



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
- 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 Italian Council of State is the last instance court and it is required to provide judicial protection against the acts and conduct of the public administration as an expression of public power, with the limitation - based on the principle of the division of powers - that it cannot review administrative merit. That is, it cannot extend its review to the administration's choices of expediency. Therefore, the examination of the grounds submitted to it may concern the correct application of rules of law or regulations as well as legal principles with full access to the examination of the facts assessed by the administration to apply the legal discipline of reference.

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:

Law of the independent administrative authorities and public entities in charge of managing economic incentives in the energy field.

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: **2000**

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 fields of law regulated by independent administrative authorities and more generally in fields of law where the impact of new technologies is greatest.

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 **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, courts are able to address technical issues through expertise and/or through the parties' observations during litigation. With regard to many technical issues, the public authority involved and/or another party will have gathered external expertise during the administrative proceedings that will be made available to the court. Only in cases where this external expertise is substantially challenged by another party and the court lacks the necessary technical expertise, the court may engage outside experts. These experts may be professionals working in the private sector (in this case we speak of technical expertise) or professionals who have a service relationship with a public administration other than the one that is a party to the litigation (in this case we speak of verification). This is a form of gathering or evaluating evidence offered by the parties provided for by the Code of Administrative Trial. These are evidentiary tools used either when the factual frame of reference is not entirely clear or when the parties' positions both appear plausible. If the external party's advice is not contested by one of the other parties, the Council of State may consider the facts stated therein to be proven, the principle of non-contestation of the opposing view applying.

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 cases where external expertise is requested by the court (see question 7 above), the court is obliged to choose the outside expert. The parties are allowed to appoint their own experts who will dialogue with the expert identified by the court during the consultation.

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 unless they conflict with superordinate sources. Therefore, their provisions, including those of a technical nature (threshold values), must be followed by the judge.

All other party documents do not bind the judge, but may be syndicated if they are the subject of appropriate complaint by the claimant.

The documents of the European Commission (recommendations, etc.) must be considered as an authoritative interpretation of the law. They are of fundamental importance for the interpretation of EU law. However, they are not binding. This means that it is possible to make decisions contrary to the content of these documents, but this obliges the court to provide valid reasons for departing from the content.

In scientific fields where the legislator has not yet set standards, the Council of State may base its convictions on scientific or technical guidelines developed by private experts or expert organizations, to the extent that they are widely recognized, provided that they have been presented in court as documents by the parties.

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 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 impossibility of answering technical questions implies either that it is proven that the administration has not provided an adequate scientific demonstration with respect to the factual premise on which it has based its measure. This results in a finding of a defect symptomatic of excess of power due to misrepresentation of the facts, illegality, unreasonableness or lack of proportionality. Or it may be resolved, on the contrary, in the failure or impossibility of the claimant to demonstrate that the administration's decision is unlawful.

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 claimed by the parties and may be applied by the court to the extent that the necessary findings are compatible with the need to ensure a prompt precautionary response so as not to irreparably harm the interests of the parties.

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:

According to Article 24, Paragraph 1, of the Italian Constitution: 'Everyone may take legal action to protect their individual rights and legitimate interests'. Article 111 of the Italian Constitution in paragraph 1 and 2 states: 'Jurisdiction shall be administered through due process regulated by law.

All trials shall be conducted with cross-examination between the parties, with equal conditions before a third-party neutral judge. The law shall ensure reasonable length of the proceedings'. Furthermore, the same article states in paragraph 6: 'All judicial decisions shall include a statement of reasons'. Therefore, the principle of effectiveness of judicial protection ensures that everyone can take legal action to protect their legal positions, the principle of due process provides that the parties, whether public or private, come before the court on an equal footing. Finally, the principle of necessary motivation requires the judge to give an account of the reasoning that gave or denied protection to the plaintiff. The Italian constitutional system, therefore, is incompatible with a limitation of the administrative court's review to the facts of the case, because this would deny the implementation of the principles mentioned above.





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 margin of legislative discretion to which the court is bound. Only if the court finds that the statutory provisions violate EU law or constitutional law can it refer the matter to the Court of Justice of the European Union or the Constitutional Court, respectively.

In cases where there is no binding legislation, the public authority enjoys some margin of discretion in choosing the scientific approach on which to base its decision. The administrative judge will be able to review the administration's technical assessment if the party introduces evidence suggesting a misrepresentation of the facts or an insufficient or illogical statement of reasons.

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 factual basis of the case shows shortcomings, the administrative judge may consider that this alone determines an unlawfulness of the administrative activity, and hold the appeal to be well founded. Otherwise, during the preliminary investigation the judge may use the instrument of technical advice or verification to clarify the situation

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:

A particularly relevant case concerns a sanction imposed by the Italian Antitrust Authority on a smartphone manufacturing company due to the planned obsolescence of devices sold to customers (Council of State, Section VI, 13 January 2023, no. 448). According to the Antitrust Authority's assumption, the updates imposed by the sanctioned company resulted in a rapid battery depletion on older models, effectively forcing the consumer to purchase a newer device. The question revolved around whether the software adaptation caused this malfunction. According to the sanctioned company, the Italian Antitrust Authority had come to this conclusion on the basis of a few, statistically insignificant consumer complaints and had not proven the factual assumption of a correlation between software updates and effects on the batteries of mobile devices. The Council of State ordered a technical advisory by entrusting it to university professors in computer science, who concluded that:

(a) in order to answer the questions posed by the Council of State they would have needed the source code of the software from the manufacturer of the mobile phone, but that even if they had had it they would have needed a team of computer engineers to examine it, considerable economic resources and a time incompatible with the reasonable duration of the trial;

(b) the source code is subject to an industrial property right, as a result of which it would have been doubtful whether the company in question would have made it available;

(c) without the source code and its updates it would not have been able to reach any determination, since the machine language transmitted to the individual devices is incomprehensible to humans.

The Council of State therefore came to the decision to annul the contested sanction, since it turned out that no such assessment of the facts had been made by the Antitrust Authority, nor could any firm conclusions be drawn even on a statistical basis since there was no numerically significant sample of cases.

