Federal Administrative Court
Supreme Court

SEMINAR ORGANISED BY THE FEDERAL ADMINISTRATIVE COURT OF GERMANY

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

The Supreme Court is a court of appeal that hears judgments and orders issued by the Eastern High Court, the Western High Court, or the Maritime and Commercial Court. The role of the Supreme Court of Denmark is, in principle, to ensure the uniformity of the legal system throughout the country and to make decisions in cases that raise questions of general importance for the application and development of the law or are otherwise of significant societal impact. Thus, the Court is primarily designed to answer and clarify questions of law in cases where the state of the law is unclear. However, the Court may also review whether the facts have been correctly determined by the lower courts and whether the law has been correctly applied in relation to those facts.

The Court hears both civil and criminal cases. In criminal cases, the Supreme Court does not determine questions of guilt and must there base its judgment of the High Court's assessment of the evidence in that regard. However, it may rule on the application of the law and the sentencing.

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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:

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:

As a precedent-setting court, the Danish Supreme Court does not deal with many cases where technical factual issues – rather than legal questions – are decisive. It should also be noted that the facts of the cases before the Supreme Court, as an appellate court, normally will have been thoroughly scrutinized by the preceding court(s).

Is it not possible to give an estimate of the number of legal disputes of a highly technical nature before the Supreme Court without a clearer definition of such disputes. A rough estimate would be that the Supreme Court handles between 0 and 5 cases annually where a written expert assessment (syn og skøn-rapport) plays a part.

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:
N/A

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 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.):

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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 X
   - Judges may rely on internal experts
   - Other (please provide a method):

Please explain your answer:
In cases involving technical questions, expert knowledge and guidance can be obtained through expert assessments (syn og skøn). Chapter 19 of the Danish Administration of Justice Act (retsplejeloven) outlines the rules for requesting and conducting expert valuations in civil cases. § 196 of the Act stipulates that "parties to a civil case may submit a request to the court for an expert assessment." The rules on expert assessments aim to ensure that the expert, with the participation of the parties, conducts an impartial investigation and assessment, providing a written statement that can be used as evidence in the case and as expert assistance to the court.

The expert provides an opinion only on factual matters, not on legal questions. However, the expert assessment is crucial for the court's decision, as the court often relies on the expert's assessment regarding the facts. While the court may initiate an expert assessment, it is ultimately the responsibility of a party, or the parties jointly, to request one. Typically, the party that needs the expert's assessment to meet its burden of proof will be the one to request the expert opinion. The request must specify the framework for the expert assessment. Based on the request and any statement from the opposing party, the court will decide whether to initiate the procedure to procure an expert's assessment.

Once the court has decided to proceed with an expert assessment, the parties must submit their questions to the expert (skønsmand) within the subject matter of the expert assessment. The court may dismiss any questions deemed irrelevant to the case.

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:
In cases where the court decides to procure an expert assessment (see above, question no. 7), any of the parties may propose experts to the court. However, the court is not bound by these proposals, as it ultimately decides who will be appointed as an expert. Before making the decision, the court must inform the parties of the individuals it intends to appoint and give the parties an opportunity to comment on these choices. An expert must be of good character, impartial, and possess professional knowledge relevant to answering the questions posed by the parties. The court may appoint one or more experts. If the court deems it appropriate, considering the nature of the case and the scope of the expert valuation, it may appoint several experts to address the same question.

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:
Regulations, as part of positive law, have a binding effect on the court. Their provisions, including to the extend these are of a technical nature, must be followed by the court.

Other documents of a technical nature, whether published by public authorities or by experts, can in principle generally be included in the court's free evaluation of evidence, based on a concrete assessment of their evidential value, i.e. judges may rely on these documents without being bound.

It should be note that expert reports obtained unilaterally by a party outside the rules mentioned under question no. 7, generally is of no evidential value.

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:
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:

The question must be seen in the context of the court's free assessment of evidence. While an answer may depend on the case in question, generally the issue at hand would be solved based on an evaluation of the burden of proof. If the party carrying the burden of proof for certain facts, including technical issues, fails to meet the burden, it will be detrimental to that party. This means that the court may draw conclusions contrary to the party's position if it fails to meet its burden of proof.

As a general rule – with many modifications – it is the party seeking to obtain something / change the status quo (usually the plaintiff) who bears the burden of proof. The burden may shift during the course of the case depending on many different factors. If that party's position is not feasible without answering technical questions – which cannot be answered – this may be fatal for that party's case.

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

- Yes, without modification
- No.
- Yes, with modification X

Please explain the modifications:
In proceedings granting temporary relief, the parties have the right to present evidence according to the general rules of civil procedure, as outlined in the criteria mentioned above. However, certain modifications

apply. The court may exclude evidence it deems incompatible with the purpose of the proceedings, including evidence that, by its nature or circumstances, falls outside the scope of temporary relief proceedings or is intended to delay the process. Expert assessment (see above, question no. 7) are often so extensive and time-consuming that the court excludes them. Instead, the court typically admits unilaterally commissioned expert opinions commissioned by one party, regardless of when they were obtained.

It should also be noted that the standard of proof needed to lift the plaintiff's burden of proof is normally lower when seeking temporary relief.

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:

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:

According to § 63 of the Danish Constitution (Grundloven), "the courts are entitled to review any question concerning the limits of public authority."

However, public authorities generally enjoy a margin of appreciation also in relation to technical questions, particularly in cases where there is no binding legislation or generally recognized scientific or technical guidelines. On the other hand, the court may freely review whether the authority has used accurate and sufficient facts as a basis for its decision.

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 public authority's assessment of the factual basis of the case reveals deficiencies, the court has the option to remit the case to the relevant public authority for a new decision to be made. The remission constitutes a form of nullity, as it means that the original decision has no legal effect.

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:

The Supreme Court's judgment of 3 December 2024 in cases BS-53152/2023-HJR and BS-53151/2023-HJR is an example of how the court handles the technically complex issue of defining the relevant market in the context of competition law, which involves both a complicated legal and factual assessment, as well as the evaluation of evidence and the margin of appreciation of public authorities.

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The case concerned the competition authorities' decision in a case regarding whether the decision that two companies had violated the competition rules should be annulled or remitted.
The competition authorities had found that DSB (owner of the Danish railway tracks), which was to renovate train engines produced by D in spring 2010, negotiated with D and DMN, who was D's Danish distributor, about the supply of spare parts for the renovation. However, the parties did not enter into an agreement, and DSB instead tried to find a supplier of spare parts through a tender. D recommended to its business partners not to bid in the tender, and thereafter DSB initiated individual negotiations with various market actors. DSB concluded agreements with, among others, the Danish company F for the supply of spare parts. F had negotiations with D's Dutch distributor E, who, after a meeting with D, withdrew its offer to supply spare parts. Furthermore, D and DMN agreed that E could not supply spare parts, and D blocked D's other distributors from supplying spare parts. F then unsuccessfully tried to order spare parts from several different distributors and manufacturers, which only succeeded in a few cases, and DSB ended up receiving spare parts from DMN. When assessing whether D had abused a dominant position, the competition authorities had to define the relevant market and assess D's position in the market.

The Supreme Court stated that the authorities must obtain the information necessary to carry out these discretionary assessments, including ensuring that the information obtained is sufficient to make a decision, and that there is such certainty about the reliability of the information that it is defensible to make a decision. It must be decided on a case-by-case basis what information needs to be obtained, depending on the circumstances of each case, including the course of the case and the behavior of the parties involved. The Supreme Court found no basis for concluding that the competition authorities' investigations had been incomplete or insufficient, nor was it proven that the authorities' conclusions were based on factually incorrect information. On this basis, there was no ground to overturn the market definition and the assessment of D's position in the market. Furthermore, the authorities had rightly found that D had abused its position, and there was no basis to overturn the authorities' assessment that this had excluded effective competition in the market for repair and maintenance of the engines in question.

The Supreme Court also found that the authorities had rightly concluded that D and DMN had entered into an agreement whereby D was to prevent parallel import and passive sales of spare parts from D's distributor network.
…

In another recent case (**judgment of 21. May 2025 in case BS-35371/2024-HJR**), the court had to decide on a case regarding transfer pricing.

The case concerned the taxation of a comapany's taxable income for the income years 2010-2012 regarding the company's revenues from sales of goods to seven of the company group's sales companies. The tax authorities had increased the company's taxable income.

Before the Supreme Court, the primary question was whether the company's transfer pricing documentation was deficient, and whether the tax authorities were therefore entitled to adjust the taxable income on an estimated basis with respect to revenues from sales to these two companies.

The assessment necessitated an analysis of the company's transfer pricing documents and methods. The Supreme Court inter alia mentioned that the burden of proof was on the Tax Authorities and found that there was no basis to conclude that the documentation was materially deficient.

Secondly, the question was whether the Ministry of Taxation had proven that the company's transactions were not conducted on arm's length terms, and whether the tax authorities' income adjustments were justified.

On this point, the Supreme Court stated, among other things, that it must be based on a usual assessment of the evidence in the case whether the Ministry of Taxation had met the burden of proof. The assessment must be made in light of the company's activities and other circumstances. Statistical calculations may be included in the evaluation of evidence in the same way as other information.

The Supreme Court found that the fact that the profit margins for several of the group's companies were outside the interquartile range (the middle 50%) for the profit margins of the comparable companies was not in itself sufficient to prove that company and the group's companies had not acted on arm's length terms. The Supreme Court also stated that the calculations of the interquartile range were only to a limited extent suitable to clarify whether arm's length terms had not been applied in the present case, as there was only information about a relatively limited number of comparable companies.

After this and following an overall assessment, the Supreme Court found that the Ministry of Taxation had not met the burden of proof that the company had not acted on arm's length terms with its sales companies.

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