



**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: Switzerland



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Bundesgericht

Federal Court

Federal Court

ederal Court



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Seminar of the ACA-Europe

**How do our courts take a decision: Decision-making process
of Supreme Administrative Courts**

Dublin, 25-26 March 2019

Supreme court of Ireland

Responses of Switzerland

Lawful procedure¹

¹Prepared by Judge Thomas Merkli

A. General questions regarding your Supreme Administrative Court/Council of State

1. What is the official title of your Supreme Administrative Court/Council of State (“institution”)? Please specify your institution’s name in your national language and its English translation, if possible.

Bundesgericht
Federal Court
Federal Court
Federal Supreme Court

2. Which country/territory does your institution serve?

Switzerland, as well as Liechtenstein in matters pertaining to value added tax.

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

Main seat in Lausanne (five Courts), secondary seat in Lucerne (two Courts).

4. Please provide a link to the website of your institution (if applicable), with a link to the English or French versions or pages of the website, if applicable.

www.bger.ch

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

5. Please describe in brief:

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

Court of last instance.

(b) The nature of your institution (for e.g. Supreme Administrative Court or Supreme Court having jurisdiction over other domains of law); and
Supreme Court in matters pertaining to administrative, civil and criminal law.

(c) The position it holds in the overall judicial system of your country/territory

Supreme judicial authority of the Confederation.

C. Number of cases

6. How many judges¹ work for your institution?

38 judges

7. How many cases² are brought before your institution every year on average?

7,800 - 8,000 cases

8. How many cases does your institution adjudicate³ every year on an average?

7,800 - 8,000 cases

D. Internal organisation of the Supreme Administrative Court

9. Does your institution comprise chambers/divisions?

Yes

10. If yes, please provide the following details:

a. How many chambers/divisions are there?

Seven Courts in total, two Courts for administrative law, two Courts for civil law, one Court for criminal law, two Courts in social insurance law.

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

5-6 judges

¹Kindly include only the number of judges and not the number of Advocate-generals (which is the subject of question 11) or the number of court officers/judicial clerks/legal researchers (which is the subject of question 13).

²In this question, the term “cases” refers to the average number of new cases filed each year, whether they are adversarial (where the judge(s) delivers a judgment on a litigation) or non-adversarial (when a case not pertaining to a legal litigation is brought before the Supreme Administrative Court) and in all categories of cases if your Supreme Administrative Court does not solely handle cases related to administrative law (for example, civil and commercial law, criminal law, etc.) It includes cases in which the institution delivers its judgement in writing as well as in the course of a hearing. This term includes applications submitted to the Supreme Administrative Court before the implementation of any filtering procedure, if such a mechanism exists.

³Kindly indicate the average number of cases closed in your Supreme Administrative Court every year, whether by a judgment or any other decision terminating the procedure, whether in writing or within the framework of a hearing.

c. The nature of the specific domains of specialisation of your Supreme Administrative Court by chamber or otherwise (if applicable) (For e.g. commercial division, environmental division, etc.)

The first public law Court (6 judges) mainly deals with appeals in the areas of territorial planning, environmental law, political rights and certain fundamental rights (e.g. equal treatment, right to personal freedom, protection of privacy, freedom of assembly and association, guarantee of property).

The second public law Court (6 judges) mainly deals with appeals in the areas of the law on foreigners, taxes, economy, education and training and certain fundamental rights (e.g. freedom of conscience and belief, freedom of language, economic freedom).

d. Do judges change chambers/divisions? If yes, how is the transfer decided?

Judges may change courts when a vacancy corresponding to their working language (German, French or Italian) is available and they have the necessary competence; when several competent judges are interested, the principle of seniority prevails.

e. Can a judge be simultaneously posted to multiple Chambers?

It is possible, but is rarely the case.

f. Are there many different levels of chambers, for example an “ordinary chamber” and a Chamber for Constitutional Review?

No

g. How many judges are usually allocated for examining and judging a matter, on an average?

Three judges

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

(i) On the basis of which rules or factors?

Depending on the importance of a case (obvious inadmissibility (single judge), “normal” case (three judges), case concerning a legal question of principle or a cantonal normative act put to a referendum (five judges)).

(ii) Who decides the number of judges that are appointed to examine and judge a case in particular?

Normally the Court President, but each judge can request a five-judge composition.

i. Is there a procedure permitting certain cases to be sent to an enlarged board of appeal or to a plenary session? If yes, how is the judgement made and how many judges decide the matter?

When a Court intends to rule on a legal question involving several Courts, it asks the Courts concerned to agree if a joint decision is desirable; in this case the question is ruled on by all the judges of all the Courts concerned.

j. Are judges confined to other specific role (e.g. rapporteur, case in-charge, other specific responsibilities, etc.) for a case in particular?

If yes, please specify the other roles and explain how they are assigned.

The President of the Court appoints a judge-rapporteur for each case.

k. How important is the role of the President of the Court for deciding:

(i) the allocation of cases to chambers or benches of judges;

The assignment of cases to the Courts is governed by the Rules of the Federal Court; in case of conflict of jurisdiction between the Courts, the President of the Federal Court appoints the competent Court.

(ii) the number of judges assigned to examine and judge a case in particular;

The President of the Court is in principle competent to determine the number of judges charged with examining a case; the judges participating in the judgment (apart from the president and the judge-rapporteur) are randomly determined by a specific computer program.

(iii) the allocation of additional cause lists to the judges (see (f) above);

The President of the Court appoints the judge-rapporteur for each case.

(iv) all other information you consider relevant in this context. For example, are there other special benches, General Meetings or benches of judges to whom cases are allocated?

The Administrative Commission (comprising the President and Vice-President of the Federal Court and a third judge) supervises and deals with the supervision cases of the lower Federal Courts. An Appeals Commission, comprising three ordinary judges, rules on certain disputes concerning administrative decisions of the General Secretariat.

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

No

(i) the number of Advocate-Generals or members executing equivalent roles in your institution;

(ii) the role of the Advocate-General in your institution; and

(ii) the extent to which the Attorney-General participates in the procedures before your institution.

E. Research and administrative assistance

12. What is the level of research and/or administrative assistance that your institution receives?

The Federal Court has clerks, a documentation department, an administrative unit (the general secretariat) and an IT department.

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

120 clerks, equivalent to 90 full-time clerks, and about 12 documentalists

14. Do the officials who provide assistance for legal research to your institution also provide administrative assistance?

No

15. Are the legal research and administrative assistance services common (i.e. shared between judges) or assigned individually to judges or is there both a common service and researchers assigned to particular judges? Please explain.

Each court has a number of clerks and each judge has a clerk as a personal assistant. The general secretariat, the documentation department and the IT department are pooled.

16. If legal research and administrative assistance is provided individually to judges, is there also a research and documentation service or equivalent service providing additional common research assistance?

The documentation department is shared by the entire Court.

17. To what extent do the assistants/legal secretaries help the judges in your institution, supposing that this be the case, especially in matters concerning:

Yes, all of these are possibilities.

(a) preparing documents prior to the hearings, such as a note meant to help the judge before the trial of a case;

(b) carrying out legal research to help the judge reach a decision in a case;

(c) discussions regarding certain aspects of a case with a judge, verbally or in writing;

(d) examination and evaluation of applicable legislation;

(e) analyses of comparative law;

(f) writing parts of judgements;

(g) proposal of suggestions of judgements or preliminary judgements for examination by the judge(s);

(h) any other element that you consider relevant in this context.

F. Hearings

18. Is a hearing conducted in all cases?

No, only in case of disagreement.

19. If a hearing is not conducted in majority of the cases:

(a) What is the percentage of cases usually involving a hearing?

1%

(b) On what basis (official rules or informal decisions) is the decision made to conduct a hearing in a case?

A hearing takes place if the participating judges do not agree on the outcome of a case as part of a circulation of the written report.

(c) Can the parties to a case request a hearing? If yes, what is the importance, or what are the consequences, of such a request?

No. Such a request has no binding effect on the Court.

20. Do the judges deliberate before a hearing? If this is the case, do these deliberations occur in all cases or in certain cases?

The judges normally deliberate in writing on the basis of a written report and the file. They rule in open court in case of disagreement.

21. Are time limits imposed on parties for making the concluding oral submissions in your institution?

The procedure is written; there is no option to present oral conclusions.

22. Are the parties authorised to address the Court during an uninterrupted period? If so, for how much time?

The parties may express themselves (in writing) in principle until the case is decided.

23. Are the arguments carried out in the course of a hearing limited to the questions mentioned in the depositions or the written statements of the parties or can they involve arguments on broader legal themes between the advocates/one party and the court?

In rare cases where the Court conducts a hearing, discussions are limited to the subject matter of the dispute. In all other cases, there is no possibility of discussion between the judges and parties.

24. Are parties authorised to submit other written briefs after a hearing?

In principle yes, but only in the context of the subject matter of the dispute determined by the judgment under appeal and the written appeal.

25. Can a judge be excluded from a proceeding by reason of a legal opinion expressed in the course of a hearing and giving rise to the perception of bias?

Yes, he can be challenged if he rules during an investigation session, but not if he expresses himself in a deliberation session.

G. Written submissions of the parties

26. What is the usual length and the level of detail of the written briefs of parties submitted to your institution? Please indicate the approximate number of pages (line spacing 1.5) of a “standard” written statement of the case.

The appellant must conclude that the appeal has been admitted and that the judgment under appeal has been reformed. A “normal” remedy has 20-30 pages.

20. Is there a maximum length for the written statements submitted by the parties in a case? If yes, please explain.

No. The law requires the appellant to succinctly state how the impugned act violates the law. However, the Court applies this provision in a flexible manner and does not normally sanction or refuse verbose briefs.

H. Examination of the case

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

The Court is limited to an examination of the grievances raised by the parties to the case as part of the subject-matter of the dispute, but it applies the automatic right and may admit or dismiss an appeal for reasons other than those stated by the parties.

22. In what way are arguments, deliberations and decision-making structured in your institution?

The Court normally decides by drawing up a written report (with the file). In case of disagreement, it rules in open court.

23. Does your institution deliberate in different languages? If so, please explain. For example, does your institution have multiple official languages?

The briefs must be written in an official language (German, French, Italian or Rumantsch grischun). The proceedings are conducted and the judgment rendered in the (official) language of the judgment under appeal. In internal discussion and in court with public deliberation, each judge speaks one of the official languages, normally his mother tongue.

24. Are there rules, procedure or conventions which govern the conduct of arguments and votes?

If yes, please explain the rules applicable, etc.

During a deliberation in public hearing, the judge-rapporteur first presents his report; the shadow reporter follows and explains his point of view, and then the other judges decide. After a second round of debate, the discussion is closed and the judges vote in public on the outcome of the case.

25. How are preferences for particular issue communicated between judges?

The preferences for an outcome are normally communicated between the judges in writing.

26. When a hearing is held, to what extent does the hearing (as opposed to the written briefs) influence the arguments, deliberations and the decision-making by the Court?

In general, one of the reasoned conclusions in writing before a deliberative hearing is adopted by the majority of the judges. Spontaneous conclusions orally reasoned by a judge in court are possible, but rather rare.

27. Are there other procedural rules or conventions which, according to you, have a significant impact on how cases are examined?

No

I. The decision of the institution

28. Is the judgement delivered in the name of the institution or does each individual judge assigned to the case in question have the option of giving a separate judgement?

The decision is without exception pronounced on behalf of the institution.

29. If the judgement is delivered in the name of the institution, does a judge author it for the institution? If this is not the case, please explain how the judgement of the Court is authored for your institution. Do official rules or informal practices apply to the matter?

The judge-rapporteur presents his written report with the help of a legal associate (clerk), who at the same time presents his proposal for the drafting of the decision. In case of

disagreements, the judges participating in the decision take a majority decision on drafting questions.

30. In what way is the judgment/reasoning of the Court recorded?

The decision and the reasoning adopted shall be retained in writing in the file and signed by the President of the Court.

31. Does your highest institution make the distinction between the Judgement (i.e. the grounds) and the Order (i.e. the operative part of the judgment of the court)?

No

32. Are there other distinctions of this type in the judgments given by your institution?

No

J. Time periods for the decision-making process

33. How much time on an average elapses between the examination of a case by your institution and the delivery of a judgement? Please indicate the approximate time period between the cognisance of a case in the Supreme Administrative Court (rather than the date on which a case is submitted for the first time to a judge for examination) and the definitive resolution of the case by, for example, the delivery of a final judgment.

The average duration of proceedings in the Federal Court is approximately 4 to 5 months. Depending on the complexity of a case, a judgment may be rendered after just a few days (in case of clear inadmissibility), or may even require a period of investigation, examination and drafting of a year or even more in exceptional cases.

34. Is there a specific mandatory time period which must be complied with for rendering the decision in all cases? If yes, please explain.

No

35. Are there mandatory time limits for certain categories of cases? If yes, please indicate the categories of cases and the time limits in question.

A decision of inadmissibility in the field of international mutual assistance in criminal matters or international administrative assistance in tax matters must be rendered within fifteen days after the end of a possible exchange of writings.

36. If no time limit is imposed for deciding cases, is there a time period considered appropriate for the decision-making process? If yes, please explain.

In each proceeding, the principle of expeditiousness must be respected. This principle is concretised according to the specificities of the case in question.

37. If time limits are imposed on your institution for the decision-making process, is it on occasion difficult for the Court to comply with these time limits? If yes, what are the main reasons that explain these difficulties?

The Federal Court usually reaches a decision within a suitable time.

38. If no time limit is imposed for deciding cases, but a certain duration, by reason of conventions or practices, is considered appropriate for the decision-making process, is it difficult for the Court sometimes to comply with this time limit? If yes, what are the main reasons that explain these difficulties?

No

K. Evolution over time

39. Have the procedures which you described in the previous responses evolved in a significant manner over the last five years?

No

40. If yes, have these changes had an influence on the way in which cases are examined and adjudicated?

41. Do these changes constitute an improvement, according to you? If yes, please explain.

I. Other comments or observations

42. Do you believe that certain aspects of your institution and/or its specific decision-making processes have not been addressed in the questions above, or do you wish to provide contextual information which might help us understand the decision-making process practiced in your court?

No reservations or contextual information to be reported.

Lausanne, 11 January 2019