



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.

Answers from the Administrative Law Chamber of the Supreme Court of Estonia

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:

As a general rule, the Administrative Law Chamber of the Supreme Court does not assess evidence or establish facts, i.e the Court mainly deals with questions of law. When verifying whether the appeal is justified, the Supreme Court considers the factual circumstances that have been ascertained by the judgment of the lower court. In addition, the Supreme Court considers the circumstances offered in order to state reasons for the assertion concerning material infringement by the circuit court of appeal of a rule of procedure, including any circumstances apparent from the record of the hearing (Code of Administrative Court Procedure (CACP)¹ § 229 section 2). The Supreme Court is bound by factual circumstances that were ascertained by the circuit court of appeal, except in a situation where ascertainment of the circumstance is contested in the appeal and where, in ascertaining the circumstance, rules of procedure were materially

¹ Available in English: <https://www.riigiteataja.ee/en/eli/520032025005/consolide>





infringed (CACP § 229 section 3). In the case of procedural flaws, the Supreme Court sends the case back to lower instance courts for them to amend the procedural flaws regarding assessment of evidence or establishment of facts and does not assess or gather evidence or establish facts itself.

However, there are some exceptions where the Supreme Court has the right to assess evidence and establish facts as well. These cases involve the application of interim measures (CACP § 252 section 2 and § 134 section 3) and public procurement cases (CACP § 279 section 1 and § 134 section 3). Application of interim measures and cases involving public procurement are processed in a streamlined manner. Provisions regarding streamlined proceedings (§ 133-136 of CACP) allow the Supreme Court to exceptionally also take into account circumstances that have not been established by the lower court, e.g. examine facts (§ 134 section 1 and 3).

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

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

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

Main fields are already mentioned in the first part of the 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

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

The Administrative Law Chamber of the Supreme Court does not have statistic regarding the question in matter. There may be only couple of cases annually where the court must deal with more difficult technical questions. So, the estimated percentage of all disputes is quite low (last year the Chamber solved 56 disputes altogether), I would estimate around 5-7%.

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:

All the fields of law, listed in question no 2 could be considered to bring along technical challenges. However, I would like to point out cases regarding climate and cases regarding Covid-19 pandemic.

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:

Usually, the judges themselves are competent to solve the cases, involving technical issues. By the time, the case has reached the Supreme Court, the parties to the proceedings have already submitted their evidence, including opinions of specialists, if necessary. Also, the lower instance courts have the possibility to gather evidence themselves or order an expertise (expert opinion) if necessary. Therefore, usually all the necessary facts of the case have already been determined, and the Supreme Court analyses the law or whether there have been any procedural errors while assessing evidence and establishing facts.

As pointed out in the answer to question no 1, the Supreme Court does not usually gather or assess evidence or establish facts. The Supreme Court does not involve external experts in order to gather new evidence. There is one example, when the Administrative Law Chamber used a well-known environmental law expert, but for an extra-judicial legal advice (for a written opinion). There was no legal basis for this involvement, but the expert was paid a fee by a contract.

However, although not experts in a general meaning, there are some cases when the Administrative Law Chamber has added other administrative authorities to the proceedings for their professional opinion. According to § 24 section 1 of CACP the administrative court may add to proceedings an administrative authority – in order for that authority to provide its opinion: 1) who oversees the respondent; 2) whose tasks the subject matter of the dispute concerns; 3) who has issued or should have issued an opinion or has issued or should have issued an approval in administrative proceedings that gave rise to the dispute. These administrative authorities can, for example, be Chancellor of Justice, Environmental Agency or different ministries. However, when added to the proceedings, the administrative authorities usually give their view about the application of legal norms or general knowledge about the background of the concrete issue in question. For example, in the case no 3-16-1864/93² the Supreme Court included the Commission of the European Union to the proceedings and asked their opinion regarding the interpretation of state aid rules.

In principle, the Supreme Court can also ask opinions from different institutions. According to § 58 of CACP the court may require a party, as well as an administrative authority that is not a party, a party's employer,

² Available in Estonian: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-16-1864/93>





insurance company or credit institution to disclose information needed to dispose of the case or motion or application, provided the authority or other person can be presumed to possess such information and provided the law does not regulate otherwise. The party, authority or person is obligated to provide the information within the time limit established by the court. The court may impose a fine on any person who violates this obligation. The Court can also require official assistance. According to § 57 section 1 first sentence of CACP where certain information, which is inevitably necessary in order to dispose of the administrative case, can only be ascertained by an administrative authority, the authority must, within the scope of its competence and powers, provide official assistance to the court dealing with the case.

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:

As explained before, the Supreme Court usually does not involve external experts in order to gather new evidence. If external experts or administrative authorities are involved for their opinion, they are chosen by the Court.

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:

Regulations are part of the material law, therefore also binding for the Administrative Law Chamber. Other documents mentioned, which contain technical expertise, are usually presented by the parties to lower instance courts. The Administrative Law Chamber therefore does not usually assess these technical expertise's themselves for the establishment of facts, as explained before. These documents can only be useful for the Supreme Court if they can be used to interpret law or gain background information about general circumstances or knowledge regarding a concrete field of dispute. However, in this case, the Supreme Court is not bound by these documents, since the Court applies the law itself. Although it must be mentioned that the documents of the Commission, if they help to interpret regulations of EU law, are usually helpful resources for the Court and are usually being followed.

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 the answer to question 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 parties to the proceedings can present and lower instance courts may rely on any evidence that is relevant to the case. The court must then base its decision on the gathered evidence. The Supreme Court must then assess whether there were any procedural flaws when assessing evidence or establishing facts by lower instance courts.

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:

First, as explained in the answer to question no 1, the Administrative Law Chamber can, exceptionally assess evidence and establish facts when applying interim measures. However, since the interim measures must be decided on a limited time basis, the time pressure does not always enable the judge to assess the case as thoroughly when resolving the case substantially. Usually, the Court gives its preliminary opinion about the perspective of the case based on the material gathered so far. According to § 249 section 1 of CACP when applying interim measures, the court first determines the need for interim measures. Furthermore, the court is obliged to assess the prospect of the complaint, weigh public and private interests and assess the foreseeable consequences of the order (§ 249 section 3 of CACP).

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:

Regarding human rights, Estonian Constitution³ article 15 states, that everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional. The Code for Administrative Procedure states also that a person may file a complaint with the administrative court strictly in order to protect their rights (§ 44 section 1 of CACP). Justice shall be administered solely by the courts. The courts shall be independent in their activities and shall administer justice in accordance with the Constitution and laws (article 146 of Estonian Constitution).

The unjustified refusal to administer justice is not permitted (§ 27 section 3 of the Code of Civil Procedure⁴). Therefore, the judge is obliged to solve the case according to their conscience. According to § 61 section 1 of the CACP the court follows the law comprehensively, fully and objectively assessing the items of evidence,

³ Available in English: <https://www.riigiteataja.ee/en/eli/530122020003/consolide>

⁴ <https://www.riigiteataja.ee/en/eli/510042025001/consolide>





and decides, according to its inner conviction, whether an assertion made by a party has been proved. The court must reason in the judgment its conclusion made based on the facts proven.

Estonia has also ratified the Aarhus Convention, which gives the environmental organizations access to court in environmental issues, which may rise technical questions.

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 Court does not intervene into the margin of appreciation of the legislator and in these cases the Court is rather reserved in its assessments.

Courts can only intervene when the legislation is contrary to the Constitution or to the EU Law. Every court has the duty to check the compatibility of national laws and regulations with the Constitution and if needed initiate constitutional review proceedings. Every court also has a duty to check the compatibility of national laws and regulations with EU law. In case the national legislation contravenes EU law, and the conflict cannot be eliminated through consistent interpretation, the court must disapply the specific provision which is contrary to EU law. The Supreme Court of Estonia has also in its case law dealt with the issue whether and to what extent constitutional review is possible for provisions connected with EU law⁵. To conclude, the General Assembly of the Supreme Court took the position that in most cases the court has the freedom to choose for which, whether for EU law or the Constitution, the verification of compliance will be carried out in order to resolve the case. However, when making choices the court must take into account that it may not disapply an Estonian law provision on account of its substantive unconstitutionality if the duty to establish the provision arises unavoidably from EU law. The court must also give reasoning for initiating constitutional review regarding an Estonian provision connected with EU law

Regarding the margin of appreciation of public authorities, according to the case law of the Administrative Law Chamber, in the case of discretionary administrative decisions, the court is prohibited from making a discretionary decision on behalf of an administrative body (§ 158 section 3 third sentence of CACP). Discretionary decisions are generally subject to a moderately intensive test of rationality. This consists primarily of a review of compliance with the rules of discretion and, in the case of a restriction of rights, of a three-step proportionality test (appropriateness, necessity, moderation; § 158 section 3 first sentence of CACP). In the case of an exceptionally wide discretion and low-intensity litigation, the substantive review of a discretionary decision may be limited to the test of manifest error. In case of administrative assessment decisions, the court is generally not prohibited from carrying out a more intensive review, including substituting its own assessments for those of the administrative body, giving reasons for such a decision. There is no general prohibition similar to the third sentence of § 158 section 3 of CACP in the case of assessment decisions, because the interpretation of legal concepts and the assessment of factual situations is a basic function of the judiciary and not a monopoly of the executive power.⁶

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

Please explain:

See also answer to question 14. If lower instance courts identify an error in the assessment of facts, and the administrative body enjoys a wide margin of appreciation in this field, the court annuls the decision or in case

⁵ Case no 5-19-29/38 (available in English: <https://www.riigikohus.ee/en/constitutional-judgment-5-19-29>).

⁶ Available in Estonian: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-1198/58>





of mandamus complaint, the court may order the respondent to both issue the administrative decision or perform the administrative operation and to make a new determination concerning the issuing of the decision or performance of the operation (§ 41 section 3 of CACP). It means that the court may send the case back to the administrative authority for the correction of errors. In case the discretion of the administrative authority has reduced to zero or the court is dealing with administrative assessment decision, the court can solve the case itself by gathering extra evidence, if necessary. As explained before, the Supreme Court, in the case of procedural flaws, sends the case back to lower instance courts for them to amend the procedural flaws regarding assessment of evidence or establishment of facts and does not assess or gather evidence or establish facts itself.

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:

I would like to point out case no 3-20-771/113⁷. In this case, an environmental organization contested a building permit for constructing a plant. The Administrative Law Chamber emphasized State's obligation to limit greenhouse gas emissions in the conditions of global warming, stemming from the Constitution. Upon permitting developments of a significant climate impact, it must be observed that the planned activities were justified by an overriding interest and did not bring along a need to excessively restrict the freedoms of persons or the public interest in the future in order to curb climate changes. The more intensively and likely the planned activities aggravate the achievement of climate objectives, the more substantial the interests justifying the activities must be. The Constitution obligates the Estonian State to make a proportional contribution to the achievement of the objective of the Paris Climate Agreement. To this end, it is in turn necessary to establish, in good times, a realistic and legally binding stage- and sector-based emissions allocation plan for achieving climate neutrality. The Supreme Court did not identify any mistakes in the assessment of the climate impact of the plant, but the Court revoked the building permit due to other mistakes in the environmental impact assessment, including insufficient analysis of the vulnerability of the plant to climate change and future climate risks.

In this case, the Court, among others had to assess technical questions. The Court stated that the environmental impact of the treatment of phenol water had not been clarified in the construction permit procedure. The environmental impact of the incineration of phenol water is not described or assessed in the strategic environmental assessment (SEA) report. But the court found that the environmental impacts related to PM10 and PM2.5 (fine particles of air pollution) were identified and sufficiently assessed in the SEA, referring also that the concentrations of fine particles discharged into the ambient air were in line with the regulation regarding air quality limit values and target values, other air quality limit values and air quality assessment thresholds. The Court stated furthermore that the environmental impacts of climate change on the building and its use has not been identified correctly. When granting a building permit, the environmental impact resulting from the effects of climate change on the building and its use must also be taken into account. The Court also referred to guidelines compiled by the European Commission. The Court stated that SEA report is limited to the climatic conditions of the recent past and does not address the extreme climatic events of the future.

⁷ Available in Estonian: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-771/103>

