



**Seminar organized by the Supreme Court of Ireland and
ACA-Europe**

**How our courts decide: The decision-making processes
of Supreme Administrative Courts**

Dublin, 25 – 26 March 2019

Answers to questionnaire: Germany



Seminar co-funded by the «Justice » program of the European Union

ACA Seminar
How our Courts Decide: the Decision-making Processes
of Supreme Administrative Courts
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Supreme Court of Ireland

Questionnaire

I. Introduction

1.1 The seminar will focus on the process followed by our national Supreme Administrative Courts in reaching their decisions. Each court will have its own formal rules, whether provided for in substantive law or in the internal rules or formal procedures of the court. Furthermore, each legal system will have its own culture and traditions which will inform the way in which the decision making process progresses.

1.2 The purpose of this questionnaire and the seminar which will follow is to provide a greater understanding of both the similarities and differences which exist between the decision making process in the respective Supreme Administrative Courts. It is hoped that this will provide useful information both for comparative purposes but also to give each Supreme Administrative Court a better understanding of the process which may have led to decisions of the courts of other EU member states.

1.3 The Dublin seminar on the 25th and the 26th March 2019 for which this preparatory questionnaire is being distributed is envisaged as a sister seminar to that which will be organised by our German colleagues in conjunction with the General Assembly of the 12th to the 14th May 2019 in Berlin. While there may be some small and unavoidable overlap between the issues raised it is intended that the Dublin Seminar will focus on the decision making process of the court whereas the Berlin Seminar will focus on access to the Supreme Court and its functions including, for example, the question of whether ‘filters’ are provided for in administrative procedural law.

1.4 Further, while this project is independent of the ACA-Europe transversal analysis project on ‘The Quality of Judgments’, there will be an inevitable link between certain elements of the questionnaire formulated for that project and aspects of this questionnaire.

1.5 Please note that when answering the questions in this questionnaire it is not (with the exception of the statistical questions regarding caseload under Part C) necessary to consider proceedings which lead to the making of provisional orders.

1.6 In addition, in the event that your institution undertakes legislative functions such as providing advice on proposed legislation as well as the function of adjudicating cases in the context of court litigation, it is not necessary to include information pertaining to the legislative functions when responding to the below questions.

II. Questions

A. Background questions in relation to your Supreme Administrative Court/Council of State

1. What is the formal title of your Supreme Administrative Court/Council of State ('institution')? Please provide the name of your institution in your national language and the English translation if possible.

Bundesverwaltungsgericht (Federal Administrative Court)

2. What country/jurisdiction does your institution serve?

Federal Republic of Germany

3. Where is your institution based (i.e. its seat)?

Leipzig, Federal State of Saxony

4. Please provide a link to your institution's website (if available), including a link to the English or French version or pages of the website if available.

www.bverwg.de (German)

www.bverwg.de/en (English)

www.bverwg.de/fr (French)

B. The Structure of your Supreme Administrative Court/Council of State

5. Please provide an outline of:

- (a) The main functions of your institution (e.g. a first and last instance court, court of cassation or court of appeal);

The main function of the Federal Administrative Court is to serve as a third instance court for the purpose of establishing the uniform interpretation and application of

federal law. In this function it only treats questions of law, not of facts. The first instance administrative courts and the second instance high administrative courts are not federal, but state courts. They apply federal and state law. In legal proceedings concerning state law the high administrative court will be the second and last instance. Only in a few enumerated fields of law (e.g. law of administrative procedure, law of civil servants) the Federal Administrative Court is also competent to decide on the interpretation and application of state law.

In some enumerated fields of law the Federal Administrative Court also serves as a first (and last) instance court deciding on questions of law and facts. This concerns mostly major planning decisions (e.g. motorways, waterways, train tracks) and law suits which are directed against the Federal Intelligence Agency (Bundesnachrichtendienst – BND).

In some enumerated subject-matters the Federal Administrative Court is also a second instance (only in questions of law), where the high administrative courts of the federal states serve as first instance courts.

Finally the Federal Administrative Court is competent in military matters serving as the (civil) appeals court for the decisions of the military courts, mostly in questions of disciplinary proceedings and other litigation between soldiers and the military administration.

(b) The nature of your institution (e.g. a Supreme Administrative Court or a Supreme Court with jurisdiction in other areas of law);

The Federal Administrative Court is exclusively competent for administrative law. Yet it has to be stated that there are two more “public law” jurisdictions in Germany. These are the fiscal courts, competent mostly of tax law, and the social courts.

and

(c) Its place within the overall court structure in your country/jurisdiction.

The Federal Administrative Court is the only German supreme court in the field of administrative law. There are four more supreme courts: The Federal Supreme Court (Bundesgerichtshof), competent for civil and criminal law, the Federal Labour Court (Bundesarbeitsgericht), competent for labour law, the Federal Social Court (Bundessozialgericht), competent for social law, and the Federal Fiscal Court (Bundesfinanzhof), competent for tax law.

The Federal Administrative Court is competent to review the decisions of 15 high administrative courts and 51 first instance administrative courts.

The Federal Constitutional Court (Bundesverfassungsgericht) has a function outside of these five jurisdictions. It is competent to review questions of constitutional law only. Its jurisdiction is relevant to the work of the Federal Administrative Court especially in two proceedings. The Federal Administrative Court may submit cases in a preliminary procedure when it considers a law unconstitutional. Only the Federal Constitutional Court has the power to abrogate parliamentary laws. Secondly, a party which considers its fundamental rights violated by a decision of the Federal Administrative Court may seize the Federal Constitutional Court by way of constitutional complaint.

C. Caseload

6. How many judges¹ serve on your institution?

56

7. How many cases² are brought to your institution per year on average?

¹ Please include figures concerning judges only and not the number of Advocates General (which will be dealt with under question 11) or judicial assistants/clerks/researchers (which will be dealt with under question 13).

² In this question 'cases' means the average number of incoming cases per year, whether litigious (in which the judge(s) decides a dispute) or non-litigious (where a case in which there is no dispute is brought before the Supreme Administrative Court) and in all categories of cases if your Supreme Administrative Court does not deal solely with administrative law cases (for example, civil and commercial law, criminal law etc). It refers to both cases decided in writing and by oral hearing. It includes applications submitted to a Supreme Administrative Court before any filtering process is undertaken if such a mechanism exists.

1.500

8. How many cases does your institution dispose of³ per year on average?

1.500

D. Internal organisation of the Supreme Administrative Court

9. Does your institution have chambers/divisions?

Yes, they are called senates.

10. If yes, provide the following details:

a. How many chambers/divisions?

10 regular review senates plus two senates in the field of military law

b. How many judges serve in each chamber/division?

A review senate must be composed of five judges. In a few senates (usually senates with a higher caseload) six judges serve, yet only five of them will decide a case. The composition rotates from case to case.

c. The nature of particular areas of specialisation in your Supreme Administrative Court by chamber or otherwise (if any) (e.g. commercial division, environmental division etc.).

Each senate has a specific competence. The "Präsidium", a committee which is composed of judges elected by the plenary of judges of the court and which is presided by the president of the court decides on the competence of the senates every

³ Please indicate the average number of cases that come to an end in your Supreme Administrative Court each year either through a judgment or any other decision that ends the procedure, whether it has been considered in writing or by oral hearing.

year. Yet, usually only minor changes are put into effect in order to grant continuity and to preserve the expertise of the judges.

In a simplified picture the competence of the senates is as follows:

- 1. Senate: Residence, Migration, Asylum*
 - 2. Senate: Civil Servants*
 - 3. Senate: Health, Food, Agriculture, Street Traffic, Railroads*
 - 4. Senate: Urban Planning, Building Permits*
 - 5. Senate: Social Law (Scattered parts, not in the competence of social courts)*
 - 6. Senate: Universities, Exams, Media, Telecommunication, Police, Intelligence, Guns*
 - 7. Senate: Environment, Waterways, Railroads, Freedom of Information*
 - 8. Senate: Expropriation (including consequences of German reunification), Commerce and Economy*
 - 9. Senate: Streets, Motorways, Fees*
 - 10. Senate: Municipalities, Economic Self-Administration, Subsidies*
- 2 Military Senates*

d. Do judges move between chambers/divisions? If yes, how is such movement determined?

The “Präsidium” (see question c) also has the competence to allocate the judges to a senate and to decide that a judge moves from one senate to another. Yet, usually judges remain in the same senate for many years (sometimes from their election until retirement). Reasons for movements may be a special expertise of a judge, the wish of the judge to move or the necessities caused by vacancies.

e. Is it possible for a judge to be assigned to more than one Chamber at a time?

Yes, this is possible and it happens. In most cases the “Präsidium” (see question c) tries to avoid this. There is a certain tradition that the eighth and the tenth senate “share” rapporteurs. The reason for this is that the tenth senate is presided by the President of the court and has thus – due to his other duties - a smaller case load.

f. Are there different levels of chambers, for example, an ‘ordinary chamber’ and Constitutional Review Chamber?

The ten review senates are all on the same level; only their competence as to the subject-matter varies (see question c). As “special” senates may be considered the military senates and the so-called “F-Senate”, competent for a special procedure viewing files in camera which are marked confidential.

g. How many judges are usually assigned to consider and decide an average case?

According to the general rule five judges consider and decide a case. Yet, if the high administrative court has not admitted the review of the case admittance has to be granted (or denied) by the Federal Administrative Court in a preliminary procedure. This decision is taken by three judges.

h. Does the number of judges assigned to decide cases vary? If yes:

(i) Based on what rules or factors?

(ii) Who decides how many judges are assigned to consider and decide a particular case?

See question g.

i. Is there a procedure for certain cases to be elevated to a grand chamber or plenary session? If yes, how is this decided and how many judges decide?

Each senate (deciding with five judges) may/must elevate a question of law to the grand senate of the Federal Administrative Court, if it wants to deviate from the jurisdiction of another senate, if this other senate has upon request decided to maintain its jurisdiction.

j. Are judges assigned certain additional roles (e.g., rapporteur, case manager, other specific responsibilities etc.) relating to a particular case?

If yes, specify the additional roles and explain how these roles are assigned.

There is a rapporteur and a co-rapporteur for each case. The cases for which a senate is competent are distributed among the judges of the senate according to a general distribution plan. This plan is convened by the judges of the senate for every year in advance. It must distribute the cases according to abstract criteria (typically the subject-matter or the order of incoming cases). In some (usually more complex) cases the president of the senate assigns the case to a pre-rapporteur. This is not a judge of the senate, but a research assistant who does not decide the case. In all review cases the rapporteur will draft an opinion which usually not only contains the main thoughts of the solution proposed, but also alternative solutions. The opinion of the co-rapporteur will usually be shorter, depending on the complexity of the case and the variety of opinions. After the senate has decided the case it is the duty of the rapporteur to draft the judgment.

Decisions in the preliminary admittance procedure are also prepared by the rapporteur. Here, it is rather unusual to prepare the case by a written opinion. The rapporteur will directly draft the proposed decision, possibly after an oral deliberation with the two other judges involved.

k. How significant is the role of the Chief Judge or President of the court in determining:

(i) The assignment of cases to chambers or panels of judges;

The cases are assigned to the senates by an abstract distribution plan which is convened by the "Präsidium" (see question c) before the beginning of each year. The president only has one vote in the "Präsidium", just as the other members. On a factual basis his authority may give him a stronger influence. Yet the decisions of the Präsidium are those of the committee, not of the president.

(ii) The number of judges assigned to consider and decide a particular case;

This question is regulated by law, so the president has no influence to this respect.

(iii) The assignment of certain additional roles to judges (see (f) above);

The decisions about the competence of a single judge are met by the Präsidium (see question c) or the senate of the judge. In this jurisdictional field the president has no special powers. The president may assign administrative duties to judges. This lies outside of their jurisdictional work (e.g. rapporteurs for general administration, for IT or for ACA Europe).

(iv) Any other matters you consider relevant in this context. For example, are there any other special panels, General Assemblies or bodies of judges to which cases are assigned.

See answer to question iii.

11. Does the position of Advocate General exist in your legal system? If yes, please indicate:

- (i) The number of Advocates General or equivalent members of your institution;
- (ii) The function of the Advocate General in the context of your institution; and
- (ii) The extent to which the Advocate General participates in proceedings before your institution.

There is no Advocate General in the sense it has e. g. at the European Court of Justice. Yet, the Code of Administrative Court Procedure provides for a “Representative of the Interests of the Federation at the Federal Administrative Court”. He/she is established in the Federal Ministry of the Interior. He/she may attend written and oral proceedings before the court. In practice the Representative participates in selected cases of special importance to the Federal Government.

E. Research and Administrative Assistance

12. What level of research and/or administrative assistance is available to your institution?

On the one hand there is the professional documentation and library service (information services). On the other hand there is about one research assistant at the disposition of every senate. These research assistants are mostly young first instance judges who spend two to three years at the Federal Administrative Court by means of a delegation. In addition there is secretarial, case management and language support.

13. How many officials provide legal research support to your institution?

The judges are supported by eleven research assistants, one per senate. The information services are composed of about 20 officials. They also fulfil other duties than the research support of judges.

14. Do officials which provide legal research assistance to your institution also provide administrative assistance?

These tasks are mostly assigned to different units.

15. Are research and administrative supports pooled (i.e. shared between judges) or assigned individually to judges or is there both a pool and some researchers assigned to individual judges? Please explain.

As explained before, one research assistant is assigned to one senate. The administrative support (secretarial, case management, language control) is consolidated in so-called service units. A service unit comprises about six officials with different professional backgrounds. One service unit may be responsible for just one or for several senates, depending on the workload.

16. If research and administrative support is assigned individually to judges, is there also a research and documentation or equivalent department which provides additional pooled research support?

See answers to questions 12. and 13.

17. To what extent, if at all, do assistants/*référendaires* provide support to judges in your institution as regards specifically:

- (a) Preparation of pre-hearing documents, such as a memorandum to assist the judge prior to the hearing of a case;
- (b) Undertaking legal research to assist a judge to make a decision in a case;
- (c) Discussing aspects of a case with a judge orally or in writing;

- (d) Consideration and evaluation of the relevant law;
- (e) Undertaking comparative law analysis;
- (f) Drafting sections of judgments;
- (g) Putting forward a suggested or preliminary decision for judge(s) to consider;
- (h) Any other element that you consider is relevant in this context.

(a) to (e): Yes. (f) and (g) are not formally excluded, but unusual. The main task of the research assistants is the drafting of the so-called pre-opinions (cf. answer to question 10. j) before the rapporteur drafts his/her opinion. This work is done to prepare the judges of the senate for the preliminary deliberation which usually is held two days before oral hearings.

F. Oral hearings

18. Is there an oral hearing in all cases?

There is an oral hearing practically in all review cases. As an exception, the preliminary admittance procedure is a merely written procedure. Also, parties may waive their right to an oral hearing. In this case the senate may (but does not have to) decide without an oral hearing. Statistically it is the minority of cases in which the parties waive this right.

19. If there is not an oral hearing in all cases:

- (a) What percentage of cases typically involves an oral hearing?

There are no official data on this question available. 90 % could be a good guess.

- (b) On what basis (formal rules or informal determinations) is it determined which cases will have an oral hearing?

See answer to question 18.

- (c) Can parties to a case request an oral hearing? If yes, what is the significance or consequence of such a request?

See answer to question 18.

20. Does deliberation take place between the judges before the oral hearing? If so, is this the practice in all cases or in some cases?

There is a typically extensive deliberation a few days before every oral hearing.

21. Are time limits imposed on parties making oral submissions before your institution?

There are no time limits. It is the art of conducting the oral hearing to terminate in due time. Most oral hearings will last one to two hours. In exceptional cases oral hearings can extend over several days.

22. Are parties permitted to address the Court for an uninterrupted period of time? If so, for how long?

There are no strict rules about this. The constitutional right to be heard and the duty of the president of the senate to conduct the hearing will have to be coordinated.

23. Is discussion in the oral hearing confined to matters set out in the statements or written submissions of the parties or may it involve broader legal discussion between the lawyers/a party and the Court?

The parties should have brought forth all legal arguments in their written submissions. Yet there is no limit to new arguments in oral hearings, especially since the dialogue style hearing may trigger new lines of argumentation.

24. Are parties permitted to file further written submissions following an oral hearing?

The court may permit further submissions and set a time limit if one party cannot properly react to new arguments or facts brought forth during the oral hearing (note: Before the Federal Administrative Court in most proceedings only questions of law can be subject of consideration). Even if such a permit was not granted the court would have to decide within its margin of due discretion whether it is appropriate to consider further submissions filed

after the oral hearing, if it has not yet delivered its judgment. If necessary it will have to reopen the oral hearing.

25. Is it possible for a judge to be excluded from proceedings based on a legal opinion expressed during an oral hearing giving rise to the perception of bias?

This would only be possible if the judge showed a lack of impartiality in the way he presented his legal opinion. The mere fact that he presented a legal opinion should not lead to an exclusion of proceedings; the presentation of a legal opinion is part of the “discussion in factual and legal terms” prescribed by law. A legal opinion expressed during this discussion, which forms the core of the oral hearing, would always have to be considered a preliminary legal opinion. Only if the judge at the same time refused to hear or consider further arguments brought forth by the parties, could this lead to his exclusion.

G. Written submissions of parties

26. What is the usual length and level of detail of written submissions of parties provided to your institution? Please indicate the approximate number of pages (1.5 line spacing) of a ‘typical’ written submission

- | | |
|-------------|--------------------------|
| 0 – 5 pages | <input type="checkbox"/> |
| 5-10 pages | <input type="checkbox"/> |
| 10-20 pages | <input type="checkbox"/> |
| 20-30 pages | <input type="checkbox"/> |
| 30-40 pages | x |
| 40-50 pages | <input type="checkbox"/> |
| 50+ pages | <input type="checkbox"/> |

20. Is there a maximum length for written submissions filed by parties in a case? If yes, please provide details.

There is no limit. In rare cases submissions may be over a thousand pages long.

H. Consideration of the case

21. Can your institution raise points of law of its own motion (i.e. ex officio) or is it limited to the points raised by the parties to the case?

The Federal Administrative Court is not only allowed, but obliged to assess the case ex officio. This means that also points of law which have not been presented by the parties are to be stressed, if the court considers them relevant.

22. How is discussion, deliberation and decision-making structured in your institution?

There is a preliminary deliberation a few days before the oral hearing. In this deliberation also the research assistant and the sixth member of the senate (should there be six – see question 10 b) will participate. This deliberation is prepared by the rapporteur, the co-rapporteur and sometimes the research assistant (pre-rapporteur) by extensive written legal opinions. Every other member of the senate may also contribute written opinions. All of these written opinions are at the disposition of each judge of the senate before the preliminary deliberation.

During the days, weeks or months of drafting a written legal opinion there may be informal discussions between members of the competent senate. During the preliminary deliberation usually the rapporteur starts to present his legal opinion, followed by the co-rapporteur and the other members of the senate. A first round of concise statements will be followed by an open discussion among the judges. Of course, form and style of discussion may vary with the case or the senate. There are no official rules about this, only tradition.

Immediately after the oral hearing (or after the hearings of one day) the final deliberation will take place. It very much follows the concept of the preliminary deliberation, but this time only the five deciding judges and the research assistant are present. The final decision (only the Order) will usually be delivered in public at the end of session.

23. Does your institution deliberate in a number of different languages? If so, please provide some detail. For example, does your institution have more than one official language?

No, only German is the official language. In practice in some subject-matters English submissions (e.g. of international technical expertise...) are accepted in written although the court is not obliged to do so.

24. Are there rules, processes, or conventions about how discussions and votes take place?

If yes, specify the relevant rules etc.

See answer to question 22.

25. How are preferences for particular outcomes communicated between the judges?

See answer to question 22.

26. Where there is an oral hearing, to what extent does the oral hearing (as opposed to written submissions) influence the court's discussion, deliberation and decision-making?

The preliminary deliberation before the oral hearing is called a preliminary deliberation because it is preliminary. In practice, since only questions of law (not of fact) are subject of the review procedure and since the parties have had the opportunity to elaborate their legal arguments in three instances, the oral hearing in the majority of cases does not alter the result of the preliminary deliberation. Often the parties do not succeed in producing new arguments. Yet, experience shows that in quite a few cases the oral hearing alters the legal arguments considered relevant by the court or even the outcome of the case.

In cases in which the Federal Administrative Court also considers questions of fact the importance of the oral hearings is even larger.

27. Are there any other procedural rules or conventions that you believe impact significantly on the way in which cases are considered?

I. The decision of the institution

28. Is the decision delivered on behalf of the institution or is it open to each individual judge assigned to the particular case to deliver a separate judgment?

The senate delivers a uniform decision. Should the judges not agree, the uniform decision will be the one of the majority. The minority judges will have to sign this decision. There is no room for separate opinions, neither oral nor written.

29. If the decision is delivered on behalf of the institution, does one judge write for the institution? If not, please explain how the judgment of the court is written for your institution. Are there formal rules or informal practice governing this?

The rapporteur will draft the decision on the basis of the argumentation brought forth by the majority judges in the deliberation. This will be his task even if he belongs to the minority. The draft is then passed from judge to judge. Every judge may write "pencil amendments" as proposals and attach his initials. Every judge will have the opportunity to see the proposed amendments of the other judges and add his/her initials if he/she agrees with the proposed amendment. Every amendment which in the end obtains three or more initials (three being the majority of five) is accepted and will be incorporated in the text of the final judgment.

30. How is the court's ruling/reasoning recorded?

The majority line of argumentation will be subject of note-taking by the judges, especially the rapporteur. The Order itself will be signed at the end of the deliberation. In case of public delivery there will be a court protocol recording the Order. The full judgment (including the motivation) will also be signed (after the procedure described in question 29) and sent to the parties.

31. Is there a distinction in your Supreme institution between the Judgment (i.e. reasons) and the Order (i.e. the operative ruling of the court)?

See answer to question 30.

32. Are there any other distinctions of this nature in the decisions delivered by your institution?

J. Timeframes for the decision-making process

33. How long, on average, between consideration of a case by your institution and the making of a decision? Please indicate the approximate length of time between the introduction of the case into the system of the Supreme Administrative Court (rather than the time when the case first comes before a judge for consideration) and the final resolution of the case through, for example, the pronouncement of the final decision.

Most review cases and first instance cases can be decided within one year. The timeframe for the preliminary admittance procedure should not exceed six months. In case of admittance the time for the review procedure (one year) must be added to this time.

34. Is there a specific mandatory timeframe for deciding all cases? If yes, please provide details.

There is not. The only consequence of exceeding the timeframes described in question 33 is that the case will have to be reported to the president of the court and a short reason should be given for the excess. Most senates report some cases at the relevant report dates (twice a year). The report does practically have no consequence except that it adds to the motivation of the judge to terminate the case.

35. Are there specific mandatory timeframes for particular categories of cases? If yes, please provide details of the categories of cases and the relevant timeframes.

See question 33.

36. If there are no mandatory timeframes for deciding cases, is there a certain amount of time that it is considered appropriate for the decision-making process to take? If yes, please provide details.

See questions 33 and 34.

37. If there are mandatory timeframes applicable to the decision-making process in your institution, is it ever difficult for the court to abide by these timeframes? If yes, what are the main reasons for this?

Not applicable.

38. If there are no mandatory timeframes for deciding cases, but by convention or practice, there is a certain amount of time that is considered appropriate for the decision-making process to take, is it ever difficult for the court to abide by this timeframe? If yes, what are the main reasons for this?

Not applicable.

K. Developments over time

39. Have the processes you have outlined in the preceding answers been subject to any significant changes in the last five years?

No significant changes. The workload changes now and then; sometimes specific subject-matters produce a very heavy workload, quicker than the Präsidium (see question 10 c) can react. In such a case the relevant senate will have to report more cases as in excess of timeframes (see question 34). Since the reasons for this will be visible (increased workload) there is no real consequence except that the Präsidium will see to lighten the burden of the specific senate.

40. If yes, have these changes had an effect on the way cases are considered and decided?

No.

41. Do these changes constitute an improvement in your view? If yes, please provide details.

I. Further comments or observations

42. Is there anything about your institution and/or its particular decision-making processes that you believe is not captured in the questions above, or any contextual information that you believe would aid our understanding of the decision-making processes in your court?

Thank you for completing this questionnaire.