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

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:

In cassation proceedings, the Supreme Administrative Court ("SAC") mainly decides on questions of law. Regarding questions of fact, all administrative courts are limited in terms of time – they base their decisions on the factual and legal situation that existed at the time of the administrative authority's decision. Furthermore, when reviewing questions of law, the SAC focuses on the legality of the decision made by the lower courts and procedural defects, such as the administrative authority basing its contested decision on facts that are not supported by the case file, are inconsistent with the case file, or the administrative authority substantially violated the law while establishing them. These defects are reviewed mainly in response to an objection raised by a party to the proceedings. However, the Supreme Administrative Court retains the discretion to supplement the evidence, whether upon request or *ex officio*.

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In specific proceedings, such as appellate disciplinary proceedings for judges, prosecutors, and executors as well as the proceedings on dissolution of political parties and movements, or electoral matters, the SAC also deals with and decides on the questions of fact.

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:

Technical challenges may also arise in the fields of mining law, tax law, customs law, in cases of state aid and subsidies, or electoral 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: **max. 3 %**
- In absolute numbers: **less than 50 yearly**

The estimated numbers build on assumption that in approx. 500 disputes before the SAC annually, regulation of a technical nature is applied. More specifically, in 2024 alone, the SAC has dealt with 352 cases concerning land use planning or construction permitting, 47 cases concerning water management, 43 cases concerning environmental impact assessment, 18 cases concerning food safety, 11 cases concerning protection against noise, 6 cases concerning air transport, 5 cases concerning large industrial operations, 5 cases concerning waste management, 3 cases concerning chemical substances and 1 strategic climate litigation.

However, that does not mean that in all these cases, the SAC was dealing with technical, or even highly technical matters. Such specific cases are rare and perhaps amount for one tenth of the cases with technical basis.

In other fields mentioned in answer to question no. 2 above, legal disputes of a highly technical nature are rare and do not reach a significant portion of the workload.

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:

Complex technical issues usually arise in the areas of public health law, construction law, environmental law, and services (renewable energy, telecommunications, radio and television broadcasting). However, they also arise in relatively distant areas such as state aid (subsidies), taxation, and intellectual property (registration of industrial designs). In these areas, legal issues may overlap with technical issues, so it is necessary for the judge to understand the technical nature of the dispute and be able to apply more advanced physical or chemical formulas. This may be the case, for example, when assessing the application and effectiveness of technical criteria or the impact of construction and activities on the surrounding area, including in combination and synergy. Typical examples are:

- Excessive noise or air pollution
- Protective measures on nature and landscape
- Measuring the speed of vehicles on roads
- Technical aspects of construction
- Classification of industrial operations, or projects for the environmental impact assessment.

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
     - As research assistants
     - As additional judges
     - 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.):

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): **X**

Please explain your answer:

If the decision depends on an assessment of facts requiring expert knowledge and cannot be resolved as a matter of common knowledge, the court can seek an opinion of an expert. The Czech legal system recognizes two ways of dealing with technical questions: a professional statement and an expert opinion. The court should request a professional statement on simple factual issues that it cannot resolve itself, but which are relatively simple for an expert. This statement is always issued in written form. Apart from experts, a professional statement may also be issued by a public authority such as state authority or university. If a professional statement is not sufficient due to the complexity of the matter, the court should appoint an expert. An expert opinion may only be issued by a person registered in the list of experts. A party to the proceedings also has the right to submit an expert opinion by expert of their choice.

If there is a discrepancy between multiple expert opinions, the court may appoint another expert and ask for a review opinion. The experts provide their opinion exclusively on facts of the case, not legal questions. The principle of the free assessment of evidence applies in the Czech legal system. Unless the expert opinion is

internally contradictory or challenged by a competing expert opinion, the court will usually base its decision on its conclusions regarding technical issues. The need to engage in the examination of expert questions is limited to a certain extent by the concept of administrative justice, which serves to protect subjective public rights, while substantive disputes are fundamentally settled in administrative proceedings.
In some cases, Czech courts have considered submissions from *amici curiae*, even though such legal proceedings are not explicitly enshrined in any Czech legislation.

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

Please explain your answer:
An expert opinion may be prepared by an expert appointed by the court or submitted by a party to the proceedings as mentioned above. If the expert opinion submitted by a party to the proceedings meets all the requirements of the law and contains a statement by the experts that they are aware of the consequences of knowingly providing a false expert opinion, this expert opinion has the same status as an opinion requested by the court.

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): **X**

Please explain your answer:
The court can rely on technical expertise as laid down in any of the aforementioned documents. If the party does not dispute the submitted documents, the court will usually consider them to be valid. The form of the evidence is not prescribed, and the judges may in principle use proof of any form, provided by the parties or presented during the hearing of the case. The court decides which of the proposed evidence shall be produced; it may also produce other evidence. In this respect, it has to reflect the complaint which contains evidence in support of claims.

Technical standards are an example of technical expertise that a court may rely on. Domestic (Czech) technical standards are not generally binding. Technical standards are considered qualified recommendations (not orders) and their use is not mandatory, but voluntary. However, in certain cases they become generally binding if a specific legal regulation expressly refers to them.

A special type of expert opinion in the field of administrative law is the assessment of health status in pension insurance matters.

In its case law, the SAC sometimes cites international standards or guidelines of international organisations, such as recommendations adopted by the OECD (Organisation for Economic Co-operation and Development), the International Telecommunication Union, findings of the Aarhus Convention Compliance

Committee, recommendations of the European Commission and the Committee on the Rights of the Child or Codex Alimentarius and FAO/WHO Food Standards.

Documents published by the EU Commission such as recommendations and guidelines carry some persuasive weight. They are important when interpreting EU law, but they are not binding. This means that decisions contrary to the content of these documents is possible, but it would put the court under the obligation of providing good reasons for deviating from the content.

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 **X**
- The judges are not formally, but factually bound by these documents
- Other (please provide the extent of binding effect):

Please explain your answer:
Formally binding are only technical norms, which are part of law, or if a regulation expressly refers to them. The judge may rely on other documents without being bound. An expert opinion mentioned in question no. 7 has the same evidentiary value as other evidence.

11. How does the court react if technical questions relevant to the case cannot be answered, not even with expert help?
Please explain:
We have not experienced such scenario. In principle, the court cannot deny justice and must deliver the decision. If technical questions relevant to the case cannot be answered, the court would likely rely on the reasonable expertise of the administrative body and the general consensus of the scientific community, with the emphasis on the legal principles such as the precautionary principle.

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:

The SAC may apply these criteria as far as it is possible in the limited period when temporary relief is to be granted. As for temporary relief, the SAC can decide on interim measures or grant suspensive effect to the cassation complaint. Generally, the above-mentioned criteria apply to these proceedings as well, since there are no specific rules on how the court should assess technical issues in these types of proceedings. However, decisions in both types of proceedings are to be given without delay, within 30 days at the latest. While the court does request the parties' statements, given the time limit it is unusual for the court itself to appoint an expert to provide expert evidence at this stage of the proceedings. We have not found any such decision in our database. There have, however, been cases where applicants for suspensive effect have provided an expert report with their application, which the SAC has referred to in its reasons for granting suspensive effect (Judgments No. 9 As 184/2024-96, 8 As 209/2023-141 and 9 As 293/2014-39). In another case, the appellant referred to an expert report prepared during the proceedings before the Regional Court (Judgment No. 8 As 185/2023-26).

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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
- Other. **X**

Please explain:

Czech Constitution does not explicitly provide for the right to review the facts of a case; this can only be deduced from procedural rules, such as the Code of Administrative Justice. However, Article 6 of the European Convention on Human Rights (ECHR), which regulates the right to a fair trial, also includes the right to full jurisdiction. The right to full jurisdiction implies, in principle, a substitutive review of the merits of administrative decisions (in administrative cases, e.g. Ortenberg v. Austria, § 31). The full jurisdiction requirement means "jurisdiction to examine all questions of fact and law relevant to the dispute before it" (Ramos Nunes de Carvalho e Sá v. Portugal [GC], §§ 176-177). These principles and decisions are followed by the Czech Constitutional Court.

In this context, the Constitutional Court's ruling Pl. ÚS 16/99 was of particular significance as it resulted, twenty-five years ago, in the abolition of the previous form of administrative justice based on it being contrary to Article 6 of the ECHR. Previously, the administrative justice had been exercised to a limited extent by civil courts. In addition to other observations, the ruling of the Constitutional Court criticised the fact that the administrative divisions of civil courts at the time lacked the capacity to review questions of fact. The current system of Czech administrative justice, headed by the Supreme Administrative Court, was subsequently established on the basis of this ruling.

As mentioned in the model questionnaire, the Aarhus Convention does not directly affect technical questions in court. However, it paves the way for NGO litigation in environmental law, which often raises technical questions of environmental law.

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 is obliged to respect the Constitution and European Union Law when adopting laws. Should there be suspicion that a law already adopted is not in accordance with the Constitution, the President of the Republic, a group of MPs or a group of senators, among others, may submit a proposal to the Constitutional Court to repeal the law. In connection with its decision-making activities, any court, including the SAC, may also submit such a proposal. With regard to the adoption of subordinate legislation (bylaws), a competent public authority must ensure that it complies not only with the Constitution, but also with the relevant laws, in particular those containing the authorisation to adopt subordinate legislation.

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

Please explain:

Yes, the courts can examine the factual basis of a case if the incorrectness of the administrative authority's findings is obvious or based on the arguments submitted by the applicant. The scope of the judicial review in a particular case is therefore largely determined by the arguments presented in the complaint, and the same applies to the handling of evidence. However, the review is not restricted to specific questions of fact or law.

The procedural rules establish the jurisdiction of lower administrative courts (Regional Courts), giving them the power to clarify the factual basis on which the administrative authority based its decision and to assess and evaluate other evidence beyond the framework of administrative decision-making, in order to establish new facts on which to base the court's decision within its full jurisdiction. However, in doing so, the court cannot replace the activity of the administrative body. In the cassation complaint procedure, the SAC merely evaluates the factual and legal findings of the Regional Court's contested decision.

The Constitutional Court can intervene in the evaluation of evidence by administrative authorities and general courts only if administrative bodies and courts had apparently and unjustifiably deviated from statutory evidence-taking standards, or if the assessment of evidence and the adopted factual conclusions were an expression of manifest error of fact or logical excess (internal contradiction), or were based on completely insufficient evidence.

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:

Recently, the SAC applied the precautionary principle in the interpretation of the term "recreational and sports facilities outside residential areas" for the purpose of the EIA. As there is no technical guidance, the SAC had to put forward its own criteria to determine whether the project at question falls under the scope of assessment. It refused to follow solely the technical description of the project which suggested the construction may serve different purpose than recreation and emphasised the location of the project outside settlement areas and a wide range of possible impacts arising from its operation. As a result, according to the SAC, the project should undergo at least a screening procedure. The SAC did not require an expert opinion (Judgment No. 1 As 111/2024-66).

In another recent case, the SAC ruled on a fine for failure to take preventive measures in forests, specifically the remediation of areas affected by bark beetle infestation. The court examined the facts of the case and confirmed that the complainant had systematically failed to fulfil her obligations as a forest owner and had created conditions for the further spread of bark beetles, as evidenced by exit holes in the infested trees. The SAC did not require an expert opinion as the documents in the administrative file were sufficient for solving the case (Judgment No. 5 As 52/2024-34).

In several rare cases, the SAC itself appointed experts. In 2017, for example, the SAC reviewed a licence for a solar power plant. To assess questions concerning the revision of the power plant, the SAC appointed the Brno University of Technology as an expert institute and instructed it also to comment on some of the findings of the opinion prepared by the Czech Technical University and submitted by the plaintiff. At the hearing the SAC examined all the opinions and also heard the experts who prepared them. Finally, the SAC concluded that the procedure followed by the inspection technician H. the inspection of the power plant was not correct and that the inspection report was not a suitable basis for certifying the safety of the photovoltaic power plant as a whole (Judgment No. 2 As 313/2015-492).

In one of the most notable historic cases, the SAC contemplated on the potential risk of the radio broadcasting to air traffic. The dispute had risen after the administrative authority amended part of the radio spectrum utilisation plan for a specific frequency band, mainly to prevent interference with the adjacent

spectrum used in air transport in border areas. This measure was contested by broadcasting companies, which argued that there was no scientific reason for such a significant restriction. Two experts were appointed and ultimately, the SAC considered their opinions to be decisive for the assessment of the technical aspects of the case. It concluded that there indeed was a real need for such regulation and that it was sufficiently justified by practical reasons (Judgment No. 2 Ao 5/2011-204).

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