



Bundesverwaltungsgericht



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

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

Berlin, 13 May 2019

Answers to questionnaire: Sweden



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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

Introduction

One of the most important tasks of ACA- Europe is to foster mutual understanding of the jurisprudence of the member states. The recognition and evaluation of the jurisprudence of the Supreme Administrative Courts of other member states is a key prerequisite for the development of a European legal community. For this purpose it is not sufficient to be able to read the decisions of the other member courts. In order to really understand their jurisprudence it is also eminent to understand under what conditions and traditions our colleagues perform their duties.

The conditions Supreme Administrative Courts work under are among others strongly determined by the specific functions a Supreme Administrative Court has in its national legal order. The specific functions on their part might have strong influence on how the access to the Supreme Administrative Court is designed and what scope of assessment of a case is applied. This leads to a number of questions: Which “filters”, for example, does administrative procedural law incorporate into the procedure, if it does at all? Does the procedure require a special admission or can every case be brought to the Supreme Administrative Court by the parties? Are only legal questions or also facts to be discussed?

Dealing with these questions the seminar to be held in Berlin from 12th to 14th May 2019 hopes to contribute to a deeper mutual understanding of the decisions of the member states’ Supreme Administrative Courts. It shares this objective with the closely linked seminar taking place in Dublin on 25th and 26th March 2019, which will lay an emphasis on the internal mode of decision making, asking how our courts decide. Both seminars will deal with different aspects of the ways of our judicial conduct, deliberation and reasoning which are all important to understand the jurisprudence of the different member states.

These aspects cannot be studied efficiently from manuals, so ACA-Europe seminars are the right place to assess these important features of the judge’s daily work.

I. Functions of the Supreme Administrative Court (SAC)

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

The general administrative system involves a decision taken by an administrative authority as a first instance. The levels of administrative courts can thereafter try appeals of those decisions.

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

Yes. In a few types of cases SAC is first instance.

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.

The practically important examples are two. The first regards applications for judicial review of certain decisions by the government affecting individuals, which are made directly to SAC according to a specific law on such procedures. The second concerns certain tax-law decisions taken by a special body, the Board for Advance Tax Rulings (Skatterättsnämnden) on issues of planned economic actions and their effect on taxation, which are appealed directly to SAC. In both cases it is the decision-maker and the subject matter of the case that stipulates that SAC is the first (and only) court to try it. According to a constitutional provision, SAC is also first instance in cases concerning the premature termination of the tenure a judge in the Supreme Court due to sickness or serious and repeated misbehaviour. It has never been applied.

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.)!

SAC handles around 8000 cases per year. Of these around 200 are actually tried on the merits as the majority are not granted leave to appeal. The number of cases concerning appeals of government decisions was 19 in 2017 and 25 in 2018. It is thus a minor type of case statistically, with less than 0.03 % of the total case-load. In regard of the number of cases actually dealt with in substance, they consist of around 10 % of the total. Cases concerning Advance Tax Rulings amounted to around 33 in 2017 and 55 in 2018. Again, this is a very minor part of the total case-load of the court, somewhere around 0,05 %. When only counting cases decided on the merits, they stand for around 20 % of the total.

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?

SAC is a supreme court with the specific task of giving guidance to lower courts and public authorities. The legislation on appeals to the SAC includes a filtering system of leave to appeal that gives the court almost full leeway to dismiss any appeal that does not include issues of principle interest that are suitable for providing precedence (exceptions mentioned above under 1 c)).

The case load of a single judge thus largely consists of decisions on leave to appeal, the vast majority which are in the negative. Every judge will handle more than 500 such cases each year. These cases make up more than 90 % of the total case-load.

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)?

The cases are mostly easy in the regard that it is quite simple to identify that they raise no question that deserves the attention of SAC. Many such cases include the assessment of evidence that raises no issue of principle or of the interpretation of law. A rough estimation would be that 80 % of these cases are of this character.

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?

SAC reviews cases from the lower courts almost only on issues of the interpretation of law. However, there is a "safety valve" in the rules on leave to appeal that permits SAC to try cases in exceptional circumstances also with regard to the facts of a case or the application of law, even if no legal guidance as such is necessary. Obvious and grave legal or factual mistakes can justify the use of this provision.

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?

The two main purposes are the standardisation and unification of the law and (further) development of the law. As explained under 3. there is some room for reviewing the adherence to procedural rules of lower courts as well.

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

In the cases of judicial review of decisions by the government, it is to provide access to court to individuals in order to fulfil Sweden's obligations under article 6 of ECHR

and the Aarhus Convention . In the cases concerning Advance tax Rulings, it is a way of both providing guidance on issues that may come up in the future and to be able to correct the legal interpretations of the Board for Advance Tax Rulings.

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

See above.

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

No.

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

No. And yes. According to the Swedish constitution, all courts have the power of judicial review (like in the USA and Norway), that is to check that legislation and action of state bodies are in accordance with constitutional provisions on legislative powers, separation of power and protection of individual rights. In that latter sense all courts can be said to have a function like a constitutional court and the highest courts are of course of special importance in this regard due to their role of providing guidance for other courts and authorities.

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

Whenever it is relevant for a specific judgement. Around five to ten cases per year deal explicitly with such issues.

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?

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?

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?

II. Access to the SAC

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

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

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

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

There is no requirement to have a legal professional as representative before SAC. Neither is there any requirement to have a representative at all, an individual can argue his or her case by themselves. Any person – not being unsuitable for external reasons – can be the representative of a party.

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

Not in this regard. There can however be public law limits on who may represent an authority in a certain regard.

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

Yes there are some formal rules, but they are only on such things as information about the parties (name, address etc.), requirements necessary for the court to be able to handle the appeal in practice.

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?

Not really, even if that is the starting point. If the facts and the situation described by the appellant would trigger different legal provisions than the ones being referred to, nothing stops the SAC from including such rules in its 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?

SAC will generally consider a referral if the case is given leave to appeal (see above). If so, art. 267 and relevant case-law will guide our decision whether or not the appellant argues for such a referral.

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 question in a) is understood as meaning “Does every party ... have the right to appeal to the SAC ... “. The answer is that the general rule applies that the party affected in the negative by the final decision has the right to appeal.

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

The decision of SAC will generally contain provisions on what part – if any – of a lower court’s decision that will still stand and what the outcome will be. It will thus most of the time be “self-executing”, as SAC is not a court of cassation but can (and often

will) decide the case in substance. In cases with complicated economic issues, final recounting of i.e. taxes or the right to social insurance can be left to the authority in question.

Some procedural issues cannot be brought to SAC by themselves, but only as part of an appeal of the final decision in question.

Opmerking [HJ1]: Jag tror inte dom menar alla beslut utan bara vissa beslut i våra underinstanser.

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)?

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?

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

Again it is understood that the question relates to the seizing of the SAC, not the decision. Access to the courts of appeal is generally restricted by a filtering system (leave to appeal). But this concerns the ordinary procedure of appeal, before SAC has tried a case. After SAC has tried a case, not other court can add other restrictions to the effect of that judgement in its execution.

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

This seems to concern the procedure of leave to appeal. As mention above, only cases of principle interest and cases that can guide lower courts and authorities on issues of law are permitted for leave to appeal in SAC. In exceptional cases a case might be allowed for reasons of grave legal or factual mistakes in the courts below.

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?

No.

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

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

If this question concerns SAC, see above (I 1 d)). Of around 8000 appeals, maybe 150 are given leave to appeal, somewhere between 1 and 2 %.

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?

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?

As SAC is not a "pure" court of appeal, but rather a specialised supreme court with the task of providing case-law within a system of three levels of administrative courts, the function of the system of leave to appeal to SAC is to make it possible for the court to focus on that task.

7. a) Are there any constitutional provisions in your country with respect to 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?

The constitution provides for the existence of a three level administrative court system with SAC "at the top", but does not specify the respective tasks of different courts in detail. This is done in law.

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)?

There is some discussion on whether cases brought directly from the Board for Advance Tax Rulings (see above) to SAC should be subject to the system for leave to appeal, as they are now exempt from such restrictions, but it appears not to be politically feasible for the time being. The number of cases is not insignificant and some of them are not of general interest at all, thus engaging SAC in deciding atypical cases.

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?

This is dependent upon the procedure in question.

In procedures regarding judicial review of governmental decisions, SAC is more or less a court of cassation. This means that SAC will try the legality of the decision and remand the case for a new decision if it is found faulty.

In procedures concerning the decisions of the Board for Advance Tax Rulings, the issues consist of purely legal questions on how future economic action will be dealt with in tax law. SAC can decide the cases in substance and this will be binding for the Tax Authority in regard of the individual concerned.

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?

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

SAC may only try actual cases that have been tried in one of the administrative court of appeals. No legal opinion by SAC outside of such a case has any legal binding force (even if it does happen that SAC would give arguments for how similar cases could be decided – obiter dicta).

In general SAC can either remand a case to the court or authority that has taken the appealed decision (cassation) or try the case in substance, replacing any decision by lower courts/authorities with its own judgement. This can include the administrative act and any discretionary part of that as well as directions to administrative authorities or courts to take a specific action. There are exceptions to this, however, the procedure concerning governmental decisions (see above) being one, the procedure on complaints on local governments decisions being another. In these cases, the legality of the decision is in focus and SAC can only uphold or quash the decision.

New facts and evidence can be brought before SAC. However, in cases that are subject to leave for appeal, only if there are special reasons for not having been able to produce them earlier (Administrative Procedure Act, § 37).

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?

Yes

b) If not, what are the differences?

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?

The question is somewhat difficult to understand. All appeals being subject to leave for appeal are handled in the same way before any such decision. If a case is given leave to appeal, the procedure continues and all such cases are handled in the same way.

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

No.

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

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

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

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

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

The role of SAC is to give guidance to lower courts and authorities and in most cases our decisions have such an effect, changing the interpretation or application of legal provisions that SAC has dealt with. Lower courts are however not bound by law to follow judgements from SAC. It is generally said that the legal reasoning of SAC is a guide for lower courts and its "binding" effect dependent upon its legal soundness and clarity. If a lower court is unconvinced by the SAC:s reasoning, the judge there is free to make another interpretation of law, subject of course to appeal to higher courts. Such "revolts" happen, but seldom. SAC is – by internal tradition – bound by its own decision and in order to deviate from an established case-law, a new case must be decided with all judges of the court (plenum) participating. This happens rarely (not once per year), but is on the other hand not unknown.

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

Yes, to the same extent as SAC in general is bound by its judgements (see 6.) above)