



Bundesverwaltungsgericht



**Seminar organized by the Federal Administrative Court of
Germany and ACA-Europe**

**Functions of and Access to Supreme Administrative
Courts**

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Answers to questionnaire: Denmark



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**ACA-Europe Seminar on Functions of and Access to
Supreme Administrative Courts**

12 - 14 May 2019

Oberverwaltungsgericht Berlin-Brandenburg
(Higher Administrative Court Berlin-Brandenburg)

Questionnaire

The Supreme Court of Denmark

Preliminary comments on the functions of the Supreme Court of Denmark

The Supreme court of Denmark is the final court of appeal in the Danish judicial system. It has general authority, meaning that the Supreme Court have authority to decide on all legal disputes irrespective of the subject matter or nature of the dispute. Contrary to many other European countries, Denmark does not have specialized administrative courts, thus making the Supreme Court the highest and final court of appeal in cases regarding administrative law and disputes concerning the exercise of public power. In addition, the Supreme Court also decides on the constitutionality of regulation and constitutional claims. For that reason, Denmark does not have a constitutional court either.

I. Functions of the Supreme Administrative Court (SAC)

1. a) How many **instances** are known in your (administrative) jurisdiction?

The Danish judicial system is a three-tier system with 24 district courts, two high courts and the Supreme Court, which all have general authority. Thus, Denmark does not have a specialized administrative court system and therefore matters of administrative law are tried by the courts in the general court system.

Civil cases (including administrative cases) are tried by the district courts as a first instance (first tier), and the decision of the district courts can be appealed to one of the two high courts (second-tier) – either the High Court of Western Denmark or the High Court of Eastern Denmark. It is only possible to bring the case before the Supreme Court (third tier) when certain requirements are fulfilled, and it requires the permission of the Appeals Permission Board.

In order to avoid that cases which clearly ought to be dealt with by the Supreme Court as a court of final instance would have to pass through all three instances, it is possible for the district courts – with the permission of the high courts – to refer a civil case to one of the high courts as a first instance. If a case is referred to the high courts as a first instance, they can always be appealed to the Supreme Court.

b) Does your SAC also serve as a first instance court?

No.

c) If so, under what circumstances does your court serve as a first instance court?

- depending on the subject-matter?
- depending on the importance of the case?
- depending on a choice by the plaintiff (alone) or the parties (by agreement)?
- depending on other criteria?

Please explain.

N/A

d) What is the percentage of first instance cases compared to the overall case load? Please give statistical data about the quantity of cases (not about the quality or the relative working load resp.)!

N/A

2. a) Looking at the **case load** of a single judge of your SAC, can you identify larger groups of cases which make up the overall case load (quantitative approach)? I.e. Provisional proceedings, proceedings of admitting an appeal, first instance proceedings, other. What is the percentage of these groups of cases in the overall case load?

It is not possible to determine the exact case load of a single judge at the Supreme Court of Denmark, but the following can be said about the overall case load (including all types of cases) of the Supreme Court.

The overall case load of the Supreme Court

In 2017 the Supreme Court decided on a total of 105 civil appeal cases and 20 criminal appeal cases. In addition, the Supreme Court decided on 72 civil and 33 criminal cases of interlocutory appeal, which for the most part concerns disputes involving procedural issues. Moreover, the Supreme Court rendered decisions in 59 petition-cases, which is a collective term for a number of diverse types of cases relating to e.g. requests of reopening a case.

The total number of cases decided by the Supreme Court in 2017 was thus 289 cases, and the civil appeal cases makes up a majority of cases before the court, with a percentage of around 36 % of the overall caseload of the court.

b) If you can identify larger groups of cases (question a), is it possible to weigh these cases as to their complexity and thus to the amount of time required in treating them (qualitative approach)?

N/A

3. a) In appeals cases, does your SAC:

- review decisions of the lower courts with a view to the facts and to the law?
- review decisions of the lower courts with a view to the law only?
- solely answer a(n abstract) legal question?

Generally regarding the judicial review of administrative decisions in Denmark

The Danish Courts' authority to monitor and control the public administration is embedded in Article 63, section 1 of the Constitution of Denmark. Within the framework of Article 63, section 1 of the Constitution, the courts do only have the authority to review whether an administrative decision is properly founded in the law (legality). In situations, where the administrative body has – by law – been granted an amount of discretion to decide, the judicial review by the courts is more cautious, as not to overstep the boundaries between the judicial and administrative powers of the state. In such cases, the judicial review is limited to consider if the administrative decision is consistent with a number of judge-made basic principles of law governing these administrative decisions of discretionary nature. Among the most important principles are the prohibition of abuse of power, the requirement of just consideration, the principle of equality and the requirement of proportionality.

The Supreme Court of Denmark's review of decisions by the lower courts

When the Supreme Court of Denmark review the decisions of the lower courts, the Supreme Court can review all aspects of the lower court's decision.

4. What are the **purposes** of the jurisdictional work of the SAC as a court of appeals?

- the standardisation/unification of the law?
- the deliverance of single case justice?
- (further) development of the law?
- care for adherence to procedural rules of lower courts?

It is one of the main purposes of the Danish Supreme Court to ensure uniform application of the law throughout the Kingdom (Denmark, Faroe Islands and Greenland).

The task of the Supreme Court in Denmark is – in that regard – the same as the lower courts: the Supreme Court interpret the laws that the legislators have put in place; but being the last instance for interpretation, the result the Supreme Court provide will be the authoritative one. The task of interpreting legislation essentially breaks down into different sub-activities such as for instance assigning meaning to a text, where the text is unclear; applying the law to a complex situation; and harmonizing legislation that appear to yield different results when applied to the same situation.

The difference between the Supreme Court and the lower courts in that respect is that as a general rule cases can only be brought before the Supreme Court in Denmark if they raise issues of fundamental importance. The task for the Supreme Court is to give guidance for future cases that will be brought before the lower courts.

It is therefore the purpose of the jurisdictional work of the Supreme Court of Denmark to both ensure the standardization/unification of the law, the deliverance of single case justice, and the development of the law in cases of doubt.

In regards to the development of the law, the Supreme Court has played a significant part in developing the basic principles of law governing the judicial review of administrative decisions of discretionary nature. These basic judge-made principles of law have significantly impacted the decision making of the administration.

5. a) What are the purposes of the jurisdictional work of the SAC as a court of first instance?

N/A

b) What is the rationale of assigning certain proceedings to the SAC as a court of first instance?

N/A

6. a) Is there a separate constitutional court in your country?

See the preliminary comments.

b) Does the SAC in your country serve as a constitutional court?

See the preliminary comments.

c) In how far does your SAC consider constitutional law, especially fundamental rights?

Since the Supreme Court of Denmark acts both as the highest administrative-, and constitutional court in Denmark, the Supreme Court of Denmark considers matters of constitutional law and fundamental rights, when these questions are raised in cases before the court.

d) If there is a separate constitutional court, is there a special/extraordinary remedy against (final) decisions of the SAC to the constitutional court claiming violations of constitutional law?

N/A

e) If there is a separate constitutional court and your court considers constitutional law, too, how would your court handle a case, if your court deems a relevant law as unconstitutional?

N/A

f) If there is a separate constitutional court in your country, can plaintiffs challenge administrative acts also before the constitutional court (i.e. without bringing the case before the SAC first)? If so, how are actions before the constitutional court related to the proceedings before the SAC?

N/A

II. Access to the SAC

1. a) Does a party have to be **represented by a legal professional** before the SAC?

A person may represent themselves before the Supreme Court, and in certain cases a party may be represented by a close relative, though this rarely happens. If a person does choose not to have an attorney at law to represent him/her, the Supreme Court – if need be – can decide to make representation of an attorney at law mandatory.

b) If so, does the representative have to be an attorney at law/solicitor/barrister?

The representative must be an attorney at law authorized to act before the Supreme Court.

c) Are there attorneys/solicitors/barristers specially authorized to act before the SAC?

Under Danish law an attorney at law may act before the Supreme Court after having applied to the judiciary office of the Supreme Court. A declaration must be attached, confirming that the individual has acted as an attorney at law for the high courts for at least 5 years. A declaration from the relevant high court stating that the attorney is practiced in legal procedure must be enclosed as well.

It should be noted that approximately 33 % of lawyers in Denmark have the right to act before the Supreme Court.

d) Are other legal professionals admitted as representatives? I.e. legal scholars, representatives of NGOs...?

No.

e) Are there specific (different) rules for representatives of administrative authorities?

No. Recently though, a proposal from the Danish Government suggests that there should be a wider possibility for administrative authorities to be represented by their own employees. Nevertheless, this proposal does not include the Danish Supreme Court.

2. a) What are the **formal requirements** for an appeal to the SAC (e.g. precise application, reasoning,...)?

Unlike most other European Supreme Courts, the Danish Supreme Court cannot itself decide which appeals to hear (leaving aside cases appealed from the Maritime and Commercial Court). In Denmark, that authority is primarily vested in an independent council; the Appeals Permission Board. Appeals decided by one of the two high courts (second-tier) can only be brought before the Supreme Court with the permission of the Appeals Permission Board. Such permission requires that the case involves matters of legal principle, or other grounds for permitting appeal.

In order to avoid that cases which clearly ought to be dealt with by the Supreme Court as court of final instance would have to pass through all three instances, it is possible for the District Courts – with the permission from the High Court – to refer civil cases to the High Court as a first instance. If a case is referred, the decision of the High Court can be appealed to the Supreme Court without any permission.

b) Is your SAC bound by (and limited to) review the case according to specific objections (on procedural law and/or on substantive law) of the appellant?

When the Supreme Court of Denmark review the decisions of the lower courts, the Supreme Court can try all the aspects of the lower court's decision.

c) If this is the case, how does your SAC deal with its duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU?

N/A

3. Concerning the function of the SAC in your country as a **court of appeals** (i.e. not as a court of first instance):

a) Does every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all kinds of decisions of the court of lower instance?

The Supreme Court of Denmark serves as the highest and final court of appeal in cases regarding administrative law and disputes concerning the exercise of public power.

There are no fixed or formal rules regulating the extent to which precedents are binding for other courts. Thus, there is in principle no stare decisis doctrine that dictates the binding nature of principles of law affirmed by the Supreme Court. However, as Section 3 and 63 of the Danish Constitution state that the courts have jurisdiction to settle any question of what is to be regarded as applicable law, and as the Supreme Court is positioned as the highest court of appeal in the Danish Court system, the judgments of the Supreme

Courts are given particular importance. The principles of law contained in the judgments are therefore, in practice, binding in future cases, whether in the judicial or in the administrative system. Thus, when a Supreme Court judgment states that a certain interpretation of a statute is to be regarded as the correct one, this interpretation will be generally applied throughout the legal system.

Secondly, precedents are obviously limited by the facts of the case. Thus, if one case can be distinguished from the case in which the principle of law was stated, the principle of the latter is not binding in the former case.

- b) Can certain types of decisions of lower courts (e.g. provisional decisions, certain fields of law,...) not be brought before the SAC?

When the Supreme Court of Denmark reviews the decisions of the lower courts, the Supreme Court can try all the aspects of the lower court's decisions.

4. As far as in general the parties of the proceedings of the lower instance can seize the decision of the SAC (as a court of appeals):

- a) Is this right restricted by a legally established **filter** (quantitative, e.g. depending on a certain value in litigation, or qualitative, e.g. in certain fields of law, depending on a preliminary assessment)?

While the judgements of the Supreme Court can be invoked as legal basis in the proceedings at the lower courts, the permission of the Appeals Permission Board is required for the specific case to be brought before the Supreme Court.

Decisions at Board meetings are taken by simple majority. In general, there are weekly meetings. Board meetings are not public and there is no opportunity to appear before the Board.

- b) If there is a preliminary assessment, please give details:

- Which court decides (lower court or SAC)?
- If the lower court admits a case to the SAC, does this decision have binding effect on the SAC?
- If the SAC decides, is there a specific procedure of admittance before the SAC?
Please give details!
- If the lower court decides (in a negative way), can the SAC still admit a case?
- If the lower court decides, does it decide on the admission of an appeal ex officio or only on application?

See question II. 2. a).

- c) Are there special rules for filters for certain fields of law (e.g. asylum law,...)?

No. The Danish Supreme Court is not limited by certain fields of law in their assessments. Being highest court of law in the Kingdom (Denmark, the Faroe Islands and Greenland) the Supreme Court has authority to deliver judgements as a final instance. It is the responsibility of the Supreme Court to settle issues of law, ensuring the consistent, right and just application and development of the law by rendering decisions in cases which raise questions of general significance for the application of the law, or otherwise of high-reaching importance for society.

- d) If your jurisdiction knows a procedure of admittance, what are the general requirements under which a case can be admitted to the SAC?

In brief, a permission to appeal entails that a case that would not otherwise be subject to appeal can be brought before a higher court. Permission to appeal requires that the case raises issues of principle or that special circumstances call for permission.

- e) If there are more than two instances in your country, is it possible to appeal against decisions of the court of first instance to the SAC directly? Under what requirements?

In Denmark, it is generally not possible to appeal a decision directly from the court of first instance to the Supreme Court. Nevertheless, decisions from the Maritime and Commercial Court (as a first instance) can be appealed directly to the Supreme Court, granted the Supreme Court accepts the appeal.

- f) Are there specific requirements in certain fields of law?

No.

- g) If your jurisdiction knows a procedure of admittance, what is the percentage of cases admitted?

The percentage of permitted appeals in civil-cases to the Supreme Court of Denmark, as permitted by the Appeals Permission Board in 2017, was 17 %. Equal to 48 permissions of 280 applications.

5. If there is no legally established filter (Q. II.4.), has your SAC established a jurisprudence on the (in-)admissibility of appeals or of specific objections (see also Q. II.2.b)) which has the effect of a factual filter, e.g. by rejecting them as abusive, or by dismissing petty cases?

See question II. 4. a)-g).

6. Considering the functions of your SAC as a court of appeals (Q. I. 3.), how are these functions related to restrictions of the access to the SAC as discussed in Q. II.4.), as far as applicable?

See Question II. 4 a)-g).

7. a) Are there any constitutional provisions in your country with respect to having an appeal's instance?

No, there is not a specific requirement in the Danish constitution regarding having an appeal's instance.

- b) If so, does the constitution in your country provide for a full review of a first instance decision or for access to a procedure of admittance to the next instance?

N/A

8. Is there a political or academic discussion concerning any kind of reform with regard to the access to the SAC (e.g. introducing filters, restricting the filter, loosening the filter)?

No.

III. Implementation / Procedural Aspects

1. As far as your SAC serves as a court of first instance: What is the **possible content of decisions** of your SAC:

- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- other?

N/A

2. As far as your SAC serves as a court of appeal:

a) What is the possible **content of decisions** of your SAC:

- cassation of the decision of the lower court and remitting the case back to the lower court?
- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- issue a legal opinion/authoritative interpretation of the law without connection to a single case?
- other?

In response to all of the above: The Supreme Court of Denmark acts both as the highest administrative-, and constitutional court in Denmark. Where the administrative body by law has been granted an amount of discretion, the judicial review by the courts is more cautious, as not to overstep the boundaries between the judicial and administrative powers of the state. In such cases the judicial review is limited to consider if the administrative decision is consistent with a number of judge-made basic principles of law governing these administrative decisions of discretionary nature. Among the most important principles are the prohibition of abuse of power, the requirement of just consideration, the principle of equality among citizens and the requirement of proportionality between ends and

means. If the administrative body has overstepped its boundaries or the decision of the administrative body is otherwise not in accordance with the law, the Danish Courts (Including the Supreme Court) can 1) repeal the administrative decision, 2) correct the administrative decision or 3) remit the case to the administrative body.

- g) To what extent can or must your SAC rely on the facts as they were investigated and determined by the lower court?

When the Supreme Court of Denmark review the decisions of the lower courts in civil cases, the Supreme Court can try all the aspects of the lower court's decision.

3. a) When your SAC serves as a first instance court, does it apply the same rules of court procedure as the common first instance courts?

N/A

- b) If not, what are the differences?

N/A

4. As far as there is a specific procedure of admittance of appeals before the SAC, are there different rules of procedure for these procedures of admittance than for admitted appeals' procedures?

No.

5. Are there (compulsory, facultative) public hearings in procedures of admittance and or the admitted appeals' procedure?

Decisions at Board meetings are taken by simple majority. Board meetings are not public and there is no opportunity to appear before the Board.

6. Do the decisions of the SAC have an effect on other cases than the one decided?

There are no fixed or formal rules regulating the extent to which precedents are binding for other courts. Thus, there is in principle no stare decisis doctrine that dictates the binding nature of principles of law affirmed by the Supreme Court. However, as Section 3 and 63 of the Danish Constitution state that the courts have jurisdiction to settle any question of what is to be regarded as applicable law, and as the Supreme Court is positioned as the highest court of appeal in the Danish Court system, the judgments of the Supreme Court are given particular importance. The principles of law contained in the judgments are therefore, in practice, binding in future cases, whether in the judicial or in the administrative system. Thus, when a Supreme Court judgment states that a certain interpretation of a statute is to be regarded as the correct one, this interpretation will be generally applied throughout the legal system.

Generally, the in-practice-binding nature of a judgment depends on the court having delivered the judgment (Supreme Court judgments being particularly suitable to form precedence), whether the judgment is formulated in concrete or general terms, how old the judgment is, and whether it contains dissenting opinions.

- a) Are lower instance courts bound by law to follow decisions of the SAC in other (similar) cases?

See question III. 6.

b) If so, under which conditions can they deviate from a decision of the SAC?

As no formal stare decisis doctrine applies in Danish law, there is no special way to review and overcome a certain principle of law as affirmed by the Supreme Court. Instead, during a court case, the parties to a dispute can argue that a certain precedent is no longer applicable. Generally, precedents – as they may be the result of specific conditions at the time of judgment – are weakened over time.

Thus, the limits to the binding nature of a judgment depend on a concrete evaluation of the specific principle of law at stake.

c) Is the SAC bound by law to follow its own previous decisions?

The Supreme Court of Denmark is not bound by law to follow its own previous decisions.

Legislation is the primary legal source in Denmark. Thus, if legislation is later passed that alters the principle of law at stake, the precedent is no longer considered applicable law.

d) If so, under which conditions can it deviate from its previous decision?

N/A

7. Are the judges of your SAC bound by the decisions of other sections within your SAC?

N/A