



SEMINAR ORGANISED BY THE FEDERAL ADMINISTRATIVE COURT OF GERMANY

IN CO-OPERATION WITH ACA-EUROPE

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

QUESTIONNAIRE

The prohibition of denial of justice or - as its twin principle - the right of access to justice put courts under an obligation to hear and assess the facts of a case and to rightfully apply the law to the facts established. In some cases this is easier said than done. Especially cases of a highly technical nature may pose extraordinary challenges to the court: challenges in understanding the facts and challenges in understanding scientific or technical answers to problems. This may occur in many fields of law the administrative judge works in, such as environmental law, telecommunications law, planning law, public procurement law etc.

In order to prevent a denial of justice courts will have to deal with such questions even though their answers may lie outside of the field of competence of the administrative judge. The seminar is designed to serve as a point of comparison and a point of best practice in order to facilitate the administrative judge with more knowledge and skills in this part of his and her work. Therefore, the seminar addresses questions of gathering technical and scientific knowhow, involving experts in the procedure, evaluating technical standards and measuring the binding authority of technical documents and publications - be it legal norms or scientific standards. The seminar will also have to address questions regarding margins of appreciation of authorities in technical evaluations.

Part 1: Jurisdiction in fields of law typically producing disputes of a highly technical nature

1. Is your court competent to answer:

- Questions of fact and questions of law
- Only questions of law
- Questions of law and partly questions of fact
- In case your answer was " Questions of law and partly questions of fact", please explain:

The Supreme Administrative Court has final jurisdiction in matters of administrative law. Natural and legal persons may petition for review of decisions by first instance administrative courts if these involve legal questions of fundamental importance. A legal issue is considered to be of fundamental importance if the contested court decision departs from relevant past decisions of the Supreme Administrative Court or if there is no - or no consistent - case law on the issue in question. The scope of review of the Supreme Administrative Court is therefore limited to legal questions of fundamental importance.

The Supreme Administrative Court examines the decision regarding its unlawfulness as claimed by the complainant based on the factual and legal situation at the time of the decision of the first instance administrative court. If the Supreme Administrative Court finds for the petitioner, it annuls the contested decision and sends it back to the court, which issued it.





The Supreme Administrative Court may only decide on the merits of the case if it is ready for decision and the decision on the merits is in the interest of simplicity, expediency, and cost saving. In this case, the Supreme Administrative Court shall - exceptionally - establish the relevant facts and, for that purpose, can also order the first instance administrative court to supplement the evidentiary proceeding. However, in cases concerning disputes of a highly technical nature, this will typically not be the case.

2. Is your court competent in the following fields of law:

- Environmental law
- Health law
- Urban planning and building law and/or spatial planning law
- Telecommunications law
- Public Procurement law

Please provide other fields of law, which bear a technical challenge to your court:

Technical challenges may also occur for example in the fields of electricity and data protection law.

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

- In percentage of all disputes:
- In absolute numbers:

Due to the high number of cases at the Supreme Administrative Court (6.883 new and in summary 3.472 pending cases in 2023, which are recorded according to the field of law) we cannot provide this quantitative data for cases specifically concerning disputes of highly technical nature.

4. In what field of law, in which kind of cases do you specifically see technical challenges to the judges of your court?

Please explain:

Specific technical challenges typically arise in the fields of environmental, telecommunication, electricity and data protection law as stated in Q 2. This may include cases concerning approval procedures especially for different kinds of plants or buildings.

Part 2: Facing modern challenges in disputes of a highly technical nature

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

- Yes
 - o As research assistants
 - o As additional judges
 - o In another function (e.g. as a separate panel etc.).

Please explain:

- No

6. In case your answer was yes:

a) How many persons of the technical staff are employed at your court?

- In percentage of all staff involved in decision-making:
- In absolute numbers of all staff involved in decision-making:

b) How are these persons involved in the decision-making process? Please explain:

c) How does the transfer of knowledge take place? Please explain (e.g. preparation of reports, discussions in session etc.):





N.a.

7. How does your court cope with technical questions, which need to be understood to solve the case?

- Judges have to understand the technical questions/have to acquire the necessary knowledge themselves
- Judges may rely on external experts
- Judges may rely on internal experts
- Other (please provide a method):

Please explain your answer:

As explained in Q 1 the Supreme Administrative Court is only competent to decide on legal questions of fundamental importance. It may only review the contested decision based on the facts and evidence established by the first instance administrative court (for the exception when deciding on the merits of the case see Q 1).

If the Supreme Administrative Court finds that the first instance administrative court's decision lacks essential elements in order to answer e.g. specific technical questions, it annuls the contested decision and sends it back to the court which issued it. As a consequence, the first instance administrative court is bound to apply the interpretation of the Supreme Administrative Court.

Thus, first instance administrative courts are responsible for gathering all relevant information - if necessary, including specific technical details - to solve a case. If the respective judge does not understand technical questions himself he usually relies on external expertise e.g. by appointing a certified court expert.

8. If judges may rely on external experts: Are these experts

- Chosen by the court
- Recommended by one of the parties
- Recommended by a public authority
- Other (please provide a method):

Please explain your answer:

N.a.

The Supreme Administrative Court may only review the contested decision based on the facts and evidence established by the first instance administrative court (see Q 7). Therefore, it does not appoint external experts itself.

9. To answer technical questions: May the court rely on technical expertise as laid down in:

- Regulations
- Other government documents or documents by public bodies
- Documents published by the EU Commission
- Documents published by experts or groups of experts
- Other (please provide a means of technical expertise):

Please explain your answer:

N.a.





The first instance administrative courts are responsible for gathering all relevant information to answer technical questions (see Q 7).

10. If your answer was yes regarding any of the criteria of question 9: To what extent does this technical expertise have a binding effect.

- The judges are bound by these documents
- The judges may rely on these documents without being bound
- The judges are not formally, but factually bound by these documents
- Other (please provide the extent of binding effect):

Please explain your answer:

N.a.

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

Please explain:

As explained in Q 7 the Supreme Administrative Court annuls the contested decision and sends it back to the court which issued it, if it finds that the first instance administrative court's decision lacks essential elements in order to answer technical questions. Subsequently, it falls within the responsibility of the first instance administrative court to gather all relevant information in order to solve a case.

12. Do these criteria described in part 2 of the questionnaire also apply to proceedings granting temporary relief?

- Yes, without modification
- No.

Please explain the modifications:

The enforceability of a first instance administrative court's decision can be suspended upon application.

When deciding if suspensive effect is granted, the Supreme Administrative Court does not review the lawfulness of the contested decision and therefore also does not examine if first instance administrative courts have gathered all relevant information to answer technical questions.

The Supreme Administrative Court examines only if the granting of suspensive effect is contrary to mandatory public interest and if, after having considered the affected public interests and the interests of other parties, the implementation of the contested decision or the exercise of the authorization granted by the contested decision results in an unreasonable disadvantage for the complainant.

Part 3: Principles determining the assessment of a case's factual basis

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

- The prohibition of the denial of justice
- Human rights
- Aarhus Convention
- Other.

Please explain:

In Austria, the fundamental principle of the rule of law enshrined in the Federal Constitution (Bundes-Verfassungsgesetz, B-VG) includes a prohibition of arbitrariness, which requires decisions to be based on the facts of each individual case. This is expressed more concretely in art. 18 para. 1 B-VG, which





stipulates that the entire state administration (administrative authorities and courts) is bound by the law. This implies the obligation to apply the law to a specific established factual situation.

The general principle of equal treatment and non-discrimination enshrined in art. 7 para. 1 B-VG can be violated if the legal assessment by an administrative authority or a first instance administrative court is not based on the actual facts, as this may constitute arbitrariness.

At the level of ordinary law, the General Administrative Procedure Act 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991, AVG), which is also applicable to courts, stipulates that the relevant facts of the case must be established ex officio, taking into account the results of the investigative procedure, according to free assessment (sec. 37 and 45 AVG).

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

Please explain:

The legislator generally enjoys its legislative margin of appreciation to which the Supreme Administrative Court is bound. Only if the Supreme Administrative Court considers the stipulations of the law to be in breach of EU law or of constitutional law it may refer the matter to the European Court of Justice respectively the Constitutional Court.

Decisions by administrative authorities characterised by a margin of appreciation, which gives the authority discretionary power, are subject to limited review. In general, first instance administrative courts cannot modify (or set aside) administrative decisions only because they consider another exercise of discretion more appropriate (art. 130 para. 3 B-VG). The review is limited to the question if the authority has exercised its discretion in accordance with the law. If this is not the case, the court itself must exercise discretion in its decision on the merits. However, first instance administrative courts in administrative penal proceedings as well as the Federal Fiscal Court in all proceedings exercise discretion, even if this means deviating from the authority's exercise of discretion. In this respect, the courts have full power of cognition. The Austrian Supreme Administrative Court may only examine whether the first instance administrative court was authorised to exercise its discretion and, if so, whether it exercised its discretion in accordance with the law (art. 133 para. 3 B-VG).

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

Please explain:

In cases where the administrative authority's assessment of the case's factual basis shows deficiencies, the first instance administrative court is responsible for gathering and investigating the facts. If this is not possible or highly uneconomic, it may also oblige the respective administrative authority to remedy these deficiencies.

However, if the Supreme Administrative Court finds that the first instance administrative court's decision lacks essential elements, it annuls the contested decision and sends it back to the court which issued it (for more details see Q 7).

Part 4: Case study

16. Can you name any cases your court has had to answer which are of special relevance to the questions asked in this questionnaire?

Please give a brief description of the case and your court's solution to it:





As explained in Q 8, the Supreme Administrative Court does not conduct any specific investigations regarding technical issues itself. If it finds that the first instance administrative court's decision lacks essential elements in order to answer e.g. specific technical questions, it annuls the contested decision and sends it back to the court which issued it.

See e.g. judgment of 8 August 2024, Ra 2022/10/0157, (https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2022100157_20240808L00, only available in German) regarding the annulment of a decision from a first instance administrative court, which dealt with an expert opinion concerning a planned hydroelectric power plant:

The first instance administrative court dismissed the appeal against a decision granting an exemption for the construction and operation of a power plant and railway power line as essentially unfounded.

In its decision, the first instance administrative court dealt, among other things, with the nature conservation and zoological implications of the project. With regard to the dormouse in particular, it stated that its presence in the project area could not be proven. This was based on the fact that although two sightings of dormice had been recorded in the Province of Salzburg, these were from 2013 and did not occur in the immediate project area. The first instance administrative court therefore assumed that there was no dormouse population in the project area. However, with regard to other animal species, it found that the zoological report showed that no significant increase in the risk of killing was to be expected if the prescribed measures and conditions were implemented and complied with. It further stated that it was not necessary to examine in more detail the intentional killing or destruction of the breeding sites or resting places of these animals.

The Supreme Administrative Court dealt with the first instance administrative court's assessment of species protection law and noted that the first instance administrative court could not rely solely on two entries in the biodiversity database from 2013 when assessing the presence of a dormouse population. During the proceedings, an expert explained that the biodiversity database was not a systematic mapping tool, but merely recorded random findings. The Provincial Environmental Ombudsman argued that random findings of dormice were rare and that separate devices (such as dormouse nesting boxes or 'house mouse tubes') were much more necessary for surveying the population. However, this had not been done. On the other hand, the Supreme Administrative Court ruled that the decision regarding the presence of other animals in the project area, which could lead to the project being prohibited, was not sufficiently justified; the zoological report did not support the findings of the first instance administrative court. It had not sufficiently addressed the experts' statements and had also failed to relate the conditions deemed necessary by the experts to the individual animal species. The Supreme Administrative Court therefore annulled the contested decision and sent it back to the first instance administrative court for further investigation.

