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

     In the Hungarian administrative court system, the Curia, as the supreme court, is primarily responsible for creating legal unity and ensuring the uniform application of law. It is an extraordinary forum for remedies. In administrative cases, eight high courts, which are organized on a territorial basis, act at first instance, and the Administrative Chamber of the Regional Appellate Court of Budapest acts at second instance and in certain cases defined by law. Therefore, as a general rule, the Curia, in its capacity as an extraordinary forum for remedies, examines questions of law and decides on questions of law on the basis of the available documents. There is no room for evidence-taking in cassation proceedings. However, the legislator has also designated the Curia as the court of first and final instance in some cases, in which it is responsible for the full adjudication of cases, including questions of fact. These cases pertain to referendum and electoral remedies, and also affect the area of the right of assembly. Furthermore, the Curia hears cases to examine whether local government decrees violate laws and to determine whether local governments have failed to fulfil their legislative obligations.

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

- **Environmental law** **Yes**
- **Health law** **Yes**
- **Urban planning and building law and/or spatial planning law** **Yes**
- **Telecommunications law** **Yes**
- **Public Procurement law** **Yes**

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

In addition to the aforementioned cases, technical challenges may be presented by administrative disputes in the fields of data protection, competition law, tax and customs administration, consumer protection, pharmaceutical industry, and other health-related areas.

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:

There are no recorded data on this, but at the same time, it is important to note that, in any of the cases heard by the Administrative Chamber of the Curia, there may be, in theory, a question of a scientific or technical nature in any area, and there may also be cases in the areas listed in question 2 whose subject matter is exclusively a question of law.
In Hungarian administrative adjudication, too, the act of putting forward submissions by electronic means has become a priority, and in administrative litigation, there are several questions of a technical nature as to whether submissions have been properly submitted.
It should be noted that, once a petition for cassation has been received, the assessment of the merits of the petition for cassation is subject to the outcome of the admissibility procedure, which specifically examines whether there is any departure from case-law or whether any infringement has occurred.

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:

Among the areas of law covered by question 2, technical problems may arise especially in environmental law, climate protection and public procurement cases, but the development of digital technology and artificial intelligence is expected to increase the number of these cases. In the context of the introduction of the new electronic land registry and the electronic register of companies, it can be expected that disputes related to the functioning of these electronic interfaces will also be brought before the Curia.

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**

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

Please explain your answer:

As explained in the answer given under question 1, the Curia is an extraordinary forum for remedies, and according to the rules of the Code of Administrative Litigation, there is no room for evidence-taking in cassation proceedings before it. When assessing petitions for cassation, the Curia decides on the basis of documents and evidence available at the time when the final decision is taken. Thus, if, in the case, an expert opinion or a statement by a specialist authority is available to the Curia in the course of administrative proceedings, the Hungarian supreme judicial forum will, if so requested, examine whether the evidence in the file is in conformity with the judgment of first instance.
In first-instance proceedings, the scope of *ex officio* evidence-taking is narrow. It is possible for the parties to submit a motion for evidence or to provide means of evidence at the first hearing at the latest. The plaintiff or the interested party may rely on a fact or circumstance that exists at the time of the preliminary administrative proceedings but has not been assessed in the preliminary administrative proceedings if the administrative body fails to take it into account despite making a reference to it, is not familiar with it through no fault of its own, or does not mention it through no fault of its own. If a forensic expert is appointed in the preliminary administrative proceedings, a private expert or an expert appointed in another proceeding may not be called upon to give evidence on the same specialist subject-matter.

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

Please explain your answer:

It was indicated in the response given under question 7 that, as a general rule, there is no room for evidence-taking before the Curia. If it becomes necessary to appoint an expert in first-instance proceedings, the court must primarily appoint a judicial expert who proceeded in the administrative proceedings. In the absence of this, the court will take measures to appoint an expert with expertise in the given specialist subject matter by consulting a list of judicial experts.

9. To answer technical questions: May the court rely on technical expertise as laid down in:
- Regulations

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- 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:

The technical type of provisions contained in the regulations are also binding on the courts by virtue of their legislative nature. On technical matters, there may be so-called standards, but their use is no longer typical.

The court may freely use the parties' pleadings and any evidence that is suitable to establish the facts according to the rules of evidence in first-instance proceedings and within the framework set out in the answer given under question 7. Evidence-taking may, in particular, take the form of witness evidence, expert evidence, documentary evidence, or inspection. The court may also take any other evidence that may be necessary to establish the facts relevant to the dispute if it appears expedient for the purpose of deciding the dispute, unless the particular method of taking evidence is contrary to public order. Apart from legal regulations, the court is not bound by the pieces of evidence and is free to admit or exclude any of them, because it must assess them individually and as a whole, by comparing them with all circumstances of the case.

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 under 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 court assesses the pieces of evidence individually and as a whole, against the facts established in the preliminary administrative proceedings. If the expert evidence is inconclusive, the court shall decide the case on the basis of the other available evidence, having regard to the burden of proof.

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:

When making a decision on a request for immediate legal protection, the standard of proof required from the parties is different. The request must set out in detail the grounds on which immediate legal protection is sought and be accompanied by supporting documents. The facts on which the request is based must be established by probable cause. When making a decision on the request for immediate legal protection, the court shall not take evidence but shall examine it, on the basis of the principle of

proportionality, in the public interest and in the interests of all the parties, whether the failure to grant immediate legal protection would cause more serious harm than would be caused by the granting of immediate legal protection.

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** **Yes**
- **Human rights** **Yes**
- **Aarhus Convention** **Yes**
- **Other.**

Please explain:

The right to turn to the courts is a protected basic right that has also been incorporated into the Fundamental Law. On the basis of its Article XXVIII (7), everyone shall have the right to seek remedy against judicial, administrative or other official decisions, which infringe upon his or her rights or legitimate interests. This basic principle is reinforced by the Code of Administrative Litigation, which defines the concept of administrative litigation broadly in order to ensure effective and seamless legal protection.

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:

Through legislation, the legislator creates the framework for administrative and judicial proceedings, the requirements and rules applicable to a given activity or situation, whether it is the mandatory appointment of an expert or a specialist authority.
Those bodies which apply the law, including the authorities, are obliged to conduct the evidentiary procedure in accordance with the law, using any evidence that can clarify the facts. An expert must be interviewed or an expert opinion must be sought if specific expertise is required to establish a significant material fact or other circumstance in the case and the competent authority does not have the appropriate expertise.
An expert may not be called upon if the opinion of a specialist authority is to be obtained on the same specialist matter. The law or a government decree on the designation of specialist authorities may, on imperative grounds of public interest, require the authority competent to decide on the merits of the case to obtain the mandatory opinion of another authority (hereinafter referred to as "specialist authority") on the technical matter and within the time limits specified therein. The authority may not depart from the specialist authority's opinion and must take a decision in accordance therewith. In such a case, the decision shall be null and void if it is taken by the competent authority without having sought the specialist authority's opinion or by disregarding the specialist authority's opinion.
The expert opinion and the specialist authority's opinion may be challenged in administrative lawsuits before the courts.

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

Please explain:

The court may not carry out the evidentiary tasks imposed on the authority. If the facts established by the authority are so incomplete that the decision cannot be reviewed on its merits, or if the facts are incomplete in a way that could affect the merits of the case, the decision shall be annulled and, if necessary, a new administrative procedure shall be ordered. If, in the cassation proceedings, the Curia finds that the facts established by the court of first instance do not correspond to the evidence and are not in conformity with the documents, it shall quash the first-instance judgement and order the court to conduct a new trial.

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 Decision No. Kfv.I.37.004/2024/6, the Curia ruled on an administrative dispute concerning the modification of an environmental permit. The plaintiff, an NGO, brought an action before court because, in its view, the environmental permit – which was issued to the defendant for the reconstruction of Lake Fertő and was subsequently amended – was unlawful and could not be used to authorise the pursuit of even more intensive activities contrary to the objectives of nature conservation.
The court of first instance appointed a conservation expert to determine whether, at the start of the hydro-mechanisation dredging carried out by the investor, the fish in the working area could escape and their injury and death could be prevented by the few minutes of idling. (Explanation: the contractor's argument was that the fish would escape anyway due to the extreme noise/vibration at the start of the work, i.e. the fish population would not be harmed) After comparing the findings of the expert opinion with previous documents, the court found that during evidence-taking, there had been no data to support the adverse effect and that the administrative decision did not constitute an infringement.
In the cassation proceedings, the Curia established that the defendant's procedure to clarify the facts was incomplete because it did not sufficiently disclose the facts. It found that the court of first instance had overruled the forensic expert's opinion without expertise and assessed it incorrectly, although there was no legal possibility for a court to overrule the expert's opinion given in a specialist matter. The Curia explained that, in environmental matters, the applier of the law must also be mindful of the level of protection already achieved, and that, in making the amendment decision, the defendant did not conduct an evidentiary procedure in respect of the grounds put forward by the interested party in the request. Since the defendant did not examine how the basic level of protection set out in the original decision on the permit had been affected by the request for amendment, and did not sufficiently clarify the facts, the court of first instance examined the deficiencies only partially and did not draw the conclusions thereof; therefore, the Curia altered the first-instance judgement and quashed the administrative decision.