



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 **X**
- 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:

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:

E.g. patent law; competition law; product safety





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: Cases brought in the fields of law mentioned in Question 2 represent approx. 10 % of all cases brought. Questions of a highly technical nature feature in only part of these cases, as the appeals brought might focus e.g. on a procedural issue.
- In absolute numbers: In 2024, approx. 330 cases were brought in the fields of law mentioned in Question 2 (as opposed to approx. 3320 cases in total). As mentioned above, the Supreme Administrative Court (SAC) did not have to deal with questions of a highly technical nature in all of these cases.

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:

Especially in the field of environmental law (environmental protection, i.e. environmental permitting and supervision, water management, mining, mineral extraction, waste management) and in patent litigation (evaluation of inventiveness of inventions, scope of patent rights). Technical considerations are central also in the field of building and planning law. Technical questions may arise occasionally even in other areas (e.g. public health, animal health etc.).

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:

The SAC employs Expert Judges (Expert Counsellors on the Environment, and Chief Engineering Counsellors). They are appointed on a fixed-term basis (for a 5-year term) and usually work as their main occupation in universities or other scientific institutions. The Expert Judges attend sessions dealing with specific cases as defined by law, such as environmental protection and water management cases as well as patent cases.

- 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: Currently approx. 34 % of all judges; however, on average, one Expert judge only attends court sessions 0-6 times per year
- In absolute numbers of all staff involved in decision-making: Currently 12 Expert Judges (eight Expert Counsellors on the Environment and four Chief Engineering Counsellors) out of a total of 35 Judges

b) How are these persons involved in the decision-making process? Please explain: Prior to a court session, the Expert Judges receive the same case material as do the Judges. They participate in the court session, case discussion and decision-making as full members of the composition hearing the case, may vote on the





outcome and act under the same responsibility for the legality of their actions as the other Judges of the SAC. Their viewpoint during court sessions is mainly scientific or technical. After a session the Expert Judges may review and comment on the draft decision. Especially in environmental cases, the SAC may organize site visits in order to examine a matter and make observations. As members of the composition hearing the case, Expert Judges participate in these visits providing technical or scientific observations that are often valuable in resolving the case.

c) How does the transfer of knowledge take place? Please explain (e.g. preparation of reports, discussions in session etc.): In the sessions of the SAC, cases are decided upon presentation by a Referendary who has been in charge of preparing the case. A Referendary may, in their preparatory memorandum, highlight scientific and technical questions which are relevant to the resolution of the case but require specific expertise. This indicates to the Expert Judge the questions on which their expertise is of particular benefit. Knowledge is primarily transferred through discussions during court sessions. Expert Judges may also participate in commenting on the draft decision or, occasionally, writing the decision together with the Referendary and Judges.

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 X
- Other (please provide a method):

Please explain your answer: The SAC is usually provided with material explaining the technical topics and questions relevant to the case. This material is gathered during the preceding administrative procedure by a public authority involved and/or a party. According to the Finnish legislation, Expert Judges are involved in handling of certain categories of cases. However, there are certain categories of cases that may entail highly scientific or technical aspects, but the participation of Expert Judges in the composition handling these cases is not permitted by the law (e.g. mining permits and mineral extraction permits). In this kind of situation, it may be appropriate to request a non-binding external expert opinion from, for example, an expert authority or a university. Some of the Judges and Referendaries in the SAC have, in addition to their legal degree, a relevant degree or other education in technical or scientific fields and therefore are able to assess the technical and scientific facts independently.

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: In the rare cases where external expertise is requested by the court, the competent composition of the court shall decide on choosing the expert. Also, the parties and public authorities are allowed to propose such experts, but they do not have to be followed by the court. The parties and authorities usually provide consultant reports or research material, which are considered as procedural material in decision-making and can be taken into account or relied upon in judicial deliberation.

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 have a binding effect on the SAC. Their stipulations – including those of a technical nature (i.e. threshold values) – have to be followed by the SAC. Regulations may also incorporate guideline values, providing the SAC with a greater margin of appreciation when applying such Regulations. The preparatory works (*travaux préparatoires*) of legal Acts which define the goals of the Act, its scope and how it will be implemented may be used as interpretation material.

Guideline documents, such as Ministry guideline documents, provide guidance on the interpretation and application of legal provisions within a specific field.

EU Commission documents guide the interpretation of EU law as an authoritative non-binding source.

If no technical stipulations are included in the applicable regulations, public authorities and courts may rely on generally recognised scientific or technical guidelines. Where there are no generally recognised guidelines, any reasonable expertise may be relied upon. The SAC may rely in its decision-making on similar knowledge.

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
- Other (please provide the extent of binding effect):

Please explain your answer: See answer to Question 9. The binding effect depends on the document.

Guideline documents are not legally binding but are taken into account as procedural material.

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

Please explain: As a premise, the public authority has a duty to prove that its decision is founded on acceptable grounds. In certain cases (e.g. in patent disputes) this duty may also rest on the private party. The SAC does not have to initiate new scientific research which is not yet available in the scientific community. The consequences of a lack of information depend on the applicable law and the circumstances of the case at hand.

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

- Yes, without modification X
- No.

Please explain the modifications:

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:

The right to legal protection is guaranteed as a fundamental right in Section 21 of the Finnish Constitution (731/1999). The more precise content of this right is laid down in the Administrative Judicial Procedure Act (808/2019). According to Section 79 of said Act, the SAC shall consider all points of fact arising in connection to the claims presented in a case and determine the points on which a decision can be based. According to Section 37 of said Act, the SAC shall ensure that the matter is examined. As a premise, the SAC only assesses the claims and facts presented by the parties. Especially in patent disputes the responsibility for providing evidence rests with the parties and decision-making at the SAC entails determining what has been established as a fact and what remains unproven. However, in the fields of law where the public interest is heightened (e.g. environmental law), the principle of judicial investigation allows the SAC more leeway in determining the scope of the dispute and gathering evidence *ex officio* e.g. by requesting an expert opinion (see answer to Question 7). This, however, is quite rare in practice.

The Aarhus Convention broadens the right of NGOs to appeal public authority decisions in the field of environmental law, thus enabling the NGOs to provide the SAC with evidence on 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 legislature enjoys a margin of appreciation which the SAC must respect. Only where the application of an Act would be in evident conflict with the Constitution the SAC must disapply the conflicting provision and give primacy to the Constitution in the case at hand (the Finnish Constitution, Section 106). Similarly, if a policy choice in a lower-level decree conflicts with the Constitution or an Act, the SAC must disapply it in the case (the Finnish Constitution, Section 107). Legislative choices which conflict with EU law (if required by EU law) of human rights obligations may similarly be disapplied in a specific case.

Public authorities enjoy a margin of appreciation that is defined by the limits and preconditions laid down in applicable legislation. Judicial assessment of administrative decision-making in questions where the authority enjoys a margin of appreciation is limited mainly to ascertaining whether the authority has followed correct procedure, based its decision-making on correct facts and law, and respected the limits of its margin of appreciation as well as the general principles of law.

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

Please explain:

A manifest error in the assessment of the facts of a case (either by the public authority or a lower instance court) is one of the grounds for granting leave for appeal before the SAC. If such an error is at hand, the SAC may hear the case, reverse the decision and return the case for renewed consideration to the authority or the lower instance court. When returning the matter, the SAC may order the authority to procure necessary evidence or order the lower-level court e.g. to arrange an oral hearing.





The SAC mostly assesses evidence that has been presented at previous instances. In most cases, there is no formal prohibition of presenting new evidence before the SAC. If new evidence of a highly technical nature is presented to the SAC, the SAC usually does not assess itself the importance of such new facts but instead reverses the decision under appeal and returns the matter for renewed consideration to the public authority.

In case of an error in the appraisal of the facts in a case where the decision has become final, extraordinary appeal may be available. According to Section 117 of the Administrative Judicial Procedure Act, the SAC may annul a final administrative decision or a final decision of an administrative court (including the SAC itself) *inter alia* if the decision is based on an error that could have materially affected the decision. Such an error could even concern the assessment of the facts. In such a case, the decision may only be annulled if it violates the rights of a private party or if the public interest requires annulment of the decision.

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:

In a recent case (decision of 12 June 2025, ECLI:FI:KHO:2025:T1326) the SAC had to decide a case concerning a substantial change (i.e. an extension of operations) of a talc mine activity. The authority had granted an environmental permit for the extension, but the Administrative Court had partly reversed the permit and partly tightened the permit regulations regarding the substructure of an extractive waste facility. On appeal by the mining operator, the SAC had to decide whether the conditions for granting the environmental permit had been met before the permit authority, taking into account the permit regulations said authority had set in the permit. The SAC reversed the decision of the Administrative Court and held in its own decision that the substructure requirements set by the authority already met the requirements of the Best Available Techniques (BAT) regarding the management of waste from extractive industries. However, the SAC added a supplementary obligation to provide more specific data of the groundwater level in the waste facility area as there was a spring in this area indicating that the groundwater surface could lie near the bottom of the waste fill. With this addition, the SAC deemed that the conditions for granting the permit were met. Expert Judges participated in the composition hearing the case.

In another recent case (decision of 25 June 2025, ECLI:FI:KHO:2025:56) the SAC held that the Finnish Food Authority had been entitled to order the mink and foxes kept at the appellant's fur farm to be culled in connection with the highly pathogenic avian influenza outbreak in 2023. According to the decision, an antibody test – which had not yet been validated but which had been planned and carried out in cooperation with the European Union Reference Laboratory for avian influenza – qualified as “generally accepted veterinary grounds” for establishing the occurrence of avian influenza in the circumstances at hand. No validated methods of testing existed at the time and, having regard to the large number both animals and places for their keeping as well as the dangerous and rapidly spreading nature of the disease, it had not been possible to use virological tests. The SAC also held that the Authority had been entitled to consider that there had existed an epidemiological link between infections in wild birds and the antibody-indicated infections in the fur animals kept by the appellant. The SAC concluded that due to the large number of animals, it had not been possible to conduct an individual risk assessment for each animal. Furthermore, with a view to the risks associated with the outbreak from a public health perspective, the culling of all fur animals kept at the premises had not constituted a disproportionate infringement of the appellant's right to property or freedom to conduct a business. The appellant had submitted several expert opinions to challenge the scientific basis of the decision of the Authority. The composition hearing the case included no Expert Judges.

