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 Federal Administrative Court is in principle a court with the purpose of unifying and standardizing the law in Germany. Therefore, it is primarily designed to answer questions of law, which may arise from (differing) jurisprudence of the 15 higher administrative courts in the federal states. In addition, the legislator has created a first-and-last instance competence of the Federal Administrative Court in enumerated fields of law. In these, being the only instance, the court is competent to answer questions of law and questions of fact, meaning that only in these cases the Federal Administrative Court will scrutinize evidence of its own. The relevant competences concern mostly legal protection against planning decisions considered of supreme importance: Major highway projects, waterway projects, major railway projects, power lines and lately LNG-infrastructure. Also, all cases brought against the Foreign Intelligence Service of Germany lie within the first-and-last instance competence of the Federal Administrative Court.

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2. Is your court competent in the following fields of law:
- Environmental law X
- Health law X, partly
- Urban planning and building law and/or spatial planning law X
- Telecommunications law X
- Public Procurement law

Please provide other fields of law, which bear a technical challenge to your court:
Law of medicinal products and medical devices (as part of health 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: 30 %
- In absolute numbers: 75

The estimated numbers make reference only to cases in which leave to appeal has been granted. Leave to appeal procedures, which by far form the largest group of cases in the court, usually do not cause technical questions.

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 no. 2. Special relevance is given to questions of nature conservation, water, emissions, explosion security, telecommunication, application and effectiveness of medicinal products, effects of the 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
  - 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:
In many cases, judges are capable of coping with technical questions by means of experience and/or by way of the submissions the parties make during litigation. Concerning many technical questions, the public authority involved and/or another party will have gathered external expertise during the administrative procedure which is made available to the court. Only if such external expertise is substantially questioned by another party and if the court lacks the necessary technical expertise of its own, external experts may be mandated by the court. This is a form of gathering evidence provided for by the Code of Administrative Court Procedure. In practice, this means of evidence is rarely made use of. In most cases, the dialectic process of external expertise gathered by the parties and the possible questioning of this expertise by the court and the other parties will suffice to give the court sufficient grounds for its decision.
The court may not base its decision on a "burden of proof" without having previously consulted with an external expert (as a means of evidence, see above). Yet, the parties are under the obligation to contribute to the litigation. So, if external expertise is made available by the public authority and it is not substantially put in question by one of the other parties or the court, then the court may rely on this external expertise although it was originally mandated by the public authority being a party of the litigation.

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 mandated by the court (see above, question no. 7), the court is under full obligation to choose the external expert. The right to be heard will put the court under an obligation to previously consult with the parties about the choice of expert. The parties are allowed to make proposals which do not have to be followed 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):

Please explain your answer:
Regulations as part of the positive law have a binding effect on the court. Their stipulations - including those of a technical nature (i.e. threshold values) - have to be followed by the court.
Some legal conventions which formally are only binding on the administration (Technische Anweisungen - TA) have been recognized by the administrative jurisprudence to set the technical standard. They are being applied in the same manner as laws.
Documents of the EU Commission (recommendations etc.) have to be considered an authoritative interpretation of the law. They have major importance for the interpretation of EU law. Yet, 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.
In scientific areas in which the legislator has not yet set standards the courts may rely on scientific or technical guidelines set up by private experts or expert organisations insofar as they are widely recognized. The preparation of these guidelines will usually require a large-scale effort of several renowned experts, which allows public authorities and their experts, the general public and NGOs to participate in the process. On such a guideline (Fachkonvention) the court may rely. Its general recognition will usually also prevent a party from successfully challenging it.
Where there is neither a legislative measure nor a recognized guideline of the described quality the public authority may rely on a scientific approach or guideline which does not have to be generally recognized. As long as this approach seems reasonable and is not obviously deficient, the court is not in a position to question the public authority's decision based on such an approach. The court does not have to get into a discussion which of several reasonable approaches is more suitable. Insofar, the public authority is granted a certain margin of appreciation.
The Federal Constitutional Court has decided that the obligation of the court to assess the facts of the case does not go as far as to initiate new scientific research which is not yet available in the scientific community. In the same decision, the Court declared the legislative and the executive branch to be under an obligation to observe and foster scientific progress in order to obtain reliable results.

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:
As explained in the answer to question no. 9, concerning scientific or technical questions which are not subject to a generally recognized guideline, the public authority may rely on any reasonable expertise. It does not have to initiate new scientific research which is not yet available in the scientific community.

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:
These criteria may be invoked by the parties and they may be applied by the court as far as evidence is available during the limited period of time when temporary relief is to be granted. If technical questions cannot sufficiently be answered in this limited period of time, the court may base its decision on evaluating and weighing the interests of the parties involved, trying to prevent any factual prejudice to the main litigation.

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 prohibition of the denial of justice as enshrined in article 19 para 4 of the German Constitution (Grundgesetz) puts every court under an obligation to assess the case and its facts as far as possible. Yet, if there is no unanimous opinion in the expert community the court is not obliged to initiate new scientific research (see above, answers to questions no. 9 and no. 11). If the public authority bases its decision on a reasonable scientific approach, the court will only review this decision under the aspect of obvious deficiencies in this approach.
With regard to human rights, the property right is of an elevated importance. Whereas German administrative court procedure in general has a subjective approach this may be altered when the property right is involved. In planning cases the individual only has legal standing to invoke infringements of his own personal rights. Thus, a natural person could not claim that an endangered species was neglected, that there is no public need for the project or that it would pollute an adjacent river. According to the jurisprudence of the Federal Administrative Court this changes if the project impairs the property rights of an individual, namely if the project provides for the expropriation of land. Such an expropriation can only be considered lawful, if the project is fully compatible with the law. Therefore, the expropriation extends the judicial review of the project from a strictly subjective legal standing to a more objective approach: Because of the impairment of the subjective property right the individual may base its action on any infringement of the law as long as this has caused (possibly among other reasons) the impairment of the property right.
The Aarhus Convention does not have a direct effect on technical questions before court. Yet, it lays ground especially for NGO litigation in environmental law, which in many cases raise 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 enjoys its legislative margin of appreciation to which the court is bound. Only if it considers the stipulations of the law to be in breach of EU law or of constitutional law it may refer the matter to the European Court of Justice or the Federal Constitutional Court respectively.
In cases without binding legislation or a generally recognised scientific or technical guideline, the public authority enjoys some margin of appreciation when choosing the scientific approach it bases its decision on. The court, which usually will fully assess the use of such a margin of appreciation, is limited to review the approach used by the public authority under the aspects of obvious deficiencies, erroneously established facts or ill motivation.

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 administration's assessment of the case's factual basis of the case shows deficiencies, the court will have to gather and investigate the facts. If this is not possible or highly uneconomic, it may also oblige the public authority to remedy these deficiencies.
In cases in which the Federal Administrative Court acts as a court of last instance, procedural flaws of the Higher Administrative Court - such as shortcomings in the establishment of the case's factual basis - are a reason to grant leave to appeal. In such a case the matter would be referred back to the Higher Administrative Court for further assessment of the facts.

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 (judgement of 19 December 2024 - ECLI:DE:BVerwG:2024 :191224U7A14.23.0 -) the court had to decide a case concerning the antifouling of an FSRU (Floating Storage and Regasification Unit - LNG infrastructure) in the harbour of Wilhelmshaven. The permission under the Federal Water Act allowed a chlorine based antifouling of the regas cooling and other seawater based tube systems aboard the vessel. The claimant - an NGO - demanded that an emission-free ultra sound method was to be used instead. The legal question to be answered was whether the method used and/or the method demanded by the claimant were to be considered an "available technique" as provided for by the Industrial Emissions Directive (2010/75/EU; article 3 para 10 lit. b). The court does, of course, not dispose of an own technical competence in this field. Yet, it was able to decide that the chlorine method was recognized as a technically and environmentally reasonable method which was usually used on FSRUs world-wide. In contrast, the ultra sound method had just recently been developed and not yet put into place on an FSRU. As a result of the public hearing it could be stated that the ultra sound method did bear a disproportionate risk for the user that it did not properly serve its function. The latter could neither be proven by practical experience nor by other means. Therefore the court decided that this method was no (yet) an "available technique" the owner of the FSRU had to rely on.