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Answers to questionnaire: Estonia

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Disputes concerning acts by regulatory authorities

Answers of the Supreme Court of Estonia

Courts with competence to hear disputes concerning regulatory authorities

1. Does your supreme administrative court have competence to hear appeals against acts by regulatory authorities? Yes

The Administrative Law Chamber of the Supreme Court of Estonia has competence to hear appeals against acts by regulatory authorities. Appeals against acts by regulatory authorities are subject to regular administrative jurisdiction. As a general rule, a person whose subjective rights have been infringed by an administrative act has the right to file a challenge to the administrative authority, or an action with an administrative court according to the rules provided by the Code of Administrative Court Procedure (henceforth CACP[1]). Our administrative jurisdiction has three instances: administrative courts, circuit courts and the Supreme Court. An appeal in cassation is accepted by the Supreme Court if any of the three justices who examine the appeal finds that there is a basis for accepting the appeal. These bases include the following: 1) the positions stated in the appeal warrant the conclusion that the circuit court has incorrectly applied a rule of substantive law, or has significantly infringed the rules of court procedure, which has resulted or could have resulted in an incorrect judgment being entered, or 2) decision on the appeal is of considerable import from the point of view of ensuring legal certainty or uniformity of approach in the case law of the courts (§ 219 (3) CACP).

Inspired by the introduction to this questionnaire, we have chosen to interpret the notion of regulatory authorities in a rather broad manner, covering most supervisory authorities which have some link to market regulation. For instance, in the statistical part of the questionnaire, we have included the Tax and Customs Board, which certainly fulfils the role of market regulation to a certain extent, although would perhaps not be considered a regulatory authority in a narrower sense.

2. In particular, can any of these authorities themselves impose sanctions (including fines)? Yes

Yes, many acts give supervisory authorities the right to impose sanctions. These can be divided into two categories, one of which falls inside the purview of administrative courts and the other is considered part of penal law, so may be disputed in general courts.

First, all supervisory authorities are (within their competence) authorised to issue precepts to subjects of supervision to impose an obligation in case of a threat or disturbance (§ 28 (1) of the Law Enforcement Act (henceforth LEA)[2], § 4 (1) of the Substitutive Enforcement and Penalty Payment Act (henceforth SEPPA)[3]). These precepts may be (and usually are) accompanied by a caution that, in case of failure to fulfil the obligation, coercive measures may be applied. Possible coercive measures include

[1] https://www.riigiteataja.ee/en/eli/512122019007/consolide (Here and henceforth, all links to legal acts, unless specified otherwise, are provided to the English language version.)
[2] https://www.riigiteataja.ee/en/eli/503032021004/consolide
[3] https://www.riigiteataja.ee/en/eli/522012015001/consolide

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penalty payments[4] (§ 10 SEPPA; may be applied multiple times to motivate the addressee to comply with the precept), substitutive enforcement (i.e., the authority itself performing the obligation at the expense of the addressee or organising the performance by a third party – § 11 SEPPA) or, under certain conditions, direct coercion (§ 28 (3) and Chapter 5 LEA). All aforementioned measures are contestable in administrative court and, by way of appeals, may reach the Supreme Court.

Second, if this is specified by law (which is the case for most supervisory authorities, including, for example, the Competition Authority (§ 73[9] (2) of the Competition Law[5]), the Financial Supervision Authority (§ 134[18] of the Credit Institutions Act[6]), the Agriculture and Food Board (§ 50 (3) of the Rural Development and Agricultural Market Regulation Act[7]) etc), these authorities also act as extra-judicial bodies that conduct proceedings in misdemeanour cases provided for in the relevant acts. Within misdemeanour proceedings, principal punishments include fines and, in case of physical persons, detention (§§ 47 and 48 of the Penal Code[8]). These punishments imposed by extra-judicial bodies may be disputed in county courts, i.e., general courts (§ 114 of the Code of Misdemeanour Procedure[9]).

A legislative draft[10] has been prepared to create a new institute of law in Estonia, administrative fine, which would replace misdemeanour, but would be subject to control in administrative courts. This is specifically meant for cases where EU law requires a pecuniary punishment with a higher upper limit than the general upper limit for misdemeanour fines foreseen in Estonian law, and analogous breaches of national law in the same fields. However, the draft has not even reached the parliament, so there is no certainty whether it will become law – as a substantial change to our legal system, it has received quite heavy criticism from different interest groups as well as academics.

3. Are any of these regulatory authorities subject to judicial review by civil courts, for some or all of their acts? Not directly

Acts by regulatory authorities cannot be directly contested in civil courts. However, in certain cases, they may indirectly be subject to review by civil courts. Specifically, where a regulatory authority approves the maximum price of a service (for example, heat supplied through a network – § 9 of the District Heating Act[11]), according to the case law of the Supreme Court, the consumer of the service has no direct link to this decision by the authority, but is instead in a contractual relationship with the provider of this service, and may thus contest the price applied to them individually in a civil court, in a contractual dispute with the service provider.[12]

4. Are the courts with competence to hear the acts of regulatory authorities:

[4] The translation (used in English translations of SEPPA and LEA) may be inaccurate, as this is not in fact considered a penalty. A more direct translation would be 'coercive payment'.
[5] https://www.riigiteataja.ee/en/eli/510042019001/consolide
[6] https://www.riigiteataja.ee/en/eli/521012021002/consolide
[7] https://www.riigiteataja.ee/en/eli/516122020008/consolide
[8] https://www.riigiteataja.ee/en/eli/509032021001/consolide
[9] https://www.riigiteataja.ee/en/eli/522042021001/consolide
[10] Information only available in Estonian, in the information system of legislative drafts: https://eelnoud.valitsus.ee/main/mount/docList/e0350345-d819-4adc-bc56-37594d5f815f.
[11] https://www.riigiteataja.ee/en/eli/520062017016/consolide
[12] Judgment of the Administrative Law Chamber of the Supreme Court, 03.11.2010, in case no. 3-3-1-27-10, available in Estonian: https://www.riigikohus.ee/lahendid?asjaNr=3-3-1-27-10.

- specifically identified by the texts in force, by way of derogation from the normal rules of territorial or material competence? No

- or do they result from the application of the general rules on the distribution of competences? Yes

Is there any specific distinction in relation to the rules of competence applicable to equivalent acts of other administrative authorities in your country? No

Most of the actions against acts of regulatory authorities are subject to general rules on jurisdiction (based on the location of the authority – § 7 (1) CACP). The only exceptions concerning territorial competence are that a person deprived of their liberty must bring their action in the court having jurisdiction of the place of their detention (§ 8 (5) CACP), and that an action which names the Tax and Customs Board or the Social Insurance Board as the respondent is brought in the court having jurisdiction of the location of the residence or seat of the applicant (§ 8 (6) CACP).

5. Are the remedies available against the acts of these authorities of the same nature as those available against the equivalent or similar acts of other administrative authorities? Yes

Admissibility of appeals against regulatory acts

6. In your view, do disputes concerning "hard law" acts (regulatory acts, sanctions, individual authorisation decisions, etc.) of these authorities raise particular issues of admissibility? Yes, some of them

Not all such disputes raise particular issues of admissibility – for example, there are no special issues when the subject of a sanction wishes to dispute the sanction. However, there are some particular issues of admissibility when a competitor or customer wishes to contest a decision of the supervisory authority.

As said in response to question 3, customers do not have right of action in administrative court against general decisions on price limits. However, if the regulatory authority exercises supervision over a specific price, not a general price limit, the customer might have right of action under the circumstances described in the next paragraph.[13]

The Supreme Court has dealt extensively with situations where a customer or a competitor has petitioned an authority to start supervisory proceedings over an undertaking, and the authority decides either not to start proceedings or not to take any measures against the undertaking. According to settled case law, there is no subjective right to demand the initiation of supervisory proceedings or the use of a specific measure against a third person, as the supervisory authority can make both of these decisions on a discretionary basis. However, a person whose rights may be infringed by the third person's illegal activity has the right to demand that the supervisory authority make these decisions without discretion errors, if the legal norm that provides for these supervisory proceedings is intended to protect the applicant's subjective rights.[14]

[13] See judgment of the Administrative Law Chamber of the Supreme Court, 22.10.2014, in case no. 3-3-1-42-14, p 15, available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-3-1-42-14.
[14] See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 01.04.2021, no. 3-18-1442/115, p 16, available in Estonian: https://rikos.rik.ee/?asjaNr=3-18-1442/115; ruling of 23.10.2013 in case no. 3-3-1-29-13, p 17, available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-29-13, and

There is also some case law regarding the right of action of an undertaking against the decision of a regulatory authority to grant a permit to its competitor in a restricted market. For example, the Supreme Court has confirmed the right of action of a pharmacy against the authorisation issued to another pharmacy in the same small town,[15] as well as the right of action of an oil shale mining undertaking against the mining permit issued to another, as the mining of oil shale is severely limited in Estonia and it is considered a public resource divided by the state.[16]

7. Are "soft law" acts (opinions, recommendations, warnings, position papers) of these authorities and, more broadly, their various positions on the behaviour to be adopted by the actors in their field of intervention (whatever form they take: code of conduct, guidelines, etc.) liable to be the subject of a direct action for annulment? Not usually

There is not much case law on regulatory authorities' "soft law" acts and their admissibility as objects of an annulment action. However, based on existing jurisprudence on various non-binding documents published by administrative bodies, one could presume that such acts cannot be directly disputed in court, but rather, if they are relied upon when making a specific decision, in court proceedings concerning that decision the legality of this "soft law" act may also be questioned, or it can be assessed whether the administrative body should have strayed from the positions expressed in that act – i.e. the court may find that the administrative body made discretion errors in the specific case, even if it followed this "soft law" document. If, however, such a "soft law" document should happen to include some binding rules, these may be addressed in a direct action for annulment.

Examples of this approach can be seen in cases concerning the following situations: the Estonian Health Insurance Fund relied on its internal rules (published on its website) when choosing between healthcare providers with whom to sign contracts for financing medical treatment[17]; the Tax and Customs Board had decided to change its previously published (non-binding) position on the taxation of certain types of transfers of shares and had taxed a group of shareholders due to this change[18]; a prison had added some provisions into a prisoner's individual treatment plan (usually a non-binding planning document) that had binding effect – a direct action against such provisions (unlike against the

judgment of 13.10.2010 in case no. 3-3-1-44-10, p 15, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-44-10. In the competition case no. 3-3-1-29-13, the Court found, inspired by the case law of the ECJ, that supervision by the Competition Authority is not only aimed at public interests, but must also protect the rights of market participants from activities forbidden by competition law. This right of action even extends to supervisory proceedings initiated by the Competition Authority *ex officio* (pp 17–19). Similarly, in a case concerning data protection, the Court found that the provisions on personal data protection (in conjunction with the constitutional right to privacy and EU law) indubitably protect the rights of physical data subjects, and thus, this must be one of the main purposes of the supervision by the Data Protection Inspectorate (judgment of 23.03.2016 in case no. 3-3-1-85-15, p 15, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-85-15).

[15] Judgment of the Administrative Law Chamber of the Supreme Court, 18.03.2021, no. 3-18-1287/45, p 14, available in Estonian: https://rikos.rik.ee/?asjaNr=3-18-1287/45.

[16] Judgment of the Administrative Law Chamber of the Supreme Court, 21.02.2017, in case no. 3-3-1-26-16, p 43, available in Estonian: https://www.riigikohus.ee/lahendid?asjaNr=3-3-1-26-16.

[17] Judgment of the Administrative Law Chamber of the Supreme Court, 16.01.2008, in case no. 3-3-1-81-07, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-81-07.

[18] Judgment of the Administrative Law Chamber of the Supreme Court, 17.06.2009, in case no. 3-3-1-23-09, available in Estonian: https://www.riigikohus.ee/lahendid?asjaNr=3-3-1-23-09. The Court found that the earlier publication of a different position did not exclude taxation, but might be relevant in assessing the shareholders' intent when doing the transaction (i.e., whether their intent was to evade taxes).

rest of the plan) was considered admissible[19]; the Estonian central bank relied on its internal rules (published online) when declining to open a bank account for a financial institution[20]; the agency responsible for the distribution of agricultural aid in Estonia relied on its assessment matrix when deciding on the reduction of aid paid to a farmer[21].

8. Can positions taken by these authorities, possibly with little or no formality (press release, website section, FAQ, etc.) be challenged in court? Yes, under certain conditions

Such positions can be challenged in court, but not with annulment actions and only if they infringe a person's subjective rights – like those related to protection of personal data or reputation. For example, the Supreme Court has found companies had the right to bring a mandatory action against the Financial Supervision Authority to order it to stop publishing a warning on its website on the illegality of these companies' activities in Estonia, as it damaged these companies' reputation.[22]

9. Who can challenge the acts of regulatory authorities? Specify the criteria for assessing the interest in bringing proceedings, making any useful distinction according to the type of act (soft law act; individual decisions of a non-repressive nature; sanction; etc.).

As described above in responses to questions 6, 7 and 8, anyone whose rights are infringed by the acts of regulatory authorities can challenge these acts, albeit not always with a direct action. This is based on § 44 (1) CACP: "Individuals may have recourse to an administrative court only for the protection of their rights." For a direct action for annulment, possible applicants could be categorised as follows:

* subjects of any sanctions[23];

* competitors or customers when requesting supervisory proceedings or specific measures against an undertaking: right of action only if the legal norm that provides for these supervisory proceedings is intended to protect the applicant's subjective rights, and then no right to ask for a specific measure, but right to error-free proceedings;

* competitors against permits given to other undertakings in restricted markets;

* customers against approval of prices: only when the authority approves a specific price, rather than the price limit.

[19] Judgment of the Administrative Law Chamber of the Supreme Court, 17.06.2010, in case no. 3-3-1-95-09, available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-3-1-95-09.
[20] Judgment of the Administrative Law Chamber of the Supreme Court, 02.04.2014, in case no. 3-3-1-72-13, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-72-13.
[21] Judgment of the Administrative Law Chamber of the Supreme Court, 18.12.2014, in case no. 3-3-1-77-14, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-77-14.
[22] Judgment of the Administrative Law Chamber of the Supreme Court, 28.01.2021, no. 3-19-885/20, p 11, available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-19-885/20.
[23] Except for warnings that do not place an obligation or prohibition on the subject, but only inform the subject of possible consequences of future breaches of law. Such warnings are not considered administrative acts, but measures which may only be disputed with a declaratory action, and that only in the absence of more efficient remedies for protecting the right in question – see § 45 (2) CACP and judgment of the Administrative Law Chamber of the Supreme Court, 02.11.2015, in case no. 3-3-1-22-15, available in Estonian: https://rikos.rik.ee/?asjaNr=3-3-1-22-15.

10. Please indicate any other particularities that you consider relevant to the admissibility of appeals against the acts of these authorities (interest in bringing proceedings, time limits for appeal, specific means of appeal open to State authorities, etc.).

The time limit for such appeals does not differ from the general time limits – i.e., usually 30 days after the date on which the administrative act was notified to the applicant (§ 46 (1) CACP).

The CACP foresees the right of action (called protest) for State authorities only when that right has been given specifically by law and for the purpose of protecting public interest (§ 256 (1) CACP). As the most common example, ministries have the right to exercise administrative supervision over the legality of administrative acts (or failure to issue thereof) of local authorities within their area of responsibility, and this right includes the right of protest if the local authority fails to act as proposed by the minister (§ 75^3 of the Government of the Republic Act[24]). Other examples include the Environmental Board's right of protest against local authorities' failure to fulfil their environmental obligations (§ 7 (5) of the Environmental Supervision Act[25]) and the Ministry of Justice's right of protest against certain decisions by the Bar Association (§§ 4 (3) and 18 of the Bar Association Act[26]).

11. Can the general acts of a regulatory authority, whether "hard law" or "soft law", be challenged by way of exception in an appeal against an individual decision (sanction, follow-up to a complaint, etc.) taken by that same authority and applying that general act (for example, if a sanction imposed on an economic operator refers to previously issued guidelines or recommendations to set out the applicable legal rules and the authority's interpretation of the texts in force)? Yes

For "soft law", see response to question 7. As for general acts of regulatory authorities that can be qualified as "hard law", these can indeed not be challenged directly, but rather in an appeal against an individual decision (whether taken by the same or a different authority) applying that general act. The legality of such a general act is then considered in the framework of constitutional review proceedings. Any court, when adjudicating a case, may find (whether based on the application of a party or *ex officio*) that a (legislative or) regulatory act relevant in the case is contrary to the Constitution. In that case, the question is transmitted to the Supreme Court for constitutional review (the Constitutional Review Chamber in case of a decision by a first or second instance court (§§ 9 (1) and 3 (2) of the Constitutional Review Court Procedure Act[27], henceforth CRCPA); the Supreme Court *en banc* in case of a decision by one of the chambers of the Supreme Court (§ 3 (3) CRCPA). In these proceedings, the Supreme Court may declare the regulatory act, or a provision of such an act, to be contrary to the Constitution and invalidate that act or provision either *ex tunc* or *ex nunc* (§ 15 (1) 2) CRCPA). The invalidation is always retroactive for the specific case, but the Supreme Court may decide to limit the wider retroactive effect, sometimes extending it to only those cases already in court.

12. Where the actions of these authorities have harmful consequences, should liability claims be brought:

- against these authorities? Yes

- or against the State on whose behalf they may have acted?

[24] https://www.riigiteataja.ee/en/eli/517122020004/consolide
[25] https://www.riigiteataja.ee/en/eli/504122020004/consolide
[26] https://www.riigiteataja.ee/en/eli/519012021002/consolide
[27] https://www.riigiteataja.ee/en/eli/512122019006/consolide

Liability for the actions of administrative authorities (in public law relationships) is regulated in the State Liability Act[28]. According to § 12 (1) of this act, the public authority whose activities caused damage is required to compensate the injured party for the damage. According to administrative law theory, this provision should mean that in the case of state authorities, the state as a whole is responsible for the damage. However, as § 17 (1) CACP defines the respondent in these cases as the government authority whose activities are the subject matter of the action, this means that in practice, such liability claims are brought against these specific authorities, not the state as a whole. This is different in case of local authorities (i.e., cities and municipalities), as the local authority as a whole is responsible independent of which organisational unit inside the local authority caused the damage.

Internal organisation of the courts and hearing of appeals

13. Are cases concerning these authorities assigned, within the courts and more particularly within the supreme administrative court, to panels specifically dedicated (to the authority concerned, or more generally to regulatory litigation), in order to allow for an increase in the level of competence or a critical mass of cases? Partially

There is some level of specialisation within administrative courts, but it is not complete. In first instance courts, cases are assigned based on "bundles" of topics to specific judges, but this specialisation is only possible in bigger courts and with topics that have a critical mass of cases each year – in smaller first instance courts, such specialisation is impossible, especially as in some regions, cases concerning regulatory authorities are very rare. As for the Supreme Court, there are only five judges in the Administrative Law Chamber, and while all judges as well as judicial assistants have certain specialisation areas (including regulatory litigation) where they act as rapporteurs, cases are resolved in panels consisting of at least three judges and in these panels, it may happen that only the rapporteur is specialised in the topic.

14. What investigative or examination techniques can you use in particular in the examination of particularly technical cases:

- oral inquiry hearing in the presence of the parties: yes

- expert's report: yes

- amicus curiae: yes

- solicitation of a reference expert administration: yes

- other?

The answer above is given as a general answer for all court instances. As for specifically the Supreme Court, we cannot use an expert's report or testimony, since the Supreme Court, as a court of cassation, is bound by the facts as ascertained by the circuit court and cannot gather and examine evidence (§ 229 (3) CACP). However, while the Administrative Law Chamber of the Supreme Court usually deals with cases in written proceedings, oral hearings in the presence of the parties are used sometimes precisely in complex technical cases, in order to ask questions about possible unclarities and discuss the case more openly with the parties. The Chamber has also used the option of asking an *amicus curiae* for an opinion about the case (usually posing specific written questions it wants answers to, but

[28] https://www.riigiteataja.ee/en/eli/507062016001/consolide

also inviting them to participate in the oral hearing, in case one is organised) – procedurally, this means joining an administrative authority to the proceedings who either performs supervision of the respondent, whose tasks the subject matter of the dispute concerns, who has issued or should have issued an opinion or has issued or should have issued an endorsement in the administrative proceedings which gave rise to the dispute, or if there are other reasons which suggest that the authority's opinion or the information that the authority holds is likely to facilitate resolving the matter (§ 24 (1) CACP). For example, the Competition Authority (when not the respondent) or competent ministries have been asked for an opinion or for background information. We have also asked the European Commission for information and/or an opinion as *amicus curiae* a few times.

Do you feel that these regulatory cases require a particular method? No

15. What is the role of the traditional administrations (especially when the act of an independent administrative authority, distinct from the ministry concerned, is at issue) in the examination of appeals against regulatory authorities:

- are they invited to comment? On the discretion of the court

- or do they remain outside the case?

No other administrative authorities except for the respondent are automatically involved in proceedings. However, as explained in response to the previous question, § 24 (1) CACP allows the court (of any instance) to join them to the proceedings if they find it necessary or useful.

16. More generally, when examining appeals against acts with a high socio-economic impact issued by these authorities, in particular those in charge of a field of economic regulation, does the court collect (on the initiative of the court or the interested organisations) observations from other stakeholders?
No

There is no basis in procedural law for joining stakeholders to the proceedings – aside from the parties and the joined administrative authority (see response to question 14), the only persons who may join court proceedings are third parties – i.e., persons whose rights or obligations may be affected by the court's decision (§ 20 (1) CACP).

17. What role does orality play, even before the hearing, in the investigation of complex cases, in particular those involving regulatory acts?

There are no particular procedural rules for cases involving regulatory acts.

In general, courts have considerable discretion in conducting proceedings, including choosing between oral and written proceedings, independent of the parties' preference – written proceedings are allowed if either all parties and third parties agree to written proceedings, or it is manifest that, in view of the legal values at issue and the nature of the dispute, including cases in which the only issues disputed by participants in proceedings are points of law, participants in proceedings do not have any reason to demand the holding of a court session (§ 131 (1) CACP). However, the Supreme Court has explained that even the parties' agreement to written proceedings does not free the court from its obligation to consider whether holding an oral hearing is necessary for the just resolution of the

dispute.[29] In addition to facts, significant legal questions relevant to the case are discussed in a hearing (§ 129 (1) 6) CACP), so even if only legal questions are disputed in the case, the court must consider the legal values at issue and the nature of the dispute when choosing the form of proceedings, as an oral hearing guarantees the most effective legal protection in disputes involving important legal values and their intense encroachment.[30]

Even before the main hearing, the court may hold a preliminary hearing, require participants in proceedings to provide explanations and put questions to participants in proceedings, in order to fulfil the functions of preliminary procedure (i.e., making all arrangements necessary for the matter to be considered without interruption at a single court session or within reasonable time in written procedure or in simplified procedure) (§ 122 (1) and (3) CACP). The main hearing may (but does not have to) be held as a continuation of the preliminary hearing (§ 127 (4) CACP). Even after the hearing has been concluded, the court may decide to resume the hearing of the matter, if: 1) after concluding the hearing of the matter and before making the decision in the matter, the court discovers an error of procedure which is material to the making of the judgment and which can be rectified; 2) after concluding the hearing of the matter and before making the decision in the matter, the court deems it necessary for a just resolution of the matter to take or examine additional evidence or discuss the facts with the participants in proceedings; 3) in the case of non-appearance, for a valid reason, of a party or third party to attend the court session (§ 130 CACP).

18. Do you have, in one form or another (specialisation of magistrates, continuing education, expert decision support unit to assist magistrates, etc.) internal resources in your courts enabling you, if necessary, to familiarise yourself with or master sectoral but also transversal expert subjects (technologies protecting privacy, communication technologies in the case of audiovisual or electronic communications regulators, role and architecture of social networks, etc.)? Yes, to some extent

We have no expert decision support units, but continuing education opportunities both on the national and international (EJTN, ERA etc) level allow judges specialised in regulatory disputes and, to some extent, all judges to familiarise themselves with such subject matters. For example, on the national level the Supreme Court (which is responsible for organising the training of judges of all instances) recently organised seminars on artificial intelligence (both the regulatory side and some technical aspects) and practical economics (business practices in general and more specifically in the building sector).

The extent of the judge's control, the court decision

19. What are the main categories of grounds that can be invoked and relied upon against the acts of regulatory authorities? Based on your experience and the case law of your country, do you find that appeals against acts of independent authorities raise particular problems (real independence in decision-making, impartiality, etc.) compared with disputes concerning acts taken by other administrative authorities? Please share any relevant analysis you may have

[29] Judgment of the Administrative Law Chamber of the Supreme Court, 05.11.2020, no. 3-19-990/30, p 26.3, available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-19-990/30.
[30] Judgment of the Administrative Law Chamber of the Supreme Court, 10.05.2016, in case no. 3-3-1-20-16, p 16.2, available in Estonian: https://www.riigikohus.ee/lahendid?asjaNr=3-3-1-20-16.

No analysis has been made in our court on this topic. Based on gut-feeling, the main category of grounds is probably simply the incorrect interpretation of law, i.e., whether an activity is lawful or not. Another big category is likely the proportionality of the decision, especially in case of sanctions. The independence and impartiality of regulatory authorities have not generally been particular issues in these disputes.

20. Does your court consider itself bound by the technical or economic assessments made by the regulator? Or does it feel entitled to control them? In the latter case, is this control complete or only limited to the manifest error of assessment?

Our courts do not consider themselves bound by the technical or economic assessments made by the regulator. Our case law differentiates between discretionary decisions by the authorities and decisions involving assessment.

Judicial control is more limited in case of discretionary decisions – there, the court may not engage in an exercise of the discretionary power in the stead of the administrative authority (§ 158 (3) CACP). Since many decisions made by regulators involve the exercise of discretionary power (especially those resulting in sanctions), in those cases, judicial control is thus limited – usually to the control of the rationality of the decision, and in case of a very wide discretion and a minor impingement on the applicant's rights, even to manifest errors. However, courts still have complete control over ascertaining the facts which the discretionary decision is based upon.[31]

As for assessment decisions, the situation is somewhat more complicated. There are no limits set in law on the judicial control of such decisions. Courts can usually replace the authority's assessment with their own. Restraint may still be in order when legislation is sparse on the issue, in case of a minor impingement on the applicant's rights, and/or when assessment requires specific non-legal knowledge or experience – in such cases, judicial control of the rationality of the assessment or even of manifest errors of assessment might suffice, depending on the combination of the three elements listed above[32].

21. If you receive an application against an act of a regulatory authority or against a sanction imposed by it, is your court only competent to annul the act or sanction or can it also modify the sanction imposed?

As choosing the sanction is (usually) a discretionary decision and administrative courts may not engage in an exercise of the discretionary power in the stead of the administrative authority (§ 158 (3) CACP), our court is only competent to annul the act. (The situation is different in misdemeanour proceedings (in the framework of which regulatory authorities impose fines – see response to question 2) – there, the (general) court can also modify the sanction imposed, provided this does not aggravate the situation of the person subject to proceedings (§ 132 2) of the Code of Misdemeanour Procedure).

22. Have you been confronted with the problem of an independent authority in your country taking into account a foreign element such as an opinion given by an authority in another country or a decision by a European authority (for example, in the context of the mechanisms set up by the GDPR

[31] Judgment of the Administrative Law Chamber of the Supreme Court, 11.12.2020, no. 3-20-1198/58, pp 13 and 15, available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-1198/58.
[32] *Ibid*., p 14.

between the European data protection authorities, which lead these authorities to submit some of their decisions to the European Data Protection Committee for approval)? Yes

I have only encountered this in competition cases, where different regulatory authorities have taken into account opinions given or decisions made by the European Commission. In one such case, the Supreme Court deemed it necessary to turn to the Commission to ask some additional questions regarding their earlier decision.[33]

23. Are these cases a particular field of preliminary questions to the Court of Justice of the European Union? No

We have asked for preliminary rulings in cases concerning regulatory authorities' decisions[34], but in other fields as well. Based on our small sample, I cannot say there are any particularities in this regard.

24. Does the drafting of court decisions raise particular issues related to the technical nature or media exposure of some of these cases? Yes, sometimes

The main issue we have encountered when drafting court decisions in such cases is that the disputes often involve business secrets. In this case, the decision must either be drafted carefully, keeping the description of facts general enough to avoid exposing the secrets (which is usually possible, since the Supreme Court as a court of cassation only deals with legal questions), or parts of it must be hidden in the published version of the decision. But this is not unique to regulatory disputes – the same issue arises often in public procurement cases.

The judge in the regulatory ecosystem

25. Are judgments on such appeals subject to any particular publicity or accompanying measures (press release)? Yes

There are no special rules that differentiate such cases from others in terms of public communication of judgments. However, in practice, regulatory disputes that generally have a wide-reaching influence on the functioning of economy or the society also raise more public interest. Thus, if the case is important from the viewpoint of case law, general public interest and/or has already been reflected in the media, the Supreme Court publishes a press release. Such press releases are usually used quite actively by journalists, both in general and sector-oriented publications, and journalists also sometimes ask for additional information. All this obviously depends on the case, as sometimes, regulatory disputes may be extremely technical and hard to explain to the general public, and not all disputes obviously have a large impact on the society.

Among most recent judgments, cases that raised more public attention included those concerning the pharmacy market, as an important legislative reform had recently taken place and already received a lot of media attention, wind energy and taxi apps as general topics interesting the public, as well as

[33] In the end, we asked for a preliminary ruling in that case. See ruling of the Administrative Law Chamber of the Supreme Court, 28.09.2020, no. 3-16-1864/65, available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-16-1864/65; summary on JuriFast: http://www.aca-europe.eu/WWJURIFAST_WEB/DOCS/BE12/BE12000504.pdf; ECJ case C-470/20.
[34] For an example, see previous footnote.

the previously mentioned case concerning the publication by the Financial Supervision Authority of warnings about questionable business practices.

26. Are regulatory authorities entitled to challenge acts or decisions taken by other public persons on the grounds that they impinge on their competence? No

27. Independently of a particular case, do your court or its members regularly participate in general exchanges bringing together professionals (regulatory authorities, operators, doctrine, ministries, etc.) from the regulatory sectors concerned?

There are no regular exchanges between members of the Supreme Court and the aforementioned professionals.

However, as the Legal Information and Judicial Training Department at the Supreme Court of Estonia organizes training events for the members of Estonian judiciary, which are also frequented by the members of the Supreme Court, some exchanges still occur during said events. E.g., the Department held a seminar on competition law in September 2020, that also included presentations by the Competition Authority. In addition, occasionally round table discussions have been organised to bring together representatives of a certain regulatory sector (for instance the Tax and Customs Board, environmental impact assessment authorities and professionals) with judges and/or judicial staff specialised in these types of disputes.

28. Are the judges in your courts, or more generally the staff of your investigating and registry departments, sometimes led in their careers to take up activities in regulatory authorities, and are such careers encouraged where appropriate?

It is not common for judges nor other staff to move in their careers from courts to regulatory authorities. However, there are also no legal hurdles to such career changes.

Quantitative data

29. What is the number of cases concerning regulatory authorities registered before your supreme administrative court in 2020?

In 2020, the Administrative Law Chamber of the Supreme Court of Estonia registered 626 cases in total. For the purposes of this questionnaire, we present only the information about the cases concerning regulatory authorities that were settled by the Administrative Law Chamber of the Supreme Court of Estonia, as we do not have reliable information about the number of cases which may have concerned regulatory authorities but did not receive leave of appeal.

30. What is the number of cases concerning regulatory authorities settled by your supreme administrative court in 2020?

In 2020, 68 cases were settled by the Administrative Law Chamber of the Supreme Court of Estonia, 30 of which concerned regulatory authorities. 11 cases concerned the Tax and Customs Board, 7 cases concerned the Agricultural Registers and Information Board, 4 cases concerned the Environmental Board, 2 cases each concerned either the Agriculture and Food Board or the Political Parties Financing Surveillance Committee, and 1 case each concerned the Social Insurance Board, the Technical Regulatory Authority, the Labour Inspectorate and the Transport Administration. For the record, in 2020 the Administrative Law Chamber did not settle any cases concerning, for example, the

Competition Authority, the Data Protection Inspectorate, the Health Board or the Agency of Medicines, regulatory authorities which have also been involved quite often in court cases reaching the Supreme Court.

31. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases registered before your supreme administrative court in 2020?

For the purposes of this questionnaire, we can only provide information about the cases concerning regulatory authorities that were settled by the Administrative Law Chamber of the Supreme Court of Estonia in 2020 (see question 29).

32. What is your estimate of the percentage of cases concerning regulatory authorities in the total number of cases settled by your supreme administrative court in 2020?

44%.

33. What percentage of applications against the acts of regulatory authorities were annulled, in whole or in part, by your supreme administrative court in 2020?

80%.