **Slovakia** allows for a certain degree of discretion of the competent public authority when deciding on rights and obligations, allowing it to take into account the specific circumstances of the case within the limits set by law. The discretionary powers granted in **Türkiye** are not unlimited. The exercise must comply with the public interest and the needs of public service. Judicial review concerns lawfulness (authority, form, cause, subject and purpose, not expediency).

In **Lithuania**, in cases without binding legislation or a generally recognised scientific or technical guideline, the public authority enjoys some margin of appreciation. Judicial review of the approach used is limited as to the aspects of obvious deficiencies, erroneously established facts or ill motivation. Additionally, the external limits of discretion granted must be observed. In **Sweden**, the Government and the central government administrative authorities that come under the Government have a certain degree of margin of appreciation. Judicial review is not limited as to whether the authority's decisions are supported by facts and law and are not arbitrary or disproportionate, but may also assess the material issues of a case and take another approach, thus resulting in the replacement of the authority's decision by the one of the court.

In **France**, public authorities enjoy a certain margin of appreciation. However, the Council of State, without taking the place of the public authority, may order it to take appropriate measures to achieve certain objectives prescribed by law without specifying which measures to take.



The diagram shows the different types of judicial review of decisions by public authorities in disputes of a technical nature.

Question 15

Is there any (legal) procedure established to remedy shortcomings in the assessment of the case's factual basis?

In the different jurisdictions, there are basically two strategies available to remedy shortcomings in the assessment of facts. On the one hand, the principle of *ex officio* investigation provides for a complete set of facts. On the other hand, the annulment of the contested decision and the referral back are conceivable.

If, in **Austria**, **Croatia**, **Germany** or **Lithuania**, the assessment by the public authority of the facts shows deficiencies, the **first instance administrative court** will have to gather and **investigate** the facts. If this is not possible or highly uneconomic, it may also oblige the authority to remedy the deficiencies. In the **Czech Republic**, the courts can examine the factual basis of a case if the incorrectness of the public authority's findings is obvious or is based on the arguments submitted by the applicant. However, the courts cannot replace the activity of the public authority. **Italian** judges may make use of technical advice or verification during the preliminary investigation to clarify the facts. The **Latvian** courts of first instance and courts of appeal can request additional evidence, explanations or re-examination of the facts if they find that the assessment of the facts is incomplete, unfounded or contradictory or can request from the public authority to remedy the identified shortcomings. However, if these shortcomings significantly affect the outcome of the case, the courts may annul the administrative act or refer the case back for a new hearing. In **Estonia**, the courts can solve cases themselves by gathering extra evidence, if the discretion of the public authority is reduced to zero or the court is dealing with administrative assessment decisions. In **France**, the administrative courts can prescribe an investigation into the facts or hold an oral hearing to deal with any questions of fact and law it considers

useful. In **Slovakia**, the courts may conduct the taking of evidence if they deem it necessary for the decision in the case or in the proceedings specified by law.

The High Administrative Court of **Croatia** acting as court of last instance can **re-examine the facts** if a lower administrative court or a public authority has failed to properly assess them. In **the Netherlands**, all instances of administrative courts, thus also the Council of State, may supplement the facts *ex officio* thus remedying shortcomings in the assessment of a case's factual basis. The Supreme Court of **Spain** may, in very exceptional circumstances, set aside or change the facts of the lower court proceedings if the findings are flawed to the point of being irrational. In **Sweden**, the Supreme Administrative Court must ensure that the case is being investigated to the extent required by its nature. Therefore, it may intervene in the investigation, by either guiding the parties and encouraging them to complete the investigation, by obtaining the information itself, or by referring the case back to a lower court or the initial decision-making body if that respective instance has not fulfilled its obligation to investigate the matter thoroughly. Before the Federal Court of **Switzerland**, factual findings may be challenged only if the facts have been established in a manifestly incorrect manner or in breach of the law and if the correction is liable to affect the outcome of the case. Rectification or addition may take place *ex officio* if precisely indicated by the applicant how the conditions for either of them would be fulfilled. In **Türkiye**, the court may request documents from the parties or other relevant entities, including expert institutions. It may resort to methods such as on-site inspection and expert examination in order to clarify the factual basis.

The **Belgian** Council of State and the courts in **Cyprus** may **annul** the contested decision and **refer it back** to the **public authority** to remedy the shortcomings identified in the judgment. The Belgian Council of State may furthermore appeal to the parties when documents are missing from the administrative file. Also in **Denmark**, the court has the option to remit the case to the relevant public authority for a new decision to be made. The **Estonian** lower instance courts as well as the administrative courts in **the Netherlands** and in **Romania**, when identifying errors in the assessment of facts, may send the case back to the public authority to remedy the errors. The Supreme Administrative Court of **Finland** may, in case of a manifest error in the assessment of the facts by the public authority or a lower instance court, reverse the decision and return the case for renewed consideration to the public authority or the lower instance court. If new evidence of a highly technical nature is presented to the Court, it reverses the contested decision and returns the matter for renewed consideration to the public authority. In **Hungary**, if the facts established by the public authority are so incomplete that the decision cannot be reviewed on the merits, or if the incompleteness could affect the merits of the case, the decision shall be annulled and, if necessary, a new administrative procedure be ordered. In **Montenegro**, the courts of first instance may return the case after annulling the decision to the public authority with clear instructions regarding the facts that the body is obliged to establish.

The Supreme Administrative Court of **Austria**, the **Bulgarian** Supreme Administrative Court, the **Estonian** Supreme Court and the **Lithuanian** Supreme Administrative Court can **reverse the judgment** of the **lower instance court** and **refer the case back to it**. The Estonian Supreme Court cannot clarify the facts and circumstances of the case itself, whereas the Lithuanian Supreme Administrative Court may request the submission of new evidence within the appeal proceedings. This is especially the case when required in the public interest or if rights or legally protected interests would be significantly violated and if there are justified reasons for not submitting the evidence earlier or the necessity to submit it

arose at a later stage. The Federal Administrative Court of **Germany** and the Council of State of **the Netherlands**, when acting as a court of last instance, and after identifying procedural flaws in the decisions of the lower instance courts, annul the contested decisions and refer the cases back to them for further assessment of the facts. This also applies to the Supreme Court of **Ireland**. Equally, the Supreme Administrative Court of **Portugal** may annul the contested decision and order its reform. Likewise, if the Curia of **Hungary** finds that the facts established by the court of first instance do not correspond to the evidence and are not in conformity with the documents, it annuls the contested decision and orders the court of first instance to conduct a new trial. The Supreme Court of **Montenegro** has the same possibility. The High Court of Cassation and Justice in **Romania** may refer the case back to the court of first instance for retrial when it is necessary to analyse the facts by re-classifying them or by supplementing or re-examining the evidence.