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

QUESTIONNAIRE

BULGARIA

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

The Supreme Administrative Court has been granted jurisdiction over the entire territory of the Republic of Bulgaria. In accordance with the provisions stipulated in the Administrative Procedure Code, the administrative courts are obligated to exercise their jurisdiction over all administrative cases, with the exception of those cases which are deemed to be within the jurisdiction of the Supreme Administrative Court. The Supreme Administrative Court examines the cases sitting in a panel of three judges when acts as a court of first instance. Judgments rendered in these cases shall be subject to cassation review by another panel of the Supreme Administrative Court, consisting of five judges. When functions as a court of last resort, reviewing the lawfulness of judgements of the ordinary administrative courts, the Supreme Administrative Court always acts in a panel of three judges.

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As a court of first instance, the Supreme Administrative Court must establish both the facts of the case and that the legal requirements have been met. It shall then consider the evidence duly collected during the proceedings. Based on the evidence relevant to the dispute, the Supreme Administrative Court shall reach conclusions about the proven facts. In its judgment, the Court forms legal conclusions after thoroughly examining all the evidence in the case, preceded by thorough analysis and argumentation.

When acting as a court of last instance, the Supreme Administrative Court does not review the facts of the cases as determined by courts of first instance. Instead, it focuses on applicable laws and their uniform interpretation and application. The Supreme Administrative Court shall assess the application of the substantive law based on the facts established by the court of first instance in the contested judgment. According to the Code of Administrative Procedure, the Supreme Administrative Court is prohibited from establishing new facts in a case when hearing the dispute as a court of cassation.

As an exception, according to Article 227 of the Administrative Procedure Code, where the judgment of the court of first instance is reversed again, the Supreme Administrative Court shall not remand the case for a new review but shall adjudicate on the substance of the matter. When the reversal grounds require so, after reversing the judgement, the Supreme Administrative Court shall schedule a date for reviewing the case in a public hearing and, if necessary, shall also collect new evidences.

Where the law is interpreted or applied incorrectly, an interpretative judgment shall be adopted by the General Assembly of the Supreme Administrative Court. Where there is conflicting or incorrect case law between the Supreme Court of Cassation and the Supreme Administrative Court, a joint interpretative decree shall be adopted by the General Assembly of Judges of the respective Colleges of the two Courts, including the seconded judges.

For example, in the case of an appeal against an opinion on an environmental assessment, or a decision that an environmental assessment is not required for works of national and strategic importance, the Supreme Administrative Court shall rule as the first and final instance. Whether or not it has jurisdiction depends on whether the contested administrative act was issued by the administrative authority in its capacity as head of the public administration, and on whether the appeal was lodged before 1 July 2024.

The Supreme Administrative Court rules on appeals against investment proposals for crude-oil refineries, gasification and liquefaction installations processing 500 tonnes or more of coal or bituminous shale per day, thermal power stations, combustion installations with a heat output of 50 megawatts or more, nuclear power stations, nuclear reactors and reprocessing facilities, as well as the construction of railways, motorways and water resource transfer activities.

In certain cases, the Supreme Administrative Court may hear appeals against individual administrative acts relating to the approval or modification of detailed plans for works of national importance, as well as for municipal works of primary importance, in its capacity as the first instance court.

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

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

Please provide other fields of law, which bear a technical challenge to your court:
Energy 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: **There is no statistic.**
- In absolute numbers: **There is no statistic.**

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:

In the fields of law listed in question № 2.
Also, these are questions relating to the identification of the facts alleged by the parties and the burden of proof appointed by the court in the aforementioned categories of cases. Environmental expertise is applied in a very specific way. Ecological expertise enables information to be systematized, evidence summarized and the methodology of judicial research into violations of environmental law developed.

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

- Yes
  - As research assistants
  - As additional judges
  - In another function (e.g. as a separate panel etc.).
    Please explain:
- No - **x**

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.):
Not applicable

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 - **x**
- Judges may rely on external experts - **x**
- Judges may rely on internal experts
- Other (please provide a method):

Please explain your answer:

When the court does not possess the necessary expertise, an expert examination shall be assigned at the court's discretion or at the request of the parties, in order to establish the facts of the case through expert findings. Before doing so, the court must allocate the burden of proof between the parties and instruct them on what circumstances they do not provide evidence for and how the facts relevant to the dispute are to be proven.

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According to a provision in the Administrative Procedure Code, the court is not limited to discussing the grounds raised by the applicant. Instead, on the basis of the evidence presented by the parties, the court is obliged to verify the legal conformity of the contested administrative act on all grounds and to declare its nullity, even if this is not requested.
If necessary, the administrative court may modify the questions assigned to the expert by the party in question, or assign additional questions to the expert itself, in order to clarify the relevant circumstances of the dispute. Failure to comply with this obligation constitutes a procedural violation of substantive law.

In administrative proceedings, the administrative authority may also commission an expert examination where clarification of certain matters requires specialised knowledge in science, art, crafts or other areas that the authority does not possess. The expert's findings in administrative proceedings for the adoption of the administrative act do not carry the same weight as an expert's opinion in court proceedings.

8. If judges may rely on external experts: Are these experts
- Chosen by the court - **x**
- Recommended by one of the parties
- Recommended by a public authority
- Other (please provide a method):

Please explain your answer:
The Supreme Administrative Court appoints the relevant expert with the given competence and knowledge in the field in which the court does not have special knowledge, in order to clarify the legal dispute on the grounds of facts.

9. To answer technical questions: May the court rely on technical expertise as laid down in:
- Regulations -**x**
- Other government documents or documents by public bodies - **x**
- Documents published by the EU Commission - **x**
- Documents published by experts or groups of experts - **x**
- Other (please provide a means of technical expertise):

Please explain your answer:
The legal regulation of expert activities in Bulgaria is set out in Ordinance No. H-1 of 14 February 2023 on the registration, qualification and remuneration of experts. According to the Ordinance, 'expertise' is a procedurally regulated activity performed at the request of the competent authority by individuals with the necessary knowledge and skills to examine certain objects or facts relating to the clarification of specific circumstances.Expert evidence is an evidentiary tool because it is one of the means by which evidentiary facts are manifested and admitted into the trial record.
The expert witness, who has specialized knowledge and is responsible for preparing the expert report, must provide a conclusion that is scientifically justified by the methods used in the study.
When gathering evidence for his assessment, the expert may refer to regulations, government documents, documents published by public bodies, documents published by the EU Commission or documents published by experts or groups of experts. Regulations are binding on the court, as are the technical requirements introduced in the areas of public relations that they regulate. For example, such requirements exist in the Combined Nomenclature in Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.

The European Commission's legally binding decisions can be mandatory in certain cases, for example in the field of state aid, and are therefore also binding and must be respected by the court. Other European Commission documents may also be relevant when interpreting EU law.
The court is free to judge the accuracy and reliability of the expert's findings, and whether to trust them. According to Article 202 of the Code of Civil Procedure, the court is not obliged to accept the expert witness's conclusion, but must consider it alongside the other evidence in the case.
Also the parties shall submit the official documents and certificates. The court may request these documents from the relevant institution or provide the party with a court certificate, which they can use to obtain the documents. The relevant authority shall be obliged to issue the requested documents or explain why they cannot be issued.
The court is not obliged to accept the expert's findings, but when it rejects them, it must provide reasons that highlight the shortcomings of the conclusion and the incorrect, inaccurate or unscientific assumptions on which it is based. The court must also consider all the evidence in a comprehensive manner. Disagreement between two opinions of the same expert cannot be resolved simply because a contrary opinion is given in court.

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

Please explain your answer:
See answer to question no. 9.

11. How does the court react if technical questions relevant to the case cannot be answered, not even with expert help?
Please explain:
Any technical issues that cannot be clarified with the help of the relevant expert should be resolvable by any other admissible means of evidence provided for in the Civil Procedure Code and the Administrative Procedure Code.

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

- Yes, without modification
- No. - **x**

Please explain the modifications:

See answer to question no. 11.

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 -**x**
- Human rights - **x**
- Aarhus Convention -**x**
- Other.

Please explain:
According to Article 127, para. 1 of the Administrative Procedure Code, the courts are obliged to consider and adjudicate each motion submitted to them within a reasonable time. According to paragraph 2, courts may not deny justice on the grounds that there is no legal basis on which to adjudicate the motion. The absence of a specific scientific method by which the expert can compile her/his expert findings does not relieve the court of its obligation to resolve the legal dispute. This is particularly true given that, under Article 6 of the European Convention on Human Rights (ECHR), everyone is entitled to a fair trial, which includes presenting legally relevant facts to the court using all evidence and means of proof accepted by national procedural laws.
Article 55 and Article 15 of the Constitution of the Republic of Bulgaria form the constitutional recognition of the right to a clean environment as an independent fundamental right. At the same time, the state has a constitutional duty to create legislation that ensures the implementation of Articles 15 and 55 'in accordance with established standards and norms'. These standards and norms may be found in a law, a statutory instrument, secondary legislation or an international treaty, given the specificity of this fundamental right in relation to the diversity of nature and the environment. It is important to emphasise that the second sentence of Article 55 proclaims that protecting a healthy and favourable (clean) environment is a fundamental duty of all citizens.
Given its legal nature and function, the fundamental right to a clean environment has rightly been classified as an equal fundamental right. It is perceived as a subjective right "of everyone" with a special social purpose: the right holder does not defend themselves from the state's uninvited interference in their private sphere, but demands it. The Constitutional Court explicitly ruled that concern for a clean environment is a requirement, not a declaration (Decision No. 12 of 2013, State Gazette No. 105/2013). This requires the State to fulfil its constitutionally assigned functions of protecting and preserving the environment, maintaining the diversity of living nature, and making wise use of the country's natural wealth and resources.
The Aarhus Convention has no direct impact on the technical issues examined by the Court. During court proceedings, the court should appoint relevant technical experts in the field of environmental law, either of its own accord or at the request of the parties involved, if specialised knowledge is required to clarify certain circumstances of the dispute.

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 administrative authority's discretion in selecting a scientific approach to justify the legal basis of an administrative act is subject to judicial review of the act's validity and legality. The court must verify the existence of the stated factual grounds and the fulfillment of the legal requirements for its adoption, including the use of scientific achievements when verifying the technical means used by the authority.

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

The administrative authority has the obligation to clarify the facts and circumstances relevant to the case and to consider the explanations and objections of the citizens and organizations concerned, if any, when issuing the administrative act. The authority shall have the right to collect evidence ex officio in the administrative proceedings for the issuance of the act.
The parties must assist the authority in collecting evidence. They shall be obligated to present evidence in their possession that is not already in the possession of the administrative authority. Where a special law exhaustively determines the evidence that an individual or organisation must present, the

administrative authority shall not have the right to require the presentation of additional evidence from that individual or organisation. All evidence collected shall be verified and assessed by the administrative authority.The authority conducting the proceedings, either of its own accord or at the request of a party, shall require the relevant administrative and judicial authorities, public servants and organizations providing public services to issue and send certificates, forward documents and provide any other evidence or information relevant to the proceedings, within the scope of its competence.
If the administrative authority does not clarify the facts and circumstances of the case, the cassation instance cannot do so. This would constitute a material breach of the court procedure rules, and the Supreme Administrative Court would therefore reverse the court of first instance's judgment and refer the case back to the lower administrative court.

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:
With Judgement No. 7230 of 29.06.2023 rendered in administrative case No. 7620/2022 the Supreme Administrative Court, as a court of first instance, heard an appeal against the legality of Order No RD-598 of 07.07.2022 issued by the Minister of the Environment and Water. According to the Order and pursuant to Article 39 in conjunction with Art. 33 of the Protected Areas Act, a protected area "Coral Bay" was declared on the territory of the village of Lozenets, municipality of Tsarevo, Burgas Region, with a total area of 1.32 square kilometers with a boundary in the water area of the Black Sea.
The SAC rejected the appeal against the Order. The three-member panel of the Supreme Administrative Court stated that the regulatory requirements for the designation of the marine protected areas, as set out in Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992), which is transposed into the nationals Protected Areas Act and the Biological Diversity Act, have been complied with by the administrative authority.
In accordance with Article 3 of the Biological Diversity Act, the SAC held that the State shall develop a National Ecological Network comprising protected areas as part of the European ecological network NATURA 2000. This may incorporate protected areas both within and outside special areas of conservation. The National Ecological Network prioritizes CORINE, Ramsar, Important Plant Area and Important Ornithological Site locations.
According to the court, protected areas are designated for the purpose of conservation of natural habitat types under Council Directive 92/43/EEC and Council Directive 79/409/EEC on the conservation of wild birds - for species of birds.
Regarding the appellants' claim that there is insufficient scientific data on the species inhabiting the territory of the protected area, the SAC referred to Decision No. 660 of 1 November 2013 (State Gazette No. 97 of 8 November 2013) of the Council of Ministers of the Republic of Bulgaria. This decision adopted the list of protected areas for the conservation of natural habitats and wild flora and fauna, as well as the amendments to this list, which were designated for the conservation of species and habitats in the Black Sea area. The court also gave credence to a report by the 'To Preserve the Coral' association, which stated that the two threatened species of fish inhabit the protected area of the Black Sea.
The court emphasised that the proposed new protected areas for habitats, as well as the changes to the boundaries of existing protected areas in the Black Sea region, were reviewed and approved at a National Council for Biodiversity meeting on 4 December 2012, which Council is an advisory body to the Minister of Environment and Water. In addition, the SAC stated, that following the Council of Ministers' decision, changes were adopted in the territorial scope of six other existing protected areas for habitats in the Black Sea region. One of these was the protected area for the conservation of natural habitats and wild flora and fauna, BG0001001 'Ropotamo'.

Thus, based on scientific data from the Institute of Oceanology and the Institute of Biodiversity and Ecosystem Research, both of which are part of the Bulgarian Academy of Sciences, the protected area 'Ropotamo' was expanded in 2013 by Decision No. 660 of 1 November 2013 (State Gazette No. 97 of 8 November 2013) of the Council of Ministers of the Republic of Bulgaria. This expansion included the territory of the later declared protected area 'Coral Bay'.The three-member panel of the Supreme Administrative Court concluded that the contested Order was lawful, based on the expert's opinion regarding the conservation of flora and fauna in the territorial waters of the Black Sea.

The Judgement of the three-member panel of the Supreme Administrative Court was appealed before a five-member panel of the Supreme Administrative Court, which by its Judgement No. 8070 of 27.06.2024 in administrative case No. 9131/2023, revoked the first instance judgment as well as the appealed order.

In its reasoning, the SAC, acting as a court of cassation, held that the contested order was unreasonable, as the administrative authority had not referred to scientific data or carried out technical expertise to establish that the Coral Bay area should be declared a protected area. This was first established by the three-judge panel of the Supreme Administrative Court, which appointed an expert to conduct a technical assessment and collected additional documentary evidence that had not been submitted during the administrative proceedings that led to the issuance of the contested Order.

In its reasoning, the Supreme Administrative Court's five-member panel explicitly accepted that it is inadmissible to refer to facts on which the order is not based, or to present evidence of scientific data that are not part of the administrative file, for the first time in the court proceedings.

In this context, the SAC considers that the reasoning of the administrative authority is complemented by the first instance administrative court's comments on the data on endangered species and their habitats in the territory of the protected area 'Ropotamo', beeing a part of the European ecological network 'NATURA 2000.

The Supreme Administrative Court's five-member panel also states that it is indeed within the discretion of the administrative authority to issue an order for the designation of the protected area or to reject the proposal made, but this does not exempt it from the obligation to carry out its own assessment and to set out considerations on the arguments in the proposal of the association that initiated the administrative procedure, as well as to verify the data contained in the request and in the report thereto by using special knowledge under Article 49 of the Administrative Procedure Code.

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