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:

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

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

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

- Tax Law,
- Energy Law, Mining Law, Competition Law, Banking Law,
- Capital Markets Law,
- Expropriation 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:
- In absolute numbers:

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:

- Healthcare law and cases concerning health compensation,
- Zoning and construction law / land use planning law,
- Environmental law, energy law, tax law,
- Cases concerning administrative contracts,
- Compensation cases,
- Disputes related to immovable properties designated for protection under the Law on the Protection of Cultural and Natural Assets,
- Disputes related to "risky areas" declared under the Law on the Transformation of Areas Under Disaster Risk.

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

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:

The court may decide to obtain the opinion and expertise of an expert if the resolution of the case requires private or technical knowledge beyond the scope of the law, either upon request of one of the parties or ex officio. However, an expert may not be consulted in matters that can be resolved through general knowledge or experience, or through legal knowledge expected of a judge.

In cases where the resolution of the dispute requires technical knowledge, on-site inspection and expert examination may be conducted. For example;

- In environmental law, when selecting experts for the expert panel, factors such as the subject of the dispute, claims and defenses of the plaintiff, defendant and any interveners, and precedents in similar disputes are considered.

- In cases filed for the annulment of Environmental Impact Assessment (EIA) decisions regarding mining activities, an expert panel is formed consisting of specialists such as environmental engineers, mining engineers, agricultural engineers, forest engineers, archaeologists, geological engineers, etc.

- In tax law, experts such as real estate valuation experts, urban planners, and civil engineers are consulted.

- In disputes concerning forest area planning decisions, in addition to urban planning experts, forest engineers, mapping engineers (in parceling cases), and real estate appraisers (where valuation is required) may be consulted.

8. If judges may rely on external experts: Are these experts

- Chosen by the court
- Recommended by one of the parties
- Recommended by a public authority
- Other (please provide a method):

Please explain your answer:

In the Turkish administrative judicial system, there is no practice of obtaining external expert opinions other than through the appointment of court experts. Once the court decides to have an expert examination, experts are selected in accordance with the Law No. 6754 on Expert Witnesses and the Law No. 6100 on Code of Civil Procedure. Article 31 of the Law No. 2577 on Procedure of Administrative Justice

states that the experts shall be selected from the lists prepared by the regional expert boards and the relevant provisions of the Expertise Law and the Code of Civil Procedure no. 6100 dated 12 January 2011 shall be applied to the experts. The Law on Expert Witnesses also lays out the procedures and principles for determining the qualifications, training, selection, and supervision of experts and mandates the establishment of regional expert boards. According to Article 12 of the Law, experts to serve in judicial and administrative courts are appointed from these lists based on judicial regions. While the court must select experts according to their field of expertise from the list, in cases where necessary conditions are met, experts not listed may also be appointed if they have the required specialization.

In tax law, during hearings, and when the claims and defenses necessitate it, the court may also hear the tax auditors who conducted the examination underlying the tax assessment subject to the tax case, as well as the financial advisor or accountant presented by the taxpayer at the hearing.

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

- Regulations
- 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:

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:

Article 282 of the Code of Civil Procedure, titled 'Evaluation of the opinion and report of the expert', provides that the judge shall freely evaluate the expert opinion along with the other evidence. Given that the purpose of consulting an expert is to obtain the necessary data for a lawful decision in disputes requiring specialized and technical knowledge, it is not mandatory to follow the conclusions of the expert report. In other words, the court has the authority to determine the legality of the act based on the technical information and findings in the report. If the report is found to be insufficient or contradictory, the court may request an additional report from the same experts or commission a new report from different experts. If the information in the case file is deemed sufficient, the court may also rule contrary to the expert report, provided that the reasoning is clearly stated.

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

According to the general principle of law, a judge cannot refrain from delivering justice. In administrative judiciary, the principle of ex officio investigation applies, and the judge employs any necessary method to resolve the dispute. These may include issuing an interim decision to request documents or information, obtaining expert opinions from specialized institutions, conducting an on-site inspection, or commissioning a new expert report.

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:

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.

Please explain:

The requirement to resolve the factual basis of a case originates primarily from the Constitution, the European Convention on Human Rights, to which Türkiye is a party, and other relevant legislation. Article 11 of the Constitution, titled "Binding and Supremacy of the Constitution," states that the provisions of the Constitution are fundamental legal rules binding on legislative, executive and judicial bodies, administrative authorities and other institutions and individuals; and Article 36, titled "Freedom to seek justice," states that everyone has the right to claim and defend themselves as plaintiff or defendant before judicial authorities and to a fair trial by making use of legitimate means and methods.

Article 6 of the European Convention on Human Rights, titled 'Right to a Fair Trial,' states: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 13, 'Right to an Effective Remedy,' provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

Therefore, in order to duly fulfill the right to a fair trial as enshrined in the Constitution and the Convention, it is important that the factual basis of the case be clarified in an accurate and clear manner, and that a proper legal assessment be made accordingly.

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On the other hand, Article 20, paragraph 1 of the Law No 2577 on Procedure of Administrative Justice provides that " The Council of State, regional administrative courts and administrative and tax courts shall make any kind of examination regarding the actions before them of their own motion. The courts might ask the parties and other relevant authorities to send documents that they consider necessary and to present any kind of information within the designated period of time. It is mandatory for the decisions on this matter to be fulfilled within the given period of time. This period can be extended for once only provided that justified reasons are given."

This article refers to the principle of ex officio investigation. According to this principle, the court may investigate the factual circumstances underlying the dispute on its own motion, even if not raised by the parties. Courts may request documents and information from the parties and other relevant entities within a prescribed time. If necessary, the court may also resort to on-site inspections or expert reports to clarify the facts.

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:

According to the principle of the generality of legislation, the legislative body has the authority to enact laws in all areas, including determining the conditions, criteria, and consequences of technical matters, or even whether to regulate a given field at all. In some cases, the details and technical matters that are difficult to regulate comprehensively by law are left to administrative regulatory texts, which also falls within the discretion of the legislature. Due to the binding nature of laws, judicial review is carried out within the limits set by law, and no legal basis or event outside the statute may be used. The legislature is considered to have discretion in determining which administrative acts shall be established for which events, provided it respects the principles of legal certainty and foreseeability.

As for the discretionary power of the administration, Article 125, paragraph 4 of the Constitution of the Republic of Türkiye stipulates: "Judicial power is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency. No judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of an administrative action and act, or which removes discretionary powers"

In accordance with this constitutional principle, as stipulated in Article 2, Paragraph 2 of the Law No 2577 on Procedure of Administrative Justice, administrative judicial power is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency and administrative courts may not pass any judicial ruling that restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, that has the quality of an administrative action and act, or that removes the discretionary powers of the administration.

Our settled case law is also based on this principle. It is undisputed that the administration, whose fundamental purpose is to serve the public interest, holds discretionary power to determine the type, place, time, and method of the actions and/or decisions it takes in order to fulfill this objective. However, this discretionary authority is not unlimited. It must be exercised in accordance with the public interest and the needs of public service, and is subject to judicial review in terms of authority, form, cause, subject, and purpose. Particular care is taken to avoid any review of expediency. For instance, in a case seeking the annulment of an administrative act, the court may not decide that a different administrative act should have been taken; it only reviews the lawfulness of the contested act within the scope of the claim, and if found unlawful, the act is annulled. Likewise, in cases where a party requests the issuance of an

administrative act, it is accepted that the court cannot issue a ruling that constitutes an administrative act or action. Another example is seen in administrative sanctions: since it is acknowledged that the administration has discretion within the minimum and maximum limits prescribed by law, courts must refrain from ruling that a harsher penalty should have been imposed instead of a lighter one, as long as the penalty remains within the legal boundaries.

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

According to Article 20 of the Procedure of Administrative Justice Law, the court may, if it deems necessary, request documents from the parties or other relevant entities, including expert institutions. In addition, it may resort to methods such as on-site inspection and expert examination in order to clarify the factual issues. In tax disputes, the procedures set out in the Law No. 213 on Tax Procedure may also be applied.

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:

Examples of cases related to administrative disputes:

Example 1:

In a case filed for the annulment of the "Environmental Impact Assessment (EIA) Not Required" decision regarding a Wind Power Plant Project, the court determined that the resolution of the dispute required an on-site inspection and expert examination. Within the framework outlined above, the court reviewed and assessed the expert report prepared by a panel consisting of an environmental engineer, flora-fauna expert, archaeologist, ornithologist, agricultural engineer, geological engineer, and electrical engineer, and rendered its decision accordingly.

The dispute was resolved by examining the project's potential impacts on natural and archaeological protected areas, local bird and other animal species, plant biodiversity, and similar environmental factors.

Example 2:

In a case filed by a natural gas distribution company, the plaintiff challenged a decision by the Energy Market Regulatory Authority that determined the upper limit of the natural gas transmission fee. It was alleged that, when compared to tariffs in other distribution regions, the defendant authority had discriminated among parties and failed to act equally. It was further argued that, since the revenue of distribution companies is derived from the unit service depreciation cost and transmission fee, the tariff determined by legislation must be set at a level that guarantees reasonable profitability sufficient to sustain investments. However, it was claimed that the contested decision did not take these considerations into account. An expert examination was conducted in the proceedings, and when the subject matter and the findings of the expert report were evaluated together, it was concluded that the tariff determined by the defendant authority had not taken into account the differences in revenues and expenditures from previous years relating to the company's main operations. Therefore, the court ruled that the tariff would

not allow the company to achieve a reasonable level of profitability necessary for further investment and decided to annul the tariff.

Example 3:

In a case filed for the annulment of the implied rejection of an application requesting the demolition of a structure constructed on the adjacent parcel—owned by a third party—in violation of zoning regulations, and the imposition of sanctions against the person responsible for the construction, Plenary Session of the Administrative Law Chamber of the Council of State, by its decision dated 04/11/2019 and numbered E:2019/555, K:2019/4954, ruled that the decision of the administrative court should be overturned. The Council of State found that the lower court's judgment, which was based solely on the information and documents submitted by the defendant administration, was not appropriate. It stated that the issue required technical expertise and on-site inspection, and therefore, a new decision should be rendered only after a site visit and expert examination conducted by a panel of specialists.

Example 4:

In a case filed for the annulment of a 1/5000 scale master zoning plan amendment that changed the function of the plaintiff's immovable property from a cultural facilities area to a park and recreational area, the administrative court based its decision on an expert report. The report noted that the parcel in question was designated as a public facility area under both the former and current master zoning plans. It further stated that the new zoning plan gradually increased building, population, and residential density values, while failing to allocate adequate public facility areas. Despite this, the report also expressed the view that designating the plaintiff's property as a park area was inappropriate, as it currently housed an operational and employment-generating business. Relying on this opinion, the administrative court annulled the plan. However, upon appeal, our Chamber ruled that the court's decision lacked legal accuracy. It emphasized that the parcel in question had long been designated as a public facility area and that, overall, the plan failed to provide sufficient public spaces as required by zoning regulations. Accordingly, it concluded that the case should have been dismissed rather than annulling the plan with respect to the plaintiff's parcel, and thus reversed the administrative court's decision.

Example 5:

In a case filed for the annulment of amendments to 1/5000 scale master and 1/1000 scale implementation zoning plans concerning various immovable properties, the administrative court issued an interim decision ordering an on-site inspection and expert examination. However, when the plaintiff failed to pay the required on-site inspection and expert fees, the court issued a second request for payment, which was again ignored within the prescribed time. Given the nature of the dispute, it was not possible to resolve the matter without an expert report. Since the plaintiff had the financial capacity but still failed to pay the required fees, the court evaluated the case based solely on the information and documents available in the file and ruled to dismiss the case, concluding that the legality of the contested zoning plan amendments could not be disproven. Upon appeal, our Chamber reversed the lower court's decision, reasoning that the zoning plan amendments had been adopted without obtaining the views of relevant institutions, that no updated geological survey report had been prepared, that the contested plan contradicted higher-level planning documents, and that the entire area in question was located within the boundaries of a medium- and long-range water catchment protection zone. It was also determined that increasing residential building density in a designated risk area was contrary to the public interest. The population in the area had been nearly tripled without allocating sufficient public service areas; notably, no area had been designated for healthcare facilities, and the remaining public amenities were below the minimum standards. Considering the technical nature of the dispute and the plaintiff's allegations, the court should have

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ordered an on-site inspection and expert evaluation, with the cost to be borne by the losing party. If the defendant administration also failed to pay, the cost should have been covered by the Treasury. A decision should have been rendered only after such procedures. Therefore, the appellate court found the lower court's decision to dismiss the case legally flawed and reversed it.

Examples of cases related to tax disputes:

Example 1:

Pursuant to the repeated Article 49 of the Law No. 213 on Tax Procedure, for the property tax paid annually, the Minimum Unit Value per Square Meter is determined by the Land Square Meter Assessment Commission's decision every four years in order to establish the taxable value. This minimum unit value is determined separately for each street and avenue, and the payable property tax is calculated accordingly. Taxpayers may file lawsuits against the decisions of the Land Square Meter Assessment Commission regarding these minimum unit values set by municipalities based on factors such as the location, condition, and size of the immovable property, as well as against the property tax calculated based on these decisions. To verify the accuracy of the minimum unit value determined by the Assessment Commission's decision, local courts conduct site inspections and expert examinations (by appointing a panel of experts who perform the inspection and prepare a report), and the local court renders a decision after evaluating this report.
In lawsuits filed against the property tax calculated on the basis of this unit value, the local court also assesses situations where the use of the property is restricted due to reasons such as lack of construction permit, designation as a protected site, etc., in accordance with the Law No. 1319 on Property Tax. Appeals concerning property tax cases exceeding the jurisdictional limit are reviewed by our Chamber.

Example 2:

Regarding the refund methods stipulated in the Value Added Tax Law, namely set-off (credit) and cash refunds, general communiqués generally adopt the principle that set-off refunds are executed without requiring a guarantee or an audit report. For cash refunds exceeding a certain amount, it is accepted that such refund requests are fulfilled only upon the presentation of a tax audit report, a Certified Public Accountant Attestation Report, or the provision of a guarantee. Thus, the realization of cash refund requests exceeding the specified limit is conditional upon fulfilling certain requirements. In other words, a direct refund procedure upon request is not foreseen. In the dispute at hand, the plaintiff's refund request was rejected on the grounds that it was not filed within the prescribed period. Therefore, no examination was conducted regarding the issues mentioned above concerning the refund claim. Moreover, the plaintiff declared that a Certified Public Accountant Attestation Report would not be prepared and requested that the refund be made based on the tax office's examination results. Considering these facts, the court's decision to annul the rejection and to order the refund to be made directly to the plaintiff without subjecting the requested amount to any further examination is not legally appropriate. Accordingly, under the principle of ex officio investigation, the court should have ordered an expert examination if necessary and investigated the above-mentioned matters to determine whether the plaintiff had a refund right as of the application date and, consequently, whether the refund could be made.

Example 3:

In the case, it is claimed that following the accounting of taxes accrued according to the tax audit report, the portion of undeclared profit remaining after setting aside legal reserves has been recorded under the "570 Retained Earnings" account, thus becoming part of the equity and retained within the company without being withdrawn. If the plaintiff's claim that it holds the part of the equity profit within the company is confirmed through an examination of the plaintiff's legal books, it cannot be argued that the plaintiff company failed to fulfill its withholding obligation by distributing profit from a source subject to withholding. Therefore, pursuant to the principle of ex officio investigation, the plaintiff's claim regarding the accounting entry should be investigated by conducting an expert examination on the plaintiff's certified legal books, if necessary. Upon confirmation of the mentioned journal entry, the case should be re-assessed in light of the legal evaluations provided above.

Example 4:

In the decision of the Council of State Tax Chambers Board dated 18/09/2019 and numbered E:2018/1134, K:2019/557, regarding lawsuits filed against tax assessments due to taxpayers' failure to present their books and documents for examination despite a proper request, it was ruled on the examination procedure as follows, provided that the books and documents may be submitted to the court: "In the decision of the Council of State Unification of Case Law Board dated 08/02/2019 and numbered E:2013/3, K:2019/1, it was concluded that if the plaintiffs claim that the legal books and documents not presented to the examiner without a valid excuse can be submitted to the court, these books and documents must be requested from the plaintiff, the records in the books examined, and a legal assessment made by taking into account the views and findings of the tax administration, the other party to the case. Accordingly, contradictory precedents were unified in this direction. In this case, the insistence decision should be overturned to conduct the examination prescribed in the mentioned decision of the Unification of Case Law Board by requesting the books and documents the plaintiff indicated it could submit in the lawsuit petition."

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