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, partly
   - Urban planning and building law and/or spatial planning law X
   - Telecommunications law
   - Public Procurement law

Please provide other fields of law, which bear a technical challenge to your court:
Admission of vehicles; Driving licences; Public access to environmental information, Doctor's registrations; Education examinations; Compliance to subsidy conditions; Permits to carry weapons

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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: 80 (in which STAB is appointed as expert)

In the year 2024 the Dutch Council of State ruled in 10.523 cases, of which 2.507 in the Environmental Chamber, 1.806 in the General Chamber and 6.210 in the Aliens Chamber. As it is hard to estimate how many of these cases concern legal disputes with a highly technical nature, we focus here on the number of cases in which the AJD appointed the Administrative Jurisdiction (Environment and Spatial Planning) Advisory Foundation (STAB; see question 7) as expert.

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 fields of environmental law and spatial planning law. Challenges can be seen specifically in cases about projects having adverse effects on nature conservation (nitrogen depositions form farms, industries, building projects and traffic), cases about industrial installations (noise, odour, air pollution, explosion security), cases about large building projects (traffic generation, parking).

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

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- Other (please provide a method):

Please explain your answer:
Primarily, it is up to the administrative authority, if necessary, to provide scientific justification for why a decision was taken. As the AJD considered in, for example, the judgment of 17 March 2021, ECLI:NL:RVS:2021:562, the administrative authority may rely on the advice of an expert after it has checked whether this advice was prepared with due care, the reasoning therein is comprehensible and the conclusions drawn are in line with it. This obligation is laid down in Article 3:9 of the General Administrative Law Act (GALA) for the legal advisor and follows from Article 3:2 GALA for other advisors. If a party has put forward concrete starting points for doubting the care with which the advice was prepared, the comprehensibility of the reasoning followed in the advice or the alignment of the conclusions therewith, the administrative authority may not rely on the advice without further reasoning. If necessary, the administrative authority needs to ask the advisor for a response to what a party has stated about the advice. The administrative law court assesses whether these conditions are met. Therefore, the judges need to have some understanding of technical questions and have to acquire some technical knowledge themselves.
In case the administrative court judges, based on its own experience and expertise, that the response does not remove the doubts, according to Article 8:47 GALA the court is allowed to appoint an expert itself and obtain expert evidence through its expert opinion. In the field of environmental and spatial planning law, the AJD often relies on expert opinions of the Administrative Jurisdiction (Environment and Spatial Planning) Advisory Foundation (STAB).

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): X

Please explain your answer:
As stated in the answer to question no. 7, according to Article 8:47 GALA the court is allowed to appoint an expert itself. In the field of environmental and spatial planning law, the AJD often relies on expert opinions of the Administrative Jurisdiction (Environment and Spatial Planning) Advisory Foundation (STAB). This is an impartial publicly funded expert organisation which, on request, advises the AJD and other courts on disputes concerning the physical environment. Its advices are mostly used for technically complex factual circumstances, such as measuring the damaging effect of an activity on the environment. Its advisers are trained as engineers, technicians, chemists, biologists, etc. They carry out investigations and prepare reports. These investigations consist of file research, site inspections and talks with all parties to the dispute. STAB presents its findings in the form of an expert report to the AJD, which then gives the parties concerned the opportunity to respond to the report before the case is heard in 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:

In case technical expertise is laid down in regulations, administrative authorities have to comply with these regulations, and the courts will fully assess if the regulations are met.
In absence of regulations, administrative authorities will be granted a margin of appreciation in technical matters. This margin is (inter alia) limited by the requirement that, when preparing a decision, the administrative authority has to gather the necessary knowledge about the relevant facts and the interests to be weighed (article 3:2 GALA). Requirements of due care entail that administrative authorities take into account authoritative technical expertise as laid down in government documents, documents by public bodies, documents published by experts or groups of experts. Basically, the more authoritative these documents are, the more they must be paid attention to. In case there are differing or not yet fully crystallized approaches in the documents available, there remains a margin of appreciation for the administrative authorities to choose from them. The courts will assess whether the use of the document chosen is not unreasonable. If the administrative authority embraced a document that passes this test, this has a selfbinding effect for the administrative authority, which means that the administrative authority will be held by the court to apply it, unless the effects of applying it will be disproportional, as will be assessed by the court.
Working documents and guidance documents from the European Commission, though not legally binding, can provide further clarification on the meaning of a European legal provision, as part of a contextual interpretation.

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): X

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 stated in the answer to question no 9, in case there are no regulations and there are differing or not yet fully crystallized approaches in the documents available, there remains a margin of appreciation for the administrative authorities to choose from them. The courts will assess whether the use of the document chosen is not unreasonable.

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:
Generally, the criteria described in part 2 of the questionnaire do not apply to proceedings granting temporary relief. Such procedures are not suitable for answering questions of a highly technical nature. These questions need to be examined by the judge in the main proceedings. Therefore, normally the interim relief judge limits the judgment to a weighing of interests in such matters. Only in cases where such

questions have been sufficiently clarified already, the interim relief judge possibly could confine itself to a provisional judgment of legality.

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. X

Please explain:

The obligation of the court to assess the case on a factual basis follows from the GALA. The cases administrative law courts deal with are always tied to a specific decision (or lack thereof) of the administrative authorities. When preparing a decision, the administrative authority has to gather the necessary knowledge about the relevant facts and the interests to be weighed (Article 3:2 GALA). The administrative court will assess whether this obligation has been met. If the judge encounters a lack of factual information when applying the above, the judge can independently investigate this. Article 8:69 (3) GALA stipulates that the judge may supplement the facts *ex officio*. Unlike in civil proceedings, the judge does not in principle have to accept the facts as presented by the parties. The judge may ask further questions. The authority to supplement the factual grounds does not extend so far that the judge can base his ruling on facts that the parties were unable to comment on in the proceedings. The authority to supplement facts must be exercised within the boundaries of the legal dispute as referred to in Article 8:69 (1) the GALA (i.e.: the administrative judge will make a decision on the basis of the notice of appeal, the documents submitted, the proceedings during the preliminary investigation and the investigation at the hearing). It follows from Article 8:69 (3) GALA that the judge is authorised, but not obliged, to supplement the facts *ex officio*. This applies to both the facts stated by the administration and the facts stated by the citizen. It offers the judge the opportunity to adapt his attitude to the actual relationship between the parties in the specific case. The greater the 'inequality' between the parties, the more reason there may be for the judge to make use of the power referred to here.

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:

Judging on an appeal to an administrative decision, the administrative courts can pursue indirect or exceptive review of generally binding provisions (algemeen verbindende voorschriften) on which the administrative decision is based. Generally spoken, this is a review whether the provision is in line with higher law, including universally binding treaty provisions, and general legal principles. This review does not extend to the legislator's policy choices, hence respects the legislator's margin of appreciation.

As an exception to the indirect or exceptive review of generally binding provisions, Article 120 of the Constitution stipulates that courts may not evaluate whether formal laws (formal acts of the legislature, consisting of government and parliament) violate the Constitution. Nevertheless, the courts often can assess whether formal laws are in line with human rights enshrined in international treaties (which rights are largely the same as the rights enshrined in the Constitution), due to which the impact of Article 120 of the Dutch Constitution is limited, if not even absent. This follows from Article 93 of the Dutch Constitution that states that universally binding provisions of treaties and decisions of international organizations can be directly relied upon by individuals and legal persons before the court. Article 120 of the Constitution does

not apply to legislation adopted by regional and local authorities or executing bodies. So for this legislation, there is no prohibition for the courts to assess its compatibility with the Constitution. Anyhow, as mentioned before, the review does not extend to the legislator's policy choices, hence respects the legislator's margin of appreciation.
As stated in the answers to questions no 9 and 11, in case there are no regulations and there are differing or not yet fully crystallized approaches in the available documents in which technical expertise is laid down, there remains a margin of appreciation for the administrative authorities to choose from them. The courts will assess whether the use of the document chosen is not unreasonable. Also the court will assess whether the administrative decision is based on proper and stated reasons, and is not disproportional.

15. Is there any (legal) procedure established to remedy shortcomings in the assessment of the case's factual basis?
Please explain:
As stated in the answer to question no .13, Article 8:69 (3) GALA stipulates that the judge may supplement the facts *ex officio*. Unlike in civil proceedings, the judge does not in principle have to accept the facts as presented by the parties. This applies in any Dutch administrative court procedure, there is no specific procedure established to remedy shortcomings in the assessment of the case's factual basis. This means that shortcomings can be addressed in procedures of first instance, procedures of first and only instance and in appeal procedures. In Dutch administrative courts' procedural law the last instance courts are not limited to a review of the first instance court's application of the law ("cassation"), they can also look at shortcomings in the assessment of the case's factual basis. The court of last instance can also refer the case back to the lower instance court to remedy shortcomings in the assessment of the case's factual basis. Furthermore, the administrative courts can order the administrative authority to remedy shortcomings in the assessment of the case's factual basis, in their final judgment or in an interim judgment.

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 the case, finally decided in its judgment of 11 June 2025, ECLI:NL:RVS:2025:2637, the AJD ruled about a decision of the municipality of Wassenaar to refuse to take enforcement action against noise nuisance experienced by applicant from the use of two padel courts. Applicant argued that the administrative authority should not have based its decision on Peutz's experts sound report. She argues that, given the distance to the padel courts of more than 50 m, measurements should not have been taken with a headwind. In support of her argument, she refers to notes from M+P experts, who argued that from paragraph 3.4.3 of Module C of the Manual for measuring and calculating industrial noise 1999 it follows that measurements may only be taken under all weather conditions if both the criterion ri ≤ 50 m and the criterion ri ≤ 10 (hb + hm) are met. The AJD points out that the distance to the source centre is greater than 50 m. If applicant were to be followed in her argument that both the criterion ri ≤ 50 m and the criterion ri ≤ 10 (hb + hm) must be met, then measurements should only have been taken with a tailwind. In this case, as follows from the Peutz report, measurements were taken with a headwind.
The AJD ordered the municipality authority to adequately motivate that Peutz's research was carried out with due care or, if it concludes that this is not the case, to rectify the inaccuracies in the research by carrying out a new measurement in accordance with this ruling and the Manual and, if necessary, to take a new decision. Hereafter the municipality authority asked Peutz to address the shortcomings that the AJD identified. In a new note, Peutz explained that the two criteria from paragraph 3.4.3 of module C of the

Manual should be regarded as non-cumulative criteria, that the criterion ri ≤ 10 (hb + hm) is met, and that the meteorological window (with wind direction as an important condition) does not play a role in this case. Applicant, in response, states that no value can be attached to the view of one of the drafters of the Manual mentioned by Peutz, because he worked at Peutz. According to applicant it follows from the very text parts of the Manual mentioned by Peutz that the criteria are cumulative.
The AJD has asked STAB to issue an expert report indicating how paragraph 3.4.3 is interpreted by noise experts and what this interpretation is based on. STAB looked in particular at the manner in which the criteria ri ≤ 50 m and ri ≤ 10(hb + hm) were applied in the predecessor of the Manual, the IL-HR-13-01 from 1981, as mentioned by Peutz. On this basis, the STAB determined that there were two separate criteria in the IL-HR - 13-01. According to the STAB, it may reasonably be assumed that the intention must have been that, as was the case in the IL-HR-13-01, the Manual refers to two separate criteria. In view of the opinion of one of the members of the advisory committee mentioned by Peutz, STAB itself contacted two other members of the advisory committee who were involved in drawing up the Manual. One of those members, like the member approached by Peutz, was of the opinion that there were non-cumulative criteria, while the other member indicated that both criteria must be met. The opinions of those members are therefore not unanimous, which means that, as STAB indicates, no firm conclusion can be drawn based on one or the other position. The report also states that STAB contacted an employee of the National Institute for Public Health and the Environment (RIVM), which is now working on a possible adjustment/clarification of a number of passages on the criteria in Annex IVh of the Environmental Regulation. This annex contains, among other things, the same text passage as in the Manual. According to this employee, RIVM is of the opinion that meeting one of the two criteria is sufficient to be allowed to measure under all weather conditions. RIVM is considering proposing a more specific formulation in the Environmental Regulation to the ministry. In the opinion of STAB, this confirms that the text passages in the Manual are unclear and open to two interpretations. STAB concludes that the Manual on the one hand can be interpreted as meaning that only meeting both conditions is sufficient to be allowed to perform noise measurements under all weather conditions, but can also be interpreted as meaning that meeting one of the two criteria is sufficient for this.
The AJD notes that there is no agreement among experts on the question of whether the criteria in paragraph 3.4.3 are cumulative or non-cumulative criteria. In this regard, the AJD points out that it is clear from the foregoing that the three members of the advisory committee who were approached in this procedure also disagree on the answer to that question. The AJD further points out that, on the one hand, the experts who applicant approached after the STAB report was issued indicated that there were cumulative criteria - although one of them noted that the text was not clear - and that, on the other hand, the expert from NSG engaged by applicant, who carried out measurements at her home in June 2023, assumed non-cumulative criteria. The AJD further considers that, according to the STAB, given the application of the criteria under the predecessor of the Manual, an interpretation is possible that these are non-cumulative criteria. The AJD considers that under these circumstances it cannot be concluded that the noise measurement performed by Peutz in May 2023 was not performed in accordance with paragraph 3.4.3 of the Manual.